

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: January 31, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Brunvoll and Associates LLC

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Serial No. 90526989

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David L. May and Jennette W. Psihoules of Nixon Peabody LLP,
for Brunvoll and Associates LLC.

Emilia Vandzhura, Trademark Examining Attorney, Law Office 126,
Andrew Lawrence, Managing Attorney.

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Before Kuhlke, Coggins, and Elgin,
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Brunvoll and Associates LLC (“Applicant”) seeks registration on the Principal Register of the mark UNFORGETTABLE TRIPS (in standard characters, with TRIPS disclaimed) for “travel agency services, namely, making reservations and bookings for transportation,” in International Class 39.¹

¹ Application Serial No. 90526989 was filed on February 12, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as November 28, 2011.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the travel agency services identified in the application, so resembles the composite word-and-design mark UNFORGETTABLE HONEYMOONS (with HONEYMOONS disclaimed) shown below



for “travel agency services, namely, making reservations and bookings for transportation,” in International Class 39,² on the Principal Register as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed and Applicant asked for and received two extensions of time (totaling four months) to file its appeal brief. The appeal is now fully briefed. We reverse the refusal to register.

I. Evidentiary Issue

Applicant attached to its appeal brief more than 120 pages previously submitted during prosecution. *See* Exhibits A, B, C-1, and C-2 to Applicant's brief. 10 TTABVUE

² Registration No. 3585764, issued March 10, 2009. The registration describes the mark as “a crescent moon with the words ‘Unforgettable Honeymoons’.” Color is not claimed as a feature of the mark.

28-149.³ This was improper, a waste of resources, and the practice is discouraged. *In re Info. Builders Inc.*, 2020 USPQ2d 10444, at *1 n.4 (TTAB 2020) (attaching previously submitted evidence to an appeal brief is unnecessary and impedes efficient disposition of the appeal by the Board); *In re Michalko*, 110 USPQ2d 1949, 1950-51 (TTAB 2014) (“Parties to Board cases occasionally seem to be under the impression that attaching previously-filed evidence to a brief and citing to the attachments, rather than to the original submission is a courtesy or a convenience to the Board. It is neither.”). Because direct citation to evidence in the record is strongly preferred, we look to and reference only the record as developed by Applicant and the Examining Attorney during prosecution of the subject application – not Exhibits A, B, C-1, and C-2 to Applicant’s brief.

II. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). Our determination under Section 2(d) involves an analysis of all probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*,” setting forth factors to be considered and referred to as “*DuPont* factors”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045,

³ Citations to the briefs in the appeal record refer to the TTABVUE docket system. Citations to the prosecution record refer to the .pdf version of the TSDR system. See, e.g., *In re Seminole Tribe of Fla.*, 2023 USPQ2d 631, at *1 n.1 (TTAB 2023).

2049 (2015). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

In any appeal, different *DuPont* factors may play a dominant role and some factors may not be relevant. *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at *4 (Fed. Cir. 2023). Similarly, varying weight may be assigned to each factor depending on the evidence presented. *Id.* While we consider each *DuPont* factor for which there is evidence and argument, *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019), two key considerations are the similarities between the marks and the similarities between the services. *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent consumer confusion as to source and to protect trademark owners from damage caused by registration of similar marks for related goods likely to cause such confusion. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *DuPont*, 177 USPQ at 566.

A. Relatedness of the Services, Trade Channels, and Classes of Consumers

The second *DuPont* factor “considers ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567), while the third *DuPont* factor considers “the similarity or

dissimilarity of established, likely-to-continue trade channels.” *Id.* at 1052 (quoting *DuPont*, 177 USPQ at 567). *See also Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014). We begin with these *DuPont* factors.

There is no dispute that the services identified in the application and cited registration are identical: “travel agency services, namely, making reservations and bookings for transportation.” Because the services are identical and there are no limitations as to channels of trade or classes of consumers, we must presume that the channels of trade and classes of purchasers for these services are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). In addition, because the services at issue are ordinary travel agency services without restriction, the average customer is an ordinary consumer. *See, e.g., In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1747 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019) (average customer of unrestricted restaurant and bar services is an ordinary consumer).

The second and third *DuPont* factors weigh in favor of likely confusion.

B. Strength of the Cited Mark

Applicant argues that “[t]he term UNFORGETTABLE in the [cited mark] is” a “diluted and weak” indicator of source due to the “numerous third-party registered marks” that include “the term UNFORGETTABLE in connection with the same or

similar goods or services” and the “frequent [third-party] use of the term UNFORGETTABLE on the internet in connection with travel agency services.”⁴

For likelihood of confusion purposes, a mark’s strength “varies along a spectrum from very strong to very weak.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (citing *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003))).

The cited mark is registered on the Principal Register without a claim of acquired distinctiveness, and therefore is considered as a whole inherently distinctive even though the mark includes a disclaimer of the term HONEYMOONS. *See Sock It To Me, Inc. v. Aiping Fan*, 2020 USPQ2d 10611, at *9-10 (TTAB 2020) (SOCK IT TO ME for socks “taken as a whole, is inherently distinctive, although its strength is somewhat limited by its first word, SOCK, which is generic for socks.”). Nonetheless, we may consider whether an inherently distinctive mark is “weak as a source indicator” in the course of a *DuPont* analysis. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517-18 (TTAB 2016).

Under the fifth and sixth *DuPont* factors, we consider the strength of the cited registered mark, and the extent to which that strength may be attenuated by “[t]he number and nature of similar marks in use on similar goods [and services].” *DuPont*, 177 USPQ at 567; *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*,

⁴ 10 TTABVUE 18, 24-25.

122 USPQ2d 1030, 1033 (TTAB 2016). Under the fifth factor, we generally treat the strength of the cited registered mark as neutral because the Examining Attorney is not expected to submit evidence of its fame. *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1086-88 (TTAB 2016). Under the sixth factor, though, an applicant may submit evidence of third parties' registration and use of similar marks to show weakness of the registered mark or a segment thereof – in this case, the segment UNFORGETTABLE – in two ways: conceptually and commercially. *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 2023 USPQ2d 737, at *4 (Fed. Cir. 2023); *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength . . .”).

First, evidence that a mark, or a segment of a mark, is commonly adopted by many different registrants may indicate that the common element has some significance that undermines its conceptual strength as an indicator of a single source. *Spireon, Inc. v. Flex Ltd.*, 2023 USPQ2d 737, at *5 (“[C]omposite third-party registrations are relevant to . . . whether a shared segment [of the marks] has a commonly understood descriptive or suggestive meaning in the field and whether there is a crowded field of marks in use.”); *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to show the sense in which a [term] is used in ordinary parlance . . . that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or

suggestive meaning, leading to the conclusion that that segment is relatively weak”) (internal citation and punctuation omitted).

Second, evidence that a mark, or a segment of a mark, is used extensively in commerce by a number of third parties may undermine its commercial strength, as the consuming public may have become familiar with a multiplicity of the same or similar marks, and may have learned to distinguish them based on minor differences. *See In re i.am.symbolic, llc*, 123 USPQ2d at 1751; *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015); *Palm Bay Imps.*, 73 USPQ2d at 1691 (Fed. Cir. 2005). Here, we have evidence concerning the common element UNFORGETTABLE.

“Unforgettable” is defined as “incapable of being forgotten: *memorable*,”⁵ and “earning a permanent place in the memory; memorable: *an unforgettable experience*.”⁶ Based on these definitions, we acknowledge that UNFORGETTABLE is suggestive for travel agency services, and therefore has at least some conceptual weakness.

In support of its position that the UNFORGETTABLE portion of the cited mark is conceptually weak (i.e., that it lies on the less distinctive end of the spectrum), Applicant introduced the following six third-party use-based registrations issued to different entities for UNFORGETTABLE-formative marks:⁷

⁵ MERRIAM-WEBSTER DICTIONARY, April 5, 2022 Office Action at 7.

⁶ We take judicial notice from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (ahdictionary.com) accessed January 30, 2024. *See, e.g., In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006) (Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format).

⁷ 10 TTABVUE 20-24 (table); March 4, 2022 Response to Office Action at 21-50. We do not consider Registration Nos. 4984419, 2658114, 5173910, or the Class 35 services in

| Mark | Reg. No. | Relevant Services |
|---|-----------------|--|
| A WORLD OF UNFORGETTABLE EXPERIENCES | 5915721 | Travel agency services, namely, making reservations and bookings for transportation; various other travel-related services |
| UNFORGETTABLE. SINCE 1907. | 4783392 | Reservation of hotel rooms for travelers; hotel and resort lodging services |
| UNFORGETTABLE EXPERIENCE | 3840349 | Hotel services; resort lodging services |
| FOR AN UNFORGETTABLE EXPERIENCE, JUST ADD WATER | 5071098 | Boat cruises |
| POWERFUL CITY ★ UNFORGETTABLE EVENTS | 4596462 | On-line travel newsletters about the Washington, DC metropolitan area; promoting Washington, D.C. as a location for tourism; providing facilities for conventions and meetings |
| THE UNFORGETTABLE COAST | 4360640 | Variety of advertising services for a wide variety of businesses (e.g., grocery stores, barbers, banks, housekeepers, churches) and including some promotional and marketing services for hotels, resorts, vacation rental providers, tour guides, recreational activity providers, charter boat operators, marinas, travel agents, tourism, tourism bureaus |

The first registration is highly probative as it covers in-part identical services. The next four registrations are also probative as they cover arguably related travel

Registration No. 3840349, as they have been cancelled. *See, e.g., In re Inn at St. John's*, 126 USPQ2d at 1745 (disregarding cancelled third-party registration).

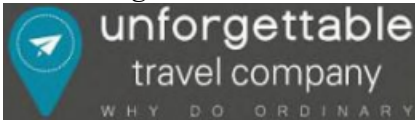
services. The sixth registration is for advertising services and as such is not probative. *See Omaha Steaks Int'l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693-94 (Fed. Cir. 2018) (Board must focus “on [services] shown to be similar;” error to rely on third-party evidence of similar marks for dissimilar services); *In re i.am.symbolic, llc*, 123 USPQ2d at 1751 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration).

In support of its position that the UNFORGETTABLE portion of the cited mark is commercially weak, Applicant introduced printouts from the following internet web pages for travel agencies using the term UNFORGETTABLE in their names or products.⁸

- unforgettabletrips.com



- unforgettabletravel.com



⁸ 10 TTABVUE 25 (table); October 5, 2022 Request for Reconsideration at 11-49. We do not consider the unforgettableescapes.com website (at 43-44) because it is a Canadian website and there is no evidence that U.S. consumers frequent this site or that the website owners sell to consumers in the United States. *See In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1265 n.9 (TTAB 2011) (no basis to conclude U.S. consumers exposed to website for Australian brewery; those webpages not considered). The Unforgettable Travel Company, Unforgettable Greece, and Unforgettable Croatia websites appear to be related, but they use different URLs and contain different trade names.

- unforgettablegreece.com



Unforgettable Greece Special Trips

- unforgettablecroatia.com



Why book with Unforgettable Croatia

- journeysunforgettable.com



Journeys Unforgettable prides itself on being a personal concierge service for customized, luxury African adventures.

- unforgettableluxurytravel.com



- transformativa.com/unforgettable-family-vacations

FAMILY TRAVEL, JAMAICA TRAVEL, TRAVEL PLANNING, TRAVEL TIPS, WHY USE A TRAVEL AGENT

Unforgettable Family Vacations

- unforgettabletravelbyjana.com

Unforgettable Travel LLC

Travel Agency
Open today until 5:30 PM

- unforgettabledestinations.com



- unforgettabletravels.net



- trips.simplyunforgettabletravel.com



Making Your Memories Simply Unforgettable

Applicant also submitted evidence consisting of a Dun & Bradstreet search of business names in the U.S., along with the 23 corresponding business entries, that contain the term “unforgettable” in the “travel and reservation services” industry.⁹ Some examples include: Unforgettable, Inc.; Unforgettable Travel; Unforgettable Travels LLC; Unforgettable Travels Inc; Unforgettable Vacations LLC; Unforgettable Travel Experiences, LLC; Unforgettable Luxury Travel, LLC; Unforgettable World Travel LLC; Unforgettable Moments Travel LLC; Unforgettable Travel Memories LLC; Unforgettable Tours L.L.C.; Unforgettable Vacations; and Unforgettable Leisure Travel.

⁹ October 5, 2022 Request for Reconsideration at 51-54 (report), 55-100 (company listings).

Evidence in the form of listings and advertisements, such as in yellow and white page phone book listings, triggers a presumption that a third-party service mark is in fact in use by third-parties, possibly making a registrant's mark weak. *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993) (showing that the mark appears in advertising, in the form of current listings in the yellow and white pages, carries the presumption that the service mark is being used by third-parties in connection with the offering of the advertised services). *See also In re Broadway Chicken, Inc.*, 38 USPQ2d 1559 (TTAB 1996) (Under the *Lloyd's* rule, evidence of hundreds of yellow and white pages listings of a restaurant name containing the word BROADWAY, almost 600 similar entries from the American Business Directory, and more than 500 similar entries from the Dun & Bradstreet database are together sufficient to establish that a significant number of persons are using names and marks containing the word "Broadway" for restaurant services and related goods; making the cited registration of BROADWAY PIZZA weak and no obstacle to the registration of BROADWAY CHICKEN for restaurant services.) While the Dun & Bradstreet evidence Applicant submits is not the same as telephone phone book listings, it is somewhat similar in nature.


We find that the foregoing dictionary, third-party registration, and third-party use evidence establishes that UNFORGETTABLE-formative marks are both conceptually and commercially weak for travel agency services and, therefore, are entitled to a narrow scope of protection.

Regarding conceptual strength, the fact that marks that contain the word UNFORGETTABLE have been registered by different travel-related service providers indicates that UNFORGETTABLE in this context suggests memorable travel experiences. The dictionary definition of “unforgettable” further supports this finding as the usage example is “an unforgettable experience.” *See Juice Generation*, 115 USPQ2d at 1675 (third-party registrations alone may be relevant, in the manner of dictionary definitions, “to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.”) (internal quotation marks omitted). *See also Jack Wolfskin*, 116 USPQ2d at 1136.

Regarding commercial strength, the evidence establishes that it is common for travel agencies to comprise or incorporate the word UNFORGETTABLE in their marks. As noted above, these travel companies suggest and emphasize memorable travel experiences. The number of third-party marks that incorporate the word UNFORGETTABLE used in connection with related travel services is “powerful” evidence that consumers encountering marks in the travel agency field have become conditioned to distinguish marks incorporating the word UNFORGETTABLE based on minute differences including the addition of descriptive and generic terms such as “travel,” “luxury travel,” “destinations,” “vacations,” “tours,” “leisure travel,” etc. *Juice Generation*, 115 USPQ2d at 1674 (extensive third-party use and registration is “powerful on its face”); *In re Broadway Chicken Inc.*, 38 USPQ2d at 1565-66 (“Evidence of widespread third-party use, in a particular field, of marks containing a

certain shared term is competent to suggest that purchasers have been conditioned to look to other elements of the marks as a means of distinguishing the source of the goods or services in the field.”).

Because the evidence shows that UNFORGETTABLE has conceptual weakness for travel agency services, and that consumers have been exposed to numerous UNFORGETTABLE-formative marks used in association with travel agencies, we find that the word UNFORGETTABLE is weak, and that minute differences between UNFORGETTABLE-formative marks used in association with travel agency services are sufficient to distinguish them. *See Palm Bay*, 73 USPQ2d at 1694 (“The purpose of [an applicant] introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different such marks on the bases of minute distinctions.”). Accordingly, the sixth *DuPont* factor concerning the weakness of the term UNFORGETTABLE supports a finding that confusion is unlikely with regard to the

cited registration for the composite word-and-design mark  for “travel agency services, namely, making reservations and bookings for transportation.”

C. Similarity of the Marks

Next, we turn to the first *DuPont* factor which considers the “similarities or dissimilarities of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *In re Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting *DuPont*, 177 USPQ at 567). The emphasis of our analysis must be on the recollection

of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at *4 (TTAB 2020); *In re Inn at St. John's*, 126 USPQ2d at 1746.

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). Further, “[n]o element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone.” *In re Electrolyte Labs. Inc.*, 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 184 USPQ 35 (CCPA 1974)). Nonetheless, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion Cap. Partners v. Lion Cap.*, 110 USPQ2d at 1161.

Applicant’s mark is UNFORGETTABLE TRIPS in standard characters, and the

cited mark is the composite word-and-design mark



In view of the weakness of the term UNFORGETTABLE, despite its placement at the beginning of the respective marks, we find that the addition of the differing terms TRIPS and HONEYMOONS is sufficient to distinguish them. Even though the additional words HONEYMOONS and TRIPS are merely descriptive and disclaimed, we cannot ignore them in our analysis. *In re Detroit Athletic Co.*, 128 USPQ2d at 1050; *Shen Mfg. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1355 (Fed. Cir. 2004) (“The disclaimed elements of a mark, however, are relevant to the assessment of similarity. This is so because confusion is evaluated from the perspective of the purchasing public, which is not aware that certain words or phrases have been disclaimed.” (internal citation omitted)). While the word UNFORGETTABLE would engender a similar meaning and commercial impression, the other wording in each mark adds additional meaning and commercial impression that distinguishes them. *See Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1356, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (affirming Board’s holding that contemporaneous use of applicant’s CAPITAL CITY BANK marks for banking and financial services, and opposer’s CITIBANK marks for banking and financial services, would not likely cause confusion, based, in part, on findings that the phrase “City Bank” was frequently used in the banking industry); *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 73 USPQ2d at 1356-57 (reversing Board’s holding that contemporaneous use of THE RITZ KIDS and RITZ was likely to cause confusion, because, inter alia, THE RITZ KIDS created a different commercial impression). We agree with Applicant that the different trailing words,

HONEYMOONS and TRIPS, with dissimilar spellings and lengths add to the dissimilarity in appearance and sound.¹⁰

Based on the evidence of record, and given that Applicant's mark contains the word TRIPS instead of HONEYMOONS, we think it likely that consumers would be able to distinguish the marks based on this difference. Accordingly, we find that the similarity of the marks is a factor that weighs against a finding of likelihood of confusion.

D. Purchasing Conditions and Consumer Sophistication

"The fourth *DuPont* factor . . . considers '[t]he conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing.'" *In re Embiid*, 2021 USPQ2d 577, at *31 (quoting *DuPont*, 177 USPQ at 567). Purchaser sophistication or degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay Imps.*, 73 USPQ2d at 1695.

Applicant argues that travel agency services "tend to be expensive, and non-routine, purchases" that are not engaged "casually. . . by sophisticated consumers exercising a high degree of care . . ." ¹¹ However, Applicant's assertions regarding consumer sophistication and the cost of the involved services "are unsupported by sworn statements or other evidence, and '[a]ttorney argument is no substitute for evidence.'" *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, at *15 (TTAB 2019)

¹⁰ 10 TTABVUE 9-10.

¹¹ 10 TTABVUE 16.

(quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (internal quotation omitted)).

The third-party travel agency websites of record do not include any pricing information, and there is no indication in the record that the unrestricted travel agency reservations and bookings services will only be available to sophisticated and discerning consumers. While some purchasers may be discriminating and exercise care in their selection, others may include ordinary consumers exercising an ordinary degree of care. The standard of care is that of the least sophisticated potential purchaser. *Stone Lion*, 110 USPQ2d at 1163; *In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) (“Board precedent requires our decision to be based on the least sophisticated potential purchasers.”)).

This *DuPont* factor is neutral.

E. Balancing the Factors

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *In re Charger Ventures LLC*, 2023 USPQ2d 451, at *4; *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 98 USPQ2d at 1261; *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”). Here, although the services are identical and presumed to travel in the same trade channels to the same classes of consumers, the term UNFORGETTABLE is weak when used in connection with travel agency services. The ubiquity of UNFORGETTABLE in the travel industry and the additional different wording present in Applicant’s mark outweigh

the similarities between the services, trade channels, and consumers. The purchasing conditions and alleged consumer sophistication are neutral.

When we consider and weigh the evidence of record and the relevant likelihood of confusion factors, *In re Charger Ventures*, 2023 USPQ2d 451, at *7, we find confusion is unlikely between Applicant's mark UNFORGETTABLE TRIPS and the cited mark



III. Decision

The Section 2(d) refusal to register Applicant's mark is reversed.