This Opinion is Not a
Precedent of the TTAB

Mailed: January 3, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Structure Financial, Inc.

Serial No. 90690591

Kubs Lalchandani of Lalchandani Simon PL,
for Structure Financial, Inc.

Andrea Cornwell, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

Before Shaw, Acting Deputy Chief Administrative Trademark Judge, Wellington, and Dunn, Administrative Trademark Judges.

Opinion by Dunn, Administrative Trademark Judge:

Structure Financial, Inc. (Applicant) seeks registration on the Principal Register of the mark STRUCTURE (in standard characters) for "securities brokerage services, namely, trading tokenized securities utilizing block-chain technology, smart-contracts, and decentralized financial protocols; brokerage services for cryptocurrency trading, namely, trading tokenized assets utilizing block-chain

technology, smart-contracts, and decentralized financial protocols," in International Class 36.[1]

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 services identified in the application, so resembles the mark

(STRUCTURE disclaimed) for "financial services and investment services, namely, funds management, investment and portfolio management services; advisory, consultancy and information services in relation to the aforementioned services," in International Class 36,[2] on the Principal Register as to be likely to cause confusion, to cause mistake, or to deceive.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. Briefs have been filed.[3] We affirm the refusal to register.

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[1] Application Serial No. 90690591 filed May 5, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant's allegation of a bona fide intention to use the mark in commerce.

[2] Registration No. 6733793 issued May 24, 2022 for services in International Class 35, 36 and 37, but only the services listed above were cited as a basis for the refusal. The registration includes the description: "The mark consists of the wording 'STRUCTURE' to the right of three angled bars in a chevron pattern."

[3] Applicant's brief has ninety pages in attachments consisting of evidence from the application file. The better practice is to cite the evidence by its location in the record. *See In re Sela Prod., LLC*, 107 USPQ2d 1580, 1584 (TTAB 2013) ("The Board frowns on an applicant or, for that matter, an examining attorney, attaching such a large [50 pages] number of exhibits to a brief. The application file is before the Board when it decides an appeal, and there is no need to resubmit materials that are already in the file."); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1203.02(e) (June 2023).

I. Likelihood of Confusion Refusal

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.,* 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

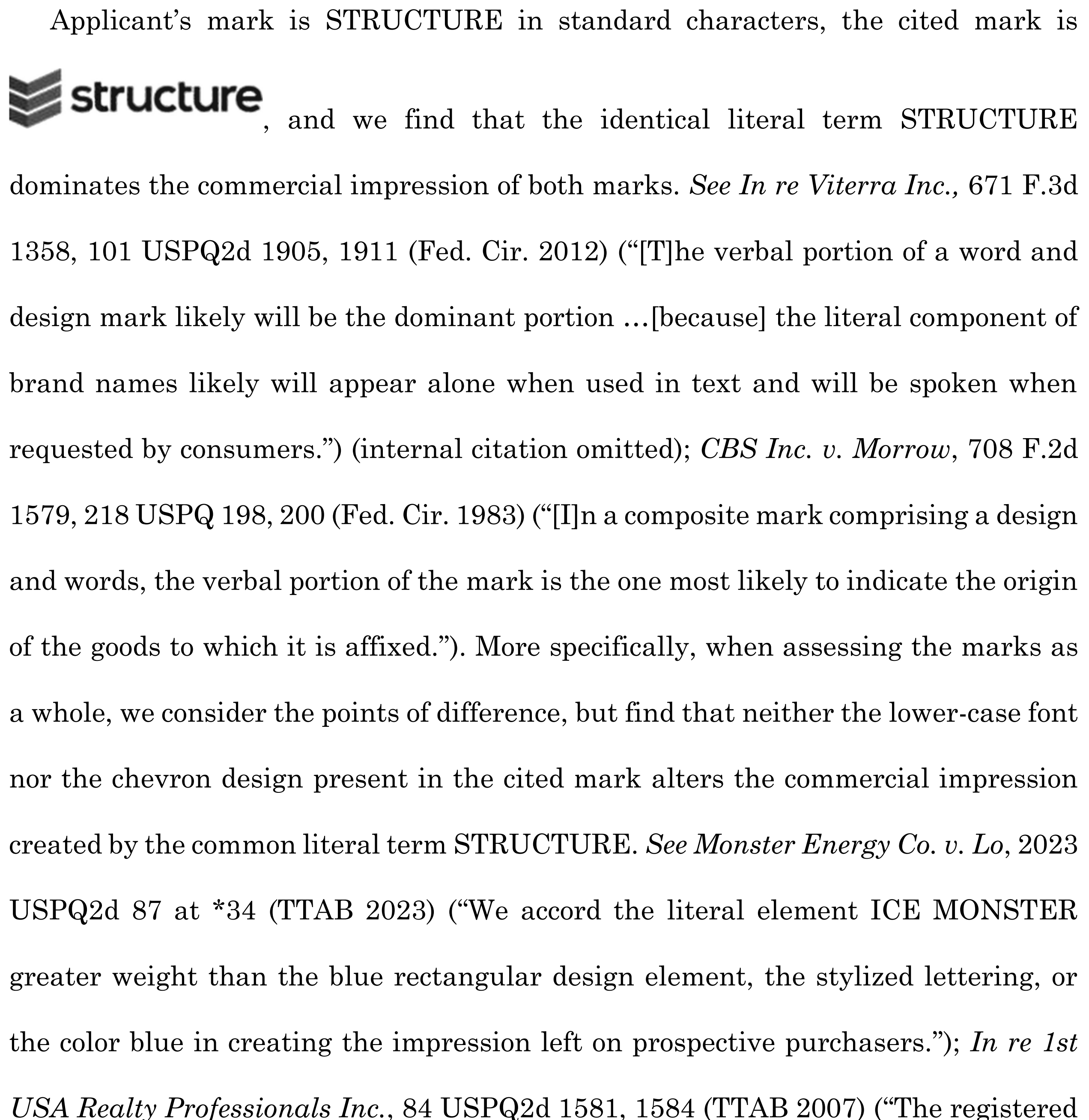
In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks."); *see also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) ("The likelihood of confusion analysis considers all [*DuPont*] factors for which there is record evidence but 'may focus . . . on dispositive factors, such as similarity of the marks and relatedness of the goods [or services].'") (*quoting Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. Similarity/dissimilarity of the marks

We compare the marks in their entireties as to "appearance, sound, connotation and commercial impression." *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin*

Maison Fondee En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff'd mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019) (*citing In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014).

Applicant's mark is STRUCTURE in standard characters, the cited mark is



, and we find that the identical literal term STRUCTURE dominates the commercial impression of both marks. *See In re Viterra Inc.,* 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012) ("[T]he verbal portion of a word and design mark likely will be the dominant portion …[because] the literal component of brand names likely will appear alone when used in text and will be spoken when requested by consumers.") (internal citation omitted); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) ("[I]n a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed."). More specifically, when assessing the marks as a whole, we consider the points of difference, but find that neither the lower-case font nor the chevron design present in the cited mark alters the commercial impression created by the common literal term STRUCTURE. *See Monster Energy Co. v. Lo*, 2023 USPQ2d 87 at *34 (TTAB 2023) ("We accord the literal element ICE MONSTER greater weight than the blue rectangular design element, the stylized lettering, or the color blue in creating the impression left on prospective purchasers."); *In re 1st USA Realty Professionals Inc.*, 84 USPQ2d 1581, 1584 (TTAB 2007) ("The registered

mark is for the words FIRST USA in a slightly stylized typestyle. However, the stylization is so minimal that it does not make a real commercial impression.”).

Moreover, because Applicant seeks to register its mark in standard character form, its mark could employ the identical font employed by Registrant and so further increase the similarities between the marks. *See DeVivo v. Ortiz*, 2020 USPQ2d 10153 at *11 (TTAB 2020) (“Applicant seeks registration of a standard character mark; as such, its display is not limited to any particular font style, size or color …. [and we] therefore must consider that the parties’ marks may be displayed in the same or similar font style, size or color.”) (internal citation omitted).

We note that Applicant’s brief does not contend that any dissimilarity of the marks weighs against a likelihood of confusion; Applicant’s brief does not address the similarity of the marks at all.

We find the marks, though not identical, create the identical commercial impression, and this weighs heavily in favor of finding a likelihood of confusion.

B. Relatedness of the services, trade channels, and conditions of sale

When considering the services, trade channels, and conditions of sale, we must make our determinations based on the services as they are identified in the application and cited registration. *See In re Dixie Rests. Inc.*, 41 USPQ2d at 1534. *See also Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). The issue is not whether the services will be confused with each other, but rather whether the public will be confused as to their source. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed.

Cir. 2000) ("[E]ven if the goods [or services] in question are different from, and thus not related to, one another in kind, the same goods [or services] can be related in the mind of the consuming public as to the origin of the goods [or services]."). It is sufficient that Applicant's services and Registrant's services are related in some manner or that the conditions surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that, because of the marks used in connection therewith, would lead to the mistaken belief that they originate from the same source. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1476 (Fed. Cir. 2000). In assessing the relatedness of the services, the more similar the marks at issue, the less similar the services need to be to support a finding of likelihood of confusion. *See In re Shell Oil Co.*, 992 F.2d 1204, 1207, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *Gen. Mills, Inc. v. Fage Dairy Processing Indus. S.A.*, 100 USPQ2d 1584, 1597 (TTAB 2011)

For convenience, we repeat that Registrant's cited services are financial services and investment services, namely, funds management, investment and portfolio management services, and related advisory, consultancy and information services. Applicant's services are securities brokerage services, namely, trading tokenized securities utilizing block-chain technology, smart-contracts, and decentralized financial protocols and brokerage services for cryptocurrency trading, namely, trading tokenized assets utilizing block-chain technology, smart-contracts, and decentralized financial protocols.

The Examining Attorney contends that the services are closely related, and "the same entity commonly provides securities and cryptocurrency trading, as well as investment or portfolio management or related advisory services, [] markets the services under the same mark, [and] that the services are provided through the same trade channels to the same classes of consumers in the financial investment field."[4] In support, the Examining Attorney submits excerpts from the websites of financial companies offering investment management services involving cryptocurrency alone (SoFi, Coinbase, Kraken) and financial companies offering investment management services involving cryptocurrency as an alternative to more traditional investments such as regulated securities (Charles Schwab, PNC, Wells Fargo, Goldman Sachs, Fidelity, JP Morgan, Kingsley Capital, Ameritrade), many of which offer mobile apps which allow clients to trade directly rather than through a professional.[5] Applicant does not dispute the record evidence, concurring that "a handful of companies … operate in cryptocurrency markets and provide consumers with various investment options" and "additional companies provide traditional financial services and also have dipped into crypto markets [including] Charles Schwab, Fidelity, First Trade, JP Morgan, Kingsley Capital Management, and TD Ameritrade."[6]

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[4] 6 TTABVUE 4.

[5] January 13, 2022 Office Action TSDR 17-32, July 27, 2022 Office Action TSDR 8-58, February 22, 2023 Office Action TSDR 8-81.

[6] 4 TTABVUE 8. While Applicant does not specifically admit that other financial services companies offer software for client trading, Applicant does not dispute that evidence, merely contending that its own "crypto and stock trading app" is unique. 4 TTABVUE 11.

The record also includes a December 14, 2021 Internet article (Investing Through Black Swan Events) discussing, among other things, tokenized funds and how investors who diversify and include in their portfolio alternative investments like bitcoin outperform others:[7]

> Like ballast steadies boats in a storm, alternative assets can keep portfolios performant in times of uncertainty. These days alternative assets include digital assets like bitcoin, as well as digital asset securities such as tokenized funds or equity in private companies. According to Yale economist Aleh Tsyvinski, a 6% allocation to bitcoin can improve overall portfolio performance.
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> For accredited and institutional investors seeking actively managed financial instruments, our Bitcoin Yield Fund brings the ability to securely earn yield from the best performing asset in modern history. Yielding 2.84% APY since the fund's inception in late July 2021 through late December 2021, this fund is designed for those with a high risk appetite looking for annual return potential.

We find this evidence demonstrates that the services of Applicant and the Registrant are closely related. *See In re Country Oven, Inc.*, 2019 USPQ2d 443903, *4-5 (TTAB 2019) ("Evidence of relatedness may include … news articles or evidence from computer databases showing that the relevant goods and services are used together or used by the same purchasers [and] advertisements showing that the relevant goods and services are advertised together or sold by the same manufacturer or dealer…").

In fact, while they do not use identical wording, we find the services are related on their face. We take judicial notice of the following definitions:[8]

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[7] January 13, 2022 Office Action TSDR 15.

[8] All definitions obtained from *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/commodity. Accessed Dec. 29, 2023. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or

broker (noun)
an agent who negotiates contracts of purchase and sale (as of real estate, commodities, or securities)

brokerage (noun)'
the business or establishment of a broker

capital (noun)
a stock of accumulated goods especially at a specified time and in contrast to income received during a specified period
also: the value of these accumulated goods

cryptocurrency (noun)
: any form of currency that only exists digitally, that usually has no central issuing or regulating authority but instead uses a decentralized system to record transactions and manage the issuance of new units, and that relies on cryptography to prevent counterfeiting and fraudulent transactions

funds (noun)
CAPITAL (synonym)

invest (verb)
to commit (money) in order to earn a financial return

investment (noun)
: the outlay of money usually for income or profit: capital outlay
also: the sum invested or the property purchased

portfolio (noun)
: the securities held by an investor: the commercial paper held by a financial house (such as a bank)

security (noun)
an instrument of investment in the form of a document (such as a stock certificate or bond) providing evidence of its ownership

stock (noun)
a store or supply accumulated or available
: the proprietorship element in a corporation usually divided into shares and represented by transferable certificates
: a portion of such stock of one or more companies

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have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

> trade (verb)
> **:** to engage in frequent buying and selling of (stocks, commodities, etc.) usually in search of quick profits

Although the term "tokenize" does not appear in the online dictionary, the record includes a definition in a June 2019 BNY Mellon blog post which was submitted early in examination by Applicant and never disputed by the Examining Attorney:[9]

> While not new to the blockchain world, the tokenization of real-world assets is now attracting industry attention. Fundamentally, tokenization is the process of converting rights - or a unit of asset ownership - into a digital token on a blockchain. Tokenization can be applied to regulated financial instruments such as equities and bonds, tangible assets such as real estate, precious metals, and even to Tokenization of Copyright to works of authorship (e.g., music) intellectual property. The benefits of tokenization are particularly apparent for assets not currently traded electronically, such as works of art or exotic cars, as well as those needing increased transparency in payment and data flows to improve their liquidity and tradability.

Turning to the respective recitations of services, because management of financial investments, funds, and portfolios includes brokerage of securities and trading of cryptocurrencies, Registrant's broadly defined financial and investment services managing funds, investments, and portfolios include Applicant's more narrowly defined brokerage services trading tokenized securities and assets utilizing block-chain technology, smart-contracts, and decentralized financial protocols. That is, we find that the identified services are not only closely related but overlap and so are legally identical in part. *See In re Equitable Bancorporation*, 229 USPQ 709, 710 (TTAB 1986) ("Turning first to the services, applicant's identification of services, i.e.,

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[9] July 11, 2022 Response TSDR 32.

'banking services,' encompasses the services specified in the cited registration, namely, 'banking services rendered through twenty-four (24) hour teller machine services.' Thus, the services must be presumed to be the same for purposes herein.").

Citing the description of services offered on its blog and Registrant's website, Applicant's primary argument is that no other financial company offers the identical services offered by Applicant, which allow "consumers to trade their cryptocurrency for shares of publicly traded companies and vice versa on global markets" via "a new kind of crypto and stock trading app."[10] Whether the services as provided actually overlap is not the relevant consideration; the Board is required to consider the usage reflected in the registration, and "cannot countenance an applicant's attempt to show that a registrant's actual usage is narrower than the statement of [services] in the registration." *In re Thor Tech, Inc.*, 90 USPQ2d 1634, n. 8 (TTAB 2009). In other words, that Registrant's identification of services presently does not mention whether it uses the mark in connection with tokenized securities brokerage as part of its investment management services does not detract from the fact that its broadly-worded recitation of services allows it to do so. *Stone Lion Capital*, 110 USPQ2d at 1163 ("Parties that choose to recite services in their trademark application that exceed their actual services will be held to the broader scope of the application.").[11]

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[10] 4 TTABVUE 11, citing January 26, 2023 Response 24-27, 35-40.

[11] Applicant also states (4 TTABVUE 11) that "no company, not even the Traditional Financial Services Provider mentioned in the Final Office Action can offer the services being offered by STRUCTURE." Applicant's website states "Structure Financial, Inc.'s services and STXR are not available in the United States and other prohibited jurisdictions." January 26, 2023 Response TSDR 39, 85. An applicant cannot have a bona fide intent to use a mark in an unlawful activity. *See In re JJ206, LLC*, 120 USPQ2d 1568, 1569 (TTAB 2016); *John W. Carson Found. v. Toilets.com, Inc.*, 94 USPQ2d 1942, 1948 (TTAB 2010). If we were not

In addition to impermissibly relying on the extrinsic evidence of Registrant's website, Applicant cites the other services in the cited registration as an impermissible restriction of the scope of Registrant's financial services.[12] Applicant

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affirming the refusal, we would remand to develop the record on why the U.S. is a "prohibited jurisdiction" for Applicant's services.

[12] While only the services shown below in **bold** were cited, Registration No. 6733793 lists the following services:

> Business management and administration services; business project management and business project administration; business project management, namely, business project management services for construction projects; commercial and industrial management assistance; computerised database management in the nature of facilities management; event management services in the relation to the organization of exhibitions or trade fairs for commercial or advertising purposes; inventory management services; business management of retail enterprises and retail premises; advisory, consultancy and information services in relation to the aforementioned services, in International Class 35.
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> Real estate and real property management services, namely, property management services for apartment buildings, retail premises, commercial premises, industrial premises, condominium associations and homeowner associations; real estate agency services; real estate agency services, namely, letting and leasing of residential, industrial, commercial, rural and retail premises; real estate management services; financial evaluation of real estate; financial management of real estate services relating to property development, property maintenance, property management and property administration; financial management services relating to property, real estate and strata scheme; financial management of owners corporations; financial management of community association; insurance risk management and insurance arranging services, in the nature of loss control management for others; **financial services and investment services, namely, funds management, investment and portfolio management services; advisory, consultancy and information services in relation to the aforementioned services;** real estate and property management services relating to apartment buildings and housing facilities, in International Class 36.
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> Building, construction, renovation, repair and maintenance services; construction project management; construction services relating to site clearing in preparation for landscaping; building maintenance services; building cleaning services; real estate development of residential premises, retail premises, commercial premises and industrial premises in the nature of building and construction services; supervision of building, construction, renovation, repair and maintenance of buildings and facilities; advisory, consultancy and information services in relation to the aforementioned services, in International Class 37.

argues "the product and services offered by the Registered Mark do not engage in any brokerage services nor operate in the cryptocurrency or decentralized currency markets, but rather is exclusive to real estate, building, facilities, and property management. These services are limited to the provision of services to manage large scale residential buildings such as apartment complexes, condo buildings and homeowners' associations."[13]

In a multiple-class registration, each class stands on its own as it would if it were in a separate registration. *See G&W Labs., Inc. v. G W Pharma Ltd*, 89 USPQ2d 1571, 1574 (TTAB 2009) ("[E]ach class of goods or services in a multiple class registration must be considered separately when reviewing the issue of fraud, and judgment on the ground of fraud as to one class does not in itself require cancellation of all classes in a registration."); *Electro-Coatings, Inc. v. Precision Nat'l Corp.*, 204 USPQ 410, 420 (TTAB 1979) ("[T]here are, in law, three applications and three oppositions to be adjudicated, because each class in a multiple class application constitutes a separate case"). The registered services in International Classes 35 and 37 exist independently from, and in no way restrict, the registered services in International Class 36.

Moreover, we will not use the restricted registered services listed in International Class 36 to impute similar restrictions with respect to unrestricted registered services in International Class 36. Each listed service separated by a semicolon is an independent service. *In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1166 (TTAB 2013) ("We find that here, the semicolon separates the registrant's 'restaurant

[13] 4 TTABVUE 12.

and bar services' into a discrete category of services which is not connected to nor dependent on the 'providing banquet and social function facilities for special occasions' services set out on the other side of the semicolon. We further find that the registrant's 'restaurant and bar services,' as separately set out in the identification of services by means of the semicolon, stand alone and independently as a basis for our likelihood of confusion findings under the second and third *du Pont* factors."); *Thor Tech Inc.*, 90 USPQ2d at 1638 (the Board declines to "interpret the word 'trailers' in the registered mark to be 'industrial and commercial trailers sold to professional purchasers' because registrant also lists dump trailers and truck bodies in its description of goods."). See also TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1402.01(a) (2018) ("commas should be used in the identification to separate items within a particular category of goods or services" and semicolons "should generally be used to separate distinct categories of goods or services within a single class.").[14] The

[14] Applicant argues (4 TTABVUE 14-15) that the reference to "the aforementioned services" in the cited services relates to "property management services for apartment buildings, retail premises, commercial premises, industrial premises, condominium associations and homeowner associations; . . . real estate agency services, namely, letting and leasing of residential, industrial, commercial, rural and retail premises;. . . financial management of real estate services relating to property development, property maintenance, property management and property administration," and not the unrestricted financial and investment services. We need not decide if this is the case because, even if true, that reading of the services' recitation would not create a lesser likelihood of confusion. The cited services also include the unrestricted "financial services and investment services, namely, funds management, investment and portfolio management services." When we consider the similarity of the parties' services, it is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of services in a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

cited registered services are unrestricted and remain so for the purpose of this analysis.

Having considered Applicant's arguments, our conclusion remains unaltered that the record shows the services of Applicant and Registrant are not only closely related but overlapping.

Turning to the channels of trade and conditions of sale, as with the similarity or dissimilarity of the services, we base our analysis on the recitations as set forth in the application and the cited registration. *See Stone Lion Capital*, 110 USPQ2d at 1162. As such, we may not consider, in assessing these factors, evidence of how Applicant and Registrant are actually rendering their services in the marketplace. *Id.* Because the services described in the application and the cited registration are in part legally identical, we presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 101 USPQ2d at 1908; *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1745 (TTAB 2018).

Applicant argues that "the conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing" weigh against a likelihood of confusion here. More specifically, Applicant contends that the financial services offered by itself and Registrant are expensive, and so appeal to sophisticated purchasers likely to apply a great deal of care in selecting the services.[15] Applicant points out that the trading of tokenized assets utilizing block-chain technology,

[15] 4 TTABVUE 16.

smart-contracts, and decentralized financial protocols are "complex and risky investments," and so those who seek out such services are sophisticated consumers.[16]

Even if consumers of the services could be considered sophisticated and discriminating, it is settled that "even sophisticated purchasers are not immune from source confusion, especially in cases such as the present one involving identical marks and related goods [and/or services]." *In re i.am.symbolic, llc*, 116 USPQ2d at 1413 (*citing In re Research & Trading Corp.*, 793 F.2d 1276, 1279, 230 USPQ 49, 50 (Fed. Cir. 1986)), *aff'd*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

Applicant also argues that the channels of trade for the registered services are restricted to Australia and this should be considered in connection with the likelihood of confusion between the services.[17] We disagree. One of the benefits of registration is the presumed validity of the registration, including that it remains in use in commerce regulable by Congress, and the presumption cannot be challenged in an ex parte appeal. *See In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517 (TTAB 2016) ("[I]t has long been settled that the validity of a cited registration cannot be challenged in an ex parte proceeding.") and Trademark Act Sec. 7(b), 15 U.S.C. § 1057(b).[18]

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[16] 4 TTABVUE 18.

[17] 4 TTABVUE 9, 12, 13, 18. The legal support Applicant cites for this proposition is not a registrability determination but an order in a district court action regarding a preliminary injunction in a case seeking relief for tortious infringement and interference. *Trilogy Healthcare of Louisville E., LLC v. Camelot Leasing, LLC*, No. 3:18-cv-00307-RGJ, 2019 BL 319460, 2019 WL 3991073 (W.D. Ky. Mar. 22, 2019). Based on the different facts and legal issues, we do not find this order provides any useful guidance here.

[18] If Applicant believed it had evidence that the registered mark is no longer in use in commerce and has been abandoned, the proper course would have been to file a petition to

In view of the overlap of the unrestricted services and their trade channels, and the similarity in commercial impression created by the marks, we believe that even sophisticated purchasers are likely to be confused, and so the services, trade channels, and conditions of sale all favor finding a likelihood of confusion.

C. Any other established fact probative of the effect of use.

The thirteenth and last *DuPont* factor consider "any other established fact probative of the effect of use." *DuPont,* 177 USPQ at 567. Applicant argues that the fact that Applicant has registered its mark in the European Union and the United Kingdom, and the mark is in use abroad, makes confusion less likely here.[19] We are not persuaded. First, Applicant relies solely on copies of its European Union and United Kingdom registrations. Foreign registrations do not demonstrate trademark use. *See Societe Anonyme Marne et Champagne v. Myers*, 250 F.2d 374, 116 USPQ 153, 156 (CCPA 1957) ("Neither [Appellant's French registration or abandoned U.S. application], however, is of any value in support of the opposition, since neither affords evidence of use or ownership of the mark in this country."); *Honda Motor Co. v. Winkelmann*, 90 USPQ2d 1660, 1664 (TTAB 2009) ("While the evidence necessary to support a bona fide intent to use may differ depending on the circumstances of each

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cancel the registration, and seek suspension of this appeal pending disposition of the cancellation.

[19] 4 TTABVUE 19.

case, the evidence that applicant relies upon through its foreign registrations and Internet printouts does not demonstrate trademark use for the claimed goods.").[20]

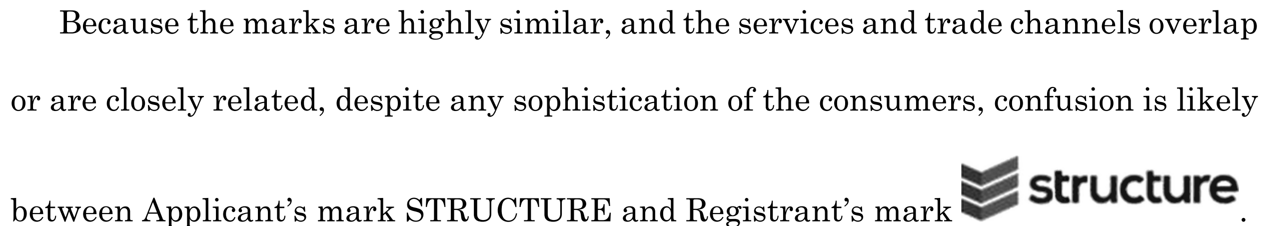
Second, testimony and evidence concerning an applicant's foreign use of its involved mark is usually irrelevant to the issues in a Board proceeding. *See Double J of Broward Inc. v. Skalony Sportswear GmbH*, 21 USPQ2d 1609, 1612 (TTAB 1991) ("Information concerning applicant's foreign activities, including foreign trademark applications and/or registrations, is not relevant to the issues in an opposition proceeding."); *Fruit of the Loom Inc. v. Fruit of the Earth Inc.*, 3 USPQ2d 1531, 1534 (TTAB 1987) ("[W]e have disregarded opposer's testimony and evidence, objected to by applicant, concerning its licensing activities under the mark in Italy and Japan. Trademark activity outside the United States is ineffective to create rights in this country."). *Cf. Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 2022 USPQ2d 602 at *5 (Fed. Cir. 2022) ("With respect to international usage, a trademark right generally extends only to countries in which the mark is used."). That is, even if Applicant submitted proof of its foreign use – which Applicant did not – Applicant also would have to demonstrate that its foreign use had some significance to, or impact on, the issues in dispute before the Board. *Compare Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *49 n.86 (TTAB 2023) ("Applicant's use of his mark in other countries prior to Opposer's adoption of its mark does not indicate priority but a

[20] *See also In re Hag AG*, 155 USPQ 598, 599 (TTAB 1967) ("The foreign registrations ... are not persuasive on the issue before us because it has not been demonstrated that the criteria for registration in these countries involve examination systems in any way analogous to that of this country; and manifestly applicant's right of registration must be determined under the provisions of the Lanham Act as interpreted by the various judicial tribunals in this country."); TBMP § 704.03(B)(1)(a).

defense to Opposer's accusation that Applicant adopted Opposer's mark in bad faith."); *Nature's Way Prods. Inc. v. Nature's Herbs Inc.*, 9 USPQ2d 2077, 2080 n.3 (TTAB 1989) ("[S]since we cannot assume that any of these publications have received any circulation in the United States, we cannot infer that these foreign uses have had any material impact on the perceptions of the relevant public in the United States.").

We find this factor is neutral.

II. Decision

Because the marks are highly similar, and the services and trade channels overlap or are closely related, despite any sophistication of the consumers, confusion is likely between Applicant's mark STRUCTURE and Registrant's mark 

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The refusal to register Applicant's mark under Trademark Act Section 2(d) is affirmed.