

This Opinion is Not a  
Precedent of the TTAB

Mailed: February 28, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Bath Busters, Inc.*

Serial No. 90850908

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for Bath Busters, Inc.

Sarah Peritz, Trademark Examining Attorney, Law Office 129,  
Pamela Y. Willis, Managing Attorney.

Before Lykos, English and Casagrande,  
Administrative Trademark Judges.

Opinion by English, Administrative Trademark Judge:

Bath Busters, Inc. (“Applicant”) seeks registration on the Principal Register of the standard-character mark BATH BUSTERS for “remodeling of residential and commercial bathroom[s]” in International Class 37.<sup>1</sup>


The Examining Attorney refused registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the following two marks registered to the same entity:

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<sup>1</sup> Application Serial No. 90850908 was filed on July 27, 2021 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming October 1, 2019 as the date of first use of the mark anywhere and in commerce.

- TILE BUSTERS (standard characters, TILE disclaimed) for “providing virtually dust free tile removal services”<sup>2</sup> in International Class 37; and



-  for “providing dustless tile removal services” in International Class 37.<sup>3</sup>

The Examining Attorney also finally refused registration on the ground that Applicant failed to comply with the requirement to disclaim the word “bath” apart from the mark BATH BUSTERS as a whole pursuant to Trademark Act Section 6(a), 15 U.S.C. § 1056(a).<sup>4</sup>

Applicant and the Examining Attorney have filed briefs.<sup>5</sup> We affirm both refusals to register.

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<sup>2</sup> Registration No. 5641788, issued on January 1, 2019.

<sup>3</sup> Registration No. 5643494, issued on January 1, 2019. The registration includes the following description of the mark: “The mark consists of a digitized broken tile symbol next to the text ‘TILE BUSTERS’, all enclosed in a rectangular box with rounded edges.” Color is not claimed as a feature of the mark.

<sup>4</sup> The Examining Attorney also initially refused registration on the ground that the specimen did not show a direct association between Applicant’s mark and the identified services. April 28, 2022 Office Action, TSDR 4-5. Applicant filed a substitute specimen obviating this refusal so it is not before us on appeal. November 21, 2022 Final Office Action, TSDR 2.

<sup>5</sup> In its brief, Applicant references “attached internet evidence showing use of [the] TILE BUSTERS mark in connection with kitchen tile removal” and “showing use of [the] BATH BUSTERS mark in connection with bathroom remodeling services that do not necessarily involve tile.” 4 TTABVUE 8, nn. 1-2. No such documents are attached to Applicant’s appeal brief. In any event, we would not have considered any new evidence introduced with Applicant’s appeal brief. “The record should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.” Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); *In re County of Orange*, 2022 USPQ2d 733, at \*29 (TTAB 2022) (refusing to consider new evidence attached to applicant’s brief; “it is well settled that the record should be complete prior to appeal”).

## **I. Disclaimer Requirement**

An examining attorney may require an applicant to disclaim an unregistrable component of a mark otherwise registrable. Trademark Act Section 6(a), 15 U.S.C. § 1056(a). Merely descriptive or generic terms are subject to disclaimer if the mark is otherwise registrable. Failure to comply with a disclaimer requirement is grounds for refusal of registration. *See, e.g., In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859, 1860, n.1 (Fed. Cir. 1987); *In re Richardson Ink Co.*, 511 F.2d 559, 185 USPQ 46, 47 (CCPA 1975); *In re Nat'l Presto Indus. Inc.*, 197 USPQ 188, 190 (TTAB 1977); *In re Pendleton Tool Indus., Inc.*, 157 USPQ 114, 115 (TTAB 1968).

In its appeal brief, Applicant did not address the requirement that it disclaim the word “bath.”<sup>6</sup> The Examining Attorney argues that the disclaimer requirement therefore “is not subject to this appeal.”<sup>7</sup> If, however, the Board finds the disclaimer requirement is properly before it, the Examining Attorney argues that the requirement should be affirmed.<sup>8</sup>

The filing of a notice of appeal has the effect of appealing all refusals or requirements made final. *In re Harley & Jones*, 119 USPQ2d 1755, 1757 (TTAB 2016) (citing *In re Citibank, N.A.*, 225 USPQ 612, 613 (TTAB 1985)). Accordingly, the disclaimer requirement is before us on appeal. Applicant, however, waived its right to challenge this requirement by failing to address it in its brief. Thus, the refusal to

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<sup>6</sup> Nor did Applicant address the disclaimer requirement during prosecution.

<sup>7</sup> Examining Attorney's Brief, 8 TTABVue 1.

<sup>8</sup> *Id.* at 2.

register Applicant's mark on the ground that Applicant failed to enter a disclaimer of "bath" is affirmed. *In re Rainier Enters., LLC*, 2019 USPQ2d 463361, at \*5 (TTAB 2019) (if an applicant fails to address a requirement or refusal the Board may consider "any challenge to that requirement or refusal waived and affirm"); *In re Katch, LLC*, 2019 USPQ2d 233842, at \*1-2 (TTAB 2019) (applicant who briefed only the refusal under Section 23(c) waived its appeal of the refusal to registration under Trademark Sections 1, 2, 3 and 45).

Applicant's failure to comply with the disclaimer requirement is a sufficient basis for refusing registration of Applicant's mark and deeming moot the refusal of registration under Trademark Act Section 2(d). *In re DTI P'ship, LLP*, 67 USPQ2d 1699, 1701-02 (TTAB 2003). For the sake of completeness, however, we exercise our discretion to determine the merits of the Section 2(d) refusal.

## **II. Section 2(d) Refusal**

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*") cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he 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.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We have considered each *DuPont* factor for which there is argument and evidence. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc’ns., Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). Varying weight, however, may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1260 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). Moreover, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

We focus our likelihood of confusion analysis on the standard-character mark TILE BUSTERS (the “Cited Mark” or “Cited Registration”) because it is the cited mark that is the most similar to Applicant’s mark. *Sock It To Me, Inc. v. Fan*, 2020 USPQ2d 10611, at \*6 (TTAB 2020) (confining 2(d) analysis to most similar pleaded mark); *In re Max Cap. Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010) (comparing applicant’s mark to most similar cited mark). If we find confusion likely between the Cited Mark and Applicant’s mark, we need not consider the likelihood of confusion

with the other cited mark; and if we find no likelihood of confusion between the Cited Mark and Applicant's mark, we would not find a likelihood of confusion with the other cited mark.

**A. Similarity or Dissimilarity of the Services, Channels of Trade, Classes of Consumers and Purchasing Conditions**

Under the second *DuPont* factor we consider “[t]he similarity or dissimilarity and nature of the goods or services” as they are identified in the Cited Registration and involved application. *DuPont*, 177 USPQ at 567; *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (Board must base comparison of the goods and services on the identifications in the cited registration and the involved application); *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (same).

The Cited Mark is registered for “providing virtually dust free tile removal services.” Applicant seeks to register its mark for “remodeling of residential and commercial bathroom[s].” “Remodel” means “to alter the structure of: remake.”<sup>9</sup> Synonyms of “remodel” include “alter,” “change,” and “make over.”<sup>10</sup>

The Examining Attorney introduced printouts, posts and articles from 15 websites showing that tile is a common fixture in bathrooms and that it is routinely removed and replaced as part of bathroom remodels and make overs.<sup>11</sup>

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<sup>9</sup> November 21, 2022 Final Office Action, TSDR 97 (definition of “remodel” from Merriam-Webster.com).

<sup>10</sup> *Id.* at 98.

<sup>11</sup> April 28, 2022 Office Action, TSDR 22-59; November 21, 2022 Final Office Action, TSDR 10-88.

- “Today’s Homeowner with Danny Lipford, Expert Advice on Improving your Home,” providing instructions on how to remove bathroom wall tile to install a soap dish;
- “Get a Flooring, Shower and Bathroom Tile Removal or Stripping Services Estimate”: “Fast, reliable and affordable tile removal and stripping services, including all types of repairs, installation, and maintenance around the home if needed”;
- “Tile Removal, Dust Control – THE Bath & Shower Demo Guide”: “Are you looking for some detailed actionable advice from a remodeling expert about demolishing your bathroom shower? If so, you won’t be disappointed with this post. ... Tile removal is one of the more tricky parts of the shower demo but there is a way to do it safely and in a relatively organized manner.”;
- West Shore Home offering bathroom renovation services, including tile color and pattern selection;
- Floor Removal Services Inc.: “Our decades of experience with tile removal make us a perfect choice to handle your demolition needs. Many of the surfaces within the bathroom and kitchen are covered in tile, which does not always come away from the surface easily.”;
- “What are the best bathroom floor tiles? Learn about different flooring materials that are practical and can enhance the look of your bathroom”;
- “How to choose bathroom tiles”: “Planning on renovating your bathroom? Here’s what you need to consider when purchasing new floor and wall tiles for the space.”;
- Article on the Better Homes & Garden under “Home Improvement Ideas” titled “14 Types of Bathroom Tile for Every Budget and Aesthetic”;
- “The Best Options for Bathroom Floor Tile in 2022”;
- “The 13 Types of Bathroom Floor Tiles (Pros and Cons)”;
- “9 Best Types of Tile for Your Bathroom Floor”: “Choosing the best tile for you is one of the most important parts of the process of remodeling your bathroom floor.”;
- “Cost to Remove Bathroom Tile”: “Don’t let your remodeling budget go overboard by hidden surprises – understand what the average Cost to Remove Bathroom Tile In your zip code by using our easy to use calculator.”;

- Tile removal services offered by Virtually Dustless Speedy Floor Removal: “If you are renovating your bathroom or kitchen, flooring can make or break your new space. . . . Our dustless tile removal services can remove your tile and dispose of it properly.”;
- TileRam offering flooring removal and demolition services, including bathroom demolition: “Our fast and fully dust-free tile technology means you no longer need to suffer the worst side effects of updating your flooring”; and
- DustRam “the leader of dustless tile removal in the U.S.”: “Are you wondering how to remove tile from a bathroom wall? ... A bathroom demolition seems to be where most homeowners feel comfortable starting a home remodel.”

We find that Registrant’s tile removal services are broad enough to encompass bathroom tile removal, and these services, in turn, are encompassed within Applicant’s bathroom remodeling service, which the evidence shows often includes the removal of bathroom tile. *Sw. Mgmt., Inc. v. Ocinoled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (“Where an applicant identifies its services broadly, we must presume that the services encompass all services of the type identified.”), *aff’d mem.*, 652 F. App’x 971 (Fed. Cir. 2016); *see also, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013) (applying principle that “registration encompasses all goods or services of the type described”) (internal quotation marks omitted); *In re AC Webconnecting Holding B.V.*, 2020 USPQ2d 11048, at \*11-12 (TTAB 2020). Thus, the services overlap and are identical, in part.<sup>12</sup>

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<sup>12</sup> This is true even if, as Applicant argues, “the services associated with the Applicant’s Mark may involve the remodeling of bathrooms that don’t involve tile at all.” Appeal Brief, 4 TTABVUE 8.



Applicant argues that the “Examining Attorney has not considered that [Registrant’s] services involving ‘tile removal’ could also primarily be performed in a kitchen or swimming pool, or other areas where tile may be used and not necessarily in a bathroom.”<sup>13</sup> Applicant’s argument is unpersuasive. We must consider the Cited Registration to include all services of the type identified, including the removal of tile in bathrooms, which services are encompassed within Applicant’s bathroom remodeling services. *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at \*15-16 (TTAB 2023) (“If an application or registration describes goods or services broadly, and there is no limitation as to their nature, it is presumed that the ‘registration encompasses all goods or services of the type described.’”) (quoting *Levi Strauss & Co. v. Abercrombie & Fitch*, 107 USPQ2d at 1173); *Sabhnani v. Mirage Brands*, 2021 USPQ2d 1241, at \*20 (TTAB 2021) (identifications “are construed to include all goods [or services] of the type identified”); *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355 (TTAB 2015) (“Registrant’s identification is presumed to encompass all goods of the type described[.]”).

The third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567. Because the services are identical to the extent they overlap, we must presume that there is overlap in the relevant trade channels and classes of consumers. *See, e.g., In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1745 (TTAB 2018) (“Because the services described in the application and the cited registration are identical, we must presume that the

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<sup>13</sup> Appeal Brief, 4 TTABVue 3-4.

channels of trade and classes of purchasers are the same.”), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Rsch. Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011) (same).

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

## **B. Similarities and Dissimilarities Between the Marks**

The first *DuPont* factor focuses on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Stone Lion*, 110 USPQ2d at 1160; *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 at 1746 (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression such that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). We must focus on the recollection of the average purchasers who normally retain a general rather than specific impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

We do not predicate our analysis on a dissection of the involved marks; we consider the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1160; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCA 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.”). In comparing the marks, we are mindful that where, as here, the services overlap, the degree of similarity necessary to find a likelihood of confusion need not be as great as where there is a disparity between the services. *Coach Servs.*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007).

The first word in each of the marks is different (bath v. tile) resulting in some differences between the marks in appearance and sound, but the marks are overall very similar in structure and cadence, each starting with a four letter, one syllable, term that is merely descriptive or generic for the identified services, followed by the word BUSTERS. *Nat’l Pork Bd. v. Supreme Lobster and Seafood Co.*, 96 USPQ2d 1479, 1497 (TTAB 2010) (THE OTHER RED MEAT vs. THE OTHER WHITE MEAT: “[W]e find that the two marks involved herein are highly similar, having the same structure and cadence and three of the same words.”); *H.D. Lee Co., Inc. v. Maidenform, Inc.*, 87 USPQ2d 1715, 1727 (TTAB 2008) (ONE FAB FIT vs. ONE TRUE FIT: “In terms of appearance and sound, the marks are similar to the extent that they share the same structure.”).

Applicant argues that the first word in each mark is “dominant” and “should be afforded more weight in the likelihood of confusion analysis” because “consumers are generally more inclined to focus on the first word, prefix or syllable in any trademark or service mark.”<sup>14</sup> We disagree. While the first part of a word may be dominant, *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988), that is not invariably the case, and it is not true here as the words “bath” and “tile” are at a minimum merely descriptive, if not generic, for the identified services and have been disclaimed. *In re Detroit Athletic*, 128 USPQ2d at 1050 (“[N]on-source identifying nature of the words ‘Co.’ and Club’ and the disclaimers thereof constitute rational reasons for giving those terms less weight in the analysis.”); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”); *In re Nat’l. Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark ....”); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2011) (disclaimed matter is often “less significant in creating the mark’s commercial impression”). Here, the shared word BUSTERS is the dominant element of each mark as it is the only element with source-identifying significance. *In re Charger Ventures*

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<sup>14</sup> Appeal Brief, 4 TTABVue 6.

*LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at \*5 (Fed. Cir. 2023) (permissible for the Board “to focus on dominant portions of a mark”).

With respect to meaning and commercial impression, Applicant argues:

[I]n the context of Applicant’s services, the term ‘BATH BUSTERS’ creates the meaning and commercial impression that the Applicant’s services are associated solely with bathrooms and bathroom fixtures. Conversely, the Cited Mark[] contain[s] the word ‘TILE’ which creates a distinct meaning and commercial impression that Registrant’s services are related to any kind of tile, which could include kitchens and other areas of a home other than a bathroom (including swimming pools, etc.). Applicant’s Mark does not create any such direct association with “tile” in and of itself, and the services associated with the Applicant’s Mark may involve the remodeling of bathrooms that don’t involve tile at all. Simply put, consumers encountering the marks will assume they have different meanings in the context of the particular services.<sup>15</sup>

As the evidence shows, however, tile is a common feature of bathrooms, and Applicant’s and Registrant’s services overlap to the extent that tile removal in bathrooms is part of some bathroom remodeling projects. There is therefore an “associative nature” between the first word “TILE” in the Cited Mark and “BATH” in Applicant’s mark resulting in marks that engender similar overall commercial impressions for the identified services. Applicant’s mark BATH BUSTERS connotes breaking up bathrooms as part of the remodeling process<sup>16</sup> and the Cited Mark projects breaking up tile, including bathroom tile. The similarity between the marks in connotation and commercial impression supports that confusion is likely. *See, e.g., Proctor & Gamble Co. v. Conway*, 419 F.2d 1332, 164 USPQ 301, 304 (CCPA 1970)

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<sup>15</sup> *Id.* at 8.

<sup>16</sup> April 28, 2022 Office Action, TSDR 12 (Merriam-Webster Dictionary defines “bath” as short for “bathroom”).

(finding a likelihood of confusion between the marks MISTER STAIN for stain remover and MR. CLEAN for cleanser and detergent; “A designation may well be likely to cause purchaser confusion as to the origin of goods because it conveys, as used, the same idea, or stimulates the same mental reaction, or in the ultimate has the same meaning.”); *H. Sichel Sohne, GmbH v. John Gross & Co.*, 204 USPQ 257, 261 (TTAB 1979) (BLUE CHAPEL for wine likely to be confused with BLUE NUN for alcoholic beverages, including wines, because the marks engendered similar commercial impressions “in that they both contain the prefix ‘BLUE’ and suffixes conveying such close relationship in their religious connotations as ‘NUN’ and ‘CHAPEL’”); *Downtowner Corp. v. Uptowner Inns, Inc.*, 178 USPQ 105, 109 (TTAB 1973) (finding a likelihood of confusion between the marks UPTOWNER and DOWNTOWNER, both for motor inn and restaurant services based in part on “the associative nature of the terms ‘downtown’ and ‘uptown’”).

In sum, we find that the marks in their entirety are quite similar in connotation and commercial impression. The marks also have some similarity in appearance and sound to the extent they share a similar structure and cadence. The first *DuPont* factor weighs in favor of finding confusion likely.

### **C. Summary**

The services, trade channels and classes of consumers overlap. The marks also are highly similar in meaning and commercial impression and share a similar structure and cadence. The first, second and third *DuPont* factors therefore support that confusion is likely. No factors weigh against a likelihood of confusion.

Accordingly, we find that Applicant's standard-character mark BATH BUSTERS for "remodeling of residential and commercial bathroom[s]" is likely to cause confusion with the Cited Mark TILE BUSTERS, in standard characters, for "providing virtually dust free tile removal services."

### **III. Conclusion**

**Decision:** The refusal to register Applicant's mark under Section 6(a) for failure to disclaim the term "bath" is affirmed. The refusal to register Applicant's mark under Section 2(d) of the Trademark Act also is affirmed.