

This Opinion is not a  
Precedent of the TTAB

Mailed: June 17, 2024

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*In re Sellersfunding Corp.*

Serial No. 97231564

Nicholas D. Wells of Legends Law Group, PLLC  
for Sellersfunding Corp.

Andrew Leaser, Trademark Examining Attorney, Law Office 117,  
Cynthia Tripi, Managing Attorney.

Before Cataldo, Lykos and Adlin,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Sellerfunding Corp., filed an application to register on the Principal Register the mark COMMERCEPAY (in standard characters) identifying the following services: “Providing working capital financing to small businesses and small business owners; Accounts receivables financing; financing services,” in International Class 36.<sup>1</sup>

---

<sup>1</sup> Application Serial No. 97231564 was filed on January 21, 2022 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s assertion of a bona fide intent to use the mark in commerce.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with two registered marks, both issued on the Principal Register to the same entity:

COMMERCE ONEPAY (in standard characters), identifying the following services: "Banking and trust services, namely, payment of accounts receivable on behalf of others," in International Class 36;<sup>2</sup> and

COMMERCEPAYMENTS, identifying services in a number of classes, including "banking services" and various financial services in International Class 36.<sup>3</sup>

After the Trademark Examining Attorney made final the refusal to register, Applicant appealed to this Board.<sup>4</sup>

Applicant and the Examining Attorney filed briefs. We affirm the refusal to register as discussed below.

---

<sup>2</sup> Registration No. 4653581 issued on December 9, 2014. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

<sup>3</sup> Registration No. 6383228 issued on June 15, 2021 with a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f), in part, as to "COMMERCE." The registration also identifies services in Classes 35, 38, 41, 42 and 45.

<sup>4</sup> All citations to documents contained in the Trademark Status & Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018). References to the briefs on appeal refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable. *See, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at \*2 n.1 (TTAB 2020). In this case, Applicant's brief is located at 6 TTABVUE. The Examining Attorney's brief is located at 8 TTABVUE.

## I. Likelihood of Confusion

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015); see also *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019).

In making our determination, we consider each relevant *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), and have treated other factors as neutral. See *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”)); *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 weights 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, 1261 (Fed. Cir. 2011); *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.”). Two key considerations are the similarities

between the marks and the relatedness of the goods or services. *See 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.”); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018).

**A. Focus on Registration No. 6383228**

For purposes of the *DuPont* factors that are relevant to this appeal we will consider Applicant’s involved application and cited Registration No. 6383228 (hereinafter, “cited registration”) for the mark COMMERCEPAYMENTS, identifying, inter alia, “banking services” in International Class 36. If likelihood of confusion is found as to the mark and services in this registration, it is unnecessary to consider the other cited registration. Conversely, if likelihood of confusion is not found as to the mark and services in this registration, we would not find likelihood of confusion as to the mark and services in the other cited registration. *See, e.g., In re Max Cap. Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

**B. Strength of the Cited Mark / Number and Nature of Similar Marks**

In determining the strength of the cited COMMERCEPAYMENTS mark, we consider both its inherent strength, based on the nature of the mark itself, and commercial strength or recognition. *See 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 ...”). “[T]he strength of a mark is not a binary factor,” but instead “varies along a spectrum from

very strong to very weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015) (internal citations omitted).

“The weaker [the registrant’s] mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Id.* at 1676 (internal citations omitted). *See also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 369 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005) (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”).

The fifth *DuPont* factor, the fame of the prior mark, and the sixth *DuPont* factor, the number and nature of similar marks in use for similar goods or services, may be considered in tandem to determine the strength of the cited mark and the scope of protection to which it is entitled.<sup>5</sup> *See DuPont*, 177 USPQ at 567; *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017).

Additionally, the Federal Circuit has held that if there is evidence a mark, or an element of a mark, is commonly adopted by many different registrants, that may indicate the common element has some non-source identifying significance that undermines its conceptual strength as an indicator of a single source. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797

---

<sup>5</sup> Because the owner of the cited registration is not a party to this appeal, and further because the Examining Attorney is under no obligation to demonstrate the fame of the cited mark, we find the fifth *DuPont* factor to be neutral. *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006) (fame of the mark in a cited registration is not normally a factor in ex parte proceedings.).

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 mark 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’”) (quoting *Juice Generation*, 115 USPQ2d at 1674).

With his first Office action at 12-15, the Examining Attorney submitted the following definitions: “commerce” – the buying and selling of goods, especially on a large scale, as between cities or nations; “pay” – to give money in exchange for goods or services; “payment” – the act of paying or the state of being paid. Applicant, with its May 8, 2023 response to first Office action at 13, submitted an additional definition of “commerce” – an interchange of goods or commodities, especially on a large scale between different countries or between different parts of the same country; trade; business.

Turning first to conceptual strength or weakness, we note that the cited registration for the COMMERCEPAYMENTS mark issued on the Principal Register with a showing of acquired distinctiveness in part as to COMMERCE under Section 2(f) of the Trademark Act. Based upon the definitions of record, COMMERCEPAYMENTS may be defined as acts of giving, investing or lending money for the buying or selling or exchange of commodities. The mark COMMERCEPAYMENTS thus appears to suggest the identified banking services in the cited registration.

Based upon this evidence, we find that the cited COMMERCEPAYMENTS mark is somewhat suggestive as a whole, and has acquired distinctiveness as to COMMERCE. Therefore, it should be entitled to somewhat narrower than the normal scope of protection accorded inherently distinctive marks. Trademark Act Section 7(b), 15 U.S.C. § 1057(b). *Cf. Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006) (a “mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods”).

Applicant argues “There is a clear and obvious link between the word COMMERCE and financial services.” 6 TTABVUE 4. At pages 10-109 of its September 11, 2023 request for reconsideration, Applicant submitted copies of approximately thirty live third-party registrations for COMMERCE-formative marks, all identifying various banking or financial services. The following examples are illustrative:<sup>6</sup>

- Reg. No. 5980636 for the mark 101 COMMERCE (COMMERCE disclaimed);

---

<sup>6</sup> All marks are presented in standard characters unless otherwise noted. Applicant also submitted approximately six third-party applications possessing little, if any, probative value. *See Interpayment Services Ltd. v. Doctors & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003) (“[T]hird-party applications are evidence only of the fact that they were filed; they have no other probative value.”). In addition, any of the submitted registrations in the list that subsequently have been cancelled have no probative value.

- Reg. No. 1868580 for the mark TEXAS COMMERCE BANK (Section 2(f), BANK disclaimed);
- Reg. No. 2846648 for the mark SEACOAST COMMERCE BANK (COMMERCE BANK disclaimed);
- Reg. No. 5207841 for the mark NATIONAL BANK OF COMMERCE (Section 2(f), BANK OF COMMERCE disclaimed); and
- Reg. No. 1213447 for the mark INTERNATIONAL BANK OF COMMERCE (Section 2(f), BANK disclaimed).

We note that of the third-party registrations of record, none are for a mark consisting of COMMERCE and PAY. We further note that the marks convey commercial impressions that are farther removed from the cited COMMERCEPAYMENTS than Applicant's COMMERCEPAY mark. Applicant's evidence of third-party registrations of COMMERCE-formative marks thus is not sufficiently persuasive of the asserted weakness of the COMMERCEPAYMENTS mark that the cited registration is not entitled to protection against Applicant's mark?. *Cf., Juice Generation*, 115 USPQ2d at 1674-75; *Wolfskin*, 116 USPQ2d at 1135-36.

Applicant further made of record with the September 11, 2023 request for reconsideration at 110-118, evidence from the following websites displaying the term COMMERCE as part of a tradename or trademark, and also used in an informational manner for various financial services:

COINBASE COMMERCE PAY BUTTON identifying an online payment app;



COMMERCEPAY END-TO-END INTEGRATED PAYMENT SOLUTION

identifying an online payment solution for business applications;<sup>7</sup>

More than a commerce solution, it's delivering on customer expectations. Transform B2C and B2B experiences with the next generation suite of commerce solutions by J.P. Morgan Payments for a payment app;<sup>8</sup>

First Commerce Credit Union identifying a bank;

Drupal Commerce Pay for a payment app;

First Commerce Financial identifying a bank;

Commerce Financial Services identifying a financial services provider;

Commerce Brokerage Services, Inc. identifying a business lender; and

Commerce Financial Advisors identifying financial advisory services.

This evidence also shows use of COMMERCE in the context of banking trademarks and tradenames. Two display the terms COMMERCE and PAY as part of a tradename and a third uses the terms in context, i.e., COINBASE COMMERCE PAY BUTTON as a feature of an online payment app.

Viewing the record as a whole, we find that the registered COMMERCEPAYMENTS mark is entitled to a somewhat narrower than usual scope of protection to which inherently distinctive marks are entitled, due to evidence of

---

<sup>7</sup> "Information originating on foreign websites or in foreign news publications that are accessible to the United States public may be relevant to discern United States consumer impression of a proposed mark." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1835 (Fed. Cir. 2007). The record is silent regarding the extent to which this website, commercepay.asia, may be accessed by consumers in the United States. Accordingly, we give this evidence very limited weight.

<sup>8</sup> B2C and B2B are shorthand forms of "business to customer" and business to business."

the conceptual weakness of the terms comprising the mark and the evidence of third-party use and registration of less closely related COMMERCE or PAY formatives for related services. *See Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (stating that likelihood of confusion fame varies along a spectrum from very strong to very weak).

### **C. The Marks**

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's mark and the cited mark in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay*, 73 USPQ2d at 1692.

Applicant's COMMERCEPAY mark is highly similar to the registered COMMERCEPAYMENTS mark inasmuch as Applicant's mark incorporates substantially all of the registered mark. In cases such as this, a likelihood of confusion has frequently been found. *Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and surfer design is similar the mark CONCEPT); *see also Coca-Cola Bottling Co. v. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL LANCER and Bengal Lancer soldier design is similar to the mark BENGAL); *In re Bissett-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (E-CELL is similar to the mark E). Applicant's COMMERCEPAY mark and the cited COMMERCEPAYMENTS mark

contain the identical first word COMMERCE, followed by variations of the term PAY and PAYMENTS. The marks thus are highly similar in appearance and sound.

Moreover, the significance of the term COMMERCE is reinforced by its location as the first word in both of the marks. *Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897) TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered”); *see also Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word).

As discussed above, the cited mark COMMERCEPAYMENTS suggests acts of giving, investing or lending money in exchange for the buying or selling or exchange of commodities. COMMERCEPAY very similarly suggests to provide money for the buying or selling or exchange of commodities. There is no evidence to suggest the term COMMERCE has a different meaning in Applicant’s mark than it does in the cited mark.

There is no correct pronunciation of trademarks. *In re Teradata Corp.*, 223 USPQ 361, 362 (TTAB 1984) (“as we have said many times, there is no ‘correct’ pronunciation of a trademark”). Nonetheless, it stands to reason that the component terms of Applicant’s marks and the registered mark will be verbalized in a very similar manner by consumers. Applicant does not argue otherwise.

“Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB

2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) (“In appropriate cases, a finding of similarity as to any one factor (sight, sound or meaning) alone ‘may be sufficient to support a holding that the marks are confusingly similar’”) (citations omitted)). Therefore, even if the marks had different meanings, it would not necessarily mean there was no likelihood of confusion.

We recognize the differences between the marks. Nonetheless, viewing the marks as a whole, we find purchasers could mistakenly believe the marks are variations of each other, pointing to a common source. The marks are highly similar in appearance, sound and meaning and, overall, create highly similar commercial impressions.

The first *DuPont* factor weighs in favor of finding a likelihood of confusion.

#### **D. The Services, Channels of Trade, and Classes of Customers**

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *Stone Lion*, 110 USPQ2d at 1159; *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004; *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “This factor considers whether ‘the consuming public may perceive [the respective goods and services of the parties] as related enough to cause confusion about the source or origin of the goods and

services.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard*, 62 USPQ2d at 1004).

In support of the refusal of registration, the Examining Attorney introduced into the record with his November 7, 2022 first Office action at 45-6, June 10, 2023 final Office action at 25-42 printouts from the following third-party websites showing use of the same marks, brand names and trade names to identify the source of banking and financing services:

- First Horizon Bank offers banking and financing services;
- Umpqua Bank offers banking and financing services;
- US Bank offers banking and financing services; and
- Wells Fargo offers banking and commercial financing services;

This evidence establishes that these third parties offer the financing services provided by Applicant, and various banking services identified in the cited registration under the same house marks, trade names or trademarks.

The Examining Attorney also introduced into the record with his November 7, 2022 first Office action at 16-43, copies of ten use-based, third-party registrations for marks identifying, *inter alia*, both banking and financing services. These include<sup>9</sup>

Reg. No. 3386185 for the mark BANORTE, identifying “banking and online banking services; financing services;”

Reg. No. 4158622 for the mark INVESTORS BANK (Section 2(f) as to INVESTORS, BANK disclaimed), identifying “banking and financing services;”

---

<sup>9</sup> The marks appear in typed or standard characters unless otherwise noted.

Reg. No. 4092377 for the mark BLUCURRENT, identifying, “banking and financing services;”

Reg. No. 4585648 for the mark SU BILLETTERA EN INTERNET, identifying “banking and financing services;”

Reg. No. 6540045 for the mark SAVVY, identifying “banking and financing services;”

Reg. No. 4735082 for the mark YOUR FINANCES MEAN THE WORLD TO US, identifying “banking and financing services;”

Reg. No. 4901728 for the mark COMTRUST, identifying “banking and financing services;”

Reg. No. 5997408 for the mark BANKMOBILE VIBE (in stylized form, “BANKMOBILE” disclaimed), identifying “banking and financing services;”

Reg. No. 5614976 for the mark FLNB (in stylized form), identifying “banking and financing services;” and

Reg. No. 6421780 for the mark SOUTHSTATE, identifying “banking services; financing services.”

As a general proposition, although use-based, third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have some probative value to the extent they serve to suggest that the services are of a kind that emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *Mucky Duck Mustard*, 6 USPQ2d at 1470 n.6. In this case, the totality of the website and third-party registration evidence demonstrates that consumers would readily expect that banking and financing services are likely to emanate from the same source.

Applicant is correct that its services are distinguishable from the registrant's services. 6 TTABVUE 10-11. However, it is not necessary for us to find that the services are indistinguishable or are even competitive to find a likelihood of confusion. *See, e.g., On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). They need only be "related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the services] emanate from the same source." *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

Further, it is not necessary for the Examining Attorney to prove likelihood of confusion with respect to each of the services identified in Applicant's application; if there is likelihood of confusion with respect to any of Applicant's identified services, the refusal of registration must be affirmed. "Likelihood of confusion must be found as to the entire class [of services identified] ... if there is likely to be confusion with respect to any service that comes within the recitation of services in that class." *Primrose Retirement Cmty., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)).

With regard to the third *DuPont* factor, the similarity of the trade channels in which the services are encountered, we must base our likelihood of confusion determination on the services as they are identified in the application and registration at issue. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William*

*Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). *See also Octocom*, 16 USPQ2d at 1787 (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods [or services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods [or services], the particular channels of trade or the class of purchasers to which the sales of goods [or services] are directed”).

Neither Applicant’s services nor the services identified in the cited registration are limited to any particular trade channel and we cannot consider asserted marketplace realities not reflected in the identifications. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000). In the absence of trade channel limitations in the identification of services in the involved application and cited registration, we must presume that these services are offered in all customary trade channels therefor. *See Citigroup v. Capital City Bank Grp.*, 98 USPQ2d at 1261; *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). Further, evidence of record demonstrates that both Applicant’s services and the registrant’s services may be encountered by the same classes of consumers under the same marks and trade names in at least one common trade channel, e.g., websites of financial institutions offering both banking and financing services.

#### **E. Conditions of Purchase**

Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Applicant argues that “While the business sophistication



of every prospective purchaser cannot be assumed in this case, it is extremely likely that a high degree of care will be exercised by purchasers of both Applicant's services and services offered under the cited marks." 6 TTABVUE 11.

First, Applicant's assertions regarding the likelihood of a high degree of care in the selection of the services at issue lack evidentiary support. Applicant's "assertions are unsupported by sworn statements or other evidence, and 'attorney argument is no substitute for evidence.'" *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, at \*14 (TTAB 2019) (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (internal quotation omitted)).

Moreover, the involved application and cited registration identify banking services and financing services, without limitation, and such services are retained not only by sophisticated firms, but also by ordinary workers, senior citizens and students, for example. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162-63 (Fed. Cir. 2014). Nothing in the record suggests that Applicant or the owner of the cited registration provide their services only to sophisticated clients.

[A]pplicant seeks registration of the "COMMCASH" mark for banking services with no restrictions whatsoever. Similarly, the services covered by opposer's pleaded registration for "COMMUNICASH" include banking services, per se. Therefore, applicant's banking services as well as those of opposer are presumed to be all services that would ordinarily be considered to fall under the heading of banking services, including not only electronic banking services to institutional customers but also electronic as well as other types of banking services offered to individual customers. Accordingly, the relevant universe of customers must be considered to include the great majority of the general public who are recipients in one form or another of banking services. For this reason,

applicant's testimony and evidence regarding the sophistication of corporate banking customers is irrelevant to a determination of the question presented in this proceeding.

*Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689, 690 (TTAB 1986), *aff'd Canadian Imperial Bank of Com. v. Wells Fargo Bank, Nat. Ass'n.*, 811 F.2d 1490 (Fed. Cir. 1987); *see also In re 1st USA Realty Prof., Inc.*, 84 USPQ2d 1581, 1587 (TTAB 2007) ("The consumers for both applicant's and the registrant's identified services are the public at large, insofar as the public includes people who wish to buy or sell homes, or to have bank accounts or credit cards, and therefore we do not regard them as being particularly sophisticated ... Because banks are federally insured, consumers do not have to investigate the financial stability of a particular bank to be sure that their money is secure.").

Even if we accept, in considering the fourth *DuPont* factor, Applicant's assertion that the involved services may be the subject of sophisticated purchases, even careful consumers are likely to be confused by highly similar marks. As stated by the Federal Circuit, "[t]hat the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods [or services]. 'Human memories even of discriminating purchasers ... are not infallible.'" *In re Research and Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (quoting *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)). Therefore, the fact that the purchasers may exercise care before engaging these services does not mean there can be no likelihood of confusion.

In the present case, the high degree of similarity of the marks and the relatedness of the services as identified outweigh any sophisticated purchasing decision. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods).

The fourth *DuPont* factor is neutral.

#### **F. Conclusion**

When we consider and weigh the evidence of record and the relevant likelihood of confusion factors, *In re Charger Ventures LLC*, 65 F.4th 1375, 2023 USPQ2d 451, at \*7 (Fed. Cir. 2023) (“[I]t is important ... that the Board ... weigh the *DuPont* factors used in its analysis *and* explain the results of that weighing.”), we conclude that consumers familiar with banking services identified in the cited registration offered under its mark would be likely to believe, upon encountering Applicant’s mark, that the financing services offered by Applicant and banking services offered by the registrant originated with or are associated with or sponsored by the same entity.

Evidence of record supports a finding that the services are related and may be encountered in at least one common channel of trade. The cited mark is somewhat conceptually weak and there is evidence of use and registration by third parties of tangentially similar marks. Thus, the mark in the cited registration is entitled to a slightly narrowed scope of protection. Nonetheless, the marks are far more similar than dissimilar in all respects. Consumer sophistication is neutral.

Serial No. 97231564

**Decision:** The refusal to register Applicant's mark **COMMERCEPAY** under Section 2(d) of the Trademark Act is affirmed.