

This Opinion is Not a
Precedent of the TTAB

Mailed: November 13, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Washington Trust Bank

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Serial No. 97542874

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Mark W. Hendricksen of Wells St. John P.S.
for Washington Trust Bank.

Leigh Case, Trademark Examining Attorney, Law Office 112,
Matthew Cuccias, Managing Attorney.

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Before Zervas, Adlin and Dunn,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Washington Trust Bank (“Applicant”) seeks registration on the Principal Register of the standard character mark CLEARLY CASH BACK (CASH BACK disclaimed) for “banking services; credit card services, namely, issuance of credit cards; credit card services, namely, providing cash and other rebates for credit card use as part of

a customer reward program and customer use incentive program” in International Class 36.¹

The Examining Attorney refused registration pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark is likely to cause confusion with the standard character mark CLEARLY BETTER BUSINESS CHECKING registered on the Principal Register for “banking services” in International Class 36 (BETTER BUSINESS CHECKING disclaimed).²

After the Examining Attorney issued a Final Office Action, Applicant appealed, and Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) of the Trademark Act is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See In re E. I. DuPont DeNemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) (“*DuPont*”); *see also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (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 [and services] and differences in the

¹ Application Serial No. 97542874, filed August 10, 2022 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), claiming a bona fide intent to use the mark in commerce.

² Registration No. 4979830, registered on June 14, 2016, maintained.

marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). We must consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). “[E]ach case [however] 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).

A. Similarity of Services, Trade Channels and Classes of Purchasers

We consider Applicant’s and Registrant’s services as identified in the involved application and the cited registration. *DuPont*, 177 USPQ 567. Applicant includes “banking services” in its identification of services, and Registrant’s entire identification of services is “banking services.” The services thus are in-part identical.

Because Applicant’s and Registrant’s services are in-part identical, we must presume that these services travel in the same channels of trade to the same classes of consumers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of purchasers, the Board was entitled to rely on the legal presumption that identical goods travel in the same channels of trade to the same classes of purchasers in determining likelihood of confusion).

The *DuPont* factors regarding the similarity of services, trade channels and classes of purchasers weigh heavily in favor of finding a likelihood of confusion.

B. Alleged Weakness of Cited Mark

The sixth *DuPont* factor, “[t]he number and nature of similar marks in use on similar goods,” *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 2023 USPQ2d 737, at *4 (Fed. Cir. 2023), “is a measure of the extent to which other marks weaken the assessed mark.” *Id.* Third-party registrations can bear on a mark’s conceptual strength if the registered marks contain an element common to the involved mark and thus show that that element has a “normally understood and well-recognized descriptive or suggestive meaning leading to the conclusion that that segment is relatively weak.” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015)). “[T]he strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak.” *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003).

Applicant argues that “the terms CLEAR and CLEARLY are widely used within International Class 36”; and that “CLEAR is very similar to CLEARLY and has become diluted within banking and financial services.”³ Applicant relies on the following third-party registrations:⁴

³ Applicant’s brief, 4 TTABVUE 9.

Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. See *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

⁴ Applicant submitted Reg. No. 5174440 for CLEAR.BANK. This registration has been cancelled. A cancelled registration is evidence of nothing but the fact that it once issued.

- CLEAR MOUNTAIN and design (Reg. No. 3181980) for “banking; investment banking services”;
- CLEAR MOUNTAIN BANK CLEAR CARD (BANK and CARD disclaimed) (Reg. No. 3509762) for “bank credit and cash card services provided solely through applicant’s banks, excluding credit card services by retailers for use by retailers’ customer to buy goods sold by retailers”;
- POINT CLICK CLEAR (Reg. No. 4078248) for “financial services, namely, providing cash letter and check processing services”;
- CLEAR TOKEN (TOKEN disclaimed) (Reg. No. 7047239) for “financial transaction services, namely, providing secure commercial transactions and payment options”;
- CLEAR AIR LENDING (LENDING disclaimed) (Reg. No. 7038570) for “financing and loan services; loan financing; providing personal loans and lines of credit; financial loan consultation”;
- CLEAR STREET (Reg. No. 6414605) for “financial services, namely, brokerage, dealing as a market maker, clearing trades, credit financing and financial asset management services, namely, custody and settlement, administration, securities lending, in securities, commodities, foreign currency exchange, and other financial instruments in the nature of digital financial assets, to money managers, professional traders and individuals; consulting services related to all the foregoing services”; and
- CLEAR ID CONFIRM (Reg. No. 5366010) for “application service provider featuring software that allows banking, finance and insurance workers to do due diligence on their customers, providing key metrics of a possible customer via public records to help them verify

Sunnen Prods. Co. v. Sunex Int’l Inc., 1 USPQ2d 1744, 1747 (TTAB 1987). Also, the mark registered pursuant to Section 44(e) of the Trademark Act, 15 U.S.C. § 1126(e). Third-party registrations that are not based on use in commerce, such as those registered under Section 44 and for which no declarations of continuing use under Trademark Act § 8, 15 U.S.C. § 1058, have been filed have no probative value. *In re Info. Builders Inc.*, 2020 USPQ2d 10044, at *19 n.19 (TTAB 2020).

their identity as well as understand possible identity risks associated with the person.”⁵

The CLEAR MOUNTAIN and design and CLEAR MOUNTAIN BANK CLEAR CARD registrations were issued to the same registrant. Also, the CLEAR ID CONFIRM registration has little probative value because its identified services have no apparent relationship to Registrant’s identified services, and Applicant has not proven nor explained why such services are related. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration).

The remaining six third-party registrations do not persuade us of any weakness in the term CLEARLY for banking services because:

- due to the different wording, these marks are dissimilar to Registrant’s mark;
- “clear” has a variety of meanings, not all of which are encompassed within “clearly,” the adverb form thereof – the meaning of CLEAR in some of the registrations differs from the meaning of CLEARLY in Registrant’s mark;⁶ and

⁵ August 10, 2023 Response, TSDR 2-18. Citations in this opinion to the application record are to the downloadable .pdf versions of the documents in the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”). *See In re Seminole Tribe of Fla.*, 2023 USPQ2d 631, at *1 n.1 (TTAB 2023)

⁶ For example, “clear” in POINT CLICK CLEAR means “to erase stored or displayed data from (a device, such as a computer or calculator).” *See* <https://www.merriam-webster.com/dictionary/clear>, accessed on November 6, 2024. “Clearly” in CLEARLY BETTER BUSINESS CHECKING means “without doubt or question.” *See* <https://www.merriam-webster.com/dictionary/clearly>, accessed on November 6, 2024.

The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed

- the six third-party registrations are insufficient in number to be persuasive.

We are also mindful of the guidance in *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269-70 (CCPA 1973), that “little weight is to be given [to third-party] registrations in evaluating whether there is likelihood of confusion” because “[t]he existence of these registrations is not evidence of what happens in the market place or that customers are familiar with them.” In sum, the six registrations for marks with terms other than those found in Registrant’s mark do not demonstrate that Registrant’s mark and the component CLEARLY are weak for banking services.

While CLEARLY is not a particularly distinctive term for Registrant’s services, Registrant’s mark must be considered inherently distinctive – “[i]t is registered on the Principal Register without a claim of acquired distinctiveness, and is therefore presumed distinctive.” *Advance Mag. Publishers, Inc. v. Fashion Elecs., Inc.*, 2023 USPQ2d 753, *15 (TTAB 2023). The registered mark is accorded a scope of protection normally given to inherently distinctive marks

C. The Similarity or Dissimilarity of the Marks

Next, we compare the marks “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps.*, 73 USPQ2d at 1691 (quoting *DuPont*, 177 USPQ at 567). In cases such as this, where Applicant’s services are in-part identical to Registrant’s services, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it

editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). We take judicial notice of these definitions.

otherwise would be if the services were not identical or highly similar. *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

When comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). Further, marks “must be considered ... in light of the fallibility of memory ...” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Viterra*, 101 USPQ2d at 1908; *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant’s mark is CLEARLY CASH BACK (with CASH BACK disclaimed) and Registrant’s mark is CLEARLY BETTER BUSINESS CHECKING (with BETTER

BUSINESS CHECKING disclaimed). CLEARLY is the initial term in both marks, and the term is immediately followed by a disclaimed phrase. As the initial and only non-descriptive (and non-disclaimed) term in both Applicant's and Registrant's marks, CLEARLY is the dominant source indicator in both marks. *See Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (noting that "it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"); *see also Palm Bay Imps.*, 73 USPQ2d at 1692. Merely descriptive or generic disclaimed matter is typically less significant when comparing marks. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Nat'l Data*, 224 USPQ at 751 ("That a particular feature is descriptive ... with respect to the relevant goods or services is one commonly accepted rationale for giving less weight to a portion of the mark.").

While the phrases BETTER BUSINESS CHECKING and CASH BACK have differences in sound, appearance and meaning, they ultimately are associated with banking and the movement of money. Ultimately, these merely descriptive terms do not distinguish the marks. Indeed, these terms merely describe types or aspects of the competing banking services Applicant and Registrant offer. The marks' shared term CLEARLY could very well be perceived as identifying related services offered by the same bank. A "side-by-side comparison is not the test. The focus must be on the 'general recollection' reasonably produced by [Applicant's] mark and a comparison of [Registrant's] mark therewith." *Johann Maria Farina Gegenuber Dem Julichs-*

Platz v. Chesebrough-Pond, Inc., 470 F.2d 1385, 176 USPQ 199, 200 (CCPA 1972) (citation omitted).

For the forgoing reasons, we find that the marks are similar enough in sound, meaning, appearance and commercial impression and that the *DuPont* factor regarding the similarity of the marks favors a finding of likelihood of confusion.

D. Conclusion

We have carefully considered all of the evidence and arguments of the Examining Attorney and Applicant. The *DuPont* factors pertaining to the similarity of the services, trade channels and purchasers weigh heavily in favor of finding a likelihood of confusion. The factor related to the similarity of the marks also weighs in favor of finding a likelihood of confusion. Applicant has not established that Registrant's mark is so weak as to be unentitled to protection against Applicant's mark. We therefore conclude that confusion is likely between Applicant's mark for its services and Registrant's mark for its services.

Decision: The refusal to register under Section 2(d) is affirmed.