

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: August 30, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re The Lip Bar, Inc.

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Serial No. 97546404

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Staci R. DeRegnaucourt of Varnum LLP,
for The Lip Bar, Inc.

David Hutchison, Trademark Examining Attorney, Law Office 123,
Susan Hayash, Managing Attorney.

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Before Zervas, Coggins, and Bradley,
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

The Lip Bar, Inc. (“Applicant”) seeks registration on the Principal Register of the mark CHEAT CODE (in standard characters) for goods ultimately identified as “mascara” in International Class 3.¹ The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the

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¹ Application Serial No. 97546404 was filed August 12, 2022, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce.

ground that Applicant's mark, for mascara, so resembles the following two marks on the Principal Register, owned by different registrants

- CHEAT CODES (in standard characters) for “bras; coats; footwear; hats; headwear; jackets; jeans; overalls; pajamas; pants; shirts; shorts; socks; sweaters; sweatshirts; swimwear; tank tops; underwear; hooded sweatshirts; t-shirts; tee-shirts” in International Class 25 (Registration No. 6047920, issued May 5, 2020); and
- CHEAT CODE (in standard characters) for “dietary supplements” in International Class 5 (Registration No. 6804183, issued July 26, 2022);

as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant requested reconsideration, which the Examining Attorney denied.² Applicant then appealed to this Board, and the appeal is fully briefed. We affirm the refusal to register.

I. Likelihood of Confusion

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

² July 26, 2023 Request for Reconsideration; August 18, 2023 Denial of Reconsideration. Citations to the prosecution record in this decision refer to the .pdf version of the document in the Trademark Status and Document Retrieval (TSDR) system; citations to the briefs in the appeal refer to the Board's TTABVue docket system. *See, e.g., In re Seminole Tribe of Fla.*, 2023 USPQ2d 631, at *1 n.1 (TTAB 2023).

cited in B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003).

In any likelihood of confusion analysis, different *DuPont* factors may play a dominant role and some factors may not be relevant. *Naterra Int'l, Inc. v. Bensalem*, 92 F.4th 1113, 2024 USPQ2d 293, at *2 (Fed. Cir. 2024) (quoting *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 2022 USPQ2d 513, at *7 (Fed. Cir. 2022)). In addition, varying weight may be assigned to each factor depending on the evidence presented, and “any one of the factors may control a particular case.” *Id.*; *see also In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at *4 (Fed. Cir. 2023). While we consider each *DuPont* factor for which there is evidence and argument, *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019), two key considerations are the similarities between the marks and the similarities between the goods. *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). These factors, and two others, are discussed below. When analyzing the factors, the overriding concerns are not only to prevent buyer confusion as to the source of the goods, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

We focus our likelihood of confusion analysis on the registered standard-character mark CHEAT CODES which, as outlined above, includes several items of clothing.

Because we find confusion likely based on the mark and goods in this registration, we need not consider the likelihood of confusion between Applicant's mark and the mark in Registration No. 6804183. *See In re Max Cap. Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010) (confining likelihood of confusion analysis to one of two cited marks).

A. Similarity of the Marks

Under the first *DuPont* factor, we compare the marks "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567); *see also Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014). "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).

Applicant's mark is CHEAT CODE, while Registrant's mark is CHEAT CODES. There is no dispute that the marks are "essentially identical," at least in terms of appearance and sound,³ and we agree. *See, e.g., Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) ("It is evident that there is no material difference, in a trademark sense, between the singular and plural forms of the word 'Zombie' and they will therefore be regarded here as the same mark."); *Swiss Grill Ltd., v. Wolf*

³ 5 TTABVUE 13 (Applicant's Brief, citing March 21, 2023 Response to Office Action at 17 (Applicant stating the marks are "functionally identical"), July 26, 2023 Request for Reconsideration at 34 (Applicant stating the marks are "visually identical")).

Steel Ltd., 115 USPQ2d 2001, 2011 n.17 (TTAB 2015) (“it is obvious that the virtually identical marks [the singular and plural of SWISS GRILL] are confusingly similar”).

With regard to connotation and commercial impression, we agree with the Examining Attorney, who argues that the connotation and commercial impression of the marks is “virtually identical.”⁴ The record evidence explains that “[a] cheat code is generally a code, method or device used by gamers to advance levels, or to get other special powers and benefits in a video game. . . . The term cheat code can also be used to denote anything a person does other than the traditional way of doing something for the purpose of winning or scoring above their competition.”⁵ This explanation comports with the dictionary definition of CHEAT CODE which means “a hidden command, code, etc., that a video gamer unlocks and uses to gain an advantage in a game, such as by advancing levels or enhancing a character’s strengths” and “a ploy or technique that bypasses traditional methods or rules in order to improve oneself or one’s success.”⁶

In the context of the relevant goods, CHEAT CODE has the same connotation: a shortcut to obtain improved results. For Applicant’s goods, CHEAT CODE gives the

⁴ 7 TTABVUE 8.

⁵ August 18, 2023 Denial of Reconsideration at 32 (Margaret Rouse, *What Does Cheat Code Mean?*) (techopedia.com).

⁶ DICTIONARY.COM (dictionary.com/browse/cheat-code), based on the RANDOM HOUSE UNABRIDGED DICTIONARY, accessed August 18, 2024. The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format or have fixed regular editions. *See, e.g., In re Katch, LLC*, 2019 USPQ2d 233842, at *21 n.12 (TTAB 2019) (taking judicial notice from DICTIONARY.COM).

impression of easier-than-usual mascara.⁷ Similarly for Registrant's goods, CHEAT CODES gives the impression of easier-than-usual clothing. Applicant argues that the marks provide a separate commercial impression distinct to the respective goods; an improvement in one's eyelashes (i.e., lusher, fuller eyelashes with mascara) versus an improvement in one's figure (with clothing),⁸ but that is too fine a point. The term CHEAT CODE, whether singular or plural, gives the impression of using a shortcut or easier technique regardless of what the object of the shortcut, ploy, or technique may be. There is no evidence that consumers would perceive the marks to engender a different meaning or commercial impression in the context of the goods listed in the application than in the context of the goods in the cited registration. *See In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *4 (TTAB 2019) (no evidence that identical marks engender different impressions as applied to non-identical goods and services). There will also be those who may not know the meaning or history behind the term CHEAT CODE, and will thus perceive the virtually identical marks as an arbitrary designation without any particular meaning. We find the standard-character marks CHEAT CODE in the application and CHEAT CODES in the cited registration have the same connotation and commercial impression.

⁷ *See, e.g.*, August 18, 2023 Denial of Reconsideration at 56 (Anjali Agarwal, *Beauty Cheat Codes That Will Make Every Lazy Girl's Life Hella Easy!*) (beautiful.in) ([W]e have a beauty cheat code for you that will make your makeup and hair care routine easy AF."); 59 (Brandi Victoria, *The Makeup Cheat Code*) (shopbluxebeautybar.com) ("The MAKEUP CHEAT CODE is here! ... I was so over my ladies wanting to create a natural makeup look but not know what products to buy nor how to apply them!! So I did the work for you!!!").

⁸ 8 TTABVUE 6.

We find the marks virtually identical in appearance, sound, connotation, and commercial impression. Accordingly, the first *DuPont* factor weighs heavily in favor of finding a likelihood of confusion. *See, e.g., Majestic Distilling Co.*, 65 USPQ2d at 1204 (explaining that “when word marks are identical but neither suggestive nor descriptive of the goods associated with them, the first *DuPont* factor weighs heavily against the applicant”).

B. Similarity or Dissimilarity of the Goods

The second *DuPont* factor considers the similarity or dissimilarity and nature of the goods as described in the involved application and cited registration, *DuPont*, 177 USPQ at 567, and contemplates whether the consuming public may perceive the respective goods as related enough to cause confusion about their source or origin. *Naterra Int’l v. Bensalem*, 2024 USPQ2d 293, at *2 (quoting *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014)).

The goods need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (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 goods] emanate from the same source.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

As indicated above, Applicant's goods are "mascara."⁹ Registrant's goods are "bras; coats; footwear; hats; headwear; jackets; jeans; overalls; pajamas; pants; shirts; shorts; socks; sweaters; sweatshirts; swimwear; tank tops; underwear; hooded sweatshirts; t-shirts; tee-shirts."¹⁰ Applicant argues that mascara and clothing are "distinct, non-overlapping goods in different trademark classes."¹¹ However, the issue is not whether purchasers would confuse mascara and clothing, but whether there is a likelihood of confusion as to the source of these goods. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984). Further, classification is an administrative matter "solely for the 'convenience of Patent and Trademark Office administration,'" and is "wholly irrelevant to the issue of registrability under section 1052(d), which makes no reference to classification." *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (citing *Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993)).

Evidence of relatedness may include excerpts from websites showing that the goods are used by the same purchasers, and advertisements showing that the goods are advertised together or offered by the same provider, or copies of third-party use-based registrations of the same mark for both Applicant's goods and Registrant's goods. *In re Embiid*, 2021 USPQ2d 577, at *8 (TTAB 2021) (citing *In re Ox*

⁹ Applicant's original identification of goods included "mascara," as well as the broad terms "cosmetics," "make-up," "cosmetic preparations," and "make-up preparations." August 12, 2022 Application at 1. Applicant later deleted these other goods, leaving only "mascara." July 26, 2023 Request for Reconsideration at 27, 32, 35.

¹⁰ December 21, 2022 Office Action at 348 (cited Registration No. 6047920).

¹¹ 5 TTABVUE 15.

Paperboard, 2020 USPQ2d 10878, at *5 (TTAB 2020); and *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

1. The Examining Attorney’s Evidence of Relatedness

The Examining Attorney introduced the following ten third-party websites which show clothing companies using the same mark in connection with their own apparel and mascara:¹² ARMANI, AVON, CHANEL, H&M, TOM FORD, DIOR, GUCCI, SAIE, VALENTINO, and ZARA.¹³ This evidence demonstrates there are third parties that use the same mark in connection with mascara and clothing. *Country Oven*, 2019 USPQ2d 443903, at *10; *see also Detroit Athletic*, 128 USPQ2d at 1051 (“[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both” Applicant’s and Registrant’s goods).

Applicant argues that most of the third-party Internet evidence is from “large prominent fashion houses” which use “famous marks” on the goods.¹⁴ Applicant argues, without legal authority to support the proposition, that it would be

¹² Many other examples submitted by the Examining Attorney when Applicant’s identification included the broader wording “cosmetics” and “make-up” are not included here; we consider only the evidence showing mascara, not cosmetics generally.

¹³ December 21, 2022 Office Action at 23-25 (Armani mascara), 46-121 (Armani clothing), 128-141 (Avon clothing), 159-160 (Avon mascara), 171-192 (Chanel clothing), 232 (Chanel mascara), 271-283 (H&M clothing), 307-09 (Tom Ford mascara), 322-346 (Tom Ford clothing); April 10, 2023 Final Office Action at 221-22 (Dior mascara), 235-284 (Dior clothing), 285, 289 (Gucci mascara), 292-299 (Gucci clothing), 301-302 (Saie mascara), 308-316 (Saie clothing), 364-384 (Zara clothing), 397-404 (Valentino mascara), 405-06 (Valentino clothing); August 18, 2023 Denial of Reconsideration at 6-8 (H&M mascara), 29 (Zara mascara).

¹⁴ 8 TTABVUE 7.

“erroneous” to conclude that the relevant goods are related “simply because [these third parties] happen to offer both goods under the same famous mark.”¹⁵ But we are not concerned with the fame of the third-party marks used on mascara and clothing; instead, we simply look to whether the evidence demonstrates that a single entity offers the relevant goods under a single mark. Evidence showing that third parties in the marketplace offer both types of goods at issue under a single mark may support the conclusion that consumers will view the goods as related. *Recot*, 54 USPQ2d at 1898 (finding the “Board erred when it refused to consider the lay evidence that several large companies produce and sell both pet and human food in deciding whether a consumer would reasonably believe that . . . dog treats originated from the same source as . . . human snacks”). Here, the Examining Attorney adduced evidence that multiple companies sell both mascara and clothing, and this evidence is pertinent to the question of whether the relevant consumers would likely believe that the involved goods originate from the same source when they are sold under the marks CHEAT CODE and CHEAT CODES, which we found above to be virtually identical.

The Examining Attorney also introduced the following six use-based, third-party registrations showing that the same entity has registered a single mark identifying at least mascara and clothing:¹⁶

- Registration No. 6605055 for YANIS CURVES AND STYLE

¹⁵ 8 TTABVUE 7.

¹⁶ April 10, 2023 Final Office Action at 26, 56, 64, 72, 157, 169-170. There are additional registrations for the same or similar marks owned by a few of the same registrants already represented on this list.



- Registration No. 6819677 for SWEET TOUCH CRAFTS
- Registration No. 6742200 for BESTIES PLAYHOUSE
- Registration No. 6925697 for SAINT REAUX
- Registration No. 6819677 for SWEET TOUCH CRAFTS
- Registration No. 6920567 for M-JOPTIM.

As a general proposition, third-party registrations that cover goods from both the cited registration and Applicant's application are relevant to show that the goods are of a type that may emanate from a single source under one mark. *Country Oven*, 2019 USPQ2d 443903, at *8; *see also In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd*, 864 F.2d 149 (Fed. Cir. 1988).

In addition, the Examining Attorney made of record 25 third-party used-based registrations of marks identifying "makeup" or "cosmetics," and one or more of the specific clothing items listed in the cited registration:¹⁷

- Registration No. 6804674 for WITCHY WELLNESS
- Registration No. 6806629 for KOSMIC JAMMIN'
- Registration No. 6937138 for SUBMISSION BEAUTY
- Registration No. 6965035 for SYN'S SKYN
- Registration No. 6981031 for ORACLE JAYNE STATION
- Registration No. 6593604 for  ELLICOR
- Registration No. 6490316 for BEAUTIFUL ANGELS COLLECTIONS
- Registration No. 6656914 for ILAC MAKEUP
- Registration No. 6834880 for LEAH SIMON
- Registration No. 6602544 for TAMYEL
- Registration No. 6607902 for 
- Registration No. 6931795 for  ALEXANDRA DEV

¹⁷ April 10, 2023 Final Office Action at 12, 14, 18, 41, 43, 52, 62, 76, 83, 85, 95, 105, 117, 126, 130, 136, 147, 151, 163, 167, 172, 186, 200, 216, 218. Some of these registrations also identify (in addition to "cosmetics" or "makeup") highly-related goods such as eye liner, eye shadow, false eyelashes, and eyelash extensions. There are additional registrations for the same or similar marks owned by some of the same registrants already represented by this list.

- Registration No. 6454945 for  rorolove
- Registration No. 6909666 for GIU
- Registration No. 6810317 for JULIAN OR
- Registration No. 6764456 for BE URBAN. LIVE NATURAL
- Registration No. 6981621 for BOTANICAL CABANA
- Registration No. 6966617 for  Surfer Girl
- Registration No. 6890929 for PRETTY TOES MATTER
- Registration No. 6838420 for SUVERIA
- Registration No. 6971276 for MYPINKBOXX
- Registration No. 6874404 for CHOLA STARTER KIT
- Registration No. 7020357 for KING WITHOUT KINGDOM
- Registration No. 7018450 for DAZZURIOUS
- Registration No. 7014216 for MAKESY

Applicant argues that these third-party registrations do not cover “the specific goods of Applicant (i.e., ‘mascara’),”¹⁸ but that argument is misplaced. While none of these third-party registrations list “mascara” specifically, that does not detract from their probative value. “Just as we must consider the full scope of the goods . . . as set forth in the application and registration under consideration, we must consider the full scope of the goods . . . described in a third-party registration.” *Country Oven*, 2019 USPQ2d 443903, at *9. A third-party “registration that describes goods broadly is presumed to encompass all goods . . . of the type described,” *id.* (citing *Stone Lion*, 110 USPQ2d at 1161), and in giving the terms “makeup” and “cosmetics” in the third-party registrations their full scope, we must presume that they encompass all such goods, including “mascara.” Although they appear less persuasive than registrations specifically listing “mascara,” these registrations are still probative.

¹⁸ 8 TTABVUE 9.











The third-party registrations “are sufficient in both quality and quantity to provide a reasonable predicate supporting the Examining Attorney’s position on relatedness and shift the burden to Applicant to rebut the evidence with competent evidence of its own.” *Id.* at *10 (citing *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003)).

2. Third-Party Registrations Proffered by Applicant













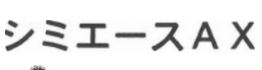



In an attempt to demonstrate that the goods are not related, Applicant submitted 100 sets of printouts from TSDR of third-party registrations purporting to show that the Office has registered the same mark to different parties for the mascara and clothing goods at issue.¹⁹ *See Embiid*, 2021 USPQ2d 577, at *37 (“[A]pplicants may submit sets of third-party registrations to suggest the opposite, i.e., that the Office has registered the same mark to different parties for the goods at issue,’ suggesting that the goods are not related.” (quoting *In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1369-70 (TTAB 2009)). *See also In re Thor Tech, Inc.*, 113 USPQ2d 1546, 1548-49 (TTAB 2015) (considering similar argument). Upon closer inspection, the number of Applicant’s relevant sets of registrations is lower than suggested. As the following examples show (by registration number and mark), at least 25 pairs of registrations involve marks that are not “substantially identical,” *Thor Tech*, 113 USPQ2d at 1549,

¹⁹ July 26, 2023 Request for Reconsideration at 77-185 (table of paired registrations), 186-727 (TSDR printouts of registrations).


which may have affected their registrability in the viewpoint of the Office at the time of application.²⁰

- 2964792  and 5540689 
- 1497350  and 6283794 
- 2559020 MK and 6550617 
- 6091203  and 6655123 
- 3459672  and 5717524 
- 3781497  and 6174911 
- 3241636  and 3717417 
- 5048931  and 6321405 
- 4387954 NO BULL and 4322122 
- 5465766  and 4935120 
- 4481888  and 5563785 
- 6792729  and 5656834 
- 1444721  and 6411317 
- 5211936  and 3107172 
- 5600999  and 4649910 
- 5386360 BLACK POWER and 4363311 
- 6771555  and 1315871 

²⁰ July 26, 2023 Request for Reconsideration at 208-212, 219-224, 264-69, 282-88, 297-302, 314-19, 352 & 438, 374-77, 379 & 355, 387-391, 404-09, 452-56, 473 & 195, 478-483, 490-94, 505-509, 524-29, 545-49, 562-65, 569-573, 609-614, 622-26, 645-650, 663-668, 672-77.

- 6589241  and  7012736
- 6707043  and 5723861 
- 5762804  and 5820992 
- 2105699  and 4437346 
- 2873980  and 4790126 
- 4045963  and 6341923 
- 5777106  and 3257972 
- 5002254  and 4984829 

At least six pairs of registrations are related:²¹

- 3372858 and 3382817 for 
- 6426838 and 6426652 for CHMAKMT
- 6613555 and 6613557 for SAKQIY
- 6608092 and 6608095 for GHLUPV
- 5972523 and 5972525 for OYB
- 6455321 and 6462143 for VASTCURY.

At least five registrations in a pair do not identify the specific goods:²²

- 3623042 for BOMBSHELL
- 2616120 for KISS
- 4833771 for FRINGE BENEFITS
- 6482263 for JOVANI
- 6939250 OURJOY.

²¹ July 26, 2023 Request for Reconsideration at 247-252 (this set of KLS marks has the same owner address, with one registration including the other's name in the address); 530 & 594, 552-55, 556-59, 705-08, 709-712 (these sets were filed on the same day and by the same applicant, but later assigned).

²² July 26, 2023 Request for Reconsideration at 235, 253, 311, 410, 588.

And one registration of a pair is not based on use (6136636 for CAMEO), while another has been cancelled in the relevant class (1119604 for ESTEĒ LAUDER).²³

3. Relatedness Overall

Relying on its own sets of third-party registrations, Applicant compares this appeal to *Thor Tech*, wherein the Board found that the applicant's evidence of third-party registrations for the same or very similar marks owned by different entities for "automobiles, trucks or sport utility vehicles on the one hand and recreational vehicles, travel trailers, and/or motor homes on the other," 113 USPQ2d at 1548, rebutted the "relevant, two third-party registrations made of record by the Trademark Examining Attorney," 113 USPQ2d at 1549. The Board explained, based in part on this evidence, that it could not conclude that consumers would assume a common source for the goods. *Id.*

Applicant suggests that the Examining Attorney's evidence is less probative due to the lower number of third-party examples found in comparison to Applicant's examples.²⁴ However, whatever probative value there is to Applicant's sets of third-party registrations is weighed in conjunction with the website evidence submitted by the Examining Attorney. The fact that the Examining Attorney did not submit more third-party examples does not detract from the fact that this evidence reveals that

²³ July 26, 2023 Request for Reconsideration at 232, 418. *See In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1264 (TTAB 2011) ("dead' or cancelled registrations have no probative value at all"); *In re 1st USA Realty Pros., Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007) (registrations not based on use in commerce not probative to show relatedness of the goods).

²⁴ 5 TTABVUE 24. Applicant makes the same argument about registrations identifying "cosmetics" broadly, *see* 8 TTABVUE 10, but Applicant did not make pairs of such registrations of record.

mascara and clothing are often offered by the same party under the same mark. The Court of Appeals for the Federal Circuit and Trademark Trial and Appeal Board have long recognized that “the PTO is an agency of limited resources” for obtaining evidence when examining applications for registration; the practicalities of these limited resources are routinely taken into account when reviewing an examining attorney’s action. *Pacer Tech.*, 67 USPQ2d at 1632; *see also In re Loew’s Theatres, Inc.*, 769 F.2d 764, 226 USPQ 865, 868 (Fed. Cir. 1985).

Applicant offered no evidence showing the extent to which the marks in its registration pairs are actually used in commerce, or consumers’ familiarity with them. “[W]here the ‘record includes no evidence about the extent of [third-party] uses . . . [t]he probative value of this evidence is thus minimal.” *Palm Bay Imps.*, 73 USPQ2d at 1693 (citing *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1561 (Fed. Cir. 2001)); *see also Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 462-63 (CCPA 1973) (“But in the absence of any evidence showing the extent of use of any of [the third-party registrations] or whether any of them are now in use, they provide no basis for saying that the marks so registered have had, or may have, any effect at all on the public mind so as to have a bearing on likelihood of confusion. The purchasing public is not aware of registrations reposing in the Patent Office and though they are relevant, in themselves they have little evidentiary value on the issue before us.”).

We have carefully considered the remaining 62 pairs of third-party registrations advanced by Applicant. Unlike in *Thor Tech*, the record here does not support a

finding that consumers are aware that the involved goods are offered by unrelated entities under the same or similar marks. There is also an absence of proof, such as by declaration or submission of copies of the relevant file histories, that no licenses or coexistence agreements are in place between any of the paired registrants; or that they do not coexist because of limited geographic areas of actual use known to the owners of the involved registrations.

Moreover, the record in *Thor Tech* differs substantially from the record in this appeal. The record in *Thor Tech* (1) included only two third-party registrations to show a relationship between the involved goods, 113 USPQ2d at 1548; (2) demonstrated that seven sets of third-party registrations were owned by the registrant of the cited registration and the applicant or one of the applicant's related companies, *id.*; (3) established that the applicant's and registrant's goods were expensive, respectively ranging between about \$8,000-23,000 and \$17,000-40,000, *id.* at 1551; (4) did not include third-party uses showing the same mark in connection with the goods; and (5) did not establish overlapping channels of trade.

That is in contrast to the Examining Attorney's evidence of 31 third-party registrations, and Internet use (as well as the overlap in trade channels, discussed below) in this appeal, which we find, under the circumstances of this case, is sufficient to establish a relationship between mascara and clothing. The contrast with *Thor Tech* is further shown through mascara and clothing being sold at much lower price points (discussed below) than the automobiles, trucks, sport utility and recreational vehicles, and motor homes involved in *Thor Tech*.

In short, the Examining Attorney’s third-party evidence is sufficient to establish that mascara and clothing are of a type that commonly originate from the same source under the same mark. “Here, the totality of the Internet and third-party registration evidence demonstrates that consumers would readily expect that these goods emanate from the same sources.” *In re I-Coat Co.*, 126 USPQ2d 1730, 1739 (TTAB 2018). *See also, e.g., In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355-56 (TTAB 2015) (six websites showing sale of the subject goods, coupled with five third-party registrations of marks for them, “support the conclusion that the goods are related”); *Kysela Pere et Fils*, 98 USPQ2d at 1265-66 (relying on over twenty third-party registrations listing wine and beer and webpages showing that companies make and sell both types of goods, finding: “[t]he third-party registration evidence and the website evidence together amply demonstrate the relatedness of beer and wine”); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-03 (TTAB 2009) (two websites showing sale of the subject goods and twenty-one third-party registrations probative of relatedness of subject goods).

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

C. Similarity or Dissimilarity of the Channels of Trade

The third *DuPont* factor considers the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567. Under this factor, we must make our analysis on the goods as they are identified in the application and cited registration. *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Because the respective identifications contain no limitations as to channels of trade or classes of purchasers, it is presumed that the mascara and clothing items identified in the application and cited registration move in all normal channels of trade normal for such goods, and that they are available to all classes of purchasers for those goods. *See Stone Lion*, 110 USPQ2d at 1161; *see also Coach Servs.*, 101 USPQ2d at 1722 (absent limitation, “goods are presumed to travel in all normal channels . . . for the relevant goods.”); *In re FCA US LLC*, 126 USPQ2d 1214, 1217 (TTAB 2018), *aff’d mem.*, 778 F. App’x 962 (Fed. Cir. 2019) (“[W]here an application contains no such restrictions, examining attorneys and the Board must read the application to cover all goods of the type identified, to be marketed through all normal trade channels, and to be offered to all normal customers therefor.”).

The same third-party commercial websites discussed above showing companies such as Dior, Saie, H&M, and Zara offering mascara as well as clothing bearing the companies’ marks advertised together further demonstrates that the goods may be encountered by the same classes of consumers under the same marks in at least two common trade channels – the websites and physical locations of the companies’ stores. This evidence supports a finding that Applicant’s and Registrant’s goods are offered in at least two common channels of trade, that is, the websites and physical locations operated by the clothing companies. *See e.g., Embiid*, 2021 USPQ2d 577, at *12 (Board found “channels of trade and classes of customers plainly overlap” where record demonstrated relevant goods sold together on third-party websites and offered and registered under a single mark by numerous businesses); *Ox Paperboard*, 2020

USPQ2d 10878, at *6 (“there is evidence that several retailers offer products of both the Registrant and Applicant, which only reinforces the presumption” of overlapping trade channels); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272-73 (TTAB 2009) (website evidence shows same or overlapping channels of trade and classes of customers); *see also Charger Ventures*, 2023 USPQ2d 451, at *5-6 (“Because the record shows that companies are known to offer both residential and commercial services under the same mark and, often, on the same website, we find that substantial evidence supports the Board’s finding on [the second and third *DuPont*] factors.”).

The third *DuPont* factor also supports a finding of a likelihood of confusion.

D. Consumer Sophistication and Care

The fourth *DuPont* factor considers the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ v. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Applicant repeatedly mentions a “reasonably prudent consumer,”²⁵ but never directly addresses the standard of care exercised by such a consumer of clothing and mascara. Purchaser sophistication or degree of care may tend to minimize likelihood of confusion; conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay Imps.*, 73 USPQ2d at 1695.

There is nothing in the nature of Applicant’s mascara or Registrant’s clothing items to suggest their purchasers are particularly sophisticated or careful. *See I-Coat*

²⁵ 5 TTABVUE 12, 13, 15, 20, 21, 23, 24, 25; 8 TTABVUE 6, 7, 8, 9, 10, 11.

Co., 126 USPQ2d at 1739. Moreover, there are no limitations on price point or intended consumer in either the application or cited registration, and we must presume that the relevant mascara and clothing items are sold at all price points and to all types of consumers, which includes ordinary consumers. *See, e.g., Embiid*, 2021 USPQ2d 577, at *32 (items of clothing “are general consumer goods that are marketed to the general population and worn by virtually everyone”) (internal quotes and citations omitted); *Sock It To Me, Inc. v. Fan*, 2020 USPQ2d 10611, *7-8 (TTAB 2020) (goods identified as “socks” are purchased by general consumers and encompass “all goods of the type identified, without limitation as to their nature or price,” including “socks that are relatively inexpensive” and may be subject to impulse purchase). We must base our decision “on the least sophisticated potential purchasers.” *Stone Lion*, 110 USPQ2d at 1163 (quoting *Gen. Mills, Inc. v. Fage Dairy Proc. Indus. S.A.*, 100 USPQ2d 1584, 1600 (TTAB 2011) (internal quotation marks omitted)).

The Examining Attorney introduced retail webpages showing mascara offered as low as \$4.99,²⁶ hats at \$6.99,²⁷ and socks at \$7.99.²⁸ Applicant introduced evidence that Registrant offers t-shirts and shorts at \$10.00.²⁹ Ordinary consumers of mascara and clothing are likely to exercise only ordinary care, and given the lack of price restrictions in the identifications, they may even buy inexpensive items on impulse with little care. *See e.g., Embiid*, 2021 USPQ2d 577, at *32; *New Era Cap Co. v. Pro*

²⁶ August 18, 2023 Denial of Reconsideration at 6 (hm.com).

²⁷ December 21, 2022 Office Action at 271 (hm.com).

²⁸ December 21, 2022 Office Action at 136, 141-42 (avon.com).

²⁹ July 26, 2023 Request for Reconsideration at 54 (cheatcodes.merchtable.com).

Era, LLC, 2020 USPQ2d 10596, at *15-16 (TTAB 2020). As to the inexpensively priced goods demonstrated by the record, “[w]hen products are relatively low-priced and subject to impulse buying, the likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” *Sock It To Me*, 2020 USPQ2d 10611, at *8 (quoting *Recot*, 54 USPQ2d at 1899). *See also, In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411-13 (TTAB 2015), *aff’d*, 123 USPQ2d 1744 (Fed. Cir. 2017) (cosmetic and beauty products may be relatively inexpensive and subject to impulse purchase); *L’Oreal*, 102 USPQ2d at 1441 (same). “The record confirms that [mascara and hats, for example,] may indeed be sold at very low price points, and may be purchased through the Internet under circumstances in which it is impossible for consumers to give careful consideration to [the goods].” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, *42 (TTAB 2021) (internal quotation marks omitted).

Because the buyers to whom sales are made are general consumers and the goods at issue are relatively low-priced and subject to impulse buying, when we focus on the least sophisticated potential consumer, we find that the fourth *DuPont* factor weighs in favor of finding a likelihood of confusion. *See, e.g., id.*; *Sock It To Me*, 2020 USPQ2d 10611, at *8; *L’Oreal*, 102 USPQ2d at 1441.

E. Summary and Conclusion

The marks are virtually identical, and this weighs heavily in favor of finding a likelihood of confusion. The goods are related, and the channels of trade and classes of consumers overlap, which also weigh in favor of finding a likelihood of confusion.

The identifications of goods include items that are inexpensive and may be subject to impulse purchases; this weighs in favor of a likelihood of confusion. When we consider and weigh the evidence of record and the relevant likelihood of confusion factors, *Charger Ventures*, 2023 USPQ2d 451, at *7, we find confusion is likely between Applicant's mark CHEAT CODE and the cited CHEAT CODES mark in Registration No. 6047920.

II. Decision

The Section 2(d) refusal to register Applicant's mark CHEAT CODE is affirmed.