

This Opinion is Not a
Precedent of the TTAB

Oral Hearing: April 2, 2024

Mailed: August 20, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board

—
In re LendingOne, LLC

—
Serial No. 97627670

—
Camille M. Miller and Madison H. McNulty of Cozen O'Connor,
for LendingOne, LLC.

Stephen Stanwood, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

—
Before Lykos, Goodman and Cohen,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

LendingOne, a Delaware limited liability company with a principal place of
business in Boca Raton, Florida (“Applicant”), seeks to register the composite mark
displayed below



for services ultimately identified as

Origination of single and one-to-four family rental, fix-and-flip, and small-balance multifamily business-purpose

mortgage loans and non-bank commercial real estate mortgage loans related to the private money lending business secured by non-owner occupied residential investment, multifamily, or commercial real property, specifically excluding mortgage lending services to mortgage lenders in connection with business services at negotiated prices” in International Class 36.¹

Applicant seeks registration on the Principal Register under Trademark Act Section 2(f), 15 U.S.C. § 1052(f), in-part as to the wording “LendingOne” based on “Applicant’s substantially exclusive and continuous use of the mark in commerce that the U.S. Congress may lawfully regulate for at least the five years immediately before the date of this statement.”²

Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the registered mark LENDERS ONE (LENDERS disclaimed) in typed format³ on the Principal Register

¹ Application Serial No. 97627670, filed October 11, 2022 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging November 13, 2015 as the date of first use anywhere and in commerce. The description of the mark is as follows: “The mark consists of the stylized term ‘LENDINGONE’ below an arrow design that spans from the second ‘N’ to the final ‘E.’” Color is not claimed as a feature of the mark.

Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system in .pdf format. Citations to the record throughout the decision include references to TTABVue, the Board’s online docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

² During prosecution, the Examining Attorney advised Applicant that the wording “LendingOne” appears to be inherently distinctive and registrable without proof of acquired distinctiveness, making Applicant’s Section 2(f) in-part claim unnecessary. *See* March 14, 2023 Office Action at TSDR 4. Applicant was also advised that this claim could be construed as a concession that LENDINGONE is not inherently distinctive. *See* May 29, 2023 Final Office Action at TSDR 6. Applicant was given the option to withdrawing the Section 2(f) in-part claim but declined to do so. *Id.*

³ “Prior to November 2, 2003, ‘standard character’ drawings were known as ‘typed’ drawings. ... A typed drawing is the legal equivalent of a standard character drawing.” TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMPEP”) § 807.03(i) (May 2024).

for “cooperative mortgage lending services,” that it is likely to cause confusion or mistake or to deceive.⁴ Altisource S.À.R.L., a Luxembourg entity, owns the cited registration.

Following issuance of the final refusal, Applicant timely filed a notice of appeal and request for reconsideration which was denied. The appeal is fully briefed. An oral hearing took place on April 2, 2024. For the reasons explained below, we reverse the refusal to register.

I. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits the registration of a mark that:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods [or services] of the applicant, to cause confusion, or to cause mistake, or to deceive.

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a 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 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, 1203 (Fed. Cir. 2003). In making our determination, the Board has considered each *DuPont* factor for which there is evidence and argument. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). When analyzing these factors, the

⁴ Registration No. 2764814, registered on September 16, 2003; renewed.

overriding concerns are not only to prevent buyer confusion as to the source of the services, 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).

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); *Shell Oil*, 26 USPQ2d at 1688 (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”). “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). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See 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)); *see also In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”). These factors, and the others, are discussed below.

A. Strength or Weakness of the Cited Mark

Because it affects the scope of protection to which it is entitled, we commence by addressing the strength or weakness of the cited mark LENDERS ONE. The sixth

DuPont factor “[t]he number and nature of similar marks in use on similar goods [or services],’ *DuPont*, 177 USPQ at 567, [] is a measure of the extent to which other marks weaken the assessed mark.” *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 2023 USPQ2d 737, at *4 (Fed. Cir. 2023) (citing *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005)). This *DuPont* factor allows an applicant to contract the scope of protection of a cited mark by adducing evidence of conceptual and commercial weakness.

“[T]he strength of a mark is not a binary factor” and “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 cited] 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).

In determining the strength of a cited mark, we consider both its inherent or conceptual strength, based on the nature of the mark itself, and, if there is evidence in the record of marketplace recognition of the mark, its commercial strength. *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 ... and its marketplace strength”); *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006).

Conceptual or inherent strength is a measure of a mark's distinctiveness. *Chippendales*, 96 USPQ2d at 1686. Distinctiveness is "often classified in categories of generally increasing distinctiveness[:] ... (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768, 112 S. Ct. 2753 (1992). "Marks that are descriptive or highly suggestive are entitled to a narrower scope of protection, i.e., are less likely to generate confusion over source identification, than their more fanciful counterparts." *Spireon*, 2023 USPQ2d 737, at *4 (quoting *Juice Generation*, 115 USPQ2d at 1674); see also *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) ("The weaker an opposer'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.") (quoting *Juice Generation*, 115 USPQ2d at 1674)).

"Commercial strength, on the other hand, is the marketplace recognition value of the mark." *Spireon*, 2023 USPQ2d 737, at *4 (internal citation and quotation marks omitted). Commercial strength is a question of "whether consumers in fact associate the . . . mark with a unique source." *Id.* In this regard, the purpose of introducing evidence of third-party marketplace use is "to show that customers have become so conditioned by a plethora of such similar marks that customers 'have been educated to distinguish between different [such] marks on the bases of minute distinctions.'" *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d

1686, 1693 (Fed. Cir. 2018) (quoting *Palm Bay*, 73 USPQ2d at 1694). *Accord Jack Wolfskin*, 116 USPQ2d at 1136; *Juice Generation*, 115 USPQ2d at 1674.

“Extensive evidence of third-party use and registrations is ‘powerful on its face,’ even where the specific extent and impact of the usage has not been established.” *Jack Wolfskin*, 116 USPQ2d at 1136 (quoting *Juice Generation*, 115 USPQ2d at 1674). *Accord Spireon*, 2023 USPQ2d at *7.

1. Third-Party Registration Evidence

First we address Applicant’s third-party registration evidence presented as a challenge to the cited mark’s conceptual strength. Properly made of record, third-party registrations may be relevant, in the manner of dictionary definitions, “to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation*, 115 USPQ2d at 1675 (internal citation quotation marks omitted); *see also Spireon*, 2023 USPQ2d at *4-5; *Jack Wolfskin*, 116 USPQ2d at 1136. Even if “there is no evidence of actual use” of “third-party registrations,” such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used.” *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976).

Applicant argues that the word LENDERS in the cited mark LENDERS ONE is conceptually weak and entitled to only a narrow scope of protection “as a result of numerous registrations ... of ‘LEND’ ” (or similar variations thereof) in connection

with mortgage lending services in Class 36.”⁵ In support thereof, Applicant made of record twenty-one (21) subsisting third-party registrations, all on the Principal Register, to show that the formative LEND- is commonly registered term in connection with “mortgage lending field.”⁶

Registration No. 5361550 for the standard character mark LENDUS;

Registration No. 6357399 for the standard character mark LENDTRAIN;

Registration No. 5872258 for the standard character mark MMC LENDING (LENDING disclaimed);

Registration No. 6208991 for the standard character mark E LEND, registered based on a claim of acquired distinctiveness under Section 2(f);

Registration No. 4629159 for the standard character mark ONYX LENDING ((LENDING disclaimed);

Registration No. 6673489 for the standard character mark EPIQ LENDING (LENDING disclaimed);

Registration No. 4474056 for the mark NATIONS LENDING (LENDING disclaimed);

Registration No. 3780818 for the standard character mark SUPREME LENDING (LENDING disclaimed) registered based on a claim of acquired distinctiveness under Section 2(f);

⁵ Applicant’s Brief, p. 6; 6 TTABVUE 12.

⁶ May 26, 2023 Response to Office Action at TSDR 8-15 (chart) and Ex. A at TSDR 22-63 (copies of each third-party registration). Applicant states in its brief that it “is aware of over 400 active applications or registrations for LEND-formative marks covering similar services in Class 36.” Applicant’s Brief, pp. 6-7; 6 TTABVUE 12-13. We have only considered the third-party registrations of record. We have not considered the third-party applications. Third-party applications, as opposed to registrations, have no probative value other than as evidence that the applications were filed. *See, e.g., In re Team Jesus LLC*, 2020 USPQ2d 11489, at *3 n.29 (TTAB 2020) (“an application would be evidence only of the fact that it was filed, and therefore has no probative value”).

Registration No. 6373496 for the mark TAP LENDING (LENDING disclaimed);

Registration No. 6563389 for the standard character mark KIND LENDING (LENDING disclaimed);

Registration No. 3762276 for the standard character mark JUST CHOICE LENDING (LENDING disclaimed);

Registration No. 5877268 for the standard character mark INTUITIVE LENDING (LENDING disclaimed);

Registration No. 6097017 for the standard character mark CERTAIN LENDING (LENDING disclaimed);

Registration No. 6395038 for the standard character mark LENDING CONFIDENCE (LENDING disclaimed);

Registration No. 6586544 for the standard character mark LENDING BAZAAR (LENDING disclaimed);

Registration No. 2829850 for the standard character mark LENDING STRENGTH (LENDING disclaimed);

Registration No. 5672082 for the standard character mark LV LENDING (LENDING disclaimed);

Registration No. 6088489 for the standard character mark INTROLEND;

Registration No. 5740138 for the standard character mark FIRST BRIDGE LENDING (BRIDGE LENDING disclaimed);

Registration No. 5610954 for the mark “LendingHome” and Design; and

Registration No. 4554592 for the standard character mark LENDCLEAR.

Each third-party registration includes mortgage lending services, and to that extent the registrations are relevant. *See Omaha Steaks Int’l v. Greater Omaha Packing Co.*, 128 USPQ2d at 1694 (the “controlling inquiry is the extent of third-party marks in use on ‘similar’ goods or services.”). These 21 third-party registrations show

that the shared term LEND and LENDING has a commonly understood meaning in connection with mortgage lending services. Indeed, the disclaimers of LENDING illustrates that “lending” is merely descriptive, if not generic, of mortgage lending services.

However, none of the third-party registered marks incorporate the entirety of the cited mark LENDERS ONE. As a result, none of the third-party registered marks are as similar to the cited mark LENDERS ONE as the applied-for mark



because none consist of a formative of the word “lend” combined with the word “one.” Rather, each registration consists of marks with entirely different terms with a completely different appearance, pronunciation and meaning. *See Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *25 (TTAB 2021) (“[W]hile the registered marks all contain the word ‘MIRAGE,’ they contain additional elements that cause many of them to be less similar to Petitioner’s mark than Respondent’s marks are.”). Third-party marks must generally be as similar to the registered mark as the applied-for mark. *See, e.g., Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284-85 (Fed. Cir. 1984) (“Applicant introduced evidence of eight third-party registrations for tea which contain the word ‘SPICE’, five of which are shown to be in use. None of these marks has a ‘SPICE (place)’ format or conveys a commercial impression similar to that projected by the SPICE ISLANDS mark, and these third-party registrations are of significantly greater difference from SPICE VALLEY and SPICE ISLANDS than either of these two marks from each other.”). We therefore find that while the word

LENDERS in the cited mark LENDERS ONE is conceptually weak, the mark as a whole has not been conceptually weakened by third-party registration evidence.

2. Third-Party Marketplace Use Evidence

Applicant also introduced evidence of third-party uses purporting to establish diminished commercial or marketplace strength of the of Registrant's mark. *See Palm Bay Imps.*, 73 USPQ2d at 1693 ("Evidence of third-party use of similar marks on similar goods [or services] is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection."); *see also Jack Wolfskin*, 116 USPQ2d at 1136; *Juice Generation*, 115 USPQ2d at 1675-76 (internal citations omitted). Applicant asserts that its "web-based investigation also reveals numerous third party uses of LEND-formative marks for similar services,"⁷ but only made of record the following four (4) examples:⁸

PLANET HOME LENDING in connection with home mortgage lending services;

PATRIOT LENDING SERVICES, INC. in connection with home mortgage lending services;

CORNERSTONE LENDING in connection with home mortgage lending services; and

SUPREME LENDING in connection with home mortgage lending services.

The third-party marketplace uses suffer the same deficiency as the third-party registration evidence because none of these marks are as similar to the registered

⁷ Applicant's Brief, p. 7; 6 TTABVUE 13.

⁸ *See* May 26, 2023 Response to Office Action, Ex. B at TSDR 64-71 (printouts from the websites planethomelending.com, www.patriotlending.com, www.houseloan.com, and www.supremelending.com each accessed on May 26, 2023).

mark as the applied-for mark. In other words, the addition of wording PLANET, PATRIOT, CORNERSTONE and SUPREME alter the marks to such an extent that they convey a different commercial impression and meaning as compared to the applied-for mark. Thus, we find that the cited mark as a whole has not been commercially weakened by third-party marketplace uses.

3. Conclusion

Applicant has not shown that the cited mark as a whole has been weakened by third-party registrations or marketplace uses of similar marks. That being said, the cited mark's strength is somewhat limited by the first word LENDERS which has been shown to be conceptually weak by third-party registration evidence and has been disclaimed. *See Sock It To Me, Inc. v. Fan*, 2020 USPQ2d 10611, at *30-31 (TTAB 2020) (SOCK IT TO ME for socks "taken as a whole, is inherently distinctive, although its strength is somewhat limited by its first word, SOCK, which is generic for socks"; "sock" disclaimed). The sixth *DuPont* factor therefore weighs slightly against a likelihood of confusion based on the partial inherent or conceptual weakness of the cited mark.

B. The Marks

We turn now to the first *DuPont* factor which involves an analysis of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay*, 73 USPQ2d at 1693 (citing *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, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff'd per curiam*, 777 F. App'x 516 (Fed. Cir. 2019) (citing *In re Davia*,

110 USPQ2d 1810, 1812 (TTAB 2014)); 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.”) (citation omitted).

“Similarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)). The proper test regarding similarity “is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks and citation omitted)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Bay State Brewing Co., Inc.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (citing *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d per curiam*, 972 F.2d 1353 (Fed. Cir. 1992)); see also *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009).

Our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). See also *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 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.”). “No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone.” *In re Electrolyte Labs. Inc.*, 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293 , 184 USPQ 35 (CCPA 1974)). Nonetheless, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161.


From a visual and aural standpoint, Applicant argues that the marks “are not exactly identical” because “Applicant’s Mark consists of one word [LENDINGONE], while Registrant’s Mark consists of two separate word[s] [LENDERS ONE].”⁹ Applicant further points to the presence of “a distinctive design element of a triangle shaped image above the word mark, intended to represent the roof of a building” as another element distinguishing the appearance of both marks.¹⁰ Applicant likens this appeal to *In re Covalinski*, 113 USPQ2d 1166 (TTAB 2014) where the Board reversed a likelihood of confusion refusal between REDNECK RACEGIRL and design of large, double-letter RR configuration and registered mark RACEGIRL in connection with in-part identical goods. Applicant also contends that the marks convey “unique and distinct commercial impressions” because Registrant “markets its services to

⁹ Applicant’s Brief, p. 9; 6 TTABVUE 15.

¹⁰ Applicant’s Brief, p. 9; 6 TTABVUE 15.

professionals and businesses in the mortgage lending field” while “Applicant is a mortgage lender itself.”¹¹ In Applicant’s view, the difference between the two services results in different connotation because Registrant’s mark “signif[ies] its services are directed to lenders themselves” while Applicant’s mark signif[ies] it provides loans.”¹²

Applicant’s mark is a composite mark, and as with any mark, we must consider this mark in its entirety. *See Jack Wolfskin*, 116 USPQ2d at 1134. “There is no general rule as to whether letters or designs will dominate in composite marks; nor is the dominance of letters or design dispositive of the issue.” *In re Electrolyte Labs. Inc.*, 929 F.2d 645, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990). Nonetheless, if a mark comprises both wording and a design, greater weight is often given to the wording, because it is the wording that purchasers would use to refer to or request the services. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *accord Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *41-42 (TTAB 2022); *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *31 (TTAB 2021). We find

that the dominant element of Applicant’s composite mark  is the wording “LendingOne.” In doing so, we reject Applicant’s contention that *Covalenski* controls here. The involved mark in that case included design features that played a much more prominent role than those of Applicant’s mark:

¹¹ Applicant’s Brief, p. 10; 6 TTABVUE 16.

¹² *Id.*



The Board, in finding the design to be the dominant element, provided the following rationale:

Here, Applicant's design mark includes the very large, prominently displayed letters RR. The bodies of the Rs are filled with a checkerboard pattern resembling a racing flag. To each R an elongated horizontal "leg" of gradually increasing thickness is appended, each of which ends in a heart design. Inside the legs appear the rest of the letters (i.e., the letter strings "edneck" and "acegirl"), in a form in which the initial letters of each string are displayed in relatively tiny typeface and subsequent letters are displayed in increasing thickness. Together, these graphic devices serve not only to draw attention to the RR letters apart from the wording, but also make the letters that form the "a-c-e" of the word "RACEGIRL" difficult to notice. Since these goods are clothing, consumers would be likely to encounter the mark in a retail setting on hang tags or neck labels. In that context, the visual impression of the mark is likely to be more important.

Covalinski, 113 USPQ2d at 1168. None of these reasons are present in this case. That is to say, the wording "LendingOne" in Applicant's composite mark




does not appear in "relatively tiny typeface" in a letter string "difficult to notice." *See id.* To the contrary, the font in Applicant's mark is in bold, block style easy-to-read lettering. The roof design in its composite mark heightens, rather than diminishes, the mark's similarity in connotation and commercial impression to Registrant's word mark LENDERS ONE. This is because the stylized

roof above the wording reinforces the meaning of the wording “LendingOne” when considered in relation to the identified services. *See, e.g., Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (“This design connotes a crossword puzzle, which reinforces the connotation created by the words of the mark. Thus, the puzzle design does not convey any distinct or separate impression apart from the word portion of the mark. Rather, it serves only to strengthen the impact of the word portion in creating an association with crossword puzzles.”); *In re 1st USA Realty Pros. Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007) (“[B]ecause a stars motif is often associated with the United States, the stars design tends to simply reinforce the component USA in applicant’s mark, rather than having a separate connotation or making a separate impression”); *In re Wilson*, 57 USPQ2d 1863, 1865 (TTAB 2001) (“[T]he illustration of pine cones merely reinforces the dominance of the arbitrary designation PINE CONE”).

Having established that the wording “LendingOne” is the dominant element of Applicant’s mark, we further find that this phrase is aurally and visually similar to the entirety of the cited mark LENDERS ONE. With the exception of the difference in suffix endings, the literal portion of Applicant’s mark are identical in sound and appearance. Consumers do not, as Applicant urges, focus on minutia. *See, e.g., In re John Scarne Games, Inc.*, 120 USPQ 315, 315-16 (TTAB 1959) (“Purchasers ... do not engage in trademark syllable counting — they are governed by general impressions made by appearance or sound, or both.”); *see also B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 6 USPQ 1719, 1721 (Fed. Cir. 1988) (“The

purchasing public, we believe, does not indulge in such recognitional contortions but sees things as they are.”); *In re Johnson Prods. Co., Inc.*, 220 USPQ 539, 540 (TTAB 1983) (“It is undeniable that if the mark is carefully examined, the two overlapping ‘S’s can be discerned. What is more significant, however, is that this sort of studied analysis of the mark is unlikely to occur in the marketplace where these products are sold.”).

The marks also project nearly the same connotation and commercial impression. When followed by the identical word “one,” each mark conveys to consumers that the quality of the loan services are superlative in nature. *See General Mills, Inc. v. Health Valley Foods*, 24 USPQ2d 1270 (TTAB 1992) (“When used in opposer’s mark to identify cereal, the ONE portion takes on a laudatory meaning.”).

In sum, we find that the marks  and LENDERS ONE are highly similar in sight, sound, connotation, and commercial impression when considered in their entirety. *See Jack Wolfskin*, 116 USPQ2d at 1134. The first *DuPont* factor weighs “heavily” in favor of finding a likelihood of confusion. *See Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 2024 USPQ2d 293, at *5 (Fed. Cir. 2024) (BABY MAGIC and BABIES’ MAGIC TEA marks are “highly similar” meaning the first factor weighs “heavily” in the confusion analysis).

C. The Services

The second *DuPont* factor “considers whether the consuming public may perceive the respective goods or services of the parties as related enough to cause confusion about the source or origin of the goods or services.” *Naterra*, 2024 USPQ2d 293 at *2

(quoting *In re St. Helena Hosp.*, 774 F.3d at 752 (cleaned up) (citation omitted)). We compare the services as they are identified in the application and cited registration. See *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018); *Stone Lion*, 110 USPQ2d at 1161; *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); see also *B & B Hardware*, 113 USPQ2d at 2049 (recognizing that an “applicant’s right to register must be made on the basis of the goods [or services] described in the application”).

The services 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 services emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). Evidence of relatedness might include news articles and/or evidence from computer databases showing that the relevant services are used together or used by the same purchasers; advertisements showing that the relevant services are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both an applicant’s services (or similar services) and the services listed in the cited registration (or similar services). See, e.g., *Davia*, 110 USPQ2d at 1817 (finding pepper sauce and agave related where evidence

showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores).

For ease of reference, we reiterate that Applicant's services are identified as

Origination of single and one-to-four family rental, fix-and-flip, and small-balance multifamily business-purpose mortgage loans and non-bank commercial real estate mortgage loans related to the private money lending business secured by non-owner occupied residential investment, multifamily, or commercial real property, specifically excluding mortgage lending services to mortgage lenders in connection with business services at negotiated prices" in International Class 36,

and Registrant's services are "cooperative mortgage lending services" in International Class 36.

Applicant argues that the services are distinct because Applicant is a lender whereas Registrant is a "mortgage cooperative that helps independent mortgage bankers, banks and credit unions operate competitively within the industry, and efficiently within their community."¹³ As support, Applicant points to the following excerpt from Registrant's website purporting to show that Registrant's "cooperative mortgage lending services" are comprised of a cooperative of "independent mortgage

¹³ Applicant's Brief, p. 12; 6 TTABVUE 18 (citing May 26, 2023 Response to Office Action, TSDR 73, Exhibit C). The Board cannot consider this evidence. The print is microscopic and when it is magnified it become blurry. *Cf. RxD Media, LLC v. IP Application Development LLC*, 125 USPQ2d 1801, 1806 n.16 (TTAB 2018) ("Illegible evidence is given no consideration."), *aff'd*, 377 F. Supp. 3d 588 (E.D. Va. 2019), *aff'd*, 986 F.3d 361, 2021 USPQ2d 81 (4th Cir. 2021).

bankers” with various mortgage professional members, including “banks, credit unions, independent mortgage banks, and real estate/builder-affiliated firms.”¹⁴

LENDERS ONE ABOUT MEMBERSHIP SOLUTIONS EVENTS JOIN US

About

The Lenders One® cooperative was established in 2000 as a national alliance of independent mortgage bankers. Today, we're one of the largest mortgage co-ops in the country with a diverse mix of 250+ member companies. These businesses cover the entire lending spectrum — from banks, credit unions, independent mortgage banks, and real estate/builder-affiliated firms — and they originate between \$50 million to \$25 billion per year.

- Innovative Solutions
- Education
- Proprietary Technology
- Events
- Networking
- 80+ Solutions Providers

Our Mission

Lenders One® is dedicated to helping independent mortgage bankers, banks, and credit unions improve their profitability and compete against large, well-funded mortgage companies.

- Reduce loan manufacturing and operational costs through direct curated white-label and preferred provider solutions.
- Maximize revenue and growth potential through capital market and lead generation solutions.
- Drive better decisions and improve profitability through proprietary data and benchmarking intelligence as well as educational and networking events.

Applicant also contends that its identification explicitly excludes Registrant’s services.

¹⁴ Applicant’s Brief, pp. 12-13; 6 TTABVue 18-19. See May 26, 2023 Response to Office Action, Exhibit D at TSDR 75 (printout from <https://www.lendersone.com/about> website accessed on May 26, 2023).

The Examining Attorney counters with several arguments. The first position the Examining Attorney takes is that the services are legally identical. The Examining Attorney reasons that “[s]ince ‘cooperative’ might simply indicate that the service provider is an organization ‘owned by and operated for the benefit of those using its services’ rather than limiting the type of services provided, registrant’s “[cooperative] mortgage lending services” presumably encompasses all services in that category, including applicant’s various types of mortgage loans” because the term “cooperative” refers to the legal structure of the entity.¹⁵ As support for this theory, the Examining Attorney made of record “seven examples of mortgage lenders organized as co-ops—Canton Co-operative Bank, The Cooperative Bank of Cape Cod, Cooperative Center, Federal Credit Union, Greenfield Cooperative Bank, Mechanics Cooperative Bank, and National Cooperative Bank” as well as “an article outlining the general concept of cooperative banking.”¹⁶ The Examining Attorney extrapolates from this evidence that “[t]he existence of all these co-op lenders reinforces the fact that consumers are likely to see ‘cooperative’ in ‘cooperative lending services’ as speaking to the service provider’s organizational structure rather than to any specific limitation on the types of loans it offers.”¹⁷

Alternatively, the Examining Attorney speculates that the services are “closely related” because Registrant’s services may consist of “mortgage loans designed for

¹⁵ Examining Attorney’s Brief, 8 TTABVUE 6.

¹⁶ See August 30, 2023 Subsequent Final Refusal at TSDR 8-21.

¹⁷ Examining Attorney’s Brief, 8 TTABVUE 6.

customers buying into co-ops.”¹⁸ “Accepting for the sake of argument this alternative interpretation that ‘cooperative mortgage lending services’ are mortgage loans designed for consumers buying into co-ops,” the Examining Attorney submitted third-party website evidence from MortgageDepot, NorthStar Funding, Quintessential Mortgage Group, Teachers Federal Credit Union, and Total Mortgage purporting to show that the that the same entity commonly creates and offers, under the same trademark, both: “(1) a range of traditional mortgage loans like applicant’s; and (2) mortgage loans for customers looking to buy into co-ops.”¹⁹

In limited circumstances where an identification is unclear, the Board has considered extrinsic evidence to show that the identification in the cited registration has a specific meaning in the industry. *See In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1354 (TTAB 2015) (“When identifications are technical or vague and require clarification, it is appropriate to consider extrinsic evidence of use to determine the meaning of the identification of goods [or services].”); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 & n.10 (TTAB 2009) (noting that, although extrinsic evidence may not be used to limit or restrict the identified goods or services, it is nonetheless proper to consider extrinsic evidence in the nature of dictionary entries to define the terminology used to describe the goods or services); *In re Trackmobile Inc.*, 15 USPQ2d 1152, 1154 (TTAB 1990) (noting that, “when the description of goods [or services] for a cited registration is somewhat unclear . . . it is improper to simply

¹⁸ Examining Attorney’s Brief, 8 TTABVUE 7.

¹⁹ *Id.* See August 30, 2023 Office Action at TSDR 22-31.

consider that description in a vacuum and attach all possible interpretations to it when the applicant has presented extrinsic evidence showing that the description of goods [or services] has a specific meaning to members of the trade.”). Such is the case here where the precise nature of “cooperative mortgage lending services” is not readily apparent. Rather than engaging in conjecture, we look to how the services are described according to the excerpt reprinted above from Registrant’s website:

The Lenders One® cooperative was established in 2000 as a national alliance of independent mortgage bankers. Today, we’re one of the largest mortgage co-ops in the country with a diverse mix of 250+ member companies. These businesses cover the entire lending spectrum — from banks, credit unions, independent mortgage banks, and real estate/builder-affiliated firms — and they originate between \$50 million to \$25 billion per year.

...

Lenders One® is dedicated to helping independent mortgage bankers, banks, and credit unions improve their profitability and compete against large, well-funded mortgage companies.

Reduce loan manufacturing and operational costs through direct curated white-label and preferred provider solutions.

Maximize revenue and growth potential through capital market and lead generation solutions.

Drive better decisions and improve profitability through proprietary data and benchmarking intelligence as well as educational and networking events.

This evidence clarifies that Registrant does not provide mortgage loans to real estate investors. Nor does Registrant even provide mortgage lending services. Rather, Registrant is a cooperative comprised of independent mortgage bankers that provides

bundled support services to its members in order to compete against large mortgage lenders.

By contrast, Applicant's specimen states that the focus of its services is to provide loans to real estate investors, such as "Fix & Flip Loans," "Multifamily Bridge Loans," and "Rental Loans." *Cf. In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017) (evidence of descriptiveness may be obtained from applicant's own specimen of use and any explanatory text included therein). Applicant submitted further evidence from its own website to explain the nature of its services:²⁰

We are a specialized mortgage lender. We only lend to real estate investors ...currently we only work with investors that have at least one completed investment in the past.

...

A Rental Loan is a long term loan on an investment property. It is underwritten primarily against the property value and the cash flow of the property itself.

...

A fix-and-flip loan is a short term mortgage used to acquire a property quickly that includes financing the repairs. Generally they are 12-24 month loans used until the property is resold or refinanced.

This explanation of Applicant's services is reflected in the identification in the application.

In some cases, the identifications themselves may suffice to find relatedness. *See Hewlett-Packard*, 62 USPQ2d at 1004 (finding the Board erred in concluding that

²⁰ See May 26, 2023 Response to Office Action, Ex. E at TSDR 76-79 (printouts from lendingone.com accessed on May 26, 2023).

there was insufficient evidence of relatedness, because it “did not consider the important evidence already before it, namely the ITU application and [opposer’s] registrations.”). This is not the case here. In fact, now that we have discerned the exact nature of Registrant’s services, it is obvious based on the language of the identifications that Applicant’s and Registrant’s services are not legally identical. Compounding this problem in burden of proof, the Examining Attorney has not introduced any evidence (i.e. third-party registrations or excerpts from third-party websites) to show that Applicant’s and Registrant’s services may emanate from a single source. *See, e.g., In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (finding Office had failed to establish that wine and vodka infused with caffeine are related goods because there was no evidence that vodka and wine emanate from a single source under a single mark or that such goods are complementary products that would be bought and used together). Accordingly, the second *DuPont* factor weighs against finding a likelihood of confusion.

D. The Established, Likely-to-Continue Channels of Trade and Classes of Consumers

This brings us to the third *DuPont* factor, the established, likely-to-continue channels of trade and classes of consumers. *See Detroit Athletic Co.*, 128 USPQ2d at 1051 (citing *DuPont*, 177 USPQ at 567). As with the second *DuPont* factor, we look to the language of the identification of services. *See B & B Hardware*, 113 USPQ2d at 2049 (explaining that “if an application does not delimit any specific trade channels of distribution, no limitation will be applied”) (cleaned up).

The Examining Attorney incorrectly invokes the presumption under *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) that because “Registrant’s identification of services places no restriction on the type of consumers who use them, and absent any such restriction, its services are ‘presumed to travel in the same channels of trade to the same class of purchasers’ as applicant’s.”²¹ The *Viterra* presumption only applies to instances where the services are identical or legally identical. This is not the case here.

We further find based on the identifications and evidence discussed above that Applicant and Registrant are not competitors, but rather offer their respective services to different classes of consumers in distinct trade channels. Applicant provides its specialized mortgage loan services to real estate investors whereas Registrant is a cooperative offering its services as ancillary support to mortgage lending professionals to compete in the marketplace. Thus, the third *DuPont* factor also weighs against finding a likelihood of confusion.

E. Conditions of Sale

Next, we consider the fourth *DuPont* factor, the conditions under which the services are likely to be purchased, *e.g.*, whether on impulse or after careful consideration, as well as the degree, if any, of sophistication of the consumers. Purchaser sophistication or degree of care may tend to minimize likelihood of confusion. *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 224 USPQ 969, 971 (Fed. Cir. 1985) (because only sophisticated purchasers exercising great care would purchase

²¹ Examining Attorney’s Brief, 8 TTABVUE 9-10.

the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED). Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay*, 73 USPQ2d at 1695.

The evidence discussed above shows that Registrant markets its services to mortgage lenders, sophisticated and knowledgeable professionals. Applicant also markets its specialized mortgage loan services to real estate investors who are also sophisticated. Although the classes of consumers differ, both Applicant's and Registrant's consumers are likely to exercise great care in purchasing their respective services. *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 999-1000, 224 USPQ 969, 971 (Fed. Cir. 1985) (concluding that, because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion between the marks NARCO and NARKOMED); *see also In re Info. Builders Inc.*, 2020 USPQ2d 10444, at *4 (TTAB 2020) (“[I]n light of the inherent nature of the goods and services involved, some degree of purchasing care may be exercised by Applicant's potential or actual consumers.”). The fourth *DuPont* factor therefore weighs against finding a likelihood of confusion.

F. Lack of Actual Confusion and Concurrent Use

We now address the seventh *DuPont* factor, the “nature and extent of any actual confusion,” and the eighth *DuPont* factor, “length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567. Applicant argues that the parties' concurrent use of their respective

marks for approximately eight years without any known instance of actual confusion creates a strong inference that confusion is unlikely.

“The length of time during and conditions under which there has been concurrent use without evidence of actual confusion,” *DuPont*, 177 USPQ at 567 — requires us to look at actual market conditions, to the extent there is evidence of such conditions of record.” *In re Guild Mtg. Co.*, 2020 USPQ2d 10279, at *6 (TTAB 2020). *See also In re Calgon Corp.*, 435 F.2d 596, 168 USPQ 278, 280 (CCPA 1971). Other than Applicant’s mere assertions, the record is devoid of any such evidence or specifics regarding their geographic extent or overlap of the Applicant’s and Registrant’s services. *Guild Mtg.*, 2020 USPQ2d 10279, at *7. “The fact that an applicant in an ex parte case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis, inasmuch as the Board in such cases generally has no way to know whether the registrant likewise is unaware of any instances of actual confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred.” *In re Opus One, Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001). There has been “no opportunity to hear from Registrant about whether it is aware of any reported instances of confusion. We therefore are getting only half the story.” *Guild Mtg.*, 2020 USPQ2d 10279, at *7.

Moreover, “[t]he relevant test is likelihood of confusion, not actual confusion.” *Detroit Athletic Co.*, 128 USPQ2d at 1053. Indeed, “a showing of actual confusion is

not necessary to establish a likelihood of confusion.” *Herbko*, 64 USPQ2d at 1380. Thus, we deem the seventh and eighth *DuPont* factors neutral.

G. Market Interface and Consent Agreement

We close by addressing the tenth *DuPont* factor, the market interface between Applicant and Registrant, which in this case involves an evaluation of their consent agreement. “[D]epending on the circumstances” consent agreements “may ... carry great weight” since the parties to the agreement are “better position to know the real life situation than bureaucrats or judges.” *Bongrain Int’l (Am.) Corp. v. Delice de France Inc.*, 1 USPQ2d 1775, 1778 (Fed. Cir. 1987). That being said, “there is no per se rule that a consent, whatever its terms, will always tip the balance to finding no likelihood of confusion, and it therefore follows that the content of each agreement must be examined. Few may be found lacking, but it is not a foregone conclusion that all will be determinative.” *Bay State Brewing Co.*, 117 USPQ2d at 1953. Factors to be considered in weighing a consent agreement include the following:

- (1) Whether the consent shows an agreement between both parties;
- (2) Whether the agreement includes a clear indication that the goods and/or services travel in separate trade channels;
- (3) Whether the parties agree to restrict their fields of use;
- (4) Whether the parties will make efforts to prevent confusion, and cooperate and take steps to avoid any confusion that may arise in the future; and
- (5) Whether the marks have been used for a period of time without evidence of actual confusion.

See generally DuPont, supra; In re Four Seasons Hotels Ltd., 987 F.2d 1565, 26 USPQ2d 1071 (Fed. Cir. 1993).

The consent agreement has multiple failings. It was executed between Applicant and a different entity other than the current owner of the cited registration, Altisource Solutions, S.a.r.L. There is nothing in the record explaining the precise nature of their relationship. More troubling, the consent agreement was executed on August 21, 2017, prior to the filing of the instant application, meaning that the agreement is stale. Compounding this deficiency, Applicant only submitted a portion of the agreement, omitting Paragraph Nos. 2-17, making the agreement a “naked consent.” *See DuPont*, 177 USPQ at 568. Accordingly, the tenth *DuPont* factor neither is dispositive nor weighs in Applicant’s favor. Rather, it is neutral.

II. Weighing the *DuPont* Factors

The final step in analyzing likelihood of confusion is to weigh the *DuPont* factors for which there has been evidence and argument; “explain the results of that weighing;” and “the weight [we] assigned to the relevant factors.” *In re Charger Ventures LLC*, 65 F.4th 1375, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023). “No mechanical rule determines likelihood of confusion, and each case requires weighing of the facts and circumstances of the particular mark.” *Mighty Leaf Tea*, 94 USPQ2d at 1260. *See also Naterra*, 2024 USPQ2d 293, at *2. We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto.

“[W]e unmistakably recognize the Federal Circuit’s instruction that consent agreements are frequently entitled to great weight.” *Bay State Brewing Co.*, 117

USPQ2d at 1967. In this appeal, however, the consent agreement of record has notable deficiencies, making the tenth *DuPont* factor neutral in our analysis. As discussed above, the seventh and eighth *DuPont* factors are also neutral.

Applicant has not shown that the cited mark LENDERS ONE has been weakened as a whole conceptually or commercially by third-party registrations or marketplace uses. However, the third-party registration evidence and disclaimer of LENDERS does show some inherent weakness in that term. The sixth *DuPont* factor therefore weighs somewhat against a likelihood of confusion. Due to the high degree of similarity of the marks in sound, appearance, connotation and commercial impression, the first *DuPont* factor weighs heavily in favor of a likelihood of confusion. *See Naterra*, 2024 USPQ2d 293, at *5 (BABY MAGIC and BABIES' MAGIC TEA marks are "highly similar" meaning the first factor weighs "heavily" in the confusion analysis). On the other hand, the second critical factor weighs against finding a likelihood of confusion. Likewise, the third and fourth *DuPont* factors each weigh against a finding of a likelihood of confusion. Weighing these findings, we conclude that the first factor is outweighed by the second, third and fourth factors, and slightly by the sixth factor. In other words, although the marks are highly similar, this is outweighed by the findings that the services are unrelated, the channels of trade and classes of purchasers do not overlap, and consumers of both Applicant's and Registrant's services will exercise more than ordinary care in their purchasing decisions. We therefore conclude that confusion is unlikely.

Decision: The Section 2(d) refusal is reversed.