

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: March 14, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re OBON3 LLC

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Serial No. 97858042

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Ilya Libenzon of Law Office of Ilya Libenzon,
for OBON3 LLC.

Marisa C. Schutz, Trademark Examining Attorney, Law Office 108,
Kathryn E. Coward, Managing Attorney.

—
Before Heasley, Allard, and O'Connor,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:¹

OBON3 LLC (“Applicant”) seeks registration on the Principal Register of the following composite mark:

¹ This opinion is issued as part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases. This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion cites to the LEXIS legal database and cites only precedential decisions, unless otherwise noted. See TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 101.03(a)(2) (June 2024) for acceptable citation forms to TTAB cases.



Tip and Go!

(“EASY TIPPING” and “TIP” disclaimed) for “Downloadable computer software for conducting financial transactions, gratuity payment processing and instructional user guides sold as a unit; Downloadable computer software and firmware for conducting financial transactions, gratuity payment processing,” in International Class 9.²

Registration is refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used on the goods identified above, so resembles the following registered marks, the first two having the same owner, that it is likely to cause confusion, to cause mistake, or to deceive:

- EZ-TIP (in standard characters) for “Downloadable computer software for accepting, validating, transmitting, and processing electronic payments; Downloadable software in the nature of a mobile application for accepting, validating, transmitting, and processing electronic payments,” in International Class 9, and registered on the Supplemental Register in the name of EZ-Tip LLC;³

² Application Serial No. 97858042 was filed on March 27, 2023, 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. The mark is described as “consist[ing] of a stylized depiction of a smart phone screen with a dollar sign in a circle positioned on the right-hand side of the screen, the wording ‘EASY TIPPING’ at the bottom of the screen with a white stripe thereunder and the wording ‘Tip and Go!’ below the screen.”

³ Reg. No. 7057308, issued on May 16, 2023.

- EZ TIP (in standard characters, “TIP” disclaimed) for “gratuity payment services; gratuity payment processing services,” in International Class 36, and registered on the Supplemental Register in the name of EZ-Tip LLC;⁴ and
- TIP & GO (in standard characters, “TIP” disclaimed) for “Downloadable mobile applications for hotel guests to electronically leave a monetary tip to housekeeping, restaurant, or other service staff,” in International Class 9, and registered on the Principal Register in the name of 9475-0726 Québec Inc.⁵

After the refusal was made final, Applicant appealed and requested reconsideration. After the request was denied, the appeal resumed. Applicant and the Examining Attorney filed briefs.⁶ We affirm the refusal.

I. Preliminary Matter

Applicant attached to its brief copies of third-party registrations, all of which were properly made of record during examination.⁷ We discourage the practice of attaching materials in the record to briefs for the reasons discussed in *In re Michalko*, Ser. No. 85584271, 2014 TTAB LEXIS 215, at *2-3 (TTAB 2014) (“Parties to Board cases occasionally seem to be under the impression that attaching previously-filed evidence

⁴ Reg. No. 6055209, issued on May 12, 2020.

⁵ Reg. No. 6718590, issued on May 3, 2022.

⁶ Applicant’s brief appears at 6 TTABVUE and the Examining Attorney’s brief appears at 8 TTABVUE.

References to the briefs on appeal refer to TTABVUE, the Board’s online docketing system. The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry.

⁷ 6 TTABVUE 16-24; January 23, 2024 Response to Office Action at TSDR 12-20.

Page references herein to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system.

to a brief and citing to the attachments, rather than to the original submission is a courtesy or a convenience to the Board. It is neither.”).

II. 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 ... 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” 15 U.S.C. § 1052(d). 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. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1314 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019). 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, 1356 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 1206 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods or services. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098,

1103 (CCPA 1976). These two factors, together with the third, fourth, sixth and eighth factors, are addressed in this decision.

We focus our Section 2(d) analysis on the mark EZ-TIP (in standard characters) for “Downloadable computer software for accepting, validating, transmitting, and processing electronic payments; Downloadable software in the nature of a mobile application for accepting, validating, transmitting, and processing electronic payments,” in International Class 9 (Reg. No. 7057308) (the “308 Registration”) because we find this mark and the identified goods most similar to Applicant’s mark and identified goods. *Sock It To Me, Inc. v. Fan*, Opp. No. 91230554, 2020 TTAB LEXIS 201, at *20-21 (TTAB 2020) (confining Section 2(d) analysis to most similar pleaded mark); *In re Max Cap. Grp. Ltd.*, Ser. No. 77186166, 2010 TTAB LEXIS 1, at *4-5 (TTAB 2010) (comparing applicant’s mark to most similar cited mark). If we find confusion likely between this mark and Applicant’s mark, we need not consider the other cited marks.

A. Similarity or Dissimilarity and Nature of the Goods, Similarity or Dissimilarity of Established and Likely-to-Continue Channels of Trade and Classes of Purchasers

We begin with the second *DuPont* factor and consider the similarity or dissimilarity and nature of the goods as they are identified in the involved application and cited registration. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1306 (Fed. Cir. 2018); *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 942-43 (Fed. Cir. 1990).

Applicant’s identified goods and the identified goods of the ’308 Registration are set out in the table below for easy reference:

Applicant’s Identified Goods	’308 Registration’s Identified Goods
Downloadable computer software for conducting financial transactions, gratuity payment processing and instructional user guides sold as a unit;	Downloadable computer software for accepting, validating, transmitting, and processing electronic payments;
Downloadable computer software and firmware for conducting financial transactions, gratuity payment processing.	Downloadable software in the nature of a mobile application for accepting, validating, transmitting, and processing electronic payments.

The Examining Attorney argues⁸ and we agree that Applicant’s “downloadable computer software for conducting financial transactions” and “downloadable computer software and firmware for conducting financial transactions” are broad enough to encompass the more narrowly defined goods “downloadable computer software for accepting, validating, transmitting, and processing electronic payments” of the ’308 Registration. Consequently the goods are legally identical in part. *See, e.g., In re Hughes Furniture Indus., Inc.*, Ser. No. 85627379, 2015 TTAB LEXIS 65, at *9-10 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”).

Next we consider established, likely-to-continue channels of trade, the third *DuPont* factor. Because we have found that Applicant’s goods and the goods of the

⁸ 8 TTABVUE 9.

'308 Registrations are legally identical in part, we must presume that these goods travel through the same channels of trade and are offered or rendered to the same or overlapping classes of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (Board entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 772 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *In re Information Builders Inc.*, Ser. No. 87753964, 2020 TTAB LEXIS 20, at *11 (TTAB 2020).

Applicant's arguments based on the "realities of the marketplace"⁹ are not persuasive, as our determination focuses, as it must, on the identifications of the involved application and the '308 Registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014) ("It was proper, however, for the Board to focus on the application and registrations rather than on real-world conditions, because 'the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application.'" (quoting *Octocom Sys.*, 918 F.2d at 942)).

B. Strength or Weakness of the Mark of the '308 Registration

Although the Examining Attorney is not expected to adduce evidence of the strength or fame of the cited registered mark, *In re Mr. Recipe, LLC*, Ser. No. 86040643, 2016 TTAB LEXIS 80, at *4 (TTAB 2016), an applicant may adduce

⁹ 6 TTABVUE 10.

evidence of “[t]he number and nature of similar marks in use on similar goods” under the sixth *DuPont* factor, *DuPont*, 476 F.2d at 1361, to show that the cited mark is comparatively weak, conceptually or commercially, and has a “comparatively narrower range of protection.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338 (Fed. Cir. 2015). Applicant argues that that the “peaceful coexistence” of five third-party registrations for EZ and EASY formative marks in the name of four different entities “lends weight to the fact that the subject mark will likewise not cause confusion.”¹⁰

The Examining Attorney counters that the “EASY BOOKING and EZ BOOK third-party registrations are coexisting, not because the compared marks are sufficiently distinguishable to avoid a likelihood of confusion, but because the goods and/or services are unrelated for likelihood of confusion purposes.”¹¹

We agree with the Examining Attorney¹² that the third-party registrations are not evidence of the extent of use, but that is not the end of the discussion. “[T]hird-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered for similar goods or services.” *Tao Licensing, LLC v. Bender Consulting Ltd.*, Can. No. 92057132, 2017 TTAB LEXIS 437, at *47 (TTAB 2017); *see also Tektronix, Inc. v. Daktronics, Inc.*, 534

¹⁰ 6 TTABVUE 13.

¹¹ 8 TTABVUE 7.

¹² *Id.*

F.2d 915, 917 (CCPA 1976) (“[T]hird-party registrations ... may be given some weight to show the meaning of a mark in the same way that dictionaries are used.”).

As an initial matter, we acknowledge that the mark of the '308 Registration is registered on the Supplemental Register. We further acknowledge that EZ is the equivalent of “easy,” and is a laudatory term meaning “capable of being accomplished or acquired with ease; posing no difficulty,” and that TIP is a verb meaning “to give a gratuity to.”¹³

Applicant made of record several third-party registrations: EASYBOOKING and EASYBOOKING and Design (Reg. Nos. 5449784, 5449785) identify, inter alia, “computer software for controlling and managing access to server applications;”¹⁴ EZ BOOK (Reg. No. 4232869) identifies “providing a website for use in making reservations and bookings for temporary lodging, restaurants and meals;”¹⁵ EZBOOK (Reg. No. 4871745) identifies a “mobile application to allow real estate agents to arrange for the scheduling of home inspections for real estate properties;”¹⁶ and EZ BOOK (Reg. No. 6909699) identifies an online scheduling tool for booking appointments and services related to heating, air conditioning, electrical, plumbing and other repair and replacement services.¹⁷

¹³ November 7, 2023 Office Action at TSDR 178, 182 (THE AMERICAN HERITAGE and MERRIAM-WEBSTER Dictionaries).

¹⁴ January 23, 2024 Response to Office Action at TSDR 16, 17.

¹⁵ *Id.* at TSDR 18.

¹⁶ *Id.* at TSDR 19.

¹⁷ *Id.* at TSDR 20.

While the goods identified in these third-party registrations are not similar to those identified in the '308 Registration, we nonetheless acknowledge that this evidence shows that the term EASY, or its phonetic equivalent EZ, standing by itself is conceptually weak and is used consistent with its dictionary definition. Showing the weakness of this single term in the mark of the '308 Registration does not, however, definitively establish the conceptual weakness of the terms of the cited mark used in close proximity. The mark of the '308 Registration is EZ-TIP. None of the third-party registered marks Applicant made of record contain both the term EZ (or a term visually/aurally similar) **and** the term TIP (or a term visually/aurally similar), making them less similar to Applicant's mark than the mark of the '308 Registration, thus causing us to discount their probative value. *Sabhnani v. Mirage Brands, LLC*, 2021 TTAB LEXIS 464, at *32 (TTAB 2021).

In sum, we find under the sixth *DuPont* factor that the mark of the '308 Registration is laudatory and conceptually weak, but is still registered and may be cited as a basis for an ex parte refusal to register under Section 2(d). *See, e.g., Otter Prods. LLC v. BaseOneLabs LLC*, Opp. No. 91200510, 2012 TTAB LEXIS 472, at *12-13 (TTAB 2012) (citing, *inter alia*, *In re Clorox Co.*, 578 F.2d 305, 308 (CCPA 1978)). Further, the inherently weak nature of the mark of the '308 Registration is not fatal to a finding of likelihood of confusion because even weak marks are entitled to protection against confusion. *Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 TTAB LEXIS 251, at *43 (TTAB 2022).

C. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's mark and the mark of the '308 Registration in their entirety, considering their appearance, sound, meaning and commercial impression. *DuPont*, 476 F.2d at 1361. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, Ser. No. 87075988, 2018 TTAB LEXIS 170, at *13 (TTAB 2018), *aff'd per curiam*, 777 F. App'x 516 (Fed. Cir. 2019) (quoting *In re Davia*, Ser. No. 85497617, 2014 TTAB LEXIS 214, at *3-4 (TTAB 2014)).

The test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053 (Fed. Cir. 2012). "The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific impression of marks." *In re i.am.symbolic, llc*, Ser. No. 85916778, 2018 TTAB LEXIS 281, at *11 (TTAB 2018). The average customers here are consumers of mobile apps for processing electronic payments, including gratuities, which includes members of the general public.

Because the similarity or dissimilarity of the marks is determined based on the marks in their entirety, our analysis cannot be predicated on dissecting the marks into their various components. *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir.

1985). In some circumstances however, “one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark.” *Leading Jewelers Guild, Inc. v. LJOW Holdings LLC*, Opp. No. 91160856, 2007 TTAB LEXIS 35, at *14 (TTAB 2007); *see also Nat’l Data*, 753 F.2d at 1058 (“[T]here 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 consideration of the marks in their entirety.”). That is, more or less weight may be given to a particular feature of a mark provided the ultimate conclusion rests on a consideration of the marks in their entirety. *Stone Lion*, 746 F.3d at 1322.

When considering the marks, we keep in mind that, where, as here, the goods at issue are legally identical in part, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 877 (Fed. Cir. 1992).

Recall that Applicant seeks to register the composite mark, shown here,



Tip and Go! (“EASY TIPPING” and “TIP” disclaimed), whereas the mark of the ’308

Registration is EZ-TIP in standard characters.

With regard to the dominant element of each mark, Applicant contends that:

The largest and most dominant features of the subject mark are the smart phone and the dollar sign

in a big circle that stands out prominently in the middle of the smart phone. The wording EA\$Y TIPPING is positioned in the lower portion of the smart phone and is in much smaller font, whereas the wording Tip and Go! is also in smaller font and positioned below the smart phone. In contrast, the dominant feature of the sited [sic] mark[] is just wording EZ-TIP.¹⁸

The Examining Attorney counters that the literal elements EA\$Y TIPPING of Applicant's mark are its dominant elements.¹⁹

We agree with the Examining Attorney and find that the literal elements EA\$Y TIPPING are the dominant elements of Applicant's mark, notwithstanding the other literal elements and the accompanying design. *See Viterra*, 671 F.3d at 1366 (“[T]he verbal portion of a word and design mark likely will be the dominant portion.”). Here, the image of the mobile phone reinforces the nature of the goods, i.e., a mobile app, and the “\$” in a circle design reinforces the nature of the app, which is that of a gratuity payment processor. It is true that the elements EA\$Y TIPPING have been disclaimed, and that disclaimed terms have less source-identifying significance when compared to non-disclaimed terms. *Cf. In re Chatam Int'l Inc.*, 380 F.3d 1340, 1342-43 (Fed. Cir. 2004); *Nat'l Data*, 753 F.2d at 1058 (disclaimed element has less source-identifying significance). That, however, does not preclude them from being the dominant element of a mark, particularly where, as here, the other literal elements,

¹⁸ 6 TTABVUE 6 (footnote omitted) (emphasis added). Applicant is correct that “case law from other jurisdictions is not binding in the United States,” 6 TTABVUE 6 n.1, and therefore we do not consider its arguments based on the registrability of marks outside the United States. *See, e.g., Double J of Broward, Inc. v. Skalongy Sportswear GmbH*, Opp. No. 84178, 1991 TTAB LEXIS 44, at *13 (TTAB 1991).

¹⁹ 8 TTABVUE 5-6.

“TIP AND GO!”, have minimal source-identifying significance, as Applicant has disclaimed the term TIP, and the “AND GO!” portion is highly suggestive of the services, as the processing is conducted via a **mobile** app – meaning that the processing can be conducted while “on the go.”

Given the generally weak nature of all the literal elements of the involved mark, the appearance of the EA\$Y TIPPING components as the first terms in the mark tips these components over the edge and renders them the dominant portion. *See, e.g., Century 21*, 970 F.2d at 876 (upon encountering the marks, consumers will first notice the identical lead word); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, Opp. No. 74797, 1988 TTAB LEXIS 60, at *8 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered[.]”).

Now we turn to the task of comparing the marks, considering first the appearance of the marks. Here, Applicant’s composite mark and the cited mark have certain differences, as Applicant’s mark has a design element and the additional words TIP AND GO!, but are similar in appearance to the extent that the dominant portion of the involved mark shares an initial “E” and the term “TIP” with the mark of the ’308 Registration.

We are not persuaded by Applicant’s arguments that its mark’s display of EA\$Y TIPPING is visually different due to its “formal and conventional appearance[.]” while the “mark EZ-TIP is in hyphenated form, [giving] it a much more compact appearance[.]”²⁰ Because EZ-TIP is registered in standard characters, we must

²⁰ 6 TTABVUE 8.

assume that the terms EZ-TIP could be displayed in the same colors, font style, and relative size and positioning as Applicant's EA\$Y TIPPING component. *See, e.g., In re Aquitaine Wine USA, LLC*, Ser. No. 86928469, 2018 TTAB LEXIS 108, at *13 (TTAB 2018) (“[T]he rights associated with a standard character mark reside in the wording per se and not in any particular font style, size, or color.”). For these reasons, we find that the cited EZ-TIP mark and Applicant's mark are somewhat similar in appearance.

Turning now to pronunciation, we find the dominant portion of Applicant's mark will sound similar to the mark of the '308 Registration. Because Applicant's EA\$Y element is likely to be perceived as a slight variation of the known word EASY, it is likely to be pronounced the same as it. In other words, the dollar sign forming the “s” is not pronounced. *See, e.g., In re Home Federal Sav. & Loan Ass'n*, Ser. No. 113589, 1982 TTAB LEXIS 202, at *5-6 (TTAB 1982) (“That applicant's mark ‘TRAN\$ FUND’ has a dollar sign where registrant's mark has a letter ‘S’ is inconsequential in a comparison of the sound, appearance, and meaning of the two marks.”). This is supported by the record, where the disclaimer of the term EA\$Y is the correctly spelled “EASY.” And, in its brief, Applicant acknowledges that “EA\$Y TIPPING” is pronounced as “ee-zee tip-ing.”²¹ Considering the mark of the '308 Registration, Applicant also concedes that EZ-TIP is pronounced as “eezee tip” and that “[t]he hyphen doesn't contribute to a separate sound[.]”²² Thus, the first terms of the

²¹ 6 TTABVUE 9.

²² *Id.*

compared literal portions of the marks (EA\$Y and EZ) are pronounced the same, and the second terms TIP and TIPPING sound the same to the extent that they share the TIP component. Consequently, the marks are similar in sound.

Because Applicant's EA\$Y TIPPING component is a slight variation of EASY TIPPING and likely to be perceived as such, it will connote the same or similar meaning and create the same or similar commercial impression as EASY TIPPING. Comparing this component of Applicant's mark (perceived as EASY TIPPING) and the mark of the '308 Registration, we agree with the Examining Attorney that the evidence of record establishes that Applicant's mark and the mark of the '308 Registration have the same overall meaning—i.e., EZ/EASY and TIP/TIPPING have the same overall meaning.²³ As discussed earlier, EZ/EASY is a laudatory term meaning “capable of being accomplished or acquired with ease; posing no difficulty,” and TIP/TIPPING is a verb meaning “to give a gratuity to.”²⁴ Moreover, TIPPING is merely the present participle verb form of TIP, “the act of giving an amount of money to someone who has provided a service, especially in a hotel or restaurant.”²⁵ We find that the marks have similar connotations, and because they are used on legally identical goods, they will engender similar commercial impressions.

With regard to connotation, Applicant argues that while its mark “EA\$Y TIPPING implies a straightforward and uncomplicated process for leaving tips or gratuities in

²³ 8 TTABVUE 6-7.

²⁴ November 7, 2023 Office Action at TSDR 178, 182.

²⁵ March 4, 2024 Office Action at TSDR 16.

the context of the restaurant or service industry,” the cited mark EZ-TIP, in contrast, suggests an easy or simplified method for a variety of tips or pieces of advice.²⁶ We disagree. We do not consider the meaning or connotation of a mark in the abstract but rather in relation to the identified goods. TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01(b)(v) (2024) and cases cited therein. Here, we have found the Applicant’s involved goods and the goods of the ’308 Registration to be legally identical in part. Where the marks are used on legally identical goods, the very similar dominant elements EA\$Y TIPPING and EZ-TIP will have similar connotations and render similar commercial impressions.

While there are some specific differences between Applicant’s mark and the mark of the ’308 Registration, we find that, considering the marks in their entirety, the marks are similar.

D. Purchase Conditions and Consumer Care

The fourth *DuPont* factor considers “[t]he conditions under which and buyers to whom sales are made....” *DuPont*, 476 F.2d at 1361. Under this factor, purchaser sophistication may tend to minimize likelihood of confusion, while impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1376 (Fed. Cir. 2005). Precedent requires that we base our decision on the least sophisticated potential purchasers. *Stone Lion*, 746 F.3d at 1325.

²⁶ 6 TTABVue 9.

Applicant argues, without evidence, that “[t]he consumers of products and services related to the Subject Mark are perceived as sophisticated consumers because they constitute, for the most part, educated consumer products and home software enthusiasts, and from a consumer standpoint, Applicant’s products and services are unlikely to be [] subject to an impulse purchase.”²⁷ “Likewise,” Applicant adds, “the consumers of the services related to the registered trademarks can be qualified as sophisticated consumers as well, constituting informed customers and professional contractors.”²⁸

Applicant does not introduce any evidence supporting its position that purchasers of the identified goods are sophisticated. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”) (quoting *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005)). Regardless, “even consumers who exercise a higher degree of care are not necessarily knowledgeable regarding the trademarks at issue, and therefore immune from source confusion.” *Made in Nature*, 2022 TTAB LEXIS 251, at *70 (quotation and quotation marks omitted). As a result, we find the fourth *DuPont* factor is neutral.

E. Applicant’s Argument that There Has Been No Actual Confusion

The eighth *DuPont* factor considers “the length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *In re Guild Mortg. Co.*, 2020 TTAB LEXIS 17, at *19 (TTAB 2020) (quoting *DuPont*, 476

²⁷ 6 TTABVUE 11-12.

²⁸ *Id.* at 12.

F.2d at 1361). In *Guild Mortg.*, the Board held that unlike the second, third, and fourth *DuPont* factors, which require us to look at the involved identifications alone, the eighth *DuPont* factor “requires us to look at **actual market conditions**, to the extent there is evidence of such conditions of record.” *Id.* (emphasis in original).

Applicant’s argument consists of a single sentence: “Applicant has marketed and offered its services and products for sale since **April 15, 2023** and is unaware of any instance of actual confusion with Registrant’s services.”²⁹ We note, however, that the application here was filed, and remains pending, on the basis of an asserted bona fide intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), and we do not see, nor does Applicant cite to any, evidence of any use in the record. Accordingly, there is no apparent basis for this conclusory argument. *See, e.g., Motion Picture Ass’n of Am. Inc. v. Respect Sportswear Inc.*, Opp. No. 91153141, 2007 TTAB LEXIS 54, at *29 (TTAB 2007).

In addition, Applicant’s allegation of a date of use in its brief is insufficient to make that evidence of record. *In re Jackson Int’l Trading Co.*, Ser. No. 77600412, 2012 TTAB LEXIS 246, at *8 (TTAB 2012) (citing *In re Simulations Publ’ns, Inc.*, 521 F.2d 797, 798 (CCPA 1975)). Therefore, the record is devoid of evidence of the extent of Applicant’s use of its involved mark, so we cannot say that there has been any meaningful opportunity for confusion to have occurred. Further, we do not know whether the owner of the ’308 Registration is aware of any instances of actual confusion as there has been no opportunity to hear from the owner of the ’308

²⁹ *Id.* at 9 (emphasis in original).

Registration in this ex parte context. *Guild Mortg.*, 2020 TTAB LEXIS 17, at *23. “We therefore are getting only half the story.” *Id.*

In any event, while a showing of actual confusion would be highly probative of a likelihood of confusion, the opposite is not true. The lack of evidence of actual confusion carries little weight, especially in an ex parte context. *Majestic Distilling*, 315 F.3d at 1317. Accordingly, the eighth *DuPont* factor is neutral.

F. Applicant’s Remaining Argument

Applicant’s reliance on other third-party registrations, such as the SLIM N’ TRIM and SLIM & TONE ORIGINAL marks, as support for its argument that because these “similar marks” on “similar products and services” peacefully coexist with each other, its mark should be able to co-exist with the mark of the ’308 Registration,³⁰ is not persuasive. It is well-settled that neither the Board nor any examining attorney is bound by prior decisions of examining attorneys to register marks. To the contrary, “the [US]PTO must decide each application on its own merits, and decisions regarding other registrations do not bind either the [USPTO] or [the reviewing] court.” *See In re Boulevard Entm’t, Inc.*, 334 F.3d 1336, 1343 (Fed. Cir. 2003); *see also In re USA Warriors Ice Hockey Program, Inc.*, Ser. No. 86489116, 2017 TTAB LEXIS 143, at *10 n.10 (TTAB 2017). The decisions of prior examining attorneys to allow other marks to register were based on the records before them, which are necessarily different than the record before the Examining Attorney and us in the present appeal.

³⁰ 6 TTABVUE 4-5.

Therefore, the fact that the other marks were allowed to register does not require a similar result here.

G. Balancing the *DuPont* Factors and Conclusion as to Likelihood of Confusion

Having carefully considered all of the evidence made of record, as well as all of the arguments related thereto, we now turn to the task of weighing the *DuPont* factors for which there has been evidence and argument. *In re Charger Ventures LLC*, 64 F.4th 1375, 1384 (Fed. Cir. 2023). The goods are legally identical in part, and their channels of trade and classes of consumers are presumed to overlap; as a result, the second and third *DuPont* factors weigh heavily in favor of a likelihood of confusion. Further, the legal identity of the goods reduces the degree of similarity between the marks necessary to conclude that there is a likelihood of confusion. Here, the marks are similar, so the first factor weighs in favor of a likelihood of confusion. The fourth (consumer sophistication), sixth (number and nature of similar marks in use on similar goods), and eighth (actual confusion) factors are neutral.

Because the first, second and third factors weigh in favor of a likelihood of confusion, the second and third heavily so, we conclude that confusion is likely. In reaching our conclusion, we are mindful that even weak marks are entitled to protection against the registration of similar marks, especially where, as here, the goods are legally identical in part and the dominant part of Applicant's mark is similar to the entirety of the mark of the '308 Registration. *See, e.g., In re Colonial Stores, Inc.*, Ser. No. 209079, 1982 TTAB LEXIS 116, at *7-8 (TTAB 1982) (likelihood of confusion is to be avoided as much between weak marks as between strong marks).

Decision

The refusal to register Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), is affirmed.