

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: August 27, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Esscenza Fragrances Corp

Serial No. 98086647

Augusto Perera of Augusto Perera, P.A.,
for Esscenza Fragrances Corp.

Audrey Ricks, Trademark Examining Attorney, Law Office 129,
Pamela Y. Willis, Managing Attorney.

Before Wellington, Allard and Cohen,
Administrative Trademark Judges.

Opinion by Cohen, Administrative Trademark Judge:

Esscenza Fragrances Corp (“Applicant”) seeks registration on the Principal



Register of for “Cologne; Perfumery; Colognes, perfumes and cosmetics;
Fragrances and perfumery; Perfumes and colognes; Perfumes, aftershaves and
colognes; Perfumes, eau de colognes and aftershaves” in International Class 3.¹

¹ Application Serial No. 98086647 (the “Application”) was filed on July 15, 2023 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an allegation of bona fide intent to

The Trademark Examining Attorney has refused registration of the Application under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that, when used in connection with these goods, Applicant's mark is likely to cause confusion, to cause mistake, or to deceive because it resembles the registered standard character mark MUSH-MUSH for the following pertinent goods "clothing, namely, shirts, T-shirts, polo shirts, pants, trousers, skirts, dresses, gloves, jackets, belts, neckties, shifts as clothing, hoodies, jerseys, short sets, bathing trunks, bathing costumes, neck tubes, neck warmers, scarves, pajamas, underwear, infant sleepers, shorts, singlets, sweaters, cloth bibs; headwear; clothing of leather, namely, shirts, pants, skirts, gloves, jackets and belts; furs being clothing."²

When the refusal was made final, Applicant appealed. The case is now fully briefed. We affirm the refusal to register.

use the mark in commerce. The Application includes the following description of the mark: "The mark consists of a stylized depiction of an apricot in gold with solid black lines outlining the pit of the fruit in the center. Superimposed on top of the fruit design is a black rectangle with the stylized gold words 'MUSH MUSH' inside the rectangle. All the forgoing presented on a black background." The colors gold and black are claimed as a feature of the mark.

The TTABVUE and TRADEMARK STATUS AND DOCUMENT RETRIEVAL (TSDR) citations in this opinion refer to the docket and electronic file database for the Application. All citations to the TSDR database are to the downloadable .pdf version of the documents.

² Registration No. 7256503 (the "Cited Registration" or the "Cited Mark") issued January 2, 2024 based on a request for extension of protection under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a), based on International Registration No. 1540013. *See* 15 U.S.C. §§ 1141f(b), 1141g. The Cited Registration includes goods and services in International Classes 9, 16, 28, 41 which do not form part of the basis for refusal. *See* 8 TTABVUE 3 ("The sole issue on appeal is whether a likelihood of confusion exists between ... MUSH MUSH ... and ... the mark MUSH-MUSH for specifically "Clothing, namely, shirts, T-shirts, polo shirts, pants, trousers, skirts, dresses, gloves, jackets, belts, neckties, shifts as clothing, hoodies, jerseys, short sets, bathing trunks, bathing costumes, neck tubes, neck warmers, scarves, pajamas, underwear, infant sleepers, shorts, singlets, sweaters, cloth bibs; headwear; clothing of leather, namely, shirts, pants, skirts, gloves, jackets and belts; furs being clothing' in International Class 25.").

I. Evidentiary Issue

Before we turn to the merits, we address an evidentiary issue.

After submission of Applicant's appeal brief on April 18, 2025 ("Original Brief"), the Board informed Applicant that its Original Brief was not at least 11-point type and double-spaced as required by Trademark Rule 2.126(a)(1) and, if double-spaced, would exceed the page limit set forth in Trademark Rule 2.142(b)(2).³ Applicant was allowed time to submit a brief that complied with the filing requirements of Trademark Rules 2.126 and 2.142.⁴ Applicant submitted an appeal brief on April 27, 2025 which was accepted by the Board ("Replacement Brief").⁵ In its Replacement Brief, Applicant did not include a spreadsheet of third-party registrations, which was included in its Original Brief.⁶ However, a very similar spreadsheet was included with Applicant's October 28, 2024 Response to Office,⁷ together with copies of most of the summarized registrations.⁸

³ 5 TTABVUE.

⁴ *Id.*

⁵ 6-7 TTABVUE.

⁶ *See, e.g.*, 4 TTABVUE 4-8.

⁷ October 28, 2024 Response to Office Action at TSDR 28-33.

⁸ Applicant's spreadsheet includes a reference to INFECTED MUSHROOM (Reg. No. 6803998) for "hats; bandanas; beanies; hoodies; tank tops; long-sleeved shirts; short-sleeved shirts; t-shirts." *Id.* at 28. However, Applicant did not submit a copy of this registration during examination. Because the Board does not take judicial notice of third-party registrations, we give Applicant's arguments based on this registration no further consideration. *See e.g., In re Thomas Nelson, Inc.*, No. 76681269, 2011 WL 481341, at *6, n. 18 (TTAB 2011) ("We recognize the Federal Circuit exercised its discretion to take judicial notice of third-party registrations in an ex parte appeal[;] [h]owever, the Board's well-established practice is not to take judicial notice of third-party registrations[.]")

The Examining Attorney objects to Applicant's reference to a spreadsheet in its Replacement Brief, arguing that Applicant is referencing new evidence in contravention of Trademark Rule 2.142(d) which requires the record be complete prior to appeal.⁹ 37 C.F.R. § 2.142(d); see *In re Seminole Tribe of Fla.*, No. 87890892, 2023 WL 3751113, at *2 (TTAB 2023). As pointed out by Applicant, the spreadsheet referenced in its Replacement Brief was included in a very similar form during prosecution and the Examining Attorney did not object at that time.¹⁰ Accordingly, we will consider the spreadsheet included with Applicant's October 28, 2024 Response to Office and arguments related thereto to the extent that the information contained in the spreadsheet was properly made of record during examination.

II. Section 2(d) Refusal

"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 or services of the applicant, to cause confusion [or] mistake, or to deceive." *In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023). Our determination of the likelihood of confusion under Section 2(d) of the Trademark Act is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) ("*DuPont*"); *Charger Ventures*, 64 F.4th at 1379. We consider each

⁹ 8 TTABVUE 3.

¹⁰ 9 TTABVUE 2-3.

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).

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, 1116 (Fed. Cir. 2024) (citing *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1362 (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 Charger Ventures*, 64 F.4th at 1381. Two key considerations are the similarities between the marks and the similarities between the goods or services. *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)). We discuss the relevant factors below.

A. Strength of Cited MUSH-MUSH Mark

The sixth *DuPont* factor, “[t]he number and nature of similar marks in use on similar goods,” allows an applicant in an ex parte appeal to contract the scope of protection otherwise accorded a cited mark by adducing evidence of conceptual or commercial weakness. *DuPont*, 476 F.2d at 1361. “A mark’s strength is measured both by its conceptual strength ... and its marketplace strength” *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010). In determining the strength of the Cited Mark, we consider inherent strength, based on the nature of the mark itself. *In re FCA US LLC*, No. 85650654, 2018 WL 1756431, at *13 (TTAB 2018). We also consider whether the mark has commercial weakness in the marketplace if

there is evidence in the record. *DuPont*, 476 F.2d at 1361 (the sixth *DuPont* factor considers “the number and nature of similar marks in use on similar goods.”); *Top Tobacco, L.P. v. N. Atl. Operating Co.*, No. 91157248, 2011 WL 6099691, at *9 (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.*, No. 91118587, 2006 WL 2460188, at *20 (TTAB 2006). “The purpose of introducing evidence of third-party 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 v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1324 (Fed. Cir. 2018) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1368, 1371 (Fed. Cir. 2005)).

Evidence that a mark, or an element of a mark, appears in the marks of many different third-party registrants may undermine the common element’s conceptual or inherent strength. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGaA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ... that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.’”) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338-39 (Fed. Cir. 2015)).

Applicant postulates that any likelihood of confusion is “significantly diminished

due to the dilution and saturation of the shared content within the relevant marketplace.”¹¹ Applicant did not introduce any evidence of third-party marketplace uses. Instead, Applicant relies on twenty-eight third-party registrations that include the term MUSH for a variety of goods and services. However, most of the third-party registrations are for unrelated goods and services (e.g., dietary supplements, photography, alarm clocks, computer software, entertainment and educational services) that differ significantly from the various clothing items identified in the Cited Registration, and Applicant supplied no evidence demonstrating how they are related. Because of the substantial difference in goods and services, we exclude from our analysis all but two third-party registrations. *See In re i.am.symbolic, llc*, 866 F.3d at 1328 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration).

The two relevant registrations are MUSHROOM HOUR (Reg. No. 6303126) for a variety of goods including “clothing, namely, t-shirts, and tank tops”;¹² and SMOOSHY MUSHY (Reg. No. 6411512) for “panties, pajamas,”¹³ but they are of little probative value. Not only do these registrations contain additional terms, neither registration includes the term MUSH alone. Rather, in the instance of MUSHROOM HOUR, the additional letters create a different word that has an entirely different

¹¹ 27 TTABVUE 16-21.

¹² October 28, 2024 Response to Office Action at TSDR 30, 77.

¹³ *Id.* at 31, 87.

meaning (e.g., “mushroom” is a fungus whereas “mush” describes something having a soft and spongy texture).¹⁴ The additional letters added to MUSH and additional wording in the third-party marks cause them to be much less similar to the Cited Mark MUSH-MUSH than that mark is to Applicant’s mark. *See Sabhnani v. Mirage Brands, LLC*, No. 92068086, 2021 WL 6072822, at *13 (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.”).

We find that Applicant has not demonstrated that the Cited Mark is conceptually weak. Because the Cited Mark is registered on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, we afford it “the normal scope of protection to which inherently distinctive marks are entitled.” *Bell’s Brewery, Inc. v. Innovation Brewing*, No. 91215896, 2017 WL 6525233, at *9 (TTAB 2017); *see Tea Bd. of India*, 2006 WL 2460188, at *22.

The sixth *DuPont* factor is neutral.

¹⁴ The Board may take judicial notice of dictionary definitions retrieved from online sources when the definitions themselves are derived from dictionaries that exist in printed form. *See B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988); *In re Cordua Rests. LP*, No. 85214191, 2014 WL 1390504, at *2 n.4 (TTAB 2014) *aff’d* 823 F.3d 594 (Fed. Cir. 2016). Accordingly, we take judicial notice of the definition of “mush” meaning “something soft and spongy or shapeless” and “mushroom” meaning “an enlarged complex aboveground fleshy fruiting body of a fungus (such as a basidiomycete) that consists typically of a stem bearing a pileus.” MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary (accessed August 22, 2025).

B. The Marks

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.’” *Sabhnani*, 2021 WL 6072822, at *13 (quoting *Palm Bay Imps.*, 396 F.2d at 1371). In assessing the marks, we compare their “appearance, sound, connotation and commercial impression.” *Juice Generation*, 794 F.3d at 1340 (citation omitted); *accord i.am.symbolic*, 866 F.3d at 1324. It has been consistently held that similarity in any one of the elements of sound, appearance or meaning is sufficient to support a finding of likelihood of confusion. *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732 (CCPA 1968) (citation omitted); *see also Hancock v. Am. Steel & Wire Co.*, 203 F.2d 737, 740 (CCPA 1953) (“it is proper to consider [the marks’] appearance, sound and meaning ... but a combination of all three factors need not necessarily exist”) (cleaned up; citations omitted). The issue is not whether the marks can be distinguished when subjected to 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. *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012). We keep in mind that consumers must depend on their recollection of marks to which they’ve previously been exposed and that their memories are fallible. *See, e.g., In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014); *Sage Therapeutics, Inc. v. Sageforth Psych. Servs., LLC*, No. 91270181, 2024 WL 1638376, at *5 (TTAB 2024)

(quoting *In re i.am.symbolic, llc*, No. 85916778, 2018 WL 3993582, at *4 (TTAB 2018)).

“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.*, 929 F.2d 645, 647 (Fed. Cir. 1990) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 1295 (CCPA 1974)). On the other hand, “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 consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). Where a mark consists of a word and a design, as is the case with Applicant’s MUSH MUSH and design mark, the word portion is typically accorded greater weight because it is more likely to make an impression upon purchasers, to be remembered by them, to be used by them to request the goods, and to be used to discuss the goods or recommend them to others by word-of-mouth. *See In re Viterra Inc.*, 671 F.3d 1358, 1366 (Fed. Cir. 2012); *L.C. Licensing Inc. v. Berman*, No. 91162330, 2008 WL 835278, at *3 (TTAB 2008) (citing *In re Appetito Provisions Co.*, No. 423405, 1987 WL 124293, at *1 (TTAB 1987)).

The design, consisting of “a stylized depiction of an apricot” appears in the background with the words MUSH MUSH superimposed over it. The apricot design is not so prominent or striking that it overwhelms the words MUSH MUSH. Rather, the apricot design is subordinate to the words MUSH MUSH and does not draw attention away from the words MUSH MUSH, or otherwise affect consumer

perception of the words. Accordingly, MUSH MUSH is the dominant element of Applicant's MUSH MUSH and design mark.¹⁵

Applicant has provided no argument or evidence that the apricot design has any significance beyond its presence as a visual element of Applicant's mark. The words MUSH MUSH in Applicant's mark will be pronounced, whereas the apricot design will not. *See, e.g., Herbko Int'l*, 308 F.3d at 1165 ("Because the impact of the design in the overall commercial impression is minor when compared with the words, a consumer viewing Herbko's mark would attach greater significance to the words CROSSWORD COMPANION than to the crossword puzzle design."); *CBS, Inc. v. Morrow*, 708 F.2d 1579, 1581-82 (Fed. Cir. 1983) ("[M]inor design features do not necessarily obviate likelihood of confusion arising from consideration of the marks in their entireties. Moreover, in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.").

The literal elements of the marks are nearly identical in appearance but for the hyphen in the Cited Mark, a minimal difference. The inclusion or absence of the hyphen has no effect on the overall sound of the marks. *See, e.g., Peterson v. Awshucks SC, LLC*, No. 92066957, 2020 WL 7888976, at *18 (TTAB 2020) ("Punctuation, such

¹⁵ In an apparent attempt to diminish the prominence of the literal elements MUSH MUSH, Applicant argues that the wording is "highly suggestive" without further expanding on this argument or citing to any evidence in support. *See, e.g., Estée Lauder Inc. v. L'Oreal, S.A.*, 129 F.3d 588, 595 (Fed. Cir. 1997) ("arguments of counsel cannot take the place of evidence lacking in the record") (citation omitted); *Iron Balls Int'l Ltd. v. Bull Creek Brewing, LLC*, No. 92079099, 2024 WL 2844425, at *26 (TTAB 2024) (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1372 (Fed. Cir. 2018)) (internal citations omitted).

as quotation marks, hyphens, periods, commas, and exclamation marks, generally does not significantly alter the commercial impression of the mark.”); *In re White Swan Ltd.*, No. 73617169, 1988 WL 252416, at *1 (TTAB 1988) (when the same words are used in marks, the presence or absence of hyphens or other punctuation marks generally will be of little significance). Because punctuation is generally not articulated, the addition of the hyphen in the Cited Mark does not alter the pronunciation of the mark and consumers will likely pronounce both marks in an identical manner.

In addition, Registrant’s standard character MUSH-MUSH mark can be depicted in any font, size, or color and could be displayed in a font similar to Applicant’s depiction of MUSH MUSH, further increasing the similarity of the marks’ appearances. Trademark Rule 2.52(a), 37 CFR 2.52(a); *see also Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 1353 (Fed. Cir. 2011) (We must “use the *DuPont* factors to determine the likelihood of confusion between depictions of standard character marks that vary in font style, size, and color and the other mark.”); *In re Aquitaine Wine USA, LLC*, No. 86928469, 2018 WL 1620989, at *5 (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.”); *Weider Publ’ns, LLC v. D&D Beauty Care Co.*, No. 91199352, 2014 WL 343269, at *9 (TTAB 2014) (standard character mark “might be used in any stylized display or color scheme, including one that is similar or identical to any lettering style” in the compared mark) (citations omitted).

Thus, while Applicant's apricot design is a point of departure from Registrant's standard character mark, the marks are nonetheless extremely similar in appearance and identical in pronunciation.

Turning to the connotations and commercial impressions of the marks, Applicant argues that MUSH "is a playful and whimsical term that evokes a sense of fun and lightheartedness" which can "suggest a comforting or enjoyable scent experience" whereas the hyphen in the Cited Mark "alters its interpretation ... imply[ing] a more structured or formal relationship between the two instances of 'MUSH.'"¹⁶ Applicant continues that its repetition of MUSH "creates a rhythmic and catchy phrase that enhances its memorability and distinctiveness. This repetition can evoke a sense of familiarity and friendliness, which is particularly relevant in the context of personal care products" but that the Cited Mark, linked to a wide range of technological and educational products and "with its hyphen, may not carry the same playful or inviting connotation, as it could be interpreted as more formal or less engaging."¹⁷ Applicant's arguments are not persuasive.

While Applicant argues that the Cited Registration involves technological and educational products thereby invoking a different connotation and commercial impression, the goods cited by the Examining Attorney as a basis for the refusal to register are "Clothing, namely, shirts, T-shirts, polo shirts, pants, trousers, skirts, dresses, gloves, jackets, belts, neckties, shifts as clothing, hoodies, jerseys, short sets,

¹⁶ 6 TTABVue 11.

¹⁷ *Id.* at 11-12; *see id.* at 14-15.

bathing trunks, bathing costumes, neck tubes, neck warmers, scarves, pajamas, underwear, infant sleepers, shorts, singlets, sweaters, cloth bibs; headwear; clothing of leather, namely, shirts, pants, skirts, gloves, jackets and belts; furs being clothing” not technological or educational products.¹⁸ Applicant’s arguments are based on goods in classes of the Cited Registration which do not form the basis of the Examining Attorney’s refusal and are thus, unpersuasive.

Because the dominant, literal element of Applicant’s mark is extremely similar in terms of visual appearance to the Cited Mark; and the marks are identical in terms of pronunciation; and are extremely similar, if not identical, in terms of connotation and commercial impression, we find that overall, the marks are extremely similar. The first *DuPont* factor weighs heavily in support of the refusal.

C. Similarity or Dissimilarity of the Goods, Consumers and Channels of Trade

1. Relatedness of the Goods

“The second *DuPont* factor ‘considers [t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.’” *Embiid*, 2021 WL 2285576, at *10 (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 1306 (Fed. Cir. 2018) (quoting *DuPont*, 476 F.2d at 1361)).

“In analyzing the [goods], the Board considers [t]he similarity or dissimilarity and nature of the [goods] as described in an application or registration.” *In re OSF*

¹⁸ The Examining Attorney submitted Internet evidence to support the argument that, like Applicant’s assertion that its perfume evokes comfort and familiarity, clothing is also used as a form of self-expression and “can also evoke a sense of softness, comfort, and warmth ... and can also evoke a feeling of warmth and familiarity.” 8 TTABVue 8.

Healthcare Sys., No. 88706809, 2023 WL 6140427, at *4 (TTAB 2023) (quoting *Embiid*, 2021 WL 2285576, at *10) (quotation omitted). The “Examining Attorney need not prove, and we need not find, similarity as to each product listed in the description of goods” to affirm the refusal. *In re St. Julian Wine Co.*, No. 87834973, 2020 WL 2788005, at *5 (TTAB 2020). “[I]t is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.” *In re Aquamar, Inc.*, No. 85861533, 2015 WL 4269973, at *4 n.5 (TTAB 2015).

It is “not necessary that the goods be similar or even competitive to support a finding of a likelihood of confusion.” *Coach Servs.*, 668 F.3d at 1369 (quoting *7-Eleven, Inc. v. Wechsler*, No. 91117739, 2007 WL 1431084, at *10 (TTAB 2007)). “[L]ikelihood of confusion can be found ‘if the respective goods are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Id.*

One way to show that consumers perceive goods as related (in the trademark sense) is to show that other companies offer the goods identified in an application and those identified in a cited registration under the same mark. *See, e.g., Naterra Int’l*, 92 F.4th at 1117; *Detroit Athl. Co.*, 903 F.3d at 1306; *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002). To support the argument that the goods are related, the Examining Attorney submitted evidence of over ten third-party websites offering clothing items and fragrances for sale under the same mark,

including RALPH LAUREN;¹⁹ COACH;²⁰ MICHAEL KORS;²¹ GUCCI;²² DKNY;²³ HOLLISTER;²⁴ MARC JACOBS;²⁵ and DOLCE & GABBANA.²⁶ Contrary to Applicant's arguments that its goods are "distinctly different"²⁷ having "a clear distinction in the nature, use, and function of the goods and services,"²⁸ the third-party website evidence demonstrates that Applicant's perfume goods and Registrant's clothing goods are offered under the same mark by the same party and are thus, related. *See, e.g., Detroit Athletic*, 903 F.3d at 1306 (crediting relatedness evidence that third parties use the same mark for the goods and services at issue because "[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both"); *Hewlett-Packard.*, 281 F.3d at 1267 (evidence that "a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis").

2. Trade Channels and Classes of Relevant Consumers

The third *DuPont* factor considers "[t]he similarity or dissimilarity of established, likely-to-continue trade channels" as well as "[t]he conditions under which and buyers

¹⁹ October 18, 2024 Office Action at TSDR 12-44.

²⁰ *Id.* at 48-65.

²¹ *Id.* at 66-85

²² *Id.* at 89-102.

²³ *Id.* at 103-16.

²⁴ December 2, 2024 Final Office Action at TSDR 16-50.

²⁵ *Id.* at 51-75.

²⁶ *Id.* at 97-14.

²⁷ 6 TTABVUE 17.

²⁸ *Id.* at 19.

to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 476 F.2d at 1361. As with the comparison of the goods, we base our comparison of the trade channels and customers on what is set forth in the Application and Cited Registration. *See, e.g., i.am.symbolic*, 866 F.3d at 1325.

Applicant repeats its arguments regarding the relatedness of the goods,²⁹ arguing that the trade channels are different because the goods are sold in different stores and target different demographics and consumers. Applicant also devotes much of its arguments to comparing the goods, trade channels and consumers of goods not cited by the Examining Attorney as a basis for refusal (e.g., photography equipment or educational services).³⁰

When, as in this case, the Application’s and Cited Registration’s identifications do not limit how the goods are sold or to whom, we presume that they are sold “in all normal trade channels to all the normal classes of purchasers.” *Detroit Athl.*, 903 F.3d at 1308 (citation omitted). That these goods are distributed in the “normal” way for each good, however, does not itself tell us whether one good’s “normal” channels and customers overlap with the other’s channels and customers, but the Examining

²⁹ *See, e.g., id.* at 17. (Applicant’s goods are “primarily focused on personal care products, specifically colognes, perfumes, and cosmetics ... targeting consumers who are looking for scents and beauty products.”); *id.* at 19 (Registrant’s clothing goods are “distributed through fashion stores and apparel websites, driven by seasonal trends and personal style”); *id.* at 18 (Applicant’s goods appeal to adults and individuals interested in personal grooming and fragrances whereas Registrant’s “extensive range of products, including toys and educational materials, [are] primarily aimed at children and their parents.”).

³⁰ *See, e.g., id.* at 22 (“The educational and entertainment aspects of MUSH-MUSH’s offerings cater to families and children”); *id.* at 23 (“There is no evidence that fragrance brands commonly expand into electronics, toys or education services, nor that manufacturers of electronic devices and toys diversify into perfumery.”).

Attorney's Internet evidence of third-party use demonstrates that more than ten third-parties who sell clothing also sell perfume together on their retail websites. *See, e.g., Hewlett-Packard*, 281 F.3d at 1267 (evidence that "a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis"); *Embiid*, 2021 WL 2285576, at *15 (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). This evidence shows that the trade channels and customers for the goods in the Application and Cited Registration overlap to at least some degree. Aside from attorney argument, which is no substitute for evidence, Applicant offers no evidence to the contrary. *See, e.g., Estée Lauder.*, 129 F.3d at 595 ("arguments of counsel cannot take the place of evidence lacking in the record") (citation omitted).

The second and third *DuPont* factors both weigh in favor of a finding of likelihood of confusion.

D. Purchase Conditions and Consumer Care

The fourth *DuPont* factor considers "the conditions under which and buyers to whom sales are made, i.e., 'impulse vs. careful, sophisticated purchasing.'" *DuPont*, 476 F.2d at 1361. "Purchaser sophistication may tend to minimize likelihood of confusion. Conversely, impulse purchase of inexpensive items may tend to have the opposite effect." *Palm Bay Imps. Inc.*, 396 F.3d at 1376.

Once again, Applicant attempts to draw a distinction between its goods and consumers and those of Registrant's by focusing on Registrant's goods not cited by the Examining Attorney as the basis for refusal.³¹ Applicant argues that its goods are associated with personal grooming and self-care and "Consumers in this market often engage in careful consideration before making a purchase."³² The problem with Applicant's assertion is that, beyond inferences we can draw from the broadly identified goods themselves, there is no evidence in the record to give us any insight as to the possible sophistication of consumers of Applicant's or Registrant's goods. *See In re I-Coat Co., LLC*, No. 86802467, 2018 WL 2753196, at *11 (TTAB 2018); *S.W. Mgmt., Inc. v. Ocinomled, Ltd.*, No. 94002242, 2015 WL 4464550, at *17 (TTAB 2015) (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein); *Estée Lauder*, 129 F.3d at 595 ("arguments of counsel cannot take the place of evidence lacking in the record") (citation omitted).

The Application and Cited Registration identify goods that are not restricted by target market, price, or any other manner that might suggest higher than normal consumer sophistication. While we can infer from the nature of Applicant's and Registrant's relevant goods that potential purchasers may include sophisticated as

³¹ 6 TTABVUE 25 ("the goods ... associated with the MUSH-MUSH mark encompass a wide range of educational and entertainment products, including digital cameras, educational toys, and various forms of media.").

³² 6 TTABVUE 24.

well as unsophisticated consumers, “[p]recedent requires that we base our decision on the least sophisticated potential purchasers.” *Stone Lion*, 746 F.3d at 1325.

Accordingly, we find that the fourth *DuPont* factor is neutral in our analysis of likelihood of confusion.

III. Summary

Having considered all of the arguments and evidence of record, we now turn to weighing the relevant likelihood of confusion factors. We find that the factors concerning the strength of the Cited Mark and the sophistication of potential purchasers are both neutral. The near identity of the literal terms in the marks causes the first factor to weigh heavily in favor of finding a likelihood of confusion; and the relatedness of the goods identified in the Application and in Class 25 of the Cited Registration and the overlap, at least to some degree, in channels of trade and classes of consumer cause the second and third factors to weigh in favor of a finding of likelihood of confusion. All factors either weigh in favor of a likelihood of confusion or are neutral.

On balance, we conclude there is a likelihood of confusion.

Decision: The refusal to register Applicant’s MUSH MUSH and Design mark under Section 2(d) of the Trademark Act is affirmed.