

This Opinion is not a
Precedent of the TTAB

Hearing: January 24, 2017

Mailed: March 17, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nomi Network, Inc.

Serial No. 85677459

Donna A. Tobin and Kimberly M. Maynard of Frankfurt Kurnit Klein & Selz P.C.,
for Nomi Network, Inc.

Paul A. Moreno, Law Office 103,¹
Michael Hamilton, Managing Attorney.

Before Wellington, Ritchie, and Shaw,
Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Nomi Network, Inc. (“Applicant”) seeks registration on the Principal Register of
the mark NOMI MADE FOR A BETTER LIFE,² in standard characters, for, as

¹ Mr. Moreno was assigned to the application after briefing, but appeared on behalf of the Office at the oral hearing.

² Application Serial No. 85677459 was filed on July 15, 2012, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). An Amendment to Allege Use alleging dates of first use anywhere and in commerce as of May 28, 2015 was filed on July 24, 2015 and accepted. A request to divide out certain classes of goods and services was filed on November 19, 2014. The “child” application was published and issued as Registration No. 4867478 on December 8, 2015.

ultimately amended, “on-line retail store services featuring clothing items, excluding footwear, that are specifically identified as made by survivors of sex slavery and human trafficking and sold to consumers who wish to support victims of sex slavery and human trafficking,” in International Class 35. The application contains the following statement: The word NOMI has no meaning in a foreign language.

The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when applied to the identified goods, so resembles the previously registered mark, NOMI,³ also in standard character format, for “footwear,” in International 25, as to be likely to cause confusion, mistake, or to deceive.

When the refusal was made final, Applicant appealed. Applicant filed a request for reconsideration, which was denied, and a request for remand to submit newly available evidence, which was granted, although the refusal was continued. Both Applicant and the Examining Attorney filed briefs and Applicant filed a reply brief. Applicant requested an oral hearing, which was presided over by this panel on January 24, 2017. For the reasons discussed below, we affirm the refusal to register.

I. Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also*

³ Registration No. 3918897 issued February 15, 2011. We note that a Section 8 affidavit of continuing use does not appear to have been filed by registrant.

In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). We consider the *du Pont* factors for which arguments or evidence were presented. The other factors, we consider to be neutral.

The Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entirety. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). In comparing the marks, we are mindful that the test 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 so that confusion as to the source of the services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd mem.*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The mark in the cited registration is NOMI. This term appears to be arbitrary or fanciful, and Applicant has acknowledged that it has no meaning. Applicant's mark incorporates in full the inherently distinctive term NOMI and adds the term or slogan MADE FOR A BETTER LIFE, which, while also distinctive, is suggestive of Applicant's stated mission. As Applicant states on its website: "Our mission is to create economic opportunities for survivors and women at risk of trafficking by providing training, product development, and marketing support."⁴ Because the shared term NOMI appears first in Applicant's mark, it is also the "most likely to be impressed upon the mind of a purchaser and remembered." *Presto Products, Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988); *see also Palm Bay Imports*, 73 USPQ2d at 1692. We thus find the marks as a whole to convey similar meanings, with consumers likely to believe that Applicant's NOMI MADE FOR A BETTER LIFE is a variation on the NOMI mark or an additional offering thereof, perhaps with a specific focus. The marks, when considered in their entireties, are similar in sight, sound and overall commercial impression.

This first *du Pont* factor weighs in favor of finding a likelihood of confusion.

The Goods and Services/ Their Channels of Trade

We next consider the relatedness of the goods and services and the channels of trade. The cited registration identifies "footwear." The application identifies "on-line retail store services featuring clothing items, excluding footwear, that are specifically

⁴ 10 TTABVUE 8.

identified as made by survivors of sex slavery and human trafficking and sold to consumers who wish to support victims of sex slavery and human trafficking.”

The Examining Attorney has submitted into the record a number of webpages showing footwear offered together with on-line retail clothing services. These include Nike (nike.com); Ann Taylor (anntaylor.com); J Crew (jcrew.com); Old Navy (oldnavy.gap.com); The North Face (thenorthface.com); United Colors of Benetton (us.benetton.com); and Coach (coach.com). The Examining Attorney also submitted numerous use-based, third-party registrations including on-line retail clothing services on the one hand and footwear on the other. These include, among others, ADVENTURE EVERYDAY (Registration No. 4637797); FRESH CANDY (Registration No. 4602861); MEN IN TOWN (Registration No. 4573585); MAVI (Registration No. 4536409); RECHARGE YOUR BODY + SOUL (Registration No. 4612432); A MOI (Registration No. 4600112); and CITY SPORTS (and design) (Registration No. 4619873). Copies of use-based, third-party registrations may serve to suggest that the goods and services are of a type which may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993). Although Applicant specifically excluded “footwear” from its identification of services, consumers will not necessarily be aware of this. In short, a consumer who is accustomed to the idea that the same entity will use the same mark in connection with providing on-line retail clothing services and footwear may mistakenly believe that there is a relationship between Applicant’s services and registrant’s footwear upon encountering Applicant’s use of the arbitrary term NOMI in its mark.

Applicant takes the position that consumers seeking its on-line retail clothing services would not seek nor encounter the footwear offered by registrant:

With information about the purpose of the clothing, where it was made, and how it supports victims of human trafficking surrounding each sale of clothing, consumers using Applicant's online retail services cannot separate those services from the support of Applicant's charitable purpose and every purchaser of goods through Applicant's on-line retail services, which are offered in connection with Applicant's mark, knows that he or she does so to support victims of sex slavery and human trafficking and is making the decision to purchase the product in order to support Nomi Network. Indeed, Nomi Network's clothing is always offered in this context, as Nomi Network's goal is to generate support for it [sic] charitable purpose.⁵

Applicant further cites an unpublished Board case in arguing that the Examining Attorney's analysis "improperly divorces Applicant's clothing from its charitable services."⁶ *See In re Triple T Enterprises*, 2014 WL 2990396 (TTAB Jun 12, 2014 Serial Nos. 85297275; 85300439). In that case, the Board found that despite having identical marks, applicant's goods were not confusingly similar to those in the cited registration since applicant's goods were "promotional" in nature. "In other words," the Board pointed out, "the marks are used in different marketing milieus and will not be encountered by the same consumers." *Id.* at 10. Here, by contrast, although Applicant may be promoting a cause, its goods are not promotional.⁷

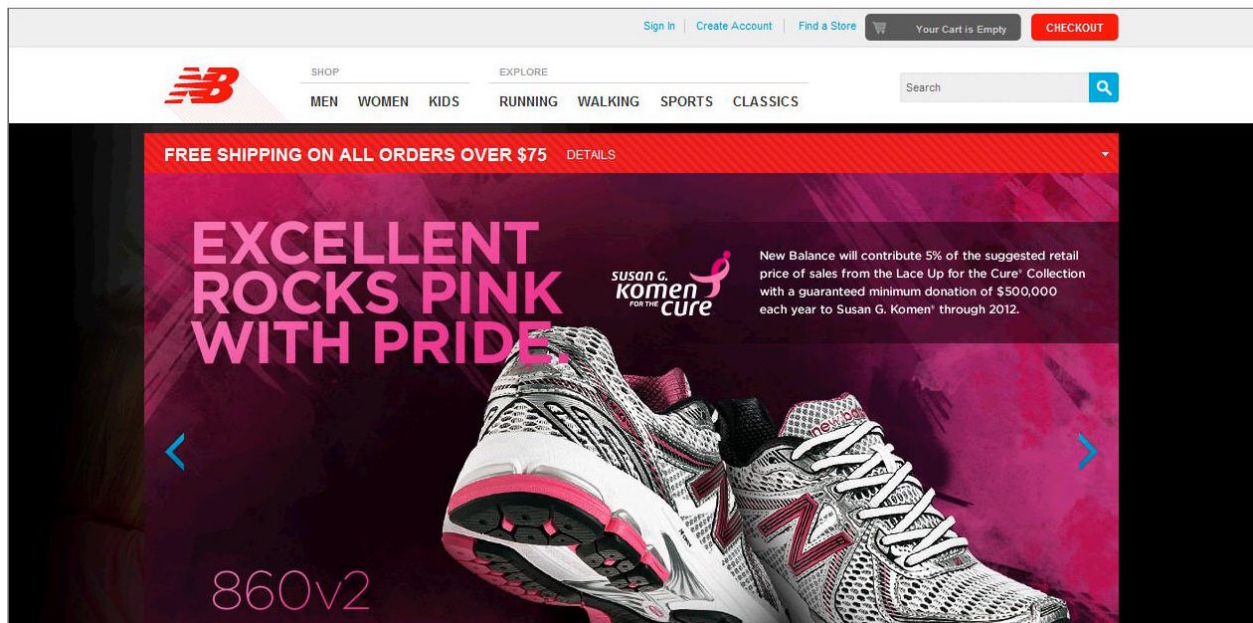
⁵ 11 TTABVUE 4-5.

⁶ 18 TTABVUE 1.

⁷ We further emphasize that every case must be decided on its own merits. In particular, while applicants may cite to non-precedential decisions, such decisions are not binding on the Board and the Board does not encourage this practice. *In re Fiat Grp. Mktg. & Corporate Commc'ns S.p.A.*, 109 USPQ2d 1593, 1596 n.6 (TTAB 2014); *In re Procter & Gamble Co.*, 105 USPQ2d 1119, 1121 (TTAB 2012); *In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1151 n.7 (TTAB 2011); *Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1875 n.5 (TTAB 2011).

The Examining Attorney points out that while the services and channels of trade of Applicant are limited, those of registrant are not. Thus Registrant's shoes may be sold or found in a similar trade channel, namely, advertised or sold in connection with a charitable cause. The Examining Attorney further points out that at least one website cited in the record for footwear, newbalance.com, specifically refers to donations to a charity cause:

http://www.newbalance.com/on/demandware.store/Sites-newbalance_us-Site/default/Default-Start?camp=PS03001001525&gclid=C1bfMNN7MCFcRa4Aodg24AJQ 10/23/2012 12:57:05 PM



Thus there is overlap between the charity purpose, as identified by Applicant, and the broadly identified wording in the cited registration. This is also therefore in contrast to the situation in another case cited by Applicant where the Board found the relevant purchasers to be different. See *Edwards Lifesciences v. Vigilanz Corp.*, 94 USPQ2d 1399, 1412-1413 (TTAB 2010). We find that these *du Pont* factors, too, favor a finding of likelihood of confusion.

Consumer Sophistication and Degree of Purchaser Care

Applicant urges us to consider the consumer sophistication and degree of purchaser care likely to be exercised by the consumers of its on-line retail clothing services, “specifically identified as made by survivors of sex slavery and human trafficking and sold to consumers who wish to support victims of sex slavery and human trafficking.”

Applicant has not presented any evidence, however, that the consumers of these goods and services will necessarily have a particular level of sophistication. We must make our determination based on the least sophisticated consumer. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (affirming that TTAB properly considered all potential investors for recited services, which included sophisticated investors, but that precedent requires consumer care for likelihood-of-confusion decision to be based “on the least sophisticated potential purchasers”). We find this factor to be neutral.

II. Conclusion

On balance, after considering all of the arguments and evidence of record as they pertain to the relevant *du Pont* factors, we find that the goods and services are related and presumably would travel through some of the same channels of trade to some of the same consumers, and that the marks, when viewed in their entirety, are also similar in sight, sound, connotation and commercial impression. Accordingly, we find a likelihood of confusion between the mark NOMI MADE FOR A BETTER LIFE for

which Applicant seeks registration in International Class 35, and the mark in the cited registration, NOMI.

Decision: The refusal is affirmed.