

This Opinion is not a
Precedent of the TTAB

Mailed: November 1, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Cocoon International Sales, LLC
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Serial Nos. 87102115 and 87102130
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Amy Sullivan Cahill of Cahill IP PLLC,
for Cocoon International Sales, LLC.

Katherine S. Chang, Trademark Examining Attorney, Law Office 115,
Dan Brody, Managing Attorney.

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Before Mermelstein, Kuczma and Coggins,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Cocoon International Sales, LLC (“Applicant”) seeks registration on the Principal
Register of the marks:

COCOON BY SEALY (standard character mark)¹; and

¹ Application Serial No. 87102115 was filed on July 13, 2016, based upon Applicant’s claim of first use anywhere and first use in commerce since at least as early as March 8, 2016.



for: Mattresses; pillows in International Class 20.

The Trademark Examining Attorney refused registration of Applicant's marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), citing Registration No. 3359214 owned by 680934 BC INC ("Registrant") for the mark SLEEP COCOON (standard character mark) for mattresses and pillows in Class 20 as a bar to registration.³

When the refusals were made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the requests for reconsideration, the appeals were resumed and Applicant and the Examining Attorney submitted briefs. Inasmuch as the appeals of the refusals of registration of Serial Nos. 87102115 and 87102130 under § 2(d) are based on the same cited Registration, and have essentially identical records and legal issues, they have been consolidated⁴ and we issue this single opinion. TRADEMARK TRIAL AND APPEAL BOARD

² Application Serial No. 87102130 was filed on July 13, 2016, based upon Applicant's claim of first use anywhere and first use in commerce since at least as early as March 8, 2016. "The mark consists of a star above the word 'COCOON' above the wording 'by Sealy.' The square on which the mark appears is simply background and is not a feature of the mark." Color is not claimed as a feature of the mark.

³ Registration No. 3359214 issued December 25, 2007, and is renewed. Additional goods in International Class 20 were identified in the Registration when issued, but were deleted by Registrant when the Registration was renewed.

⁴ See Order of July 18, 2018 granting the Examining Attorney's Motion to Consolidate the appeals. 14 TTABVUE.

MANUAL OF PROCEDURE (“TBMP”) § 1214 (June 2018). As set forth below, the refusals to register are affirmed.

I. Likelihood of Confusion

Our determination under § 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). Not all of the *du Pont* factors are relevant to every case, and only factors of significance to the particular mark need be considered. *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). In addition to the similarities between the marks and the goods, we also consider the similarity or dissimilarity of established, likely-to-continue trade channels; the conditions under which and buyers to whom sales are made, i.e., “impulse” versus careful, sophisticated purchasing; the number and nature of similar marks in use on similar goods; and the nature and extent of any actual confusion. Any one of these factors may play a dominant role in the likelihood of confusion analysis. *du Pont*, 177 USPQ at 567.

We carefully considered all of the evidence of record as it pertains to the relevant *du Pont* factors, as well as Applicant's arguments (including any evidence and arguments not specifically discussed in this opinion). The other factors we treat as neutral.

A. Similarity of the Goods, Channels of Trade and Classes of Customers

The identifications of Applicant's goods and Registrant's goods are identical and have no restrictions as to nature, type, channels of trade or classes of customers. Therefore, it is presumed that the channels of trade and classes of customers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *In re Am. Cruise Lines, Inc.*, 128 USPQ2d 1157, 1158 (TTAB 2018).

Applicant argues that the similarity of trade channels is a relevant factor contending that Registrant's products "appear to be offered to U.S. customers exclusively online, featured only on the website www.plasmabed.com," while Applicant's goods "are sold directly to consumers through the www.cocoonbysealy.com web site and through Amazon.com."⁵ According to Applicant,

⁵ Applicant's Appeal Brief pp. 12-13 (11 TTABVUE 13-14) citing to <https://sleepdelivered.com/cocoon-mattress-review/> (identifying purchase options) in May 2, 2108 Request for Reconsideration, TSDR at 42. Page references herein to the application record refer to the downloadable .pdf version of the United States Patent and Trademark Office (USPTO) Trademark Status & Document Retrieval (TSDR) system. Cites to the record are to the

because none of its products are sold “through the retail website that purports to offer Registrant’s goods” and “[n]one of Registrant’s SLEEP COCOON products are sold through the retail websites offering Applicant’s goods,” there is no overlap in channels of trade. However, “[t]he authority is legion that 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 regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular previous channels of trade or the class of purchasers to which sales of the goods are directed.” *Octocom Sys., Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (citing prior cases). Thus, it is well established that “absent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers.” *Viterra*, 101 USPQ2d at 1908 (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). Inasmuch as Applicant’s identifications of goods and that in the cited registration do not limit or restrict the trade channels, the goods are considered to travel in the same channels of trade to the same class of customers.

In view of the foregoing, the *du Pont* factors of the similarity of the goods, trade channels and customers favor a finding of likelihood of confusion.

documents filed in Serial No. 87102115 unless otherwise noted. References to the briefs refer to the Board’s TTABVue docket system.

B. Sophistication of Customers

Applicant contends that its mattresses are priced between \$399 and \$1,149 per item, and its pillows are priced at \$69 each and are frequently purchased with its mattresses.⁶ Due to the relatively high price of its mattresses and pillows, Applicant concludes that the consumers of its goods are sophisticated.

Applicant's arguments are unavailing. The applications before us identify Applicant's goods simply as "mattresses" and "pillows," which are not limited to expensive items sold to sophisticated purchasers. Therefore, we must construe them to include mattresses and pillows of all types, sold at all price points, and to all purchasers of such goods. We recognize that mattresses are not typically purchased on impulse. However, because mattresses and pillows are purchased by nearly all types of consumers, it is difficult to conclude that all of the respective consumers are sophisticated or that any care taken in the purchase of the goods would mitigate the likelihood of confusion resulting from the use of similar marks on identical goods. Further, Applicant has not demonstrated that purchasers of pillows are

⁶ September 20, 2017 Response to Office Action, TSDR at 12, citing to Applicant's website at <https://www.cocoonbysealy.com/mattress/chill>. The evidence Applicant introduces includes advertising from its website indicating its mattresses are offered for sale for "\$95.75/month for 12 months" and "Queen Mattresses starting at \$724 or \$61/month for 12 months." *id.*, TSDR at 44-45; and third-party websites reviewing Applicant's mattresses which indicate "COCOON" mattresses are offered for sale from \$399 for a twin mattress to \$999 for a King sized mattress, as reported on the following product review websites: <https://sleepopolis.com/mattress-reviews/cocoon-mattress-review/>, <http://bust.com/living/16223-it-s-a-bed-in-a-box-one-woman-s-saga-testing-the-cocoon-by-sealy-mattress.html>, and <https://sleepdelivered.com/cocoon-mattress-review/>, see Request for Reconsideration Denied at TSDR 17, 19, 39-40, 42, 54.

sophisticated, and Board precedent requires our decision to be based on the least sophisticated potential purchasers. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014).

Even if some the customers are sophisticated or knowledgeable, or exercise a higher degree of care in the selection of mattresses and pillows, this does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion, especially in cases such as the instant one involving similar marks and identical goods. *See, e.g., Id.; Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011); *In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988) (“Being knowledgeable and/or sophisticated in a particular field does not necessarily endow one with knowledge and sophistication in connection with the use of trademarks.”). Thus, the factor concerning sophistication of customers is neutral.

C. Similarity of the Marks

In comparing the marks, we must consider the marks in their entireties as to appearance, sound, connotation and commercial impression, to determine the similarity or dissimilarity between them. *Viterra*, 101 USPQ2d at 1908 (quoting *du Pont*, 177 USPQ at 567); *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Similarity in any one of these elements may be sufficient to find the marks confusingly similar. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009); *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535

(TTAB 1988). The test, under the first *du Pont* factor, 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. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014).

There are some similarities and dissimilarities in appearance and sound between the word portions of the marks. Applicant's marks start off with "COCOON" followed by "BY SEALY" while Registrant's mark begins with the word "SLEEP" followed by "COCOON." Applicant maintains that the Examining Attorney incorrectly based the refusal on the fact that the marks share the term "COCOON." Applicant also correctly maintains that despite the disclaimer of the word "SLEEP" in the cited mark, we must review the marks as a whole without breaking them into component parts. *Viterra*, 101 USPQ2d at 1908; *In re Hearst Corp.*, 982 F.2d 493, 25 USPQ2d 1238, 1239 (Fed. Cir. 1992) ("Marks tend to be perceived in their entirety, and all components thereof must be given appropriate weight."); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) (filing of a disclaimer with the USPTO does not remove the disclaimed matter from the purview of determination of likelihood of confusion).

Although marks are compared in their entirety, one feature of a mark may be more significant or dominant in creating a commercial impression. *See Viterra*, 101 USPQ2d at 1908; *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir.

1985). Matter that is descriptive of or generic for a party's goods, such as "SLEEP" which is descriptive of mattresses and pillows and disclaimed in the cited mark, is typically less significant or less dominant in relation to other wording. *See Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1824-25 (TTAB 2015) (citing *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004)). Accordingly, while we consider Registrant's mark in its entirety, COCOON is the more dominant portion of Registrant's mark and the inclusion of the descriptive word SLEEP does not itself obviate a likelihood of confusion.



Turning to Applicant's word-and-design composite mark , the word portion is the dominant and most significant feature of that mark because consumers will request or refer to the goods using that wording. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1247 (TTAB 2010). For this reason, greater weight is normally accorded to the word portion of the mark when determining whether the marks are confusingly similar. *Viterra*, at 101 USPQ2d at 1911; *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999). Further, because "COCOON" is presented in the mark in a large font positioned above the much smaller wording "by Sealy," the dominant portion of the wording in Applicant's mark is the large, first word "COCOON." The asterisk, or stylized star element, is itself of minimal impact and appears to highlight the word "COCOON," reinforcing the dominance of that word in the mark.

Applicant contends that the inclusion of its registered and “famous” SEALY house mark sufficiently distinguishes its marks from the cited mark so as to avoid any likelihood of confusion.⁷ In support of the fame and recognition of the SEALY mark, Applicant submits the Declaration of Liz Wright, Vice President at Tempur Sealy International, Inc.⁸ Despite the lack of information in the Wright Declaration establishing a legal relationship between Tempur Sealy International, Inc. and Applicant, the Examining Attorney does not dispute the fame of the SEALY mark.⁹

There have been numerous cases over the years that have reached different conclusions on whether the addition of a house mark avoids confusion. It has long been held that the addition of a trade name or house mark to a registered mark does not generally avoid confusion. *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1364 (TTAB 2007) (citing *Menendez v. Holt*, 128 U.S. 514, 521 (1888)). The Board has described the different effects the addition of a house mark to a registered mark can have in a likelihood of confusion case. Such addition may actually be an aggravation of the likelihood of confusion as opposed to an aid in distinguishing the marks so as to avoid source confusion. On the other hand, where there are some recognizable differences in the asserted conflicting marks or the marks in question are highly suggestive or merely descriptive or play upon commonly used or registered terms, the addition of a house mark to the assertedly conflicting product mark has been determined sufficient

⁷ Applicant’s Appeal Brief p. 6 (11 TTABVUE 7).

⁸ Request for Reconsideration at TSDR 11-14, Declaration of Liz Wright TSDR 16-19.

⁹ Examining Attorney’s Consolidated Appeal Brief, 15 TSDR 7.

to render the marks as a whole sufficiently distinguishable. *In re Christian Dior, S.A.*, 225 USPQ 533, 534 (TTAB 1985) (citations omitted) (applicant's mark LE CACHET DE DIOR similar to the registered mark CACHET).

In this case, even if "SEALY" is a famous house mark, that does not dictate a finding of no likelihood of confusion. When we consider that Applicant's identified goods are identical to Registrant's goods and that their respective marks contain the identical term "COCOON" which is mildly suggestive of the goods, the addition of Applicant's house mark in the nature of a tag line after the term "COCOON" does not eliminate the likelihood of confusion. Consumers familiar with Registrant's SLEEP COCOON mark for its mattresses and pillows are likely to believe that there is some association or sponsorship with Applicant's COCOON BY SEALY mattresses and pillows.

Applicant relies on *Nabisco v. Warner-Lambert*, 220 F.3d 43, 55 USPQ2d 1051 (2d Cir. 2000) (defendant's "prominent use of its DENTYNE house mark in its DENTYNE ICE mark significantly reduces, if not altogether eliminates, any likelihood of consumer confusion" with ICE BREAKERS) and *W.W.W. Pharm. Co. v. Gillette Co.*, 984 F.2d 567, 25 USPQ2d 1593 (2d Cir. 1993)¹⁰ (confusion not likely between RIGHT GUARD SPORT STICK and SPORTSTICK; "when a similar mark is used in conjunction with a company name, the likelihood of confusion may be lessened") in

¹⁰ Superseded on other grounds by *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 32 USPQ2d 1936 (2d Cir. 1994).

support of its position that the differences between the marks are sufficient to obviate any likelihood of confusion.¹¹

However, a closer look at those two cases reveals that the marks at issue are materially different from Applicant's marks. In *Nabisco*, defendant "prominently -- indeed primarily -- identifies DENTYNE ICE as a member of the DENTYNE family of gums, a brand that [plaintiff] concedes is widely recognized by the consuming public." 55 USPQ2d at 1054. Additionally, the court noted that "[t]he cumulative effect of the differences between the parties' products and in the commercial presentation of their marks creates distinct marketplace impressions." 55 USPQ2d at 1055.

In *W.W.W. Pharmaceutical*, defendant's mark RIGHT GUARD SPORT STICK included the words "sport" and "stick" after, and in about one-third the size of, the well-known brand name "Right Guard" and in the same size as the word "deodorant" or "deodorant anti-perspirant." In affirming the lower court's ruling in favor of defendant, the Second Circuit noted that extensive third party use of the words "sport" and "stick" weighed against finding that plaintiff's mark SPORTSTICK was strong. 25 USPQ2d at 1597.

Unlike Applicant's marks, the marks involved in those cases begin with the defendants' well-known "Dentyne" and "Right Guard" brand names. Here, Applicant's brand name "Sealy" is located at the end of its marks reducing the impact of the "Sealy" brand name. This is further evidenced by Applicant's word-and-design

¹¹ Applicant's Appeal Brief p. 6, 9-10. (11 TTABVUE 7, 10-11).



composite mark where “by Sealy” is presented below and in a noticeably smaller font than the first word “COCOON.”

We find that the addition of Applicant’s house mark to these otherwise very similar marks used on identical goods does not necessarily mean that consumers are not likely to be confused and does not obviate a likelihood of confusion. *See Mighty Leaf Tea*, 94 USPQ2d at 1260; *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1965 (TTAB 2016); *Gen. Mills Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ 1584, 1602 (TTAB 2011); *Fiesta Palms*, 85 USPQ2d at 1364.

Applicant’s and Registrant’s marks are similar, with each containing the distinctive word “COCOON.” Customers familiar with Registrant’s mattresses and pillows sold under its SLEEP COCOON mark would likely view Applicant’s mark COCOON BY SEALY used on the identical products as a brand extension of Registrant’s mark (or vice versa), or variation on Registrant’s SLEEP COCOON mark. We note that the Trademark Act not only guards against the misimpression that a senior user, like Registrant, is the source of a junior user’s goods, but it also protects against “reverse confusion,” where a significantly larger or prominent junior user, such as Applicant, is perceived as the source of a smaller, senior user’s goods such that the “senior user may experience diminution or even loss of its mark’s identity and goodwill due to extensive use of a confusingly similar mark by the junior user” for related goods. *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744,

1752 (Fed. Cir. 2017) (quoting *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993)).

Applicant's COCOON BY SEALY marks begin with the same word that comprises the dominant portion of Registrant's SLEEP COCOON mark.¹² The disclaimed descriptive portion of Registrant's mark, i.e., SLEEP, does not cause Registrant's mark to convey a different impression from Applicant's marks and would not signal to potential purchasers that Registrant's goods emanate from or are associated with a different source than Applicant's goods. With respect to the identical goods, consumers would likely perceive the dominant COCOON portion in both parties' marks as having the same meaning and commercial impression. Accordingly, the marks as a whole are similar in sound, appearance, connotation and commercial impression. Additionally, where, as here, the goods at issue are identical, "the degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992); *see also Viterra*, 101 USPQ2d at 1908.

¹² Applicant notes that the cited registration was not cited against its prior application for the wordmark COCOON in Serial No 86769045. That application was abandoned after the issuance of an Office Action. Thus, no final determination of registrability was made, but even if it had been, the Board is not bound by the decision of the prior examining attorney. We must decide this case based on the evidence that is before us now. *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1206 (TTAB 2009); *see also In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *In re Perez*, 21 USPQ2d 1075, 1077 (TTAB 1991) (§ 2(d) refusal affirmed even though the cited previous registration had not been cited against applicant's previous registration, now expired, of the same mark for the same goods; Board not bound by an examining attorney's prior determination as to registrability).

In view of the foregoing, the *du Pont* factor of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression favors a finding of likelihood of confusion.

D. Number and Nature of Similar Marks in Use on Similar Goods

Applicant contends that the differences between its marks and Registrant's mark are particularly significant because the registered mark is entitled to a narrower scope of protection. According to Applicant, the cited mark currently co-exists on the Principal Register with numerous third-party marks containing the "COCOON" element for sleep-related products, which is relevant to the sixth *du Pont* factor regarding the number and nature of similar marks in use on similar goods.¹³ *See du Pont*, 177 USPQ at 567.

In support, Applicant submits evidence of four registrations, three of which are commonly owned, covering bedding and bedding accessories in Class 24.¹⁴ The fourth registration, is for sleeping bags and sleeping bag liners in Class 20.¹⁵ Such evidence, Applicant argues, establishes that the consuming public is exposed to third-party use of similar marks on similar goods and is thereby "relevant to show that [Registrant's]

¹³ Applicants' Appeal Brief p. 14-15 (11 TTABVUE 15-16).

¹⁴ Registration Nos. 1542591 for COCOON THE ANCIENT ART OF COMFORT & Design for "bedding, namely silk quilts and related bedding accessories, namely linen and pillow cases;" and 2620436 for COCOON and 2623975 for COCOON & Design for "bedding, namely silk-filled quilts and quilt exterior covers, and related bedding accessories, namely pillow shams, silk-filled lap blankets, lap blanket exterior covers;" all in Class 24. Applicant also cited Registration No. 1926695 which was cancelled on May 23, 2017 and has not been considered. March 17, 2017 Response to Office Action, TSDR 9-10, 16-19.

¹⁵ Registration No. 2863013 for the mark COCOON for "sleeping bags and sleeping bag liners" in Class 20. March 17, 2017 Response to Office Action, TSDR 20.

mark is relatively weak and entitled to only a narrow scope of protection,” citing *Palm Bay Imps.*, 73 USPQ2d at 1693.¹⁶ Applicant did not submit any evidence of use by third parties.

Applicant’s list of four registrations, three of them owned by the same entity, none of which are for exactly the same types of goods, is not a strong showing of relevant third-party registration and use of the term “Cocoon.” The third party registrations are few in number, and fall well short of the “voluminous” and “extensive” evidence presented in *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 n.2 (Fed. Cir. 2015) (at least fourteen relevant third-party uses or registrations of record), or of that in *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1673 n.1, 1674 (Fed. Cir. 2015) (at least twenty-six relevant third-party uses or registrations of record). Moreover, as the Board explained in *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016), a citation of registrations and applications (in that case, only six third-party registrations owned by just two parties for different goods) has limited probative value because third-party registrations standing alone, are not evidence that the registered marks have actually been used in commerce, let alone that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269-70 (CCPA 1973). Therefore, the cited registered mark has not been shown

¹⁶ Applicant’s Appeal Brief pp. 14-15 (11 TTABVUE 15-16).

to be weak as used in connection with mattresses and pillows. Thus, the third-party registrations are entitled to little weight on the question of likelihood of confusion where there is no evidence of actual use. *Tektronix, Inc., v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694 (CCPA 1976). Accordingly, this factor is neutral.

E. Absence of Actual Confusion

Applicant maintains that confusion is not likely as it is not aware of any instances of actual confusion between the goods offered in connection with its marks and the goods offered under the cited mark during the little more than two years that it has been using its mark.¹⁷ While a showing of actual confusion is highly probative, if not conclusive, of a high likelihood of confusion, a lack of evidence of actual confusion carries little weight, especially in an ex parte context. *Majestic Distilling*, 65 USPQ2d at 1205; *In re Cook Medical Tech. LLC*, 105 USPQ2d 1377, 1383-84 (TTAB 2012). *See also In re Bissett-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). The Board in such cases, and in this case, 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. *See, e.g., In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001); *In re Jeep Corp.*, 222 USPQ 333, 337 (TTAB 1984);

¹⁷ Applicant's Appeal Brief p. 16 (11 TTABVUE 17).

In re Barbizon Int'l, Inc., 217 USPQ 735, 737 (TTAB 1983). Accordingly, this factor is neutral.

II. Balancing the Factors

The identity of the goods and similarity of the marks weigh in favor of finding a likelihood of confusion. The other factors are neutral. When marks appear on identical goods, as they do in this case, the degree of similarity necessary to support a conclusion of likely confusion declines. Accordingly, the overall similarity of the marks in their entireties in sound, appearance, meaning and commercial impression

causes us to find that Applicant's marks COCOON BY SEALY and  for mattresses and pillows is likely to cause confusion with the SLEEP COCOON mark in the cited registration for the identical goods.

Decision: The refusals to register Applicant's marks COCOON BY SEALY and



under § 2(d) of the Trademark Act are affirmed.