This Opinion Is Not a Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ballast Capital Advisors LLC

Application Serial No. 87509097

Vernon P. Squires of Bradley & Riley PC for Ballast Capital Advisors LLC.

Nicholas K. D. Altree, Trademark Examining Attorney, Law Office 107,
J. Leslie Bishop, Managing Attorney.

Before Zervas, Bergsman and Hudis, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Ballast Capital Advisors LLC (Applicant) seeks registration on the Principal Register of the mark BALLAST CAPITAL ADVISORS and design, reproduced below, for "financial planning and investment advisory services," in Class 36.[1]

[1] Application Serial No. 87509097 was filed on June 28, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant's claim of first use anywhere and first use in commerce as early as May 18, 2016.

The description of the mark in the application reads as follows:

> The mark consists of the stylized words "BALLAST CAPITAL ADVISORS" and an 8-pointed star surrounded by a circle. There is a small circle on each point of the star. The circle goes through the middle of each point of the star. "BALLAST" appears in dark blue upper case lettering, with "CAPITAL ADVISORS" in italicized light blue lettering in upper and lower case, directly under the word "BALLAST." The 8-pointed star appears to the left of the words.
>
> The color(s) dark blue and light blue is/are claimed as a feature of the mark.

Applicant disclaimed the exclusive right to use the words "Capital Advisors.

The Examining Attorney issued a final refusal to register Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the three registered marks listed below as to be likely to cause confusion:

1. Registration No. 2989915 for the mark BALLAST POINT VENTURES (in typed drawing form)[2] and Registration No. 5060845 for the mark BALLAST POINT VENTURES and design, reproduced below, owned by the same entity and both registered for "financial services, namely, venture capital, financial

[2] Registration No. 2989915 registered on August 30, 2005; renewed.

Prior to November 2, 2003, "standard character" drawings were known as "typed" drawings. Effective November 2, 2003, Trademark Rule 2.52, 37 C.F.R § 2.52, was amended to replace the term "typed" drawing with "standard character" drawing. A typed mark is the legal equivalent of a standard character mark. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) ("until 2003, 'standard character' marks formerly were known as 'typed' marks.").

and investments consulting, financial and investments advice and financial and investments banking," in Class 36.[3]

The description of the mark in the registration reads as follows:

> Color is not claimed as a feature of the mark. The mark consists of the words "BALLAST POINT VENTURES" with a star inside a circle to the left of the word "BALLAST."

Registrant disclaimed the exclusive right to use the word "Ventures" in both registrations.

2. Registration No. 5348745 for the mark BALLAST (in standard character form) for, inter alia, "real estate investment services," in Class 36.[4]

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.,* 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*") *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.,* 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor that is relevant or for which there is evidence of record. *See In re Guild Mortg.*

[3] Registration No. 5060845 registered October 11, 2016.

[4] Registered December 5, 2017.

Co., 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc'ns, Inc.,* 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.,* 114 USPQ2d 1232, 1242 (TTAB 2015) ("While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant."). "[E]ach case must be decided on its own facts and the differences are often subtle ones." *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004)*; Federated Foods, Inc. v. Fort Howard Paper Co.,* 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."); *see also In re i.am.symbolic, LLC,* 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) ("The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but 'may focus … on dispositive factors, such as similarity of the marks and relatedness of the goods'") (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

I. BALLAST POINT VENTURES registrations

A. **The similarity or dissimilarity and nature of the services.**

Applicant is seeking to register its mark for "financial planning and investment advisory services." The description of services in the BALLAST POINT VENTURES registrations is "financial services, namely, venture capital, financial and

investments consulting, financial and investments advice and financial and investments banking." Applicant's "financial planning and investment advisory services" are identical to Registrant's "financial and investments consulting, financial and investments advice."

Under this *DuPont* factor, the Examining Attorney need not prove, and we need not find, similarity as to each activity listed in the identification of services. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of services in a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.,* 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd* 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) ("it 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.").

Applicant argues to the contrary insisting that the services differ substantially.[5] Greg Carstensen, Applicant's President, attested to the following:

> 2. [Applicant] operates in the business of providing financial advice to investors. [Applicant] analyze[s] a given client's situation and goals, and then help the client decide what might be appropriate investments, including equities, bonds, retirement accounts, etc. [Applicant] does

[5] Applicant's Brief, p. 14 (5 TTABVUE 15).

References to the briefs on appeal refer to the Board's TTABVUE docket system. Coming before the designation TTABVUE is the docket entry number; and coming after this designation are the page references, if applicable.

> not infuse capital directly into private equity investments or related services.
>
> 3. … Ballast Point Ventures [Registrant] operates a different business space than [Applicant]. [Registrant] solicits investments to use for private equity, including its own funds. This type of investment activity generally is directed to and conducted with high net-worth accredited investors.[6]

However, we analyze the similarity or dissimilarity and nature of the services based on the services as they are described in the application and the cited registrations. *See In re Detroit Athletic Co.,* 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018); *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys, Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The 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 channels of trade or the class of purchasers to which the sales of goods are directed.").

We may not read limitations into the identification of services. *In re i.am.symbolic, LLC*, 123 USPQ2d at 1748; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation and nothing in the inherent

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[6] Carstensen Affidavit ¶¶2-3 attached to the March 26, 2018 Response to Office Action (TSDR 71).

Citations to the examination record refer to the Trademark Status and Document Retrieval System (TSDR), by page number, in the downloadable .pdf format.

nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"); *In re Thor Tech,* 90 USPQ2d 1634, 1638 (TTAB 2009) ("We have no authority to read any restrictions or limitations into the registrant's description of goods."). In other words, we cannot resort to extrinsic evidence to restrict the breadth of Applicant's or Registrant's services. *See In re Bercut-Vandervoort & Co.,* 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

Finally, we are required to give "full sweep" to the activities set forth in the descriptions of services. The services are presumed to encompass all services of the nature and type identified in the application and registration. *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (where "there is an absence of any restrictions as to the channels of trade and no limitation as to the classes of purchasers, it is presumed that in scope the identification of goods encompasses not only all the goods of the nature and type described therein, but that the identified goods are offered in all channels of trade which would be normal therefor"); *In re Elbaum,* 211 USPQ 639, 640 (TTAB 1981); *see also Stone Lion Capital Partners*, 110 USPQ2d at 1162 ("An application with 'no restriction on trade channels' cannot be 'narrowed by testimony that the applicant's use is, in fact, restricted to a particular class of purchasers.'"). Therefore, we must presume that Applicant's "financial planning and investment advisory services" includes all types of financial planning

and investment advisory services, including Registrant's "financial and investments consulting, financial and investments advice," regardless of what the evidence actually shows.

We find that Applicant's description of services and Registrant's description of services are in part identical.

B. **Established, likely-to-continue channels of trade and classes of consumers.**

Because the services described in the application and the cited registrations are in part identical, we presume that the channels of trade and classes of purchasers are the same. *See Viterra,* 101 USPQ2d at 1908 (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 Inn at St. John's, LLC,* 126 USPQ2d 1742, 1745 (TTAB 2018), *aff'd mem.* (No. 18-2236) (Fed. Cir. September 13, 2019) ("Because the services described in the application and the cited registration are identical, we presume that the channels of trade and classes of purchasers are the same."); *United Glob. Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.,* 101 USPQ2d 1022, 1028 (TTAB 2011).

C. **The similarity or dissimilarity of the marks.**

We turn now to the *DuPont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *DuPont,* 177 USPQ at 567. "Similarity in any one of these

elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.") (citation omitted). In comparing the marks, we are mindful that where, as here, the services are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the services. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.,* 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind,* 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Prod. Inc. v. Ing-Jing Huang,* 84 USPQ2d 1323, 1325 (TTAB 2007).

"The proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs.*, 101 USPQ2d at 1721); *see also Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.,* 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012).

As noted above, Applicant is seeking to register the mark BALLAST CAPITAL ADVISORS and design reproduced below:

Registrant's marks are BALLAST POINT VENTURES in standard character form and BALLAST POINT VENTURES and design reproduced below:

The marks are similar because they share the word "Ballast" as the first and dominant term. The word "Ballast" is a noun that is defined as follows:

> 1. *Nautical.* any heavy material carried temporarily or permanently in a vessel to provide desired draft and stability.
>
> 2. *Aeronautics.* something heavy, as bags of sand, placed in the car of a balloon for control of altitude and, less often, of attitude, or placed in an aircraft to control the position of the center of gravity.
>
> 3. anything that gives mental, moral, or political stability or steadiness: *the ballast of a steady income.*
>
> 4. gravel, broken stone, slag, etc., placed between and under the ties of a railroad to give stability, provide drainage, and distribute loads.[7]

It is also a verb that is defines as follows:

[7] Dictionary.com based on THE RANDOM HOUSE UNABRIDGED DICTIONARY (2019). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd,* 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

1. to furnish with ballast: *to ballast a ship.*

2. to give steadiness to; to keep steady: *parental responsibilities that ballast a person.*[8]

When used in connection with financial services, the word "Ballast" is an arbitrary term that is inherently strong and accorded a broad scope of protection. *See Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004) (defining an arbitrary mark as a "known word used in an unexpected or uncommon way" and observing that such marks are typically strong); *see also Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Fondee En 1772,* 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (arbitrary terms are conceptually strong trademarks).[9]

Based on use of word "Ballast" as the first term in all the marks, all the marks engender the commercial impression of a steadying advisory influence.

The descriptive term "Capital Advisors" in Applicant's mark has little, if any, source-identifying significance. It is well settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations. *See In re Detroit Athletic Co.*, 128 USPQ2d at 1050 (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight

[8] *Id.*

[9] There is no evidence regarding the number and nature of similar marks in use in connection with similar services.

in reaching a conclusion on the likelihood of confusion.'") (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *In re Dixie Rests. Inc.*, 41 USPQ2d at 1533-34; *In re Code Consultants, Inc.,* 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often "less significant in creating the mark's commercial impression"). Likewise, the descriptive term "Ventures" in Registrant's marks has little, if any, source-indicating significance. There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the conclusion rests on a consideration of the marks in their entireties. *Viterra*, 101 USPQ2d at 1908; *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

As we note above, further highlighting the significance of the word "Ballast" in the respective marks is its position as the first word in the marks. We often have held that the lead element in a mark has a position of prominence; it is likely to be noticed and remembered by consumers and to play a dominant role in the mark. *See In re Detroit Athletic Co.*, 128 USPQ2d at 1049 (finding "the identity of the marks' two initial words is particularly significant because consumers typically notice those words first"); *Palm Bay Imps. Inc.* 73 USPQ2d at 1692 ("Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of Am.,* 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.,* 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of

a mark which is most likely to be impressed upon the mind of a purchaser and remembered").

Moreover, in the case of marks consisting of words and a design, the words are normally accorded greater weight because the words are likely to make an impression upon purchasers, would be remembered by them, and would be used by them to request the services. *See Viterra*, 101 USPQ2d at 1908, 1911 (Fed. Cir. 2012) (citing *CBS Inc. v. Morrow*, 708 F. 2d 1579, 218 USPQ 198, 200 (Fed. Cir 1983)); *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983).

Registrant's standard character mark BALLAST POINT VENTURES is not limited to any particular depiction. The rights associated with a mark in typed drawing form reside in the wording, and not in any particular display. Thus, Registrant's mark may be depicted in any manner, regardless of the font style, size, or color, and might at any time in the future be displayed in a manner similar to Applicant's mark. *Viterra*, 101 USPQ2d at 1909-11; *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (rejecting argument that for purposes of determining whether two marks are similar, a mark in a typed drawing (equivalent to modern standard character format) is distinct from such mark in a logo format; "[b]y presenting its mark in a typed drawing, a **difference** cannot

legally be asserted by that party" (emphasis in original)). In other words, Registrant may depict is mark in a manner similar to Applicant's mark as displayed below:

BALLAST POINT
Ventures

Registrant's mark BALLAST POINT VENTURES and design is even closer in appearance than the mark in standard character form because the design elements are similar. Both designs appear on the left side of the mark and consist of a circle and stars. In Registrant's mark, there is a four-point star while Applicant has an eight-point star.[10] While the design elements are not identical, we focus on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *see also Bridgestone Americas Tire Operations, LLC v. Federal Corp.,* 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012) ("Exact identity is not necessary to generate confusion as to source of similarly-marketed products."). In this case, the peripheral differences fail to distinguish the marks.

Applicant argues that "Ballast Point" in Registrant's marks engenders a different meaning and commercial impression than the word "Ballast" in Applicant's mark.[11]

> As [Applicant] noted in its responses to the Office Actions, the phrase "Ballast Point" conveys an entirely different meaning than the single word Ballast. Ballast Point represents a geographic neighborhood near Tampa, Florida, where the Registrant is based. Ballast Point is the location of a famous civil war battle. Both words depend on

[10] The description of the mark in Applicant's application identifies the design element as an 8-pointed star surrounded by a circle.

[11] Applicant's Brief, p. 10 (5 TTABVUE 11).

> each other to present a unique meaning. To insist that "Ballast" is the dominant word in the mark ignores that our language hosts many two-word terms that create a distinct impression, e.g. "West Point," "Bull Run," "Palm Beach," etc.[12]

According to the Wikipedia article that Applicant submitted, BALLAST POINT is a neighborhood in Tampa, Florida, with a population of almost 5,000 people. "The neighborhood is home to the Ballast Point Neighborhood Association and the City of Tampa Police Neighborhood Watch (crime watch groups: Ballast Point Neighborhood Watch I, II and III."[13] Although Registrant is located in St. Petersburg, Florida, Registrant's website does not refer to its location near the Ballast Point neighborhood and there is no evidence regarding the renown of the Ballast Point neighborhood.

That the Wikipedia entry highlights the Ballast Point Neighborhood Association and Neighborhood Watch Groups indicates that the Ballast Point neighborhood is not well known outside of Tampa. To the significant number of consumers seeking financial and investment advice that are unaware that Ballast Point is a Tampa neighborhood, the commercial impression engendered by Registrant marks BALLAST POINT VENTURES is the steadying influence of Registrant's services.

We find that Applicant's mark BALLAST CAPITAL ADVISORS and design is similar to Registrant's marks BALLAST POINT VENTURES in standard characters and BALLAST POINT VENTURES and design in their entireties in terms of appearance, sound, connotation and commercial impression.

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[12] *Id.*

[13] March 26, 2018 Response to Office Action (TSDR 8).

D. **The conditions under which sales are made.**

Applicant, without any evidence, argues that the respective consumers are sophisticated and discerning.[14]

> Accredited investors who consider the **BALLAST POINT VENTURES** services will bring an exceptional degree of sophistication to investing in private equity offerings. This high-risk, high-reward segment of the financial industry does not entice impulse buying.[15]

Applicant's contention is just attorney argument unsupported by any evidence. As the Federal Circuit recently reiterated, "Attorney argument is no substitute for evidence." *Cai v. Diamond Hong, Inc.*, 127 USPQ2d at 1799 (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)); *see also In re DeBaun,* 687 F.2d 459, 214 USPQ 933, 934 n.4 (CCPA 1982) ("we need not evaluate the weight to be given to the attorney's declaration with respect to statements more appropriately made by appellant.").

The relevant activities in Registrant's description of services are for, inter alia, "financial and investments consulting, financial and investments advice," without any restriction or limitation to "accredited investors." We cannot resort to extrinsic evidence to restrict the conditions under which Registrant's services are sold. *See In re Bercut-Vandervoort & Co.,* 229 USPQ at 764 (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

[14] Applicant's Brief, p. 17 (5 TTABVUE 18).

[15] *Id.*

Finally, we must consider the consumers to whom sales are made as including the "least sophisticated consumer in the class." *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1163-64 (recognizing Board precedent requiring consideration of the "least sophisticated consumer in the class"); *see also In re Sailerbrau Franz Sailer,* 23 USPQ2d 1719, 1720 (TTAB 1992) (finding that all purchasers of wine may not be discriminating because while some may have preferred brands, "there are just as likely to be purchasers who delight in trying new taste treats."). Because there are no restrictions, limitations, or descriptions of the relevant consumers in the description of services, we must presume that consumers to whom Applicant and Registrant offer their financial and investment advice include all consumers of such services, including unsophisticated investors who are seeking retirement advice, assistance in paying for college, or assistance in how to finance a home. While consumers generally may exercise more care in those activities, there is nothing in the record to show that it rises to the level to weigh in Applicant's favor.

We find that the degree of consumer care is neutral.

E. **Conclusion**

Because the marks are similar, the services are in part identical, and there is a presumption that the services are offered in the same channels of trade to the same classes of consumers, we find that Applicant's mark BALLAST CAPITAL ADVISORS and design for "financial planning and investment advisory services" is likely to cause confusion with the registered marks BALLAST POINT VENTURES in standard character form and BALLAST POINT VENTURES and design both for and both

registered for "financial services, namely, venture capital, financial and investments consulting, financial and investments advice and financial and investments banking."

II. Registration No. 5348745 for the mark BALLAST

A. Similarity or dissimilarity of the marks.

As noted above, Applicant is seeking to register the mark BALLAST CAPITAL ADVISORS and design reproduced below:

Registrant's mark is BALLAST in standard character form.

The marks are similar because they share the arbitrary word "Ballast." As discussed above, the word "Ballast" is the dominant element in Applicant's mark because (i) words are the dominant part of composite marks consisting of words and designs, (ii) the term "Capital Advisors" is descriptive and has less significance as a source indicator, and (iii) the word "Ballast" is the first word in the name "Ballast Capital Advisors." Applicant concedes that "Ballast" is an important part its mark.[16]

Under such circumstances and where Applicant's mark encompasses Registrant's entire mark, courts and the Board have found the marks to be similar. *See China Healthways Inst. Inc. v. Xiaoming Wang,* 491 F.3d 1337, 83 USPQ2d 1123, 1125 (Fed. Cir. 2007) (applicant's mark CHI PLUS is similar to opposer's mark CHI both for electric massagers); *Coca-Cola Bottling Co. of Memphis, TN, Inc. v. Joseph E.*

[16] Applicant's Brief, p. 11 (5 TTABVUE 12).

Seagram and Sons, Inc., 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (applicant's mark BENGAL LANCER for club soda, quinine water and ginger ale is likely to cause confusion with BENGAL for gin); *Johnson Publ'g Co. v. Int'l Dev. Ltd.,* 221 USPQ 155, 156 (TTAB 1982) (applicant's mark EBONY DRUM for hairdressing and conditioner is likely to cause confusion with EBONY for cosmetics); *In re Cosvetic Labs., Inc.,* 202 USPQ 842 (TTAB 1979) (applicant's mark HEAD START COSVETIC for vitamins for hair conditioners and shampoo is likely to cause confusion with HEAD START for men's hair lotion and after-shaving lotion).

We find that Applicant's mark BALLAST CAPITAL ADVISORS and design is similar to Registrant's mark BALLAST in terms of appearance, sound, connotation and commercial impression.

B. The similarity or dissimilarity and nature of the services.

Applicant is seeking to register its mark for "financial planning and investment advisory services," while Registrant description of services is for, inter alia, "real estate investment services." Because Applicant's "investment advisory services" are not limited or restricted in any way, they include all types of investment advice, including real estate investment services. *See Stone Lion Capital Partners*, 110 USPQ2d at 1162; *In re Jump Designs LLC*, 80 USPQ2d at 1374; *In re Elbaum,* 211 USPQ at 640.

The Examining Attorney points to excerpts in Applicant's specimen to support a finding that financial planning and investment advisory services include real estate investment services.

> In the market crisis of 2008, [Applicant's President] was given responsibility for American Equity's MBS portfolio selectively guiding capital into distressed MBS assets and growing AUM from $500 million to over $2.5 billion by the end of 2009. He was an early buyer or REMIC securities and established numerous private fund vehicles to capitalize on the market dislocation.[17]
>
> * * *
>
> [Applicant's President] co-founded Aysmmetria Group (www.asymmetriagroup.com) a private equity management company overseeing venture capital assets including commercial real estate.[18]

By touting its Principal's experience investing in real estate to show use of the mark BALLAST CAPITAL INVESTORS and design for "financial planning and investment advisory services," the Examining Attorney concludes that Applicant's services include real estate investment services.[19]

Further, the Examining Attorney submitted 25 use-based third-party registrations based on use for "financial planning and investment advisory services" and "real estate investment services."[20] Third-party registrations based on use in commerce that individually cover a number of different services might have probative value to the extent that they serve to suggest that the listed services are of a type

[17] "REMIC" is a "real estate mortgage investment conduit." It is "an entity (as a corporation, partnership, or trust) that functions as a vehicle for investment in mortgage obligations and especially collateralized mortgage obligations and receives favorable tax treatment by restricting its own investment to the maintenance of cash flow and reserves and to investment in properties acquired from foreclosure on the underlying mortgages." Merriam-Webster.com accessed September 25, 2019.We take judicial notice of this definition.

[18] June 28, 2017 Specimen (TSDR 4).

[19] Examining Attorney's Brief (7 TTABVUE 7).

[20] April 20, 2018 Office Action (TSDR 8-39) and October 29, 2018 Office Action (TSDR 7-54).

that may emanate from the same source. *In re Albert Trostel & Sons Co.,* 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.,* 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd mem.* 864 F.2d 149 (Fed. Cir. 1988). Representative registrations, with the relevant portion of the description of services, are listed below:

MARK	**REG. NO.**	**SERVICES**
5MWAY	3749194	Financial planning and investment advisory services; real estate investment
DUFFY ANDERSON	4319600	Financial and investment advisory services; real estate investment services
EXCALIBUR PRIVATE WEALTH	4562367	Financial planning; investment advisory services; real estate investment services
PERPETUAL CAPITAL	3702392	Investment advisory services; real estate investment
FOLIOMAX	3596315	Financial planning and investment advisory services; real estate investment

Applicant argues that in response to an Office Action during the prosecution of Registrant's application, Registrant admitted that it does not offer any financial services and that, therefore, the services at issue in this application do not overlap.[21] There are several problems with Applicant's argument. First, Applicant did not submit the copy of the Office Action wherein Registrant purportedly stated that it does not render any financial services. Therefore, Applicant's arguments are without evidentiary support.

In this regard, Applicant quoted from Registrant's purported Response to an Office Action wherein Registrant stated the following:

> Applicant exclusively offers the specific management services for residential and commercial real estate in addition to construction services. Applicant does not offer

[21] Applicant's Brief, p. 12 (5 TTABVUE 13).

> any type of financial services nor does [Ballast Point Ventures] provide any real estate management services.[22]

However, Registrant's description of services includes "real estate investment services," as well as "real estate management services, as just two of many activities comprising the description of services in Class 36. Based on the excerpt provided by Applicant, we cannot tell if the Applicant was responding to a likelihood of confusion refusal based on Registrant's "real estate investment services" or "real estate management services." This illustrates why it is incumbent upon an Applicant to submit evidence to support its argument.

Further, Applicant's reliance on *EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc.,* 213 USPQ 597 (TTAB 1982), *aff'd,* 706 F.2d 1213, 217 USPQ 986 (Fed. Cir. 1983), regarding the effect of Registrant's purported admission is misplaced. In *EZ Loader Boat Trailers,* the Board held,

> It is well settled that an applicant's prior inconsistent statements in its application for registration or in another proceeding do not give rise to an estoppel in subsequent proceedings. *Institutional Wholesalers v. Saxons Shoppes, Inc.*, 170 USPQ 107 (TTAB 1971); *Textron, Inc. v. Gillette Co.*, 180 USPQ 152, 154 and cases cited therein (TTAB 1973). However, such statements constitute admissions and may be considered as evidence, albeit not conclusive evidence, of the truth of the assertions therein. *Bakers Franchise Corp. v. Royal Crown Cola Co.*, 160 USPQ 192 (CCPA 1969); *Maremont Corp. v. Airlift Corp.*, 174 USPQ 395, 396 (CCPA 1972).

EZ Loader Boat Trailers, 213 USPQ at 599; *see also Interstate Brands Corp. v. Celestial Seasonings, Inc.,* 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978) ("That a

[22] October 18, 2018 Response to Office Action (TSDR 5-6).

party earlier indicated a contrary opinion respecting the conclusion in a similar proceeding involving similar marks and goods is a fact, and that fact may be received in evidence as merely illuminative of shade and tone in the total picture confronting the decision maker. To that limited extent, a party's earlier contrary opinion may be considered relevant and competent. Under no circumstances, may a party's opinion, earlier or current, relieve the decision maker of the burden of reaching his own ultimate conclusion on the entire record."). Registrant's statement that it "exclusively offers the specific management services for residential and commercial real estate in addition to construction services" does not preclude it from offering "real estate investment services," especially since those activities are part of the description of services.

In any event, Applicant's contention that the services do not overlap misses the point. In determining whether the services are related, it is not necessary that the services of the parties be similar or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes that the Examining Attorney establish that the services are related in some manner or that conditions and activities surrounding marketing of these services are such that they would or could be encountered by same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Coach Servs,* 101 USPQ2d at 1722.

The issue here, of course, is not whether purchasers would confuse the services, but rather whether there is a likelihood of confusion as to the source of the services. *In re Cook Med. Tech. LLC,* 105 USPQ2d 1377, 1380 (TTAB 2012); *Helene Curtis Indus. Inc. v. Suave Shoe Corp.,* 13 USPQ2d 1618, 1624 (TTAB 1989); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). As noted above, Applicant touts its Principal's experience in making real estate investments as a reason to engage its "financial planning and investment advisory services." In addition, the third-party registrations indicate that "financial planning and investment advisory services" and "real estate investment services" may emanate from a single source. Applicant has not submitted any evidence in rebuttal.

We find that Applicant's "financial planning and investment advisory services" are related to Registrant's "real estate investment services."

C. Established, likely-to-continue channels of trade and classes of consumers.

Applicant "believes no similarity of trade channels exist"[23] because Registrant "unequivocally admitted it does not engage in financial services. As such, there can be no overlap of trade channels."[24] To support its argument, Applicant refers to Registrant's specimen of use in Registrant's application that Applicant did not submit.

> According to the specimen of its mark submitted to support the registration, "If you are looking for the highest quality

[23] Applicant's Brief, p. 15 (5 TTABVUE 16).

[24] *Id.* at page 16 (5 TTABVUE 17).

> property management in San Francisco, please give us a try."[25]

The trade channels and classes of consumers concern how and to whom the services are marketed. *See In re Iolo Techs. LLC,* 95 USPQ2d 1498, 1499 (TTAB 2010) (the goods are "likely to be seen by the same persons"); *In re Binion,* 93 USPQ2d 1531, 1534-35 (TTAB 2009) ("would or could be encountered by the same persons"); *Motion Picture Ass'n of Am. v. Respect Sportswear, Inc.,* 83 USPQ2d 1555, 1562 (TTAB 2007) ("encountered by the same persons"); *Jeanne-Marc, Inc. v. Cluett, Peabody & Co.,* 221 USPQ 58, 61 (TTAB 1984).

There is nothing that prevents Registrant's "real estate investment services" from being promoted in the same channels of trade and to the same classes of consumers as Applicant's "financial planning and investment advisory services." As discussed above, because Applicant's "investment advisory services" are not limited or restricted in any way, they include all types of investment advice, including real estate investment services. Moreover, it is logical that someone who has or is interested in "real estate investment services' may require "financial planning and investment advisory services." Applicant's specimen of use, discussed above, which touts Applicant's Principal's history of real estate investments as a reason to engage Applicant's services, demonstrates this.

Finally, as discussed above, because Applicant did not submit the specimen for our review, there is nothing for us to consider. Nevertheless, the fact that the

[25] *Id.*

specimen shows use of Registrant's mark in connection with property management services does not preclude Registrant from rendering real estate investment services. *See* TRADEMARK MANUAL OF EXAMINING PROCEDURE § 904.01(a) (October 2018) ("Generally, if more than one item of goods, or more than one service, is specified in one class in an application, it is usually not necessary to have a specimen for each product or service. When the range of items is wide or contains unrelated articles, the examining attorney may request additional specimen(s) under 37 C.F.R. § 2.61(b).").

We find that the established, likely-to-continue channels of trade and classes of consumers favors finding a likelihood of confusion.

D. Conditions under which sales are made.

Applicant argues that the relevant clients will exercise a high degree of care because they will be sophisticated and discerning. Specifically, Registrant's clients, "persons or entities owning apartment buildings are likely to use discretion and care when choosing a property manager such as [Registrant]."[26] The problem with this argument is that Applicant concludes, without evidence, that consumers seeking property management services will exercise a high degree of care, but Registrant's services, at issue, are "real estate investment services."

Because there are no restrictions, limitations, or descriptions of the relevant consumers in the description of services, we must presume that consumers to whom Applicant and Registrant offer their financial and investment advice and real estate

[26] Applicant's Brief, p. 17 (5 TTABVUE 18).

investment services include all consumers of such services, including unsophisticated investors who are seeking retirement advice, assistance in paying for college, or assistance in how to finance a home. While consumers generally may exercise more care in those activities, there is nothing in the record to show that it rises to the level of weighing in Applicant's favor.

We find that the degree of consumer care is neutral.

E. Conclusion

Because the marks are similar, the services are related, and the services are offered in the same channels of trade to the same classes of consumers, we find that Applicant's mark BALLAST CAPITAL ADVISORS and design for "financial planning and investment advisory services" is likely to cause confusion with Registrant's registered BALLAST service mark for, inter alia, "real estate investment services."

Decision: The refusal to register Applicant's mark BALLAST CAPITAL ADVISORS and design is affirmed.