

This Opinion is Not a
Precedent of the TTAB

Mailed: December 3, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Killeen Mayo Car Wash, LLC
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Serial No. 87597456
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Delphine James of the Law Office of Delphine James
for Killeen Mayo Car Wash, LLC.

Ashley D. Hayes, Trademark Examining Attorney, Law Office 108,
Kathryn E. Coward, Managing Attorney.

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Before Lykos, Lynch and Pologeorgis,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Killeen Mayo Car Wash, LLC (“Applicant”) seeks to register on the Principal
Register the composite mark displayed below,



for “automobile cleaning and car washing” in International Class 37.¹

Registration was refused on three separate bases: (1) under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s applied-for mark so resembles the registered mark GALAXY in standard characters for “Car wash services” in International Class 37,² that it is likely to cause confusion or mistake or to deceive; (2) for Applicant’s failure to comply with the Trademark Examining Attorney’s requirement to disclaim EXPRESS and FREE under Trademark Act Section 6(a), 15 U.S.C. § 1056(a), on the ground that the terms are merely descriptive of the identified services;³ and (3) for Applicant’s failure to comply with the Trademark Examining Attorney’s information request under Trademark Rule 2.61(b), 37 C.F.R. § 2.61(b).

¹ Application Serial No. 87597456, filed September 6, 2017, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The description of the mark is as follows: “The mark consists of a shaded circle in graded shades of blue representing a globe, with numerous four pointed stars in yellow and white, and shaded circles in yellow and white, some surrounded by rings also in yellow and white, all depicting planets. The circle is outlined in maroon and then gray. The wording ‘GALAXIES EXPRESS CAR WASH’ is superimposed over the circle. The wording appears on a shaded pink background in a stylized font that contains shades of yellow and white. The end of a hose with water streaming out extends from the bottom left corner of the circle toward the top right of the circle. The hose is white and outlined in pink, with slight pink shading on the end opposite the nozzle and pink lines on the nozzle. The water coming from the hose contains different shades of blue, is outlined in pink, and represents one of the diagonal lines in the letter ‘X’ in ‘GALAXIES’ and ‘EXPRESS’. Blue drops of water with white dots in the center appear to be falling from the end of the streaming water. A curving band, representing a comet, runs along the outside of the left side of the circle. The curving band is yellow gradually turning to pink with an inner yellow band at one end, followed by the wording ‘FREE SPACE VACUUMS.’” The colors blue, yellow, white, pink, gray and maroon are claimed as features of the mark.

² Registration No. 3944528, registered April 12, 2011; “Combined Declaration of Use and Incontestability under Sections 8 & 15” accepted and acknowledged on June 21, 2016.

³ During prosecution, Applicant agreed to disclaim CAR WASH and VACUUMS.

When the refusals were made final, Applicant appealed and requested reconsideration. The Trademark Examining Attorney maintained the refusals to register and denied the request for reconsideration. Thereafter, the appeal was resumed and is now briefed. For the reasons explained below, we affirm the refusals under Section 2(d) of the Trademark Act and based on the Examining Attorney's Trademark Rule 2.61(b) information request, but affirm in part and reverse in part the refusal predicated on the disclaimer requirement.

I. Evidentiary Objections

Before addressing the merits of this appeal, we address two evidentiary objections asserted by the Examining Attorney.

First, the Examining Attorney objects to Applicant's submission of new evidence with Applicant's appeal brief consisting of search results from the LexisNexis® "Company and Financial" database and a screen shot from the "D&B Duns Market Identifies Plus (US)" database. Applicant's Brief, 4 TTABVUE 12-346. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d) provides that "[t]he record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed." Because Applicant's new evidence was untimely, the Examining Attorney's objection is sustained, and the objected-to evidence submitted concurrently with Applicant's appeal brief has been given no consideration. *See In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1744

(TTAB 2018) *aff'd*, Slip Op. No. 18–2236 (Fed. Cir. Sept. 13, 2019) (mem); *In re Fiat Grp. Mktg. & Corp. Commc'ns S.p.A*, 109 USPQ2d 1593, 1596 (TTAB 2014).

Second, the Examining Attorney reiterates her objection to the lists of third-party registrations, as opposed to actual copies of the third-party registrations, submitted with Applicant's responses to the Office actions. *See* March 19, 2018 Response to Office action, TSDR pp. 3-12; August 30, 2018 Request for Reconsideration, TSDR pp. 2-3, 17-18. The Examining Attorney explained in the initial Office action, the Final Office action, and Denial of Applicant's Request for Reconsideration that submission of a list of registrations does not make such registrations part of the record, and that in order to make the third-party registrations part of the record, Applicant must either submit copies of the registrations, or the electronic equivalent from the USPTO's automated systems (i.e., TSDR), prior to appeal. *See In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2064 (TTAB 2013); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 1208.02 (2019). The Examining Attorney is correct, and despite being forewarned, Applicant failed to comply. In view thereof, we sustain the Examining Attorney's objection on this ground as well and do not consider the listed registrations to be of record.

II. Information Request

Trademark Rule 2.61(b), 37 C.F.R § 2.61(b), provides that "[t]he Office may require the applicant to furnish such information ... as may be reasonably necessary to the proper examination of the application." According to the U.S. Court of Appeals for the Federal Circuit, the wording "reasonably necessary" in this context should be

interpreted broadly, and applies to information that is “relevant to” registrability or “reasonably calculated” to lead to such relevant information. *Cf. Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 73 USPQ2d 1409, 1414 (Fed. Cir. 2005) (discussing Patent Rule 1.105(a)(1), which is the equivalent of Trademark Rule 2.61(b)). The underlying purpose of the rule

[is] to encourage high-quality, efficient examination and recognizes that an applicant is often in the best position to provide the facts and information that the USPTO needs to properly examine an application and assess registrability of the applicant’s mark. If an information request is phrased clearly and focused on obtaining the information most relevant to evaluate a particular ground of refusal or requirement, examination is more efficient and refusals (or allowances) of registration based on insufficient facts and information can be avoided.

TRADEMARK MANUAL OF EXAMINING PROCEDURE § 814 (Oct. 2018) (“TMEP”). Noncompliance is a proper ground for refusing registration. *In re AOP LLC*, 107 USPQ2d 1644, 1651 (TTAB 2013); *see also, In re Cheezwhse.com Inc.*, 85 USPQ2d 1917, 1919 (TTAB 2008); *In re DTI P’ship LLP*, 67 USPQ2d 1699, 1701 (TTAB 2003); TMEP § 814. Furthermore, failure to comply with an information request under Trademark Rule 2.61(b) may be a sufficient basis in and of itself for refusal of registration. *DTI P’ship*, 67 USPQ2d at 1699 (affirming refusal to register under Rule 2.61 without reaching substantive refusal under Trademark Act § 2(e)(1)).

In the first Office Action dated December 19, 2017, the Examining Attorney requested Applicant to respond to the following questions:

(1) State whether applicant’s services are or will be advertised as being an “express car wash”, or are or will be advertised as being fast, expedited, or time saving:

(2) State whether applicant's services include or will include the use of vacuums for free.

In its March 19, 2018 response to the first Office Action, Applicant completely ignored the Examining Attorney's information request. This prompted the Examining Attorney to maintain and make final this requirement on April 10, 2018. Again, when filing its August 30, 2018 Request for Reconsideration, Applicant ignored the Examining Attorney's information request. Applicant only acknowledged this requirement for the first time in its appeal brief, arguing that

[t]he applicant should not be required to answer questions for the following reasons; [t]he Applicant will advertise its mark as shown in the Specimen because that's required by the Trademark Office. The Examiner is requiring applicant to testify to future advertisement in order to support the allegation of descriptiveness.

Applicant's Brief, p. 8, 4 TTABVue 9.

The Examining Attorney's requirement for additional information was appropriate. The Examining Attorney questions were "reasonably calculated" to lead to relevant information regarding Applicant's mark and the nature of the recited services for purposes of assessing potential refusals or requirements. Applicant made no attempt to answer the questions. As explained in *DTI P'ship*, which also involved an intent-to-use application:

[Applicant] may comply with the request by submitting the required advertising or promotional material. Or it may explain that it has no such material, but may submit material of its competitors for similar goods or provide information regarding the goods on which it uses or intends to use the mark. Or it may even dispute the legitimacy of the request, for example, if the goods identified in the application are such ordinary consumer items that a request for information concerning them would be

considered unnecessary and burdensome. **What an applicant cannot do, however, is to ignore a request made pursuant to Trademark Rule 2.61(b), as applicant has here.**

DTI P'ship, 67 USPQ2d at 1701 (citing *In re SPX Corp.*, 63 USPQ2d 1592, 1597 (TTAB 2002)) (emphasis added). During prosecution, Applicant repeatedly ignored the request and did nothing to attempt to comply. Applicant had a duty to participate in the examination process by responding directly to each request for information. *See Star Fruits*, 73 USPQ2d at 1415 (“So long as there is some legitimate reason for seeking the information . . . the applicant has a duty to respond.”). The Examining Attorney’s questions were focused on the issue of whether the wording in the mark was merely descriptive, which is directly relevant to both the likelihood of confusion analysis and disclaimer requirement.

We affirm the refusal to register based on Applicant’s failure to comply with the Trademark Rule 2.61(b) information requirement. This refusal, by itself, is a sufficient basis for refusing registration. *See, e.g., In re Playanalytics, Inc.*, 70 USPQ2d 1453, 1458 (TTAB 2004); *In re Joseph Edward Page*, 51 USPQ2d 1660, 1665 (TTAB 1999). Nevertheless, for sake of completeness, we now address the disclaimer requirement under Trademark Act Section 6(a) and refusal under Trademark Act Section 2(d).

III. Disclaimer Requirement

An examining attorney may require an applicant to disclaim an unregistrable component of a mark otherwise registrable. Trademark Act Section 6(a), 15 U.S.C.

§ 1056(a). A “disclaimer” is a statement that an applicant does not claim exclusive rights to an unregistrable component of a mark:

[A] disclaimer of a component of a composite mark amounts merely to a statement that, in so far as that particular registration is concerned, no rights are being asserted in the disclaimed component standing alone, but rights are asserted in the composite; and the particular registration represents only such rights as flow from the use of the composite mark.

Sprague Electric Co. v. Erie Resistor Corp., 101 USPQ 486, 486-87 (Comm’r Pats. 1954). Merely descriptive terms are unregistrable under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), and therefore are subject to disclaimer if the mark is otherwise registrable. Failure to comply with a disclaimer requirement is grounds for refusal of registration. *In re Omaha Nat’l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Richardson Ink Co.*, 511 F.2d 559, 185 USPQ 46 (CCPA 1975); *In re National Presto Indus. Inc.*, 197 USPQ 188 (TTAB 1977); and *In re Pendleton Tool Indus. Inc.*, 157 USPQ 114 (TTAB 1968).

“A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). See also *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015). The determination of whether a portion of a mark is merely descriptive must be made in relation to the services for which registration is sought, not in the abstract. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Bayer*, 82 USPQ2d at 1831. This requires consideration of the context in which the term is

used or intended to be used in connection with those services, and the possible significance that the term would have to the average purchaser of the services in the marketplace. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Bayer*, 82 USPQ2d at 1831; *In re Omaha Nat'l Corp.*, 2 USPQ2d 1859. Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries, newspapers, or surveys.” *In re Bayer*, 82 USPQ2d at 1831 (quoting *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818, 819 (Fed. Cir. 1986)).

Inasmuch as Applicant has already disclaimed CAR WASH and VACUUMS, the scope of the disclaimer issue in this appeal is limited to consideration of the Examining Attorney’s requirement to disclaim the terms EXPRESS and FREE. However, in order to analyze whether the requirement is warranted, we will examine the context in which the terms are used in the phrases GALAXIES EXPRESS and FREE SPACE in relation to the identified services.

Applicant argues that the term EXPRESS is suggestive. The record shows otherwise. “Express” when used as a noun as in the phrase GALAXIES EXPRESS is defined as “an overnight or rapid delivery service.”⁴ It is not uncommon for competitors to advertise their automobile cleaning and car wash services as fast or speedy. Note for example the following:

Metro M Express (www.metroexpresscarwash.com):
Experience a clean car in 5 minutes or less! A top quality

⁴ Oxford English Dictionary (U.S. version) attached to December 19, 2017 Office action, TSDR, pp. 6-8.

wash that's fast, inexpensive and environmentally friendly ...⁵

Mister Car Wash (mistercarwash.com): In a hurry and need a car wash? Choose one of our speedy, exterior only, express car washes while staying in the comfort of your vehicle.⁶

Surf Thru Express Car Wash (surfthruexpress.com): A Clean Care in 5 minutes Using Quality Products!⁷

We therefore affirm the disclaimer requirement as to the word EXPRESS because as used in connection with automobile cleaning and car washing services, it merely describes a feature of the service as fast or speedy.

We reverse, however, as to the requirement to disclaim the word FREE. As used in the context of FREE SPACE, we find that “free” is part of this unitary phrase and constitutes a double entendre in light of Applicant’s GALAXY composite mark. “Free space” is defined as “a region that has no gravitational and electromagnetic fields: used as an absolute standard. Also called (no longer in technical usage): vacuum.” THE FREE DICTIONARY BY FARLEX (www.freedictionary.com). *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013) (Board may take judicial notice of online dictionaries that exist in printed format or have regular fixed editions).

According to TMEP Section 1213.05(b), a unitary phrase is

‘a group of words that are used together in a fixed expression,’ ‘two or more words in sequence that form a syntactic unit that is less than a complete sentence,’ and ‘a sequence of two or more words arranged in a grammatical construction and acting as a unit in a sentence.’

⁵ *Id.* at 9.

⁶ *Id.* at 10.

⁷ April 10, 2018 Office action at 77-78.

MacmillanDictionary.com, search of ‘phrase,’ <http://www.macmillandictionary.com/dictionary/american/phrase> (Jan. 31, 2012); The American Heritage Dictionary of the English Language 1324 (4th ed. 2006); Random House Webster’s Unabridged Dictionary 1460 (2nd ed. 2001). Acting as a ‘single idea’ or a ‘syntactical unit,’ however, does not necessarily mean that a phrase is ‘unitary’ in the trademark sense. A phrase qualifies as unitary in the trademark sense only if the whole is something more than the sum of its parts. *Dena Corp. v. Belvedere Int’l, Inc.*, 950 F.2d 1555, 1561, 21 USPQ2d 1047, 1052 (Fed. Cir. 1991) (finding EUROPEAN FORMULA and design for cosmetic products not unitary since the ‘elements are not so merged together that they cannot be regarded as separate’ and the proximity of the words to the design feature “does not endow the whole with a single, integrated, and distinct commercial impression”).

TMEP Section 1213.05(c) explains the concept of a double entendre:

A ‘double entendre’ is a word or expression capable of more than one interpretation. For trademark purposes, a ‘double entendre’ is an expression that has a double connotation or significance as applied to the goods or services. The mark that comprises the ‘double entendre’ will not be refused registration as merely descriptive if one of its meanings is not merely descriptive in relation to the goods or services.

A true ‘double entendre’ is unitary by definition. An expression that is a ‘double entendre’ should not be broken up for purposes of requiring a disclaimer. *See In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983), where the Board found inappropriate a requirement for a disclaimer of LIGHT’ apart from the mark ‘LIGHT N’ LIVELY’ for reduced calorie mayonnaise ...

The word GALAXY in Applicant’s composite mark, along with its globe and star design, evokes the commercial impression of outer space. “Galaxy” is defined as “any of the very large groups of stars and associated matter that are found throughout the universe. THE MERRIAM WEBSTER DICTIONARY (www.merriam-webster.com) submitted with December 19, 2017 Office Action. It is readily apparent from the mark

that “free space” connotes a region in outer space lacking a gravitational pull and electromagnetic field as a clever play on Applicant’s automobile vacuum services at no additional cost. *See* TMEP § 1213.05(c) (“The multiple interpretations that make an expression a “double entendre” must be associations that the public would make fairly readily, and must be readily apparent from the mark itself.”) (citing *In re RiseSmart Inc.*, 104 USPQ2d 1931, 1934 (TTAB 2012)). This double entendre takes the word “free” out of the realm of mere descriptiveness.

In view of the foregoing, the refusal based on the disclaimer requirement is affirmed as to the term EXPRESS but reversed as it pertains to the word FREE.

IV. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont*”). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *du Pont* factor for which there is evidence or argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). When analyzing these factors, the overriding concerns are not only to prevent buyer confusion as to the source of the services, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the 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.”). These factors, and the other relevant *du Pont* factors, are discussed below.

A. The Services and Trade Channels

First we compare the services as they are identified in the involved application and cited registration. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) and *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). To state the obvious, Applicant’s “car washing services” are identical to Registrant’s “car wash services.” Because the services are in-part identical and unrestricted as to trade channels, we must also presume that these particular services travel in the same ordinary trade and distribution channels and will be marketed to the same potential consumers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *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);

American Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst., 101 USPQ2d 1022, 1028 (TTAB 2011).

Accordingly, the *du Pont* factors regarding the similarity or dissimilarity of the services and the similarity or dissimilarity of established, likely to continue trade channels each favor a finding of likelihood of confusion.

B. The Marks

This *du Pont* likelihood of confusion factor involves an analysis of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (citing *du Pont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s*, 126 USPQ2d at 1746 (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). “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.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). Our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and

considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”).

It is well-settled that where the services are identical in part, as is the case here, less similarity between the marks is needed for us to find a likelihood of confusion. *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (“When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.”).

Applicant argues that the Examining Attorney has improperly dissected the applied-for mark and that the additional wording and design element suffice to distinguish it from the cited mark. We acknowledge the specific differences in sight and sound pointed out by Applicant. However, we disagree with Applicant’s contention that the Examining Attorney has improperly dissected the marks and that they are overall different in meaning and commercial impression. In reaching a conclusion on the issue of likelihood of confusion, 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 a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161 (citing *In re Nat’l Data Corp.*, 224 USPQ at 751). The dominant portion of Applicant’s mark, the initial word GALAXIES, is the plural version of the word comprising the entirety of the cited mark GALAXY. GALAXIES, as the first term in Applicant’s mark “is most likely to be impressed upon the mind of a purchaser and remembered.” *See Presto Prods. Inc. v.*

Nice-Pak Prods. Inc., 9 USPQ2d 1895, 1897 (TTAB 1988) (“[It is] a matter of some importance since it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.”); *see also, Palm Bay*, 73 USPQ2d at 1692 (“The presence of this strong distinctive term as the first word in both parties’ marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of the word ROYALE.”). In addition, as superimposed over the design element, GALAXIES attracts the consumer’s attention, and as such is the dominant element. The descriptive term EXPRESS, and the generic wording CAR WASH which appear below, are ancillary in nature. The phrase FREE SPACE VACUUMS is in smaller sized lettering compared to GALAXIES, and is likely to be perceived as a tag line. Consumers are therefore more likely to attribute source identifying features to the initial, arbitrary word GALAXIES in Applicant’s mark.

We further find that the globe and stars design in Applicant’s mark reinforce the connotation and commercial impression projected by the word GALAXIES. As noted above, a galaxy is defined as a cluster of stars. This design element serves to emphasize and not detract from the dominance of the word GALAXIES.

For the foregoing reasons, we find that overall Applicant’s and Registrant’s marks are similar in connotation and commercial impression. Thus, this *du Pont* factor also weighs in favor of finding a likelihood of confusion.

C. Balancing the Factors

We have carefully considered all of the evidence made of record, as well as all of

the arguments related thereto. The similarities of the marks coupled with the in-part identical nature of the services and overlapping trade channels leads us to the conclusion that prospective consumers are likely to confuse the source of the involved services.⁸

Decision: The Section 2(d) refusal and failure to comply with the Examining Attorney's Trademark Rule 2.61(b) information requirement are affirmed; the disclaimer requirement is affirmed in part and reversed in part.

⁸ In its brief, relying on excluded evidence, Applicant argues that the cited mark GALAXY is weak when used in connection with car wash services due to widespread third-party use. As a result our evidentiary rulings explained above, we have not considered Applicant's arguments pertaining to the sixth *du Pont* factor.