

This Opinion is not a
Precedent of the TTAB

Mailed: June 26, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Smith & Loveless, Inc.
—

Serial No. 87617637
—

Jeffrey L. Clark of Wood, Phillips, Katz, Clark & Mortimer,
for Smith & Loveless, Inc.

David A. Brookshire, Trademark Examining Attorney, Law Office 114,
Laurie Kaufman, Managing Attorney.

—
Before Mermelstein, Heasley, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Smith & Loveless, Inc. (“Applicant”) seeks registration on the Principal Register
of the mark shown below



for “wet well mounted pumping stations; wastewater pumping stations; sewage pumping stations,” in International Class 7.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the typed mark EVERLASTING shown in Registration No. 524232 for “valves for controlling the flow of fluids,” in International Class 6,² as to be likely, when used on or in connection with the goods identified in the application, to cause confusion, to cause mistake, or to deceive.

Applicant appealed after the Examining Attorney made the refusal final. The case is fully briefed. We affirm the refusal to register.

I. Evidentiary Issues

Before proceeding to the merits of the refusal and discussing the record on appeal, we must address two evidentiary matters. Applicant attached to its main brief copies of the certificates of registration of eight marks that Applicant claims in an argument heading are “CLOSER TO EVERLASTING THAN APPLICANT’S MARK” and are used “WITH GOODS CLOSER TO ‘VALVES’ THAN APPLICANT’S PUMPING STATIONS” and “IN MARKETS WITH LESS SOPHISTICATED CUSTOMERS THAN THOSE WHO PURCHASE APPLICANT’S

¹ Application Serial No. 87617637 was filed on September 21, 2017 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claimed first use of the mark and first use of the mark in commerce at least as early as June 2, 2015. Applicant describes the mark as “consist[ing] of the word EVERLAST beneath an image of pipes looped in the general shape of the symbol for infinity.”

² The cited registration issued on April 18, 1950 and was last renewed in 2009. A typed mark is the legal equivalent of a standard character mark. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012).

PUMPING STATIONS.” 4 TTABVUE 3, 12-22.³ Applicant also discusses certain Internet webpages in its main brief, in which Applicant provides what appear to be active hyperlinks to the pages, as well as screenshots from them. *Id.* at 4-6. As to some of the screenshots, Applicant states that they “were included in prior responses,” and argues that such inclusion “is submitted to be suitable and more convenient for ease of reference than to submit them as attachments.” *Id.* at 5 n.1. As to others, Applicant states that “[t]hese pictures were also included within the prior responses and come from the indicated web address,” and argues that such inclusion “within the responses is similarly submitted to be suitable and more convenient for ease of reference than to submit them as difficult to print attachments.” *Id.* at 6 n.2.

The Examining Attorney acknowledges that “Applicant argues that the word ‘EVERLAST’ is diluted and that registered marks with similar wording coexist alongside each other,” but argues that “the registrations applicant relies on for this claim were never properly entered into the record,” as “Applicant only included a list of these registrations in its original response” to the first Office Action, and the “mere submission of a list of registrations does not make such registrations part of the record.” 6 TTABVUE 8 (citing, *inter alia*, *In re Compania de Licores Internacionales S.A.*, 102 USPQ2d 1841 (TTAB 2012)). The Examining Attorney notes that in the “final office action this omission was noted and applicant was informed that, because

³ Citations to the briefs in this opinion refer to TTABVUE, the Board’s online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

the cited registrations were not properly made of record they could not be addressed.” *Id.* at 8-9. He “requests that the Board disregard the third-party registrations submitted by applicant with its appeal brief.” *Id.* at 9. He argues in the alternative that “if the Board takes judicial notice of the third-party registrations which were improperly made of record, the cited registrations do not establish dilution of the wording and goods involved in this appeal.” *Id.*

The Examining Attorney also argues that “Applicant’s internet materials have not been properly made of record and are objected to.” *Id.* He claims that Applicant merely “provided excerpted images and their web address and/or hyperlinks, which is not sufficient to introduce the underlying webpages into the record.” *Id.* (citing, inter alia, *In re Olin Corp.*, 124 USPQ2d 1327 (TTAB 2017)). He contends that “the underlying webpages associated with the web addresses and/or links were not considered and should not be considered by the Board.” *Id.*

In its reply brief, Applicant submits “that it would be proper and best serve the efficient administration of justice for the Board to take judicial notice . . . and consider the other ‘EVER’ registrations noted in Applicant’s Appeal Brief.” 7 TTABVUE 2 (citing *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681 (Fed. Cir. 2010)). Applicant claims that the “arguments regarding these registrations are not new as Applicant’s arguments regarding these registrations were made during prosecution before appeal,” that “the registrations are all the U.S. Patent and Trademark Office Records,” that “full copies of those registrations have been submitted with Applicant’s Appeal Brief,” and that “the Examining Attorney has

acknowledged that the Board could take judicial notice of those registrations and has included his counter-arguments relating to the relevance of those registrations” in his brief. *Id.* Applicant does not address the objected-to Internet evidence.

With respect to the registrations, “[w]e recognize the Federal Circuit exercised its discretion to take judicial notice of third-party registrations in [*Chippendales*],” but “the Board’s well-established practice is not to take judicial notice of registrations that reside in the USPTO, and we do not take judicial notice of applicant’s late-filed registration[s] here.” *In re Jonathan Drew, Inc.*, 97 USPQ2d 1640, 1641 n.11 (TTAB 2011). Following this well-established practice is particularly justified here because the Examining Attorney advised Applicant in the final Office Action that Applicant had not made the registrations of record merely by submitting a list of them, and that “[b]ecause the registrations are not properly made of record they cannot be addressed.”⁴ *Cf. In re City of Houston*, 101 USPQ2d 1534, 1536 (TTAB 2012) (where the examining attorney failed to advise the applicant during prosecution of the insufficiency of a list of registrations, the Board deemed the examining attorney to have waived any objection to the list and considered it for whatever probative value it had). The Examining Attorney further advised Applicant in the final Office Action that it needed to submit “copies of the registrations, or the complete electronic equivalent from the USPTO’s automated systems, prior to appeal.”⁵ Applicant should

⁴ May 19, 2018 Final Office Action at 1. All citations to the record in this opinion are to the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

⁵ *Id.*

have heeded this advice and made the registrations of record on a request for reconsideration, Trademark Rule 2.63(b)(1)(i), 37 C.F.R. § 2.63(b)(1)(i), or on a request for remand following the filing of the appeal. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). It did neither, and we sustain the Examining Attorney's objection to the third-party registrations and have given them no consideration in our decision.

The Examining Attorney similarly advised Applicant during prosecution that the webpages that were referenced and displayed in Applicant's response to the first Office Action were not properly made of record and would not be considered,⁶ and he again explained how Applicant could make those materials of record.⁷ Applicant did not heed this advice either, and we sustain the Examining Attorney's objection to Applicant's Internet evidence and have given it no consideration in our decision, except to the extent that this material was properly introduced by the Examining Attorney.⁸ *Olin Corp.*, 124 USPQ2d at 1331 n.15.

II. Record on Appeal

The record on appeal consists of Applicant's specimen of use, dictionary definitions of "everlasting," "ever," and "last," made of record by the Examining Attorney;⁹ pages

⁶ Those webpages, including pages from Applicant's own website, were the ones referenced and displayed in Applicant's main brief. April 13, 2018 Response to Office Action at TSDR 3-4; 4 TTABVUE 4-6.

⁷ May 19, 2018 Final Office Action at TSDR 1.

⁸ Three of the screenshots from the excluded webpages display Applicant's own pumping stations, 4 TTABVUE 6, one of which is also shown (and described) on a page from Applicant's website that was made of record by the Examining Attorney. October 13, 2017 Office Action at TSDR 9. We have considered that webpage.

⁹ *Id.* at TSDR 4-6 (MERRIAM-WEBSTER DICTIONARY); May 19, 2018 Final Office Action at TSDR 2 (OXFORD LIVING DICTIONARIES).

from Applicant's website at smithandloveless.com, made of record by the Examining Attorney;¹⁰ and pages from third-party websites displaying pumping stations and valves under the same mark, made of record by the Examining Attorney.¹¹

III. Analysis of Likelihood of Confusion Refusal

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under § 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Two key factors in every § 2(d) case are the similarity or dissimilarity of the marks, and of the goods or services, because the “fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). Both Applicant and the Examining Attorney address these key factors. 4 TTABVUE 3-9; 6 TTABVUE 4-8. Applicant also discusses the fourth *DuPont* factor, the “conditions under which

¹⁰ *Id.* at TSDR 7-14.

¹¹ *Id.* at TSDR 15-21.

and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing,” *DuPont*, 177 USPQ at 567, 4 TTABVUE 5-6, and the sixth *DuPont* factor, the “number and nature of similar marks in use on similar goods. *DuPont*, 177 USPQ at 567, 4 TTABVUE 3-5.¹²

A. The Similarity or Dissimilarity of the Marks

The first *DuPont* factor is “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps., Inc. v. Veuve Cliquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *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) (citing *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)). “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) (quotation omitted). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific

¹² As discussed above, we have excluded the third-party registrations and webpages on which Applicant’s arguments under the sixth *DuPont* factor depend because those materials were never properly made of record. Accordingly, we do not address Applicant’s arguments on this factor.

impression of marks.” *In re i.am.symbolic*, 127 USPQ2d 1627, 1630 (TTAB 2018) (citations omitted).

1. Applicant’s Arguments

Applicant argues that the cited mark EVERLASTING “is widely recognized as an adjective – a descriptive word – with a clear meaning (*i.e.*, lasting forever),” while “EVERLAST by contrast is not a commonly used word (it is probably most commonly used and recognized as relating to boxing gloves and equipment), and even when used could as easily be understood to have a completely different meaning (*i.e.*, always finishing last in a competition).” 4 TTABVUE 8. According to Applicant, “despite the EVERLAST- similarity . . . the differences in usage and taken meaning are such that people would not generally think of EVERLAST when hearing or seeing EVERLASTING.” *Id.*¹³

Applicant also “asserts that the Office Action has improperly minimized, if not completely overlooked, the design element of Applicant’s mark.” *Id.* Applicant claims that the Examining Attorney “completely ignores the significant design element in Applicant’s mark – the image of pipes looped in the general shape of the symbol for infinity,” *id.*, which Applicant characterizes as “a significant, probably dominant, element of Applicant’s mark.” *Id.* at 9.

¹³ Applicant argues that the “significance of the difference between EVERLAST and EVERLASTING was clearly illustrated by the prior registration of the mark EVERLAST as used with ‘general purpose valve lubricant/sealant for industrial uses such as oilfield services,’” citing one of the third-party registrations that we have excluded. 4 TTABVUE 8. Because we have excluded that registration, we have given no consideration to this argument.

2. The Examining Attorney's Arguments

The Examining Attorney argues that “the literal wording in the applied-for mark merely deletes the ‘ING’ from the registered mark,” which “only slightly modulates the sound and appearance of the wording in the marks and does not alter the meaning of the mark, which is to suggest that the attached goods will last a long amount of time.” 6 TTABVUE 5. He further argues that the “design elements and minor stylizations in the applied-for mark are unlikely to differentiate the marks from one another because the registered mark is in typed drawing format.” *Id.* He argues that “the registered mark is in [typed] form and therefore may be presented in stylization and accompanied by designs that are identical to those in the applied-for mark,” *id.* at 6, and that “the use of an infinity symbol merely reinforces the commercial impression of the words ‘everlast[.]’ and ‘everlasting’ which is synonymous for ‘infinite’ meaning ‘lasting forever.’” *Id.*

3. Analysis of Similarity

The word EVERLAST in Applicant's mark differs from the cited mark EVERLASTING only by the absence in Applicant's mark of the -ING suffix in the cited mark. As noted above, Applicant concedes what it calls “the EVERLAST-similarity,” 4 TTABVUE 8, but argues “that the differences in usage and taken meaning are such that people would not generally think of EVERLAST when hearing or seeing EVERLASTING.” *Id.* We find that the marks are similar in all means of comparison.

With respect to appearance, we reject Applicant’s claim that the infinity symbol in its mark is “a significant, probably dominant, element” *Id.* at 9. The marks must be considered in their entirety, but “in articulating reasons for reaching a conclusion on the issue 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 consideration of the marks in their entirety.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)). Applicant’s mark, reproduced again below,



contains both a word and a design. “In the case of a composite mark containing both words and a design, ‘the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.’” *Viterra*, 101 USPQ2d at 1908 (quoting *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)); *see also In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (“The verbal portion of a word and design mark ‘likely will appear alone when used in text and will be spoken when requested by consumers’”) (quoting *Viterra*, 101 USPQ2d at 1911)).

“Applicant is here not applying to register the word EVERLAST as a mark,” but rather “the overall design mark, one component of which is the word EVERLAST,” 4

TTABVUE 9, but we find that the word EVERLAST in Applicant's mark should be "accorded greater weight because [it] is likely to make a greater impression upon consumers, to be remembered by them, and to be used by them to request the goods." *Aquitaine Wine USA*, 126 USPQ2d at 1184. Applicant acknowledges that there is "no relevant design difference in the appearance of EVERLAST given that the [cited mark] is in 'standard character format,'" 4 TTABVUE 9, because the cited EVERLASTING mark "may be presented in any font style, size, or color, including the same font, size and color as the literal portions of Applicant's mark." *Aquitaine Wine USA*, 126 USPQ2d at 1186.¹⁴

We find that the marks are quite similar in appearance, particularly taking into account "the recollection of the average customer, who retains a general rather than specific impression of marks," *i.am.symbolic*, 127 USPQ2d at 1630, and the fact that the "marks 'must be considered . . . in light of the fallibility of human memory' and 'not on the basis of side-by-side comparison.'" *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977)). Although the infinity symbol is visually prominent in Applicant's mark when the mark is viewed

¹⁴ As noted above, the Examining Attorney goes further and argues that the cited mark may also be "accompanied by designs that are identical to those in the applied-for mark." 6 TTABVUE 6. This argument is incorrect. We may not assume that the cited mark may be used with any designs because we have held that "when we are comparing a standard character mark to a word + design mark for Section 2(d) purposes, we will consider variations of the depictions of the standard character mark *only with regard* to 'font style, size or color' of the 'words, letters, numbers, or any combination thereof.'" *Aquitaine Wine USA*, 126 USPQ2d at 1187 (citing *Viterra and Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011)).

alone, a consumer with a fallible memory and a general impression of the cited EVERLASTING mark who encounters Applicant's EVERLAST-dominated mark is unlikely to distinguish the two marks on the basis of the presence of the infinity symbol in Applicant's mark.

Neither Applicant nor the Examining Attorney addresses the marks' similarity in sound, but we find that they sound quite similar. The design element in Applicant's mark would not be verbalized and the dominant word EVERLAST sounds like the first three syllables of EVERLASTING.

With respect to the connotation and commercial impression of the marks, Applicant focuses almost entirely on the claimed differences in the meaning of EVERLAST and EVERLASTING in the context of the involved goods. As noted above, Applicant argues that EVERLASTING "is widely recognized as an adjective" with "a clear meaning (*i.e.*, lasting forever)," 4 TTABVUE 8, while the word EVERLAST in its mark "is not a commonly used word" and when used could be understood to refer to EVERLAST boxing equipment, or "could as easily be understood to have a completely different meaning (*i.e.*, always finishing last in a competition)." *Id.*

The record does not support Applicant's argument. To the contrary, it shows that EVERLAST is roughly synonymous with EVERLASTING because EVERLAST similarly connotes "continuing for a long time or indefinitely,"¹⁵ or "lasting forever or a very long time."¹⁶ Applicant's webpage touts the "long service life" of its EVERLAST

¹⁵ October 13, 2017 Office Action at TSDR 4 (MERRIAM-WEBSTER DICTIONARY).

¹⁶ May 19, 2018 Final Office Action at TSDR 2 (OXFORD LIVING DICTIONARIES).

product and states that “EVERLAST™ is designed to provide you a long, successful pumping life”:

3:59:06 PM January 30, 2017
http://smithandloveless.com/products/everlast-above-ground-pump-stations/everlast-series-2000-relay-logic-controls-sliding-hood

Smith & Loveless Inc. Products Parts & Service About S&L Markets Contact

EVERLAST™ Series 2000 with Relay Logic Controls & Sliding Hood

Smith & Loveless Inc.'s above-ground wastewater pumping stations pave the way for end-users to reap the benefits of robust construction, operator-safe maintenance and single-source solutions. The result is efficient pump station performance, long service life and realized savings—verified by decades of successful installations.

S&L's next generation **EVERLAST™** Wet Well Mounted Pump Stations perfectly embody this philosophy. Featuring the top S&L innovations, new looks and enclosures, convenient package options, and leading warranty protection, **EVERLAST™** is designed to provide you a long, successful pumping life.

Series 2000

- Packaged Station
- Sliding Two-Piece Enclosure
- 3/8" (9.5 mm) Baseplate
- Relay Logic Controls

Flows	Up to 1,300 GPM (82 lps)
TDH	Up to 158' (48 m)
Power	1.5 - 50 Hp (11 - 37 kW)
Pumps	4" - 6" (100 - 150 mm)

17

The use of the infinity symbol above the word EVERLAST in Applicant’s mark merely reinforces this similarity in meaning, as EVERLASTING is a synonym for both “infinite,”¹⁸ and “infinity.”¹⁹

Although the word EVERLAST in Applicant’s mark may not be “a commonly used word,” 4 TTABVUE 8, Applicant’s own use of it belies any intention to evoke boxing equipment or to signal that Applicant’s goods are “always finishing last in a

¹⁷ October 13, 2017 Office Action at TSDR 9.

¹⁸ THESAURUS.COM (last accessed on June 21, 2019). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed form or regular fixed editions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

¹⁹ MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, last accessed on June 21, 2019).

competition.”²⁰ *Id.* EVERLAST would clearly not be understood by consumers to have these nonsensical meanings when used with pumping stations “designed to provide you a long, successful pumping life.”²¹ Instead, we find that Applicant’s mark connotes to consumers exactly what its constituent elements suggest (and what Applicant’s website communicates), namely, that Applicant’s pumping stations will last a very long time. We find that the marks are quite similar in meaning.

The marks are very similar in all means of comparison when they are considered in their entirety. The first *DuPont* factor thus strongly supports a finding of a likelihood of confusion.

B. The Similarity or Dissimilarity of the Goods and Channels of Trade

The second *DuPont* factor “considers ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,’” *Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting *DuPont*, 177 USPQ at 567), while the third *DuPont* factor “considers ‘[t]he similarity or dissimilarity of established, likely-to-continue trade channels.’” *Id.* at 1052 (quoting *DuPont*, 177 USPQ at 567). Our analysis under these factors is based on the identifications of goods in the application and the cited registration. *Id.*; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014). “[L]ikelihood of confusion can be found ‘if the respective products are related in some manner and/or if the circumstances

²⁰ It hardly seems credible that Applicant would intend to communicate through the word EVERLAST, or that its customers would understand the word to communicate, that Applicant’s goods will “always finish[] last in a competition.”

²¹ October 13, 2017 Office Action at TSDR 9.

surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (internal citations omitted).

The goods identified in Applicant’s application are “wet well mounted pumping stations; wastewater pumping stations; sewage pumping stations.”²² Applicant characterizes pumping stations as “complicated, integrated units with many integrated components, in specialized fields (wet wells, wastewater and sewage).” 4 TTABVUE 6. We reproduce below a photograph of one of Applicant’s pumping stations:



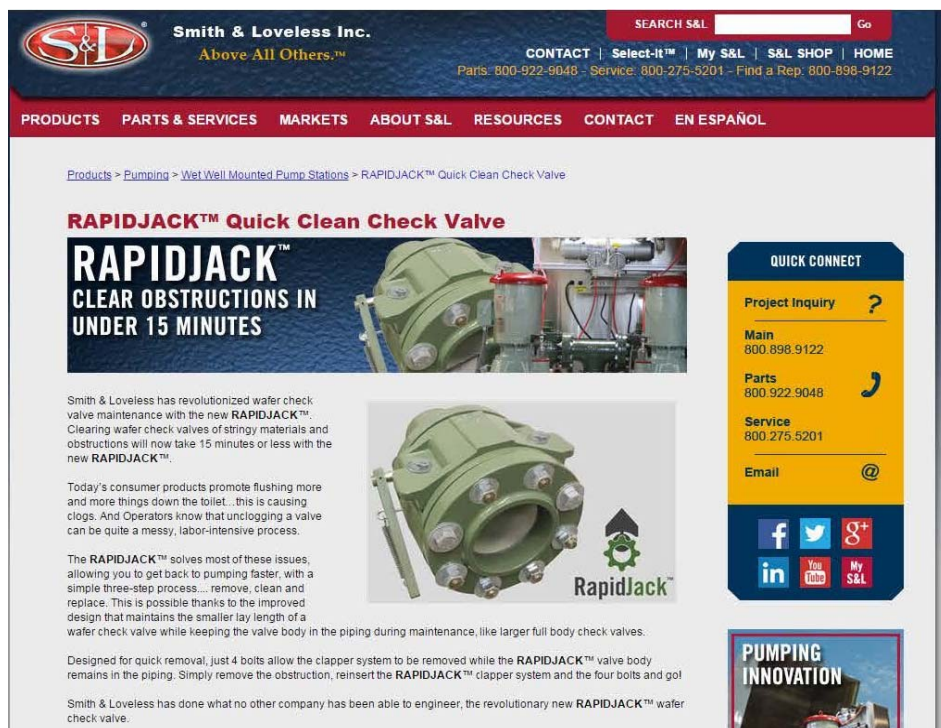
23

²² Three different types of pumping stations in Class 7 are listed in the application. The refusal to register may be affirmed as to the entire class if a likelihood of confusion is found as to any of the identified goods in the class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

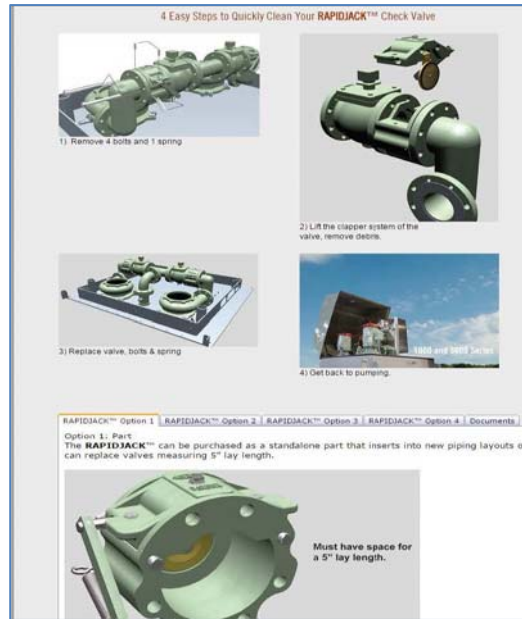
²³ October 13, 2017 Office Action at TSDR 9.

The goods identified in the cited registration are broadly described as “valves for controlling the flow of fluids.”

The Examining Attorney argues that the identified goods are related “because they are both used for controlling and conveying liquids,” and “valves for controlling the flow of liquids are integral components of wet well, wastewater and sewage pumping stations.” 6 TTABVUE 7. He also argues that because the goods in the registration are “not limited to any particular channels of trade, use or class of customers it is assumed that this wording includes valves of all manner, including valves as component part of sewage pumps.” *Id.* He points to webpages showing the sale of pumping stations and valves under the same mark, *id.*, including the pages from Applicant’s website reproduced below:



²⁴ *Id.* at TSDR 8.



25

The Rapidjack valve can be purchased as a replacement part for a sewage pump, or “as a standalone part that inserts into new piping layouts or can replace valves measuring 5” lay length.” Applicant’s website and catalog offer various other valves:²⁶



27

²⁵ *Id.*

²⁶ *Id.* at TSDR 11-12.

²⁷ *Id.* at TSDR 13.

Applicant's sale of both pumping stations and valves establishes the existence of "circumstances surrounding their marketing" that "could give rise to the mistaken belief that they emanate from the same source" when sold under similar marks. *Coach Servs.*, 101 USPQ2d at 1722. We disagree with the Examining Attorney that the goods are related merely "because they are both used for controlling and conveying liquids," 6 TTABVUE 7, but we agree with him that "valves for controlling the flow of liquids are integral components of wet well, wastewater and sewage pulping stations." *Id.*²⁸ Indeed, Applicant's website states that a complete wet well pumping station consists of "pumps, piping, valves, [and] controls,"²⁹ and the record shows that pumping stations cannot operate without functioning valves.

We have long recognized that the sale of both a finished product and a component part of that product under the same or similar marks may give rise to confusion. *See, e.g., In re Int'l Tel. & Tel. Corp.*, 197 USPQ 910, 911 (TTAB 1978) (finding a likelihood of confusion arising from use of THUNDERBOLT for cartridge heaters and THOR'S 3 IN 1 THUNDERBOLT and design for electrically energized ovens because "there exists an intimate relationship between a finished product such as registrant's oven and the component parts which comprise such oven such as applicant's cartridge heater"); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009) (finding that goods identified as "electric motors for machines" were related to goods identified

²⁸ Although Applicant complains that the Examining Attorney improperly interprets the goods identified in the cited registration as "cover[ing] anything and everything that is 'used for conveying liquids,'" 4 TTABVUE 3, Applicant's sale of valves for pumping stations shows that "valves for controlling the flow of liquids" encompass that particular type of valve.

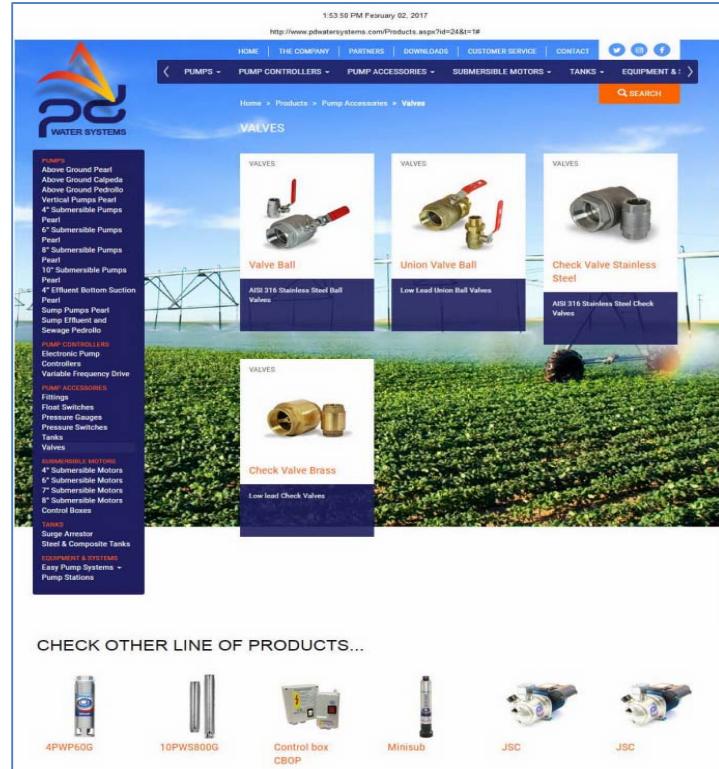
²⁹ October 13, 2017 Office Action at TSDR 7.

as “air compressors and parts therefor” because “the record show[ed] that an electric motor is or can be an essential component and/or replacement part of an air compressor”); *Teledyne Techs., Inc. v. W. Skyways, Inc.*, 78 USPQ2d 1203, 1207 (TTAB 2006) (finding that ignition harnesses for piston aircraft engines and aircraft engines were “commercially related” because harnesses were a component part of aircraft engines).

As noted above, we must deem the “valves for controlling the flow of liquids” identified in the EVERLASTING registration to encompass valves for pumping stations, and the “intimate relationship” between pumping stations and valves could give rise to confusion when, for example, someone who has purchased or is considering purchasing an EVERLAST pumping station is exposed to an EVERLASTING valve for those goods, or someone who has purchased an EVERLAST pumping station is considering purchasing an EVERLASTING valve. *See Int’l Tel. & Tel. Corp.*, 197 USPQ at 911 (discussing ways “likelihood of confusion could exist where a finished product and a component of such finished product were sold under the same or similar marks,” on the part of ultimate purchasers, repairers of the finished products, dealers of the components, and even competitors).

The Examining Attorney made of record the webpage of a second company that sells both pumping stations and valves under the same mark in the United States:³⁰

³⁰ He also made of record two other webpages of companies that sell both goods. One company appears to be located in the United Kingdom, *id.* at TSDR 15-16, while the other webpage appears to be directed to South African consumers. *Id.* at TSDR 17-19. The Examining Attorney did not show that these webpages have been exposed to consumers in the United States, and we have given them no consideration.



31

This webpage “[f]urther support[s] a finding that applicant’s goods and registrant’s goods are related for purposes of the second *du Pont* factor. . . .” *Davey Prods.*, 92 USPQ2d at 1203 (citing webpages of two companies who offered both water pumps or electric motors, and air compressors, under the same marks).

Applicant’s arguments regarding relatedness are that it “is not applying to register its mark for use with valves or anything ‘used for conveying liquids,’” and that “the fact that both companies sell valves overlooks the significant differences in the markets for the goods in question.” *Id.* at 4. These arguments are unavailing. The fact that Applicant does not seek registration of its marks for the goods identified in the cited registration has no bearing on the relatedness of those goods, and even

³¹ *Id.* at TSDR 20.

assuming that there may be some “differences in the markets for the goods in question,” Applicant’s website, and the website of the second seller of both pumping stations and valves, show that those markets overlap significantly.

Because the goods are intrinsically (indeed integrally) related and there is record evidence, most importantly from Applicant’s own website, that the goods may be sold under the same marks, the second *DuPont* factor supports a finding of a likelihood of confusion.

“Under the third *du Pont* factor, we consider evidence pertaining to the similarity or dissimilarity of the trade channels in which the goods identified in the application and in the cited registration, respectively, are marketed.” *Davey Prods.*, 92 USPQ2d at 1203. “Because neither applicant’s identification of goods nor registrant’s identification of goods includes any restrictions or limitations as to trade channels, we presume that the respective goods are or would be marketed in all normal trade channels for such goods.” *Id.* The Examining Attorney’s Internet evidence shows that the normal trade channels for the goods overlap, and that “the goods identified in applicant’s application and in registrant’s registration would be encountered by the same purchasers on the same manufacturer and/or supplier websites.” *Id.* “This overlap in trade channels supports a finding, under the third *du Pont* factor, that a likelihood of confusion exists.” *Id.*

C. The Conditions of Purchase for the Goods

Applicant argues that “the goods with which Applicant is using its [mark] and applying to register that mark are of a type in which a high degree of care is used

when purchasing such products.” 4 TTABVUE 5. According to Applicant, pumping stations are complicated products, “and are relatively expensive and thus the type of goods bought in a sophisticated market in which the customers pay particular attention and are particularly knowledgeable about suppliers of such goods.” *Id.* at 6.

These arguments are unsupported by the record, and our primary reviewing court recently reiterated that “[a]ttorney argument is no substitute for evidence.” *Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)). Applicant offers no declaration or other evidence discussing the purchasing process for its goods, including its valves for pumping stations, or their prices, and the pages from Applicant’s website made of record by the Examining Attorney do not contain prices.³² *Cf. Davey Prods.*, 92 USPQ2d at 1204 (discussing price list made of record by applicant showing that “air compressors can cost thousands of dollars”). Moreover, Applicant’s website refers to “packaged Smith & Loveless pumping systems,” suggesting that the goods are “turn-key” products that are designed for easy operation by purchasers following installation.³³

Nevertheless, we will assume, based on the inherent nature of the goods as shown and described in the record, that both pumping stations and valves for pumping stations “are somewhat expensive and that some care would be taken in purchasing the goods,” *id.*, but it is “well-settled that even careful purchasers who are

³² *Id.* at TSDR 7-14. The pages from the website of the other seller of the goods similarly does not display prices. *Id.* at TSDR 20-21.

³³ *Id.* at TSDR 7.

knowledgeable as to the goods are not necessarily knowledgeable in the field of trademarks or immune to source confusion arising from the use of confusingly similar . . . marks on or in connection with the goods.” *Id.* As discussed above, marks for all types of goods and services “must be considered . . . in light of the fallibility of human memory’ and ‘not on the basis of side-by-side comparison,” *St. Helena Hosp.*, 113 USPQ2d at 1085, and “[h]uman memories even of discriminating purchasers, technicians, etc. are not infallible.” *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970). *See also In re Research & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (“That the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods”). Even though the goods are somewhat expensive and would be purchased with a heightened degree of care, the fourth *DuPont* factor only slightly supports a finding that confusion is not likely.

D. Summary and Conclusion

The marks are very similar, and the goods are integrally related and are both sold by Applicant, and at least one other manufacturer, through overlapping channels of trade. “Sophistication of buyers and purchaser care are relevant considerations, but are not controlling on this factual record.” *Research & Trading Corp.*, 230 USPQ at 50. We find that confusion is likely as a result of Applicant’s use of the applied-for mark for the goods identified in the application.

Decision: The refusal to register is affirmed.