

This Opinion is Not a
Precedent of the TTAB

Mailed: June 11, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re South Coast Industries LLC

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Serial No. 87848470

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South Coast Industries LLC, pro se.

Christina Calloway, Trademark Examining Attorney, Law Office 122,
Kevin Mittler, Managing Attorney.

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Before Mermelstein, Larkin, and Dunn,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

South Coast Industries LLC (“Applicant”), appearing pro se, seeks registration on the Principal Register of the standard character mark SPACE PACK (PACK disclaimed) for goods ultimately identified as “Plastic bags with one-way valves, in which air is evacuated for storing household items, namely, clothing, pillows and bedding,” in International Class 22.¹

¹ Application Serial No. 87848470 was filed on March 24, 2018 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 December 1, 2013. Applicant initially sought registration for a host of additional goods, but during prosecution deleted all goods other than the identified plastic bags.

The 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 the mark so resembles the standard character mark SPACE BAG (BAG disclaimed),² and the composite word-and-design mark shown below (BAG disclaimed)



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both owned by the same registrant and both registered for a “evacuatable resealable storage bag made of nylon and polyethylene with a valve made of polyethylene and a closure system made of ABS plastic,” as to be likely, when used in connection with the goods identified in the application, to cause confusion, to cause mistake, or to deceive.

When the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which was denied. The appeal is fully briefed.⁴ We affirm the refusal to register.

² Registration No. 2055701 issued on April 22, 1997 and has been renewed.

³ Registration No. 2189041 issued on September 15, 1998 and has been renewed.

⁴ Citations in this opinion to the briefs 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 number(s) of the docket entry where the cited materials appear. Applicant initially filed an appeal brief that exceeded the applicable page limits, 8

I. Record on Appeal⁵

The record on appeal includes Applicant's specimen of use, which we reproduce below because it illustrates the nature of the goods identified in the application



and the following materials:

- Pages from the USPTO's electronic databases regarding the cited registrations, made of record by the Examining Attorney;⁷

TTABVUE, but subsequently filed a conforming brief. 10 TTABVUE. Citations to Applicant's appeal brief are to the conforming brief.

⁵ Citations in this opinion to the application record, including the request for reconsideration and its denial, are to pages in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO"). We summarize only the record evidence that is germane to the refusal at issue on this appeal.

⁶ March 24, 2018 Specimen at TSDR 1.

⁷ July 17, 2018 Office Action at TSDR 2-7.

- Definitions of the word “pack,” made of record by the Examining Attorney,⁸ and Applicant;⁹
- Definitions of, and synonyms and antonyms for, the words “bag” and “pack,” made of record by Applicant,¹⁰ and a definition of, and synonyms for, the word “bag,” made of record by the Examining Attorney;¹¹
- Examples of third-party uses of SPACE-formative marks for various types of bags, made of record by Applicant;¹²
- Examples of third-party sales of goods with similar material compositions as the involved goods and used for the same purposes as those goods, made of record by the Examining Attorney;¹³
- Pages from the USPTO’s Trademark Electronic Search System (“TESS”) database regarding third-party registrations of SPACE-, PACK-, and BAG-formative marks, made of record by Applicant;¹⁴
- Internet webpages using the words “pack,” “packing,” and “packed,” made of record by Applicant;¹⁵ and

⁸ *Id.* at TSDR 65-66 (CAMBRIDGE DICTIONARY).

⁹ January 17, 2019 Response to Office Action at TSDR 8-9 (MERRIAM-WEBSTER DICTIONARY).

¹⁰ *Id.* at TSDR 10 (MERRIAM-WEBSTER DICTIONARY); August 25, 2019 Request for Reconsideration at TSDR 10-23 (CAMBRIDGE ENGLISH DICTIONARY), 24-34 (MERRIAM-WEBSTER DICTIONARY), 35-37 (THESAURUS.COM).

¹¹ February 25, 2019 Final Office Action at TSDR 7-10.

¹² January 17, 2019 Response to Office Action at TSDR 12-13.

¹³ February 25, 2019 Final Office Action at TSDR 11-59.

¹⁴ August 25, 2019 Request for Reconsideration at TSDR 2-9, 52-59.

¹⁵ *Id.* at TSDR 38-51.

- Internet webpages displaying vacuum storage bags and packs, made of record by the Examining Attorney.¹⁶

II. Analysis of 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 the likelihood of confusion under Section 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. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). 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 *DuPont* factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and 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 and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). Applicant focuses almost entirely on the first *DuPont* factor. 10 TTABVUE 6-22; 13 TTABVUE 2-4, 6-9. Applicant also invokes *sub silentio* the sixth *DuPont* factor, the “number and nature of similar marks in use on similar goods,”

¹⁶ September 30, 2019 Denial of Request for Reconsideration at TSDR 2-27.

DuPont, 177 USPQ at 567, in its discussion of the first *DuPont* factor. 10 TTABVUE 11-14; 13 TTABVUE 4-5.¹⁷

We will focus our *DuPont* analysis on the standard character SPACE BAG mark because we find this mark to be the more pertinent of the two cited marks. If we find a likelihood of confusion as to the cited standard character mark, we need not find it as to the cited composite mark; conversely, if we do not find a likelihood of confusion as to the standard character mark, we would not find it as to the composite mark. *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. 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,’” while the third *DuPont* factor considers “the similarity or dissimilarity of established, likely-to-continue trade channels.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). “Apparently conceding the issue, Applicant did not address these factors in its brief, so we offer only a brief explanation of our conclusion.” *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1740 (TTAB 2016).

¹⁷ Applicant advances various other arguments that do not involve a *DuPont* factor. In its appeal brief, Applicant states that if the “Board still has concern that SPACE PACK may cause confusion . . . due to SPACE in the mark, applicant will agree to amend registration to the Supplemental Register.” 10 TTABVUE 14. Marks “declared to be unregistrable under subsections (a), (b), (c), and (d) and (e)(3) of section 2 of this Act” on the Principal Register are also unregistrable on the Supplemental Register. 15 U.S.C. § 1091. Applicant also makes arguments that appear to address the possible descriptiveness of its mark, 10 TTABVUE 22-23; 13 TTABVUE 3-4, an issue that is not before us.

Our analysis under these factors is based on the identifications of the goods in the application and the cited registration. *Detroit Athletic Co.*, 128 USPQ2d at 1051; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014). It is “not necessary that the goods be identical or even competitive to support a finding of a likelihood of confusion.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven, Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). “[L]ikelihood of confusion can be found ‘if the respective goods are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Id.* (quoting *7-Eleven*, 83 USPQ2d at 1724).

The goods identified in the application are “Plastic bags with one-way valves, in which air is evacuated for storing household items, namely, clothing, pillows and bedding.” The goods identified in the cited registrations are “evacuatable resealable storage bag made of nylon and polyethylene with a valve made of polyethylene and a closure system made of ABS plastic.”

The Examining Attorney argues that the identification of goods in the cited registrations “presumably encompasses all goods of the type described, including applicant’s identification of goods, which further specifies the purpose of the goods, ‘Plastic bags with one-way valves, in which air is evacuated *for storing household items, namely clothing, pillows and/or bedding*,” 12 TTABVUE 9, such that the goods are legally identical. *Id.* She also cites Internet evidence that she claims “clearly

establishes that the same entity commonly provides the relevant goods and markets them under the same mark.” *Id.*

We can determine the relatedness of the involved goods solely from the respective identifications themselves. *See Kellogg Co. v. Gen. Mills Inc.*, 82 USPQ2d 1766, 1770 (TTAB 2007) (extrinsic evidence not required where identifications “reveal sufficient facts”). We could not locate a definition of the technical or archaic word “evacuatable” that appears in the identification in the cited registration,¹⁸ but the verb “evacuate” means, inter alia, “to remove something (such as gas or water) from[,] especially by pumping,”¹⁹ and the suffix “-able” means, inter alia, “capable of,”²⁰ so in the context of the entire identification in the registration, we interpret the adjective “evacuatable” to mean that the “resealable storage bag” is “capable of having gas or water removed.” The bags identified in the registration thus have the same functional capability as the “Plastic bags with one-way valves, in which air is evacuated” identified in the application.

The “evacuatable resealable storage bag” identified in the registration also has the same material composition and components as the plastic bags identified in the application. The identification states that the bag is “made of nylon and polyethylene,” the latter of which is “a light, usually thin, soft plastic, often used for

¹⁸ The Board may take judicial notice of dictionary definitions, including definitions from online dictionaries, *see, e.g., In re Omniome, Inc.*, 2020 USPQ2d 3222, *2 n.17 (TTAB 2019), and may do so to clarify the meaning of words in an identification of goods or services. *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009).

¹⁹ MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, last accessed on June 10, 2020).

²⁰ DICTIONARY.COM (dictionary.com, last accessed on June 10, 2020).

making bags or for keeping things dry or fresh.”²¹ Both of the identifications also state that the plastic bags contain a valve.

Finally,

[w]here the goods in the application at issue and/or in the cited registration are broadly identified as to their nature and type, such that 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, and that they would be purchased by all potential buyers thereof.

In re Jump Designs, LLC, 80 USPQ2d 1370, 1374 (TTAB 2006). The “evacuatable resealable storage bag” identified in the registration is not restricted to any particular field of use, and thus must be deemed to be usable for all uses to which such bags are put, including “storing household items, namely, clothing, pillows and bedding,” the particular field of use described in the application. The record confirms that the goods identified in the registration are in fact promoted and used for those purposes, as it shows promotion of the bag identified in the registrations as “ideal for storing bedding”:

²¹ CAMBRIDGE DICTIONARY (dictionary.cambridge.org/us/english/polyethylene, last accessed on June 10, 2020).



The image shows a large, tan-colored tote bag with a blue and pink label. The label features the Ziploc logo and the text "SPACE BAG" and "ALL-IN-ONE TOTE STORAGE SYSTEM". It also includes icons for "4x STORAGE" and "1 ALL-IN-ONE TOTE STORAGE SYSTEM". Below the main image are four smaller images showing the tote bag in use, including one with a pillow and another with a box.

ZIPLOC® SPACE BAG® ALL-IN-ONE TOTE

★★★★☆ 2.8 | 5 Reviews | Write a Review

The Space Bag® All-in-One Tote is ideal for storing bedding and can compress up to 2 queen size comforters and 2 pillows. It provides 4x the storage and is airtight, waterproof, and reusable.

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and as “ideal for storing clothing”:



The image shows a blue and white package for Ziploc Space Bag Large Flat. The package features the Ziploc logo and the text "SPACE BAG" and "TOUGHEST PROTECTION". It also includes icons for "3x SPACE SAVING" and "CLOTHING 2 LARGE FLATS". Below the main image are four smaller images showing the bag in use, including one with a sweater and another with a box.

ZIPLOC® SPACE BAG® LARGE FLAT

★★★★☆ 4 | 46 Reviews | Write a Review

The Space Bag® Large Flat compression bag is ideal for storing clothing and can compress up to 10 sweaters. It provides 3x the storage and is airtight,

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²² February 25, 2019 Final Office Action at TSDR 14.

²³ *Id.* at TSDR 27-28.

Accordingly, we agree with the Examining Attorney that the goods identified in the registrations as “evacuatable resealable storage bag made of nylon and polyethylene with a valve made of polyethylene and a closure system made of ABS plastic” encompass, and are thus legally identical to, the goods identified in the application as “plastic bags with one-way valves, in which air is evacuated for storing household items, namely, clothing, pillows and bedding.”²⁴ The second *DuPont* factor supports a finding of a likelihood of confusion. *Double Coin Holdings Ltd. v. Tru. Dev.*, 2019 USPQ2d 377409, *6 (TTAB 2019).

The identifications of these legally identical goods do not contain any restrictions as to channels of trade, and the goods thus “are presumed to travel in the same channels of trade to the same class of purchasers.” *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). The third *DuPont* factor also supports a finding of a likelihood of confusion.

B. The Number and Nature of Similar Marks in Use on Similar Goods

As noted above, Applicant implicitly invokes the sixth *DuPont* factor, 10 TTABVUE 11-14; 13 TTABVUE 4-5, which considers “[t]he number and nature of

²⁴ In its reply brief, Applicant describes its goods by reference to most of the features of the goods identified in the cited registration as “evacuatable resealable storage bag made of nylon and polyethylene with a valve made of polyethylene and a closure system made of ABS plastic.” Applicant states that its goods embody “the immediate idea of the Ingredient (polypropylene, plastic), Quality (airtight polypropylene plastic layers), Function (remove air to save space), Feature (vacuum-seal valve, airtight zipper, bag), [and] Purpose (triple storage space) or Use (Vacuum Out The Air) of the goods.” 13 TTABVUE 9.

similar marks in use on similar goods.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). Applicant argues that “the term SPACE is predominately, and overwhelming used in the space saving bag market with similar good’s marks” and “[e]vidence of third-party use of similar marks with similar goods ‘is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection’ in that particular industry or field.” 10 TTABVUE 11 (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005)).

Applicant claims that it “submitted all registered marks (SPACE BAG, SPACE MAX, SPACE SAVER) for space saving bags,” and argues that “in combination with [the] SPACE PACK mark, these marks holds [sic] majority of market share within Retail and eCommerce channels for space saving home storage bags,” and that “[a]ll respective market leaders were included, and therefore [the] evidence should be considered [an] accurate representation of what is currently happening in the marketplace.” *Id.* Applicant argues that its “12+ years [sic] experience in marketing vacuum-seal home bags for bedding, pillows, can confirm these are the market leaders holding majority market share.” *Id.* Applicant’s argument is “no substitute for evidence” in the form of a declaration or other proof of the claimed relative market shares in the vacuum-sealed home bag business. *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, *14 (TTAB 2019) (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (internal quotation omitted)).

Accordingly, we give no consideration to Applicant's unsubstantiated arguments on that subject.

Applicant made of record two third-party registrations of the marks SPACE MAX and SPACESAVER for the involved goods, both of which are owned by the same registrant and one of which is registered on the Supplemental Register.²⁵ Applicant made of record two pictures of packages bearing these registered marks,²⁶ and argues that the Examining Attorney "has provided additional examples of products in the market with 'Space' in product's name; proving this term is commonly used and therefore should be given less weight." 10 TTABVUE 12. Applicant points to the Examining Attorney's "evidence of unregistered marks with 'Space' term: Space Mates, Store-All [sic] Space Saving Bag." *Id.*²⁷ Applicant claims, again without evidentiary support, that these are "minimal market share owners," *id.*, but argues that "this does confirm majority of similar product marks contain the name 'Space.'" *Id.*

Applicant concludes that

²⁵ August 25, 2019 Request for Reconsideration at TSDR 6-9.

²⁶ January 17, 2019 Response to Office Action at TSDR 12-13. The Examining Attorney also made of record pages from the spacesaver.com website showing bags bearing the registered SPACESAVER mark. February 25, 2019 Final Office Action at TSDR 40-46.

²⁷ Applicant does not cite to the record, but appears to be referring to a bag sold under the Storables mark and described as a "Large Travel Space Mates Bag," July 17, 2018 Office Action at TSDR 61, and bags sold under the Stor-All Solutions mark and described as a "Space Saving Compression Bag" and a "Space Saving Vacuum Bag." February 25, 2019 Final Office Action at TSDR 50-59. There are also bags sold under the Flight 001 mark and described as a "Spacepak System," July 17, 2018 Office Action at TSDR 30-44, and a bag sold under the Vacwel mark in a "Small Vacuum Storage Space Saver Pack." September 30, 2019 Denial of Request for Reconsideration at TSDR 24.

these submitted “Space” marks dominate the current space saving bag market and therefore are clear evidence of what is currently happening in the marketplace and what consumers are experiencing when shopping within this channel. Applicant can submit significant amount of more marks with term “Space” in name; or recommend Appeal Board search on Google “Space Saver Bag” to see all the additional minor share owners with the term “Space” in name. Please note that all registered home storage vacuum-seal bag marks were submitted as evidence, and contain the term “Space” in their respective marks.

Id. at 12.²⁸ In its reply brief, Applicant “contends it is so obvious that ‘SPACE’ is necessary to describe space saver bag, no trademark protection can flow from the term.” 13 TTABVUE 5.

The Examining Attorney argues that “the few similar third-party registrations submitted by applicant are insufficient to establish that the wording SPACE is weak or diluted,” 12 TTABVUE 13, because the two SPACE MAX and SPACESAVER marks “are for goods that do not specifically include a valve, as the goods in the cited registration and applicant’s goods do,” and because the third-party marks are structured differently than the involved marks. *Id.*

“The Federal Circuit has held that evidence of the extensive registration and use of a term by others can be powerful evidence of the term’s weakness.” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (citing *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. Millennium Sports, S.L.U.*, 797 F.3d 1361, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) and *Juice Generation, Inc. v. GS*

²⁸ We decline Applicant’s invitation to do our own searching for evidence to counter the refusal and remind Applicant that “the application record should be complete prior to the filing of an appeal.” *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1633 n.6 (TTAB 2018).

Enters. LLC, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)). “Use evidence may reflect commercial weakness, while third-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered for similar goods or services.” *Id.*

The record does not contain “evidence of the extensive registration and use of the term [SPACE] by others” for the involved goods. *Id.* Two third-party registrations and a handful of third-party uses, several of which involve descriptive, non-trademark use of the word “space,” are “a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant in both [*Jack Wolfskin*] and [*Juice Generation*].” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. Sept. 13, 2019).²⁹ Although the term SPACE may be somewhat suggestive with respect to the identified goods, we find that the sixth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

C. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we consider “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps.*, 73 USPQ2d at 1691 (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Inn at St. John’s*, 126 USPQ2d at 1746.

²⁹ In *Juice Generation*, there were at least 26 relevant third-party uses and registrations, *Juice Generation*, 115 USPQ2d at 1672 n.1, while in *Jack Wolfskin*, there were at least 14. *Jack Wolfskin*, 116 USPQ2d at 1136 n.2.

The proper test regarding similarity “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*, 127 USPQ2d at 1801 (quoting *Coach Servs.*, 101 USPQ2d at 1721 (internal quotation marks and citation 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 impression of marks.” *i.am.symbolic*, 127 USPQ2d at 1630 (citations omitted).³⁰

Because the goods are legally identical, the degree of similarity between the marks necessary to find a likelihood of confusion is reduced. *See, e.g., Viterra*, 101 USPQ2d at 1912; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Applicant argues that the Examining “Attorney’s refusal revolves around the dissection of the applied-for mark, assuming [the] majority of the weight on the word ‘Space’ and defining ‘Pack’ as a ‘backpack’; and therefore assuming consumers shopping for home storage solutions will automatically have a logical and liner connection between space backpack and vacuum-seal bag.” 10 TTABVUE 8. Applicant claims that “[w]hen applied-for mark and registered mark are compared in

³⁰ Given that the goods are intended for everyday household use, their average customer is an ordinary consumer.

their entireties, they are significantly differences [sic] in visual and aural impression, in meaning, and in overall commercial impression.” *Id.* at 9.

With respect to appearance, Applicant argues that SPACE PACK and SPACE BAG are “drastically different” because “the change in the second term is telling.” *Id.* With respect to sound, Applicant argues that “[s]poken aloud, SPACE PACK does not sound similar to SPACE BAG” *Id.* Finally, Applicant argues that the “meaning of Applicant’s mark and the cited mark are also very different, especially when used within the context of household storage.” *Id.* Applicant focuses on the different meanings of the words “bag” and “pack.” According to Applicant:

“Bag” in “Space Bag” is generic or descriptive to [sic] a space saving bag.” **“Pack” in “Space Pack” means “to make into a compact bundle” and “to increase the density of”, therefore it is not a generic or descriptive explanation of a vacuum-seal bag; and leaves consumers with no choice but to make an “imaginative leap” to connect the applied for mark with the designated vacuum-seal product and exercise their imagination to reach a conclusion as to the nature of the good. . .** In terms of home storage, “Bag” is used in context of a noun meaning a flexible container that may be closed for holding, storing, and is the literal term of the item and referenced by name of a home storage “bag”. In terms of home storage, “Pack” is used in context of a verb to make into a compact bundle. Accordingly to Merriam-Webster dictionary evidence submitted and confirmed by Examining Attorney, “Pack” as a noun is defined as to carry especially on the back or paper container for transport; and hence less relevant for home storage scenario or application. Therefore, consumers will easily be able to distinguish the marks on the basis of the second word of the mark. The average consumer faced with these marks is not likely to be confused as the source of goods, due to the non-synonymous words of “PACK” describing the action of “filling their storage to their limit” and “BAG” a specific, actual item

used to store home items. BAG and PACK are different words that do not share any similar meaning in reference to home storage or vacuum-seal products. Also note, cited mark No. 2189041 and 2055701 does not use the word “Pack” to identify their goods themselves.

Id. at 10 (emphasis in original).

Applicant also rejects the Examining Attorney’s dictionary definitions of “bag” and “pack” as “misleading” because they do “not accurately prove the marketplace consumer is not able to distinguish between compressions benefits of ‘Pack’ and a physical ‘Bag’; nor does it clearly prove ‘Pack’ and ‘Bag’ are synonymous in [the] context of the home storage or vacuum-seal bag marketplace.” *Id.* at 14. Applicant also argues that the Examining Attorney’s evidence from thesaurus.com that “bag” and “pack” are synonyms “should be deemed uncreditable” by the Board or “heavily scrutinized as webpage content is not consistent nor reliable.” *Id.* at 16.

The Examining Attorney argues that the marks are similar because they contain the identical first word SPACE “combined with the wording PACK and BAG, respectively, which can be used synonymously for the goods.” 12 TTABVUE 6. She argues that “the identical first wording in conjunction with the descriptive and/or generic wording conveys the same commercial impression – namely, that the goods assist in providing space to store clothing, bedding, and/or similar items.” *Id.* She rejects Applicant’s argument that “PACK is suggestive and refers to the verb form of the word in relation to the goods” because “this argument is contradictory to applicant’s concession that the wording PACK is descriptive and/or generic for the applied-for goods by the disclaimer of record.” *Id.* at 7. She points to “evidence from thesaurus.com and dictionary.cambridge.org [that] indicates the noun BAG is

synonymous with the noun PACK and vice versa.” *Id.* She concludes that the “marks are comprised of identical first words, combined with descriptive and/or generic wording that can be used synonymously to describe the goods. Thus, this factor of similarity of the marks favors a finding of likelihood of confusion.” *Id.* at 8.

In its reply brief, Applicant argues that “Compress, Protect, Organize is Space Pack’s commercial impressions which is highly suggestive of tying ‘Space’ and ‘Pack’ into a single unique concept.” 13 TTABVUE 3. Applicant also argues that “pack” is not synonymous with “bag” because the definitions of the noun “pack” “do not resemble a home storage bag: rather a paper container or specific backpack for travel purposes.” *Id.* at 6. With respect to the thesaurus entries, Applicant “objects to its admissibility, and recommends heavily scrutinized [sic] as webpage content does not produce consistent results” because “Thesaurus.com synonym results have not been static and have changed through trademark proceedings,” and because “Applicant has still not been able to replicate and verify Attorney’s [sic] findings on Thesaurus.com; and screen shots provided in August 2019 Reconsideration Request after FOA (8/24/19 and confirmed again on 3/8/20) prove Thesuarus.com does not list ‘Bag’ [as] synonymous to ‘Pack’.” *Id.* at 7.

We begin by addressing the dispute between Applicant and the Examining Attorney regarding the dominant portions of the marks. “Applicant maintains that ‘SPACE’ is not the dominant portion of Applicant’s mark and should not be given special weight in comparing Applicant’s mark to the cited marks.” 10 TTABVUE 13. The Examining Attorney responds that “[c]onsumers are generally more inclined to

focus on the first word, prefix, or syllable in any trademark or service mark,” 12 TTABVUE 6, and suggests that SPACE is the dominant portion of both marks because SPACE is combined in both marks “with descriptive and/or generic wording that can be used synonymously to describe the goods.” *Id.* at 8.

The marks must be considered in their entireties, 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 entireties.” *Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)). The word SPACE is the first part of both marks, and that “is particularly significant because consumers typically notice those words first.” *Id.* at 1049 (citing *Palm Bay Imps.*, 73 USPQ2d at 1692). *See also Century 21 Real Estate Corp.*, 23 USPQ2d at 1700. The words BAG and PACK that follow SPACE in the marks have been disclaimed and have little or no source-identifying capacity because they identify or describe the goods provided under the marks. *See, e.g., In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (holding that Board properly found that DELTA, not CAFE, was the dominant portion of the mark THE DELTA CAFE for restaurant services).³¹

³¹ We reject Applicant’s argument that the disclaimed term “PACK’ is [a] suggestive term for a space saving bag.” 10 TTABVUE 26. “[I]t has long been held that the disclaimer of a term constitutes an admission of the merely descriptive nature of that term . . . and an acknowledgement of the lack of an exclusive right therein at the time of the disclaimer.” *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1442 (TTAB 2005). *See also Quaker State Refining Corp. v. Quaker Oil Co.*, 453 F.2d 1296, 172 USPQ 361, 363 (CCPA 1972) (a disclaimer is an admission of descriptiveness at the time the disclaimer was made). Applicant argues on reply that it has “previously requested removal of the Disclaimer,” 13 TTABVUE 8, but it did not

Although SPACE may be somewhat suggestive of the involved goods, we find that it is the dominant portion of both marks. We turn now to the required comparison of the marks “in their entirety as to appearance, sound, connotation and commercial impression,” *Palm Bay Imps.* 73 USPQ2d at 1691, giving greater weight in that comparison to the word SPACE than to the words BAG and PACK in the marks.

Both marks have a similar structure, as the identical lead word SPACE is followed by a one-syllable second non-source identifying word that is modified by SPACE. Differences in appearance and sound between SPACE BAG and SPACE PACK resulting from the different second words are discernable when the marks are seen or heard together, but 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)), and we must bear in mind that some consumers “may have but dim recollections from having previously seen or heard one or the other of the involved marks.” *Neutrogena Corp. v. Bristol-Myers Co.*, 410 F.2d 1391, 161 USPQ 687, 688 (CCPA 1977). For a consumer with a “general rather than specific impression” or a “dim recollection” of the cited mark SPACE BAG, Applicant’s mark SPACE PACK is more similar than dissimilar to SPACE BAG in appearance and sound because the similarities resulting from the presence in both marks of the dominant lead word

argue against the requirement of a disclaimer in its response to the first Office Action or in its Request for Reconsideration, and thus did not preserve the issue for appeal.

SPACE outweigh the differences resulting from the presence of the subordinate words BAG and PACK.

With respect to the connotations and commercial impressions of the marks, as discussed above, Applicant's argument is essentially two-fold: (1) the word BAG in the cited mark is used in its noun form, while the word PACK in Applicant's mark is used in its verb form; and (2) BAG and PACK are not synonymous or otherwise similar in any event. We are not persuaded by either argument.

Applicant claims that "[i]n terms of home storage, 'Pack' is used in context of a verb to make into a compact bundle." 10 TTABVUE 10. Applicant made of record registrations of the marks PACKIT for food and beverage containers and PACK & ZIP for plastic bags.³² These marks have a different structure than Applicant's SPACE PACK mark, and, unlike in Applicant's mark, in these marks it is apparent that the word "pack" is used as a verb.³³ The record also contains webpages promoting Hefty SHRINK-PAK products that use the word PAK, the equivalent of PACK,³⁴ as a noun for what are described as "space saving compression storage bags" that are "the ideal storage solution for seasonal clothing, bedding, and your bulky winter sweaters and coats,"³⁵ and webpages from honeycando.com that state that "[v]acuum

³² August 25, 2019 Request for Reconsideration at TSDR 54-57.

³³ Applicant also made of record a registration of the mark EASY BAG IT in which the word "bag" is used as a verb. *Id.* at TSDR 52-53.

³⁴ We take judicial notice that the noun "pak" means "pack; package." DICTIONARY.COM (dictionary.com, last accessed on June 10, 2020).

³⁵ September 30, 2019 Denial of Request for Reconsideration at TSDR 3.

packs are vacuum sealed storage bags designed for compacting and storing”³⁶ Given the structure of Applicant’s SPACE PACK mark and the fact that PACK has the meanings as a noun discussed below, the word PACK in Applicant’s mark is more likely to be viewed as a noun modified by SPACE than as a verb when the mark is used in connection with “Plastic bags with one-way valves, in which air is evacuated for storing household items, namely, clothing, pillows and bedding.”

The nouns “bag” and “pack” are not perfect equivalents, but there is sufficient evidence in the record to show that they are similar in meaning when they are used in connection with the involved goods. Both the Examining Attorney and Applicant made of record a dictionary definition of the noun “pack” as “a number of things usually of the same kind that are tied together or stored in a container, or the container itself.”³⁷ The Examining Attorney also made of record a page from thesaurus.com listing “pack” as a synonym for “bag,”³⁸ which thesaurus.com defines as a “container for one’s possessions.”³⁹ Definitions of “pack” made of record by

³⁶ *Id.* at TSDR 17.

³⁷ July 17, 2018 Office Action at TSDR 66; August 25, 2019 Request for Reconsideration at TSDR 11 (CAMBRIDGE DICTIONARY).

³⁸ February 25, 2019 Final Office Action at TSDR 7.

³⁹ As noted above, Applicant claims that this entry is unreliable and changeable. Thesaurus entries are standard reference works subject to judicial notice, *see In re Styleclick.com*, 58 USPQ2d 1523, 1525 (TTAB 2001), and we take judicial notice that the contents of the thesaurus.com entry listing “pack” as a synonym for “bag” is the same now as when the Examining Attorney made the entry of record in February 2019. THESAURUS.COM (thesaurus.com, last accessed on June 10, 2020). The MERRIAM-WEBSTER THESAURUS also lists “pack” as a word related to bag, defined as “a container made of a flexible material (as paper or plastic).” August 25, 2019 Request for Reconsideration at TSDR 31.

Applicant include “container,”⁴⁰ and “a container in which things are put to be kept, sold, or sent somewhere, or the contents of the container.”⁴¹ We find that in the context of the involved goods, the disclaimed terms BAG in the cited mark and PACK in Applicant’s mark both refer generally to a container, and that when BAG and PACK are combined with and modified by the marks’ common dominant term SPACE, the marks as a whole have a similar connotation and commercial impression of a container that is used to save space when storing items.

The marks are more similar than dissimilar in appearance and sound, and 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*, 127 USPQ2d at 1801 (quotation omitted), when they are used with identical goods. We find that the first *DuPont* factor supports a finding of a likelihood of confusion.

III. Conclusion

The goods, channels of trade, and classes of consumers are identical, the marks are similar when considered in their entirety, and the sixth *DuPont* factor is neutral. We find, on the basis of the record as a whole, that a consumer familiar with the cited SPACE BAG mark for an “evacuatable resealable storage bag made of nylon and polyethylene with a valve made of polyethylene and a closure system made of ABS plastic” who encounters Applicant’s SPACE PACK mark for “Plastic bags with

⁴⁰ August 25, 2019 Request for Reconsideration at TSDR 25.

⁴¹ *Id.* at 17 (CAMBRIDGE DICTIONARY).

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one-way valves, in which air is evacuated for storing household items, namely, clothing, pillows and bedding” is likely to believe mistakenly that those goods originate with, or are sponsored or authorized by, the owner of the SPACE BAG mark.

Decision: The refusal to register is affirmed.