

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Horizon Group USA, Inc.

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Serial No. 87901706

James E. Rosini and Armin Ghiam of Hunton Andrews Kurth LLP
for Horizon Group USA, Inc.

Robert J. Struck, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

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Before Lykos, Adlin and Coggins,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Horizon Group USA, Inc. (“Applicant”) seeks to register on the Principal Register the standard character mark SUGAR BOMBS for “Bath bombs” in International Class 3.¹

Registration was refused 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

¹ Application Serial No. 87901706, filed May 1, 2018, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use the mark in commerce.

registered standard character mark SUGARBOMB on the Principal Register for “cosmetics” in International Class 3,² that it is likely to cause confusion or mistake or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. The Trademark Examining Attorney maintained the refusal to register and denied the request for reconsideration. The appeal was resumed and is now briefed.

For the reasons set forth below, we affirm the Section 2(d) refusal.

I. Evidentiary Issues

The Examining Attorney objects to Applicant’s inclusion of hyperlinks to the WIKIPEDIA entries for “bath bombs” and “cosmetics” in Applicant’s appeal brief and Applicant’s reliance on the content of these entries on the ground of untimeliness and improper format. The objection is sustained. The record in an application should be complete prior to the filing of an appeal. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d).³ See *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018),

Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system and identify documents by title and date. References to the briefs and other materials in the appeal record refer to the Board’s TTABVUE docket system.

² Registration No. 3857610, registered October 5, 2010; Section 8 declaration accepted.

³ According to Trademark Rule of Practice 2.142(d) governing the submission of evidence in an ex parte appeal: “The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal. If the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the Board to suspend the appeal and to remand the application for further examination.”

aff'd mem., 777 F. App'x (Fed. Cir. 2019); *In re Fiat Grp. Mktg. & Corp. Commc'ns S.p.A*, 109 USPQ2d 1593, 1596 (TTAB 2014). While technically not separately "filed" with the Board, the hyperlinks and the descriptions of their alleged content constitute an improper attempt to augment the record. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). And even if timely, providing only a link is insufficient to make Internet materials of record. *In re Change Wind Corp.*, 123 USPQ2d 1453, 1462 n.8 (TTAB 2017). To make Internet material properly of record, the offering party must provide the full address (URL) for the web page, and the date it was accessed or printed, either by the information displayed on the web page itself, or by providing this information in an Office action or an applicant's response along with printed copies from the website. *In re I-Coat Co.*, 126 USPQ2d 1730, 1733 (TTAB 2018). In view thereof, the hyperlinks to the WIKIPEDIA entries and any arguments associated therewith have been given no consideration.

Likewise, we sustain the Examining Attorney's objection to Applicant's references in its appeal brief to two third-party registrations which are not part of the record. To make third party registrations part of the record, an applicant must submit copies of the registrations, or the complete electronic equivalent from the USPTO's electronic records showing the current status and title of the registration, prior to appeal. *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 (2020) and cases cited therein. The mere reference to third-party registrations in a brief is insufficient. *See In re 1st USA Realty Prof'ls Inc.*, 84 USPQ2d 1581, 1583

(TTAB 2007); *In re Ruffin Gaming LLC*, 66 USPQ2d 1924, 1925 n.3 (TTAB 2002). We have given Applicant's arguments based upon this evidence no consideration either.

II. 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) (“*DuPont*”). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must 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). When analyzing these factors, the overriding concerns are not only to prevent buyer confusion as to the source of the goods, 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 goods. 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.”). We

discuss these factors and others below.

A. The Marks⁴

This first *DuPont* 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 Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (citing *DuPont*, 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. *Accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).). “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) (citation omitted).

Applicant’s compound word mark SUGAR BOMBS is merely the pluralized version of the cited mark SUGARBOMB. “It is well established that trademarks and/or service marks consisting of the singular and plural forms of the same term are essentially the same mark.” *Weider Publ’ns, LLC v. D & D Beauty Care Co.*, 109

⁴ Applicant presented no arguments regarding this *DuPont* factor in its brief. Nonetheless, we do not construe Applicant’s silence as a concession regarding this first factor.

USPQ2d 1347, 1355 (TTAB 2014) (finding the singular and plural forms of SHAPE to be essentially the same mark), *appeal dismissed per stipulation*, No. 14-1461 (Fed. Cir. Oct. 10, 2014) (citing *Wilson v. Delaunay*, 245 F.2d 877, 878, 114 USPQ 339, 341 (CCPA 1957) (finding no material difference between the singular and plural forms of ZOMBIE such that the marks were considered the same mark)); *see also Swiss Grill Ltd., v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2011 n.17 (TTAB 2015) (holding “it is obvious that the virtually identical marks [the singular and plural of SWISS GRILL] are confusingly similar”).

The same logic holds true for marks consisting of the same terms whether or not displayed as separate words or together as a compound word mark. The presence or absence of a space between the two terms SUGAR and BOMB or BOMBS is inconsequential. *See Seaguard Corp. v. Seaward Int’l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEAGUARD and SEA GUARD “are, in contemplation of law, identical”). In addition, the absence of a space between the clearly recognizable separate words SUGAR and BOMB in the cited mark does not alter the meaning or overall commercial impression. *See In re Best W. Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (“There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical”). *Cf. In re Carlson*, 91 USPQ2d 1198, 1200 (TTAB 2009) (“We find, first, that the compression of the words URBAN and HOUSING into a single term, URBANHOUSING, still conveys the commercial impression of two words. In other words, consumers would recognize the mark as consisting of the separate elements URBAN and HOUSING”).

Thus, when comparing the marks overall, they are virtually identical in sound and sight, and engender the same connotation and commercial impression. Consumers do not focus on minutia but rather overall impressions. *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1645 (TTAB 2009) (citing *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975)). We find this *DuPont* factor weighs strongly in favor of finding a likelihood of confusion.

B. Strength of the Cited Mark

In determining the strength of a mark, we consider both its inherent strength, based on the nature of the mark itself, and, if there is evidence in the record of marketplace recognition of the mark, its commercial strength. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”); *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006).

In this case, Applicant challenges the conceptual or inherent strength of the cited mark. Applicant argues that the cited mark “is not particularly strong or distinctive” because there are “literally thousands of federal applications and registrations for marks that contain the words SUGAR or BOMB.”⁵ More specifically, Applicant

⁵ Applicant’s Brief, p. 11; 14 TTABVUE 12.

contends that “there are 46 active registrations including the word SUGAR and 16 live registrations containing the word BOMB.”⁶

Third-party registrations alone may be relevant, in the manner of dictionary definitions, “to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (internal quotation marks omitted). *See also Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015). In addition, “in determining the degree of weakness, if any, in the shared terms, we must ‘adequately account for the apparent force of [third-party use and registration] evidence,’ regardless of whether ‘specifics’ pertaining to the extent and impact of such use have been proven.” *In re Inn at St. John’s*, 126 USPQ2d at 1746.

Here, however, none of the third-party registrations Applicant relies upon have been made of record. We reiterate that the mere referencing of registrations does not make such registrations part of the record. *See In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018) (citing *In re 1st USA Realty Prof’ls*, 84 USPQ2d at 1583; *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974)). For this reason, the conceptual strength of Registrant’s SUGARBOMB mark is not seriously at issue. The mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of

⁶ *Id.*

the Trademark Act. *Tea Bd. of India*, 80 USPQ2d at 1889. The registration is “prima facie evidence of the validity of the registered mark” Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b). *See also Tea Bd. of India*, 80 USPQ2d at 1899. We have no evidence that “sugar bomb” has a particular meaning in connection with “cosmetics” and as noted above, no third-party registrations of marks properly of record comprised of SUGAR or BOMB or the combination thereof for the same or similar goods that might demonstrate the inherent weakness of the mark as a source identifier. Thus, on this record, Applicant has not shown that Registrant’s SUGARBOMB mark is weak.

C. The Goods

Next we compare the goods as they are identified in the involved application and cited registration.⁷ *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *Stone Lion*, 110 USPQ2d at 1161; *Octocom Sys., Inc. v. Hous. Comput. 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). The goods need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898

⁷ Applicant’s allegation that Registrant has used the cited mark in connection with only shimmer powder blush constitutes an improper collateral attack on the registration that will not be entertained in the context of an ex parte appeal. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1535 (Fed. Cir. 1997). Here, we confine our analysis to those goods listed in the cited registration.

(Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that the goods emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations for both applicant’s goods and the goods listed in the cited registration. *See, e.g., In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores).

Where virtually identical marks are involved, as is the case here, the degree of similarity between the goods that is required to support a finding of likelihood of confusion declines. *Cf. In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015) (citing *In re Shell Oil Co.*, 26 USPQ2d at 1689), *aff’d*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

Applicant, citing *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082 (Fed. Cir. 2014), contends that the Examining Attorney is required to show “something more” than the mere fact that the goods are used together. Applicant’s reliance on *In re St. Helena Hosp.* is misplaced. “Something more” is only required in the context of

comparing goods versus services, not goods versus goods, when the relationship between the goods and services is obscure or less evident. *See id.* *See also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) § 1207.01(a)(ii) (Oct. 2018) (“Establishing Relatedness of Goods to Services”). Such is not the case here where we are comparing two different products and not goods versus services.

To demonstrate that the goods are commercially related, it was entirely appropriate for the Examining Attorney to rely on evidence from business-to-consumer (B2C) websites demonstrating that it is not uncommon for bath bombs and cosmetics to be sold under the same mark by entities manufacturing both sets of goods. The record shows that Lush,⁸ Ulta Beauty,⁹ Kismet¹⁰ and Justice¹¹ all produce bath bombs and cosmetics marketed to consumers under the same trademark. This evidence shows that consumers may expect to find both Applicant’s and Registrant’s goods as identified in the involved application and cited registration as emanating from a common source under a single brand name.

Applicant criticizes the probative value of this evidence with the sweeping

⁸ Printouts from www.lushusa.com showing LUSH branded bath bombs and cosmetics consisting of face powder, mascara, skin tint and eyeliner. Final Office Action dated January 10, 2019, pp. 2-10.

⁹ Printouts from www.ulta.com showing ULTA branded “Babalicious Color Bath Bomb,” “Mermaid Splash Color Marbic Bath Bomb,” “Moisturizing Shea Butter Treatment Bath Bomb,” and “Metallic Eye Cream Shadow.” Denial of Request for Reconsideration dated August 23, 2019, pp. 28-37.

¹⁰ Printouts from www.kismetcosmetics.com showing KISMET branded bath bombs and cosmetics consisting of foundation, primer, mascara, lipstick and eyeliner. Final Office Action dated January 10, 2019, pp. 32-44.

¹¹ Printouts from www.shopjustice.com showing JUSTICE branded “unicorn bath bomb box set,” “just shine makeup palette” and lip gloss. Final Office Action dated January 10, 2019, pp. 57-67.

assertion that “as e-commerce is growing and taking over a larger share of retail business, an ever-increasing number of online retailers carry countless products—many of which have no relevance to the others listed on their website.”¹² The aforementioned evidence is not from brick and mortar department stores such as Macy’s or “big box” online retailers such as Amazon or eBay selling a wide variety of goods as Applicant suggests but rather from companies specializing in cosmetics and bath products via their own direct-to-consumer sales websites. This targeted type of retailing is narrower in scope, and as such is entitled to a higher degree of probative weight. *See, e.g., In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, 2020 BL 293152 (TTAB 2020). And while this evidence does involve house marks, it remains probative to the extent that the house marks do not identify a wide variety of goods, but rather are limited to bath bombs and other bath products and cosmetics. That is to say, the evidence is relevant inasmuch as it demonstrates that both Applicant’s and Registrant’s identified goods may originate from the same source.

The Examining Attorney also introduced six used-based third-party registrations showing that the same entity has registered a single mark identifying both bath bombs and cosmetics. *See* Registration Nos. 5416915, 5496300, 4404450, 4426339, 4487614, 4660507, 5651227, and 5636723.¹³ Although use-based third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have some probative value to the

¹² Applicant’s Appeal Brief, p. 9; 14 TTABVUE 10.

¹³ June 29, 2018 Office Action, pp. 10-16 and January 10, 2019 Office Action pp. 68-85.

extent they may serve to suggest that the goods are of a kind that emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

Relying on *Homeowners Group, Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 18 USPQ2d 1587 (6th Cir. 1991), Applicant counters that bath bombs and cosmetics are not “competitive products because they are not substitutes for each other” and that “[t]he record is devoid of any evidence suggesting that bath bombs are replacements for cosmetic products.”¹⁴ Elaborating on this argument, Applicant points out the different functions of each product, noting that “[b]ath bombs add essential oils, scent, bubbles or color to bath water, but makeups enhance or alter the appearance of the face.”¹⁵ Applicant misapprehends the standard for showing that goods are related. According to the case law governing Board proceedings, the involved goods do not need to be competitive in order to find that there is a likelihood of confusion. *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1368 (TTAB 2009). Rather, it is only necessary to show that the 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 the goods emanate from the same source,” *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1722. In other words, there is no requirement that the

¹⁴ Applicant’s Appeal Brief, p. 7; 14 TTABVUE 8.

¹⁵ *Id.*

goods serve the same function such that they constitute replacements for one another.

To be clear, we have not found that “bath bombs” are a subcategory “cosmetics.” Rather, based on the record, we find that the goods are related because it is not uncommon for the same entity to manufacture both of these types of goods and market them under the same brand name. Accordingly this *DuPont* factor also supports a finding of a likelihood of confusion.

D. Trade Channels and Class of Consumers

We now consider the established, likely-to-continue channels of trade. Because the identifications in the application and cited registration have no restrictions on channels of trade, we must presume that the goods travel in all channels of trade appropriate for such goods, which as Applicant acknowledges include retail stores, such as the online stores reflected in the Examining Attorney’s evidence. *See In re Viterra Inc.*, 671 F.3d 1358, 1362, 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)). In addition, both Applicant’s and Registrant’s goods may be encountered by the same prospective class of consumers, namely, women.¹⁶

As such, the *DuPont* factor regarding the similarity or dissimilarity of established, likely to continue trade channels and class of consumers also favors a finding of likelihood of confusion.

E. Conditions of Purchase

We now look to the conditions under which the goods are likely to be purchased,

¹⁶ *See* Applicant’s Appeal Brief, p. 6; 14 TTABVue 7.

e.g., whether on impulse or after careful consideration, as well as the degree, if any, of sophistication of the consumers. Purchaser sophistication or degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay*, 73 USPQ2d at 1695.

Applicant argues that consumers of cosmetic products “predominantly include females within the ages of 18-45” who “tend to be very sophisticated and knowledgeable about their purchasing decisions, and often times, these consumers are either repeat buyers or have the ability to sample the product before the purchase.”¹⁷ Continuing, Applicant contends that “[c]osmetic products are significantly more expensive than bath bombs, and because they last for some time, the packaging is made from finer materials.”¹⁸ By contrast, “[b]ath bombs are a subclass of bath and shower products;” “[b]ath bombs rarely cost more than a few dollars;” and “are almost never sampled before purchase.” In addition, “the packaging is generally made from cheap disposable material.”¹⁹

The fact that female millennials, or for that matter any age demographic, may be highly knowledgeable about cosmetics does not mean they are immune from source confusion, or that they exercise a high degree of care in purchasing bath bombs, which Applicant argues are single use, inexpensive products. Because neither Applicant’s

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

nor Registrant's identification limits the goods to a particular price point, we must treat the goods as including both inexpensive as well as high-end bath bombs and cosmetics. The record shows that contrary to Applicant's assertion, both cosmetics and bath bombs may be sold at relatively low price points. For example, Lush branded bath bombs retail for \$4.50-\$10.95; its cosmetics such as face powder, mascara and skin tint each sell for \$14.95 and eyeliner for \$16.95.²⁰ Similarly, Ulta Beauty offers bath bombs for \$3.25-\$25.00 while selling a variety of cosmetics within a similar price range of \$6.00-\$20.00.²¹ Likewise, Kismet sells bath bombs for \$6.00-\$12.00 while offering foundation, powder and lipstick each for \$5-\$42.00 and eyeliner and lipstick each for \$18.00.²² Justice provides a unicorn bath bomb set for \$12.90 while selling a makeup palette for \$16.50 and lip gloss for \$4.90.²³ "When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care." *Recot Inc. v. M.C. Becton*, 54 USPQ2d at 1899; *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984). *See also L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012) ("Products such as opposer's cosmetics and personal care products ... tend to be relatively inexpensive and may be the subjects of impulse purchases). Thus, this *DuPont* factor

²⁰ January 10, 2019 Final Office, p. 15.

²¹ *Id.* at 18-32.

²² *Id.* at 37-54.

²³ *Id.* at 62-68.

of the conditions of sale also weighs in favor of a finding of likelihood of confusion.

F. Any Other Established Fact Probative of the Effect of Use

The thirteenth and final *DuPont* factor pertains to “any other established fact probative of the effect of use.” *DuPont*, 177 USPQ at 567. Rarely invoked, this factor “accommodates the need for flexibility in assessing each unique set of facts....” *In re Strategic Partners Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012). Applicant argues that because the USPTO permitted the marks BEAUTY TREAT and TREATS, DIVA and LA DIVA, and RAINBOW and NAKED RAINBOW, and MAGNETIC and MAGNETIC PERSONALITY for bath products and cosmetics to coexist on the Principal Register,²⁴ the Board should reverse the Section 2(d) refusal. In support thereof, Applicant relies on copies of each registered mark obtained from the USPTO database.

From the face of the registration certificates, we can glean that the USPTO permitted allowance of such registrations due to the dissimilarities of the marks. By contrast, in the appeal before us, the marks are almost identical. For this reason, Applicant’s evidence is of limited utility. We therefore deem this factor neutral.

G. Balancing the Factors

We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto. With virtually identical marks and related goods marketed in the same trade channels to the same category of consumers at the same price points, consumers are not likely to understand that the goods emanate from

²⁴ July 10, 2019 Request For Reconsideration, Exhibit B, pp. 12-32.

different sources. These findings lead us to the conclusion that prospective consumers are likely to confuse the source of the involved goods.

Decision: The Section 2(d) refusal is affirmed.