

This Opinion is Not a
Precedent of the TTAB

Mailed: May 3, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re James Lindsay
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Serial No. 88801152
—

William A. Wooten of Wooten Law Office for James Lindsay.

Thomas P. Young, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.

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

Opinion by Larkin, Administrative Trademark Judge:

James Lindsay (“Applicant”) seeks registration on the Principal Register of the
standard-character mark WIFEY for goods identified as

Candle contained in a clamshell; Candle torches; Candle-making kits; Candles; Candles and wicks for candles for lighting; Candles being of wax or liquid, for the illumination of carved pumpkins, mini-pumpkins, gourds, and other fruits and vegetables; Candles containing insect repellent; Candles for lighting; Candles for night lights; Tapers; Aromatherapy fragrance candles; Beeswax for use in the manufacture of candles; Christmas tree candles; Perfumed candles; Scented candles; Tallow candles; Tealight candles; Unity candles; Votive candles; Wax for

making candles; Wicks for candles in International Class
4.¹

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 standard-character mark WIFEYSCENTS, registered on the Principal Register for "Personal care products, namely, perfumes and natural essential oils" in International Class 3,² 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.

When the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which was denied. Applicant and the Examining Attorney have filed briefs.³ We affirm the refusal to register.

¹ Application Serial No. 88801152 was filed on February 18, 2020 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant's allegation of a bona fide intention to use the mark in commerce in connection with the identified goods.

² The cited Registration No.5429374 issued on March 3, 2018.

³ Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. See *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). 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. Applicant's appeal brief appears at 6 TTABVUE and the Examining Attorney's brief appears at 8 TTABVUE. A brief captioned "Applicant's Response Brief" appears at 9 TTABVUE, but it is substantively identical to Applicant's appeal brief, with the exception of the date in its proof of service, which tellingly purports to certify service of Applicant's "Appeal brief." *Id.* at 13. If a reply brief is filed, it should respond to arguments made in the examining attorney's brief. Simply repurposing an appeal brief as a reply brief serves no purpose and wastes the Board's time.

I. Record on Appeal⁴

The record on appeal includes USPTO electronic records of the cited registration;⁵ a dictionary definition of the word “scent;”⁶ webpages from sellers of fragrances and candles;⁷ USPTO electronic records regarding third-party registrations of “WIFE”-formative marks in Class 3;⁸ and a page from the website of the owner of the cited registration at wifeyscents.com.⁹

II. Analysis of Refusal

“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 [or] mistake, or to deceive.” *In re Charger Ventures LLC*, ___ F.4th ___, 2023 USPQ2d 451, at *2 (Fed. Cir. 2023) (cleaned up). Our determination of the likelihood of confusion under Section 2(d) of the Trademark Act 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*”). *Id.*, at *4. We consider each

⁴ Citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

⁵ April 16, 2020 Office Action at TSDR 3-4; August 4, 2021 Office Action at TSDR 3-4.

⁶ April 16, 2020 Office Action at TSDR 6-9 (lexico.com (OXFORD DICTIONARY)); March 4, 2022 Final Office Action at TSDR 3-4. It was unnecessary for the Examining Attorney to make this definition of record twice.

⁷ April 16, 2020 Office Action at TSDR 11-59; August 4, 2021 Office Action at TSDR 5-69; March 4, 2022 Final Office Action at TSDR 6-90.

⁸ September 6, 2020 Request for Reconsideration at TSDR 8-14.

⁹ *Id.* at TSDR 15.

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).

“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services.” *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, at *29 (TTAB 2021), *appeal docketed*, No. 22-1212 (Fed. Cir. 2021) (citing *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)).

Applicant argues that the “Examining Attorney’s refusal in this case is based entirely on an analysis of the first two factors in a *du Pont* analysis, namely the similarity of the marks and the similarity of the good/services,” and that “several other *du Pont* factors are relevant in this case, should be considered, and may be dispositive, namely similar marks in use on similar goods/services, the fame of the contesting mark, concurrent use without actual confusion, dilution of the ‘WIFE’ term in the class, and extent of potential confusion.” 6 TTABVUE 8 (citation omitted). As discussed below, Applicant’s argument alludes to the fifth, sixth, eighth, and twelfth *DuPont* factors. *DuPont*, 177 USPQ at 567.

A. Similarity or Dissimilarity of the Marks

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *In re Embiid*, 2021 USPQ2d 577, at *11 (TTAB 2021) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73

USPQ2d 1689, 1692 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1801, 1812 (TTAB 2014)).

“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.’” *Id.*, at *11 (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (internal 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 a specific impression of marks.” *Id.* (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)). The average customers here are purchasers of the candles and candle-related goods identified in the application and purchasers of the perfumes and natural essential oils identified in the cited registration, and they include members of the general public.

The marks are WIFEY and WIFEYSCENTS, both in standard characters. Applicant acknowledges the obvious—that the marks share the word WIFEY—in arguing that “a determination that there is no likelihood of confusion may be appropriate, even where the marks share common terms,” 6 TTABVUE 7, based on the impact of other *DuPont* factors. *Id.* Applicant argues that “the likelihood of confusion refusal cannot be based on the dissection of a mark or only part of a mark,”

that a “consumer’s general impression of trademarks is influenced by the actual use of the marks in their entirety, and as such, all components of the marks in question must be given appropriate weight,” and that “[w]hen a mark’s components are given fair weight, confusion may become less likely.” *Id.* at 7-8 (citations omitted).

Applicant also argues that “[t]he marks in question, while sharing the similar term ‘WIFEY’, are vastly different when examined in their entirety,” *id.* at 9, that the unique components of Applicant’s mark must be given fair weight,” *id.* at 10, and that “consumers of Applicant’s and Registrant’s services [sic] will also see the marks in their entirety in the marketplace and will not be subject to a singular term without the other relevant elements and terms.” *Id.* Alluding to the sixth *DuPont* factor, the “number and nature of similar marks in use on similar goods,” *DuPont*, 177 USPQ at 567, Applicant claims that “because there is major dilution of the term ‘WIFE’ in the relevant international classes (IC 003 and 004), the additional terms will be readily identifiable, have more significance and should be given appropriate weight.” *Id.* (citation omitted).

Applicant concludes that

since the USPTO has allowed Wifeyscents to register and coexist in the same class plus the dilution of Wife-related terms argued above, the consumer will recognize the distinct differences between the terms. Also, since “Wifeyscents” is one word and “scents” is not disclaimed, this unique term, as a whole, is easily identifiable and distinct from the “Wifey” trademark application.

Id. at 11.

The Examining Attorney responds that “the registered mark ‘WIFEYSCENTS’ encompasses the entirety of the applied-for mark ‘WIFEY,’” and that “[i]ncorporating

the entirety of one mark within another does not obviate the similarity between the compared marks, as in the present case, nor does it overcome a likelihood of confusion under Section 2(d).” 8 TTABVUE 3 (citations omitted). He further argues that the “inclusion of the term ‘SCENTS’ in the registered mark does not obviate the similarity between the marks” because “[c]onsumers are generally more inclined to focus on the first word in any trademark or service mark” and “consumers will be more inclined to focus on the first term in the registered mark.” *Id.* (citations omitted).

The Examining Attorney also argues that “the term ‘SCENTS’ merely describes a characteristic of the registrant’s goods, namely, registrant’s goods are pleasant smelling liquids worn on the skin, like perfume,” that “[m]atter that is descriptive of or generic for a party’s goods is typically less significant or less dominant in relation to other wording in a mark,” and that the record evidence shows that producers of essential oils and perfumes commonly use the term ‘SCENT’ to describe how the goods are pleasant smelling.” *Id.* at 4 (citations omitted). He concludes that “this wording is less significant in terms of affecting the mark’s commercial impression, and renders the wording ‘WIFEY’ the more dominant element in the registered mark.” *Id.*

With respect to Applicant’s argument that there are third-party registrations of “WIFE-” formative marks, the Examining Attorney responds that “the question here centers on the use of the term ‘WIFEY,’” that “[u]se of the term ‘WIFE’ does not establish that the term ‘WIFEY’ is weak and entitled to less protection,” and that “the

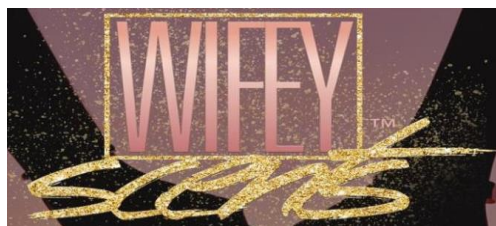
applied-for and registered mark are the only marks containing the shared term ‘WIFEY’ in the context of candles and fragrances.” *Id.* (citations omitted).

The WIFEY and WIFEYSCENTS 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.” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *30-31 (TTAB 2021) (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)). We find that the cited compound mark WIFEYSCENTS “is dominated by the word [WIFEY], which is the first word in the mark and the only one with source-identifying significance,” *id.* at *33 (citation omitted), because the suffix word SCENTS, which means, in the context of the goods identified in the cited registration, “pleasant-smelling liquid worn on the skin; perfume,”¹⁰ is merely descriptive of, if not generic for, those goods. As a generic or descriptive term, the word “SCENTS” “may be given little weight in reaching a conclusion on the likelihood of confusion.” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1185 (TTAB 2018) (quoting *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000)). We turn now to the required comparison of the marks in their entirety, giving greater weight in that comparison to the word WIFEY in the cited mark than to the word SCENTS.

¹⁰ April 16, 2020 Office Action at TSDR 6 (lexico.com (OXFORD DICTIONARY)).

It is self-evident that WIFEY and WIFEYSCENTS are similar in appearance because Applicant's mark is WIFEY alone and the cited mark begins with the identical word. Moreover, "[b]ecause both marks are presented in . . . standard character form, each could be used in any typeface, color, or size, including the same stylization actually used or intended to be used by the other party, or one that minimizes the differences or emphasizes the similarities between the marks." *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1823 (TTAB 2015) (citing *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011)).

The Federal Circuit has held that in determining possible depictions of a cited standard-character mark, "illustrations of the mark as actually used may assist the T.T.A.B. in visualizing other forms in which the mark might appear." *Citigroup*, 98 USPQ2d at 1259. Applicant made of record a page from the website of the owner of the cited registration that displays the standard-character WIFEYSCENTS mark in the two manners shown below:



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¹¹ September 6, 2022 Request for Reconsideration at TSDR 15.

Both displays of WIFEYSCENTS are within the scope of possible displays of the standard-character mark “in ‘any particular font style, size, or color,’” *Aquitaine Wine USA*, 126 USPQ2d at 1186 (quoting Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a)), and they both accentuate the dominance of the word WIFEY in the cited mark.¹² We must assume that Applicant’s standard-character WIFEY mark could be displayed in the same manner as the word WIFEY in the cited standard-character mark, as shown below:



This display enhances the similarity of the marks in appearance when they are considered in their entirety because it “minimizes the differences or emphasizes the similarities between the marks.” *Anheuser-Busch*, 115 USPQ2d at 1823. We find that the marks are quite similar in appearance.

With respect to sound, the cited mark begins with “WIFEY” when it is verbalized and Applicant’s entire mark is verbalized as “WIFEY.” Just as marks are not viewed side-by-side when comparing them in appearance, they are not pronounced sequentially when comparing them for aural similarity or dissimilarity. From the

¹² The WIFEYSCENTS standard-character mark is displayed in the drawing in the cited registration as WIFEYscents. April 16, 2020 Office Action at TSDR 4. “[T]his does not change the nature of the mark from standard characters to special form,” *New Era*, 2020 USPQ2d 10595, at *2 n.1 (citing *In re Calphalon Corp.*, 122 USPQ2d 1153, 1154 n.1 (TTAB 2017)), but it does illustrate another manner in which the mark may be displayed that accentuates the word WIFEY.

perspective of “the average customer, who retains a general rather than a specific impression of” the sound of one of the marks, *Embiid*, 2021 USPQ2d 577, at *11 (quotation omitted), and who separately hears the other mark, the cited mark WIFEYSCENTS sounds like a variation of Applicant’s mark WIFEY, and Applicant’s mark WIFEY sounds like a shortened verbalization of the cited mark WIFEYSCENTS, one that could result from the “penchant of consumers to shorten marks,” *Sabhnani*, 2021 USPQ2d 1241, at *36 (quoting *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016)), reflecting the “universal habit of shortening full names — from haste or laziness or just economy of words.” *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring). We find that the marks are quite similar in sound.

Finally, with respect to meaning, WIFEY is “an informal word for wife,”¹³ and it imbues both marks with the identical informal connotation of a female spouse. Applicant argues that because of third-party registrations of the marks NOTTHISWIFE, TROPHY WIFE, BAIWIFE, MASSAGE MY WIFE’S BACK, and RASTA WIFE and design for various goods in Class 3,¹⁴ “the consumer will recognize the distinct differences between the terms” WIFEY and WIFEYSCENTS. 6 TTABVUE 11. We disagree. There is no evidence of third-party use or registration of any “WIFEY-” formative marks, and although the third-party marks in the

¹³ Dictionary.com (last accessed May 2, 2023). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *20 n.41 (TTAB 2023).

¹⁴ September 6, 2022 Request for Reconsideration at TSDR 8-9.

registrations in the record contain the word “wife” from which “wifey” is derived, they contain additional elements that cause them all to be far less similar to either of the involved WIFEYSCENTS and WIFEY marks than those marks are to one other. *See Sabhnani*, 2021 USPQ2d 1241, at *25 (citation omitted). The third-party registration evidence does not show that consumers are able to distinguish between WIFEYSCENTS and WIFEY based on the minute difference between those marks. *Cf. i.am.symbolic*, 127 USPQ2d at 1636 (five uses of WILLPOWER mark insufficient to show that consumers had been educated to be able to distinguish between #WILLPOWER and WILLPOWER WEAR HAVE THE WILL and design marks).¹⁵ We find that the marks are quite similar in meaning.

The WIFEY and WIFEYSCENTS marks are quite similar in all means of comparison when considered in the entirety, and the first *DuPont* factor strongly supports a conclusion that there is a likelihood of confusion.

¹⁵ Applicant cites *In re Broadway Chicken Inc.*, 38 USPQ2d 1559 (TTAB 1996), for the proposition that “there is major dilution of the term ‘WIFE’ in the relevant international classes,” 6 TTABVUE 10, but that case is totally dissimilar on its facts with respect to the quantity and quality of the evidence of third-party marks. In *Broadway Chicken*, trademark search reports and telephone directories showed that there were hundreds of entities providing restaurant services under a mark beginning with BROADWAY, which supported the Board’s finding that “a significant number of third parties are using trade names/service marks containing the term BROADWAY for restaurant/‘eating place’ services, as well as for goods and services related thereto,” *id.* at 1565, and its ultimate conclusion that there was no likelihood of confusion between BROADWAY CHICKEN and BROADWAY PIZZA for restaurant services. Here, “there is no evidence of third-party usage, there is only evidence of just a few third-party registrations” of marks that do not contain WIFEY, *Inn at St. John’s*, 126 USPQ2d at 1746, and “[t]his is a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant in” the Federal Circuit’s seminal decisions in *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) and *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015).

B. Similarity or Dissimilarity of the Goods

“The second *DuPont* factor ‘considers [t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration’” *Embiid*, 2021 USPQ2d 577, at *22 (quoting *Detroit Athletic Co.*, 128 USPQ2d at 1051-52 (quoting *DuPont*, 177 USPQ at 567)). The goods “need not be identical or even competitive to find a likelihood of confusion.” *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *4 (TTAB 2019) (citations omitted). “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 [they] emanate from the same source.’” *Id.* (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir 2012) (internal quotation omitted)).

“Evidence of relatedness may include news articles 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; or copies of prior use-based registrations of the same mark for both applicant’s goods and the goods listed in the cited registration.” *Embiid*, 2021 USPQ2d 577, at *22-23.

Applicant notes that the “Examining Attorney asserts that the goods at issue are related because the goods commonly emanate from the same commercial entity because manufacturers of candles and essential oils often manufacture both products under the same mark.” 6 TTABVUE 8. He argues that his application “makes no claim to any use in personal care products and essential oils,” and that “the only goods

in Applicant's registration [sic] that bear any resemblance to those in the registered mark [sic] are scented or perfumed candles, which still provide an altogether separated good from the registered mark." *Id.* at 9. Applicant further argues that "when the relatedness of goods and services is less evident, the mere fact that they are used together is insufficient to establish relatedness," and that the "USPTO must show 'something more'." *Id.* (quoting *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1087 (Fed. Cir. 2014)). Applicant concludes that "the Examining Attorney claims that these goods are confusingly similar because they are often sold together when produced by a single manufacturer," but that "due to the variation of products offered by both Applicant and the registered mark, the mere fact that both types of products are used together is not sufficient to block Applicant's registration." *Id.*

The Examining Attorney responds that "the goods of the applicant and registrant are related as the goods commonly emanate from the same commercial entity and travel through the same channels of trade." 8 TTABVUE 5. He argues that the "record contains numerous examples of entities that produce candles, essential oils and perfumes under the same mark," *id.*, citing websites offering fragrances and various forms of candles under the same mark. *Id.* at 5-6. He claims that this evidence "establishes that the same entity commonly manufactures a variety of essential oils, perfumes, and candles, including candles for use as tea lights or repelling insects, under the same mark and through the same trade channels," and that "the use of the

mark on the applicant's goods, including separately from the scented candles, is likely to cause consumers to mistake the source of those goods." *Id.*

In assessing the similarity of the goods, we "begin with the identifications of goods in the registration and application under consideration." *Country Oven*, 2019 USPQ2d 443903, at *5. The goods identified in the cited registration are "personal care products, namely, perfumes and natural essential oils." The numerous goods identified in the application include "Candles," "Aromatherapy fragrance candles," "Perfumed candles," and "Scented candles." We will focus on these goods because "[t]he Examining Attorney need not prove, and we need not find, similarity as to each product listed in the description of goods. '[I]t is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.'" *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at *3-4 (TTAB 2020) (quoting *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n. 5 (TTAB 2015)). *See also Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 208 USPQ 986, 988 (CCPA 1981).

The third-party webpages in the record show that perfumes and essential oils, and various types of candles, including the aromatherapy fragrance candles, perfumed candles, and scented candles identified in the application, are commonly sold under the same mark. We summarize the evidence below:

- Niven Morgan and Tom Ford offer fragrances and candles;¹⁶

¹⁶ August 4, 2021 Office Action at TSDR 63-69; April 16, 2020 Office Action at TSDR 11-15.

- Aveda offers “Pure-Fume”™ aromas, essential oils for aromatherapy, and scented candles;¹⁷
- Avon offers perfumes, essential oil blends for aromatherapy, and what it describes as “beautifully-scented candles;”¹⁸
- Basin offers solid perfumes and candles “made with paraffin wax and fragrance oil designed to light up your senses;”¹⁹
- Bath & Body Works offers perfumes, essential oils, and candles with various scents;²⁰
- Rituals offers perfumes and scented candles;²¹
- Byredo, Redflower, and Sea Witch Botanicals offer perfumes and candles;²²
- Arvedikas displays “Essential Oils,” “Perfumes,” and “Aroma Candles” on the same page on its website;²³
- The masthead of the website of Nantucket Perfume Company displays links to “Women’s Perfume” and “Essential Oils” on the same page on which it offers a “Coconut Pineapple Massage Oil Candle;”²⁴
- Enfleurage offers essential oils, perfumes, and a frankincense candle;²⁵

¹⁷ April 16, 2020 Office Action at TSDR 16-25; August 4, 2020 Office Action at TSDR 19-23. It was unnecessary for the Examining Attorney to make these webpages and those discussed in the next footnote of record more than once.

¹⁸ April 16, 2020 Office Action at TSDR 26-35; August 4, 2020 Office Action at TSDR 30-34. We must construe the goods identified in the cited registration as broadly as reasonably possible “to include all goods of the nature and type described therein,” *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413 (TTAB 2018) (quoting *In re Jump Design LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006)), and we construe the “perfumes” identified in the cited registration to encompass “solid” perfumes as well as aerosol perfumes.

¹⁹ April 16, 2020 Office Action at TSDR 36-40.

²⁰ *Id.* at TSDR 41-59.

²¹ August 4, 2020 Office Action at TSDR 40-49.

²² March 4, 2022 Final Office Action at TSDR 6-9, 17-36, 37-40.

²³ *Id.* at TSDR 42.

²⁴ *Id.* at TSDR 51.

²⁵ *Id.* at TSDR 63-73.

- Reblscents offers “Candles & Room Scents” as well as “Fragrances;”²⁶ and
- Beverly and Third Candle Company offers soy candles and roll-on perfume oils.²⁷

These websites provide far more than “a reasonable predicate supporting the Examining Attorney’s position on relatedness and shift the burden to Applicant to rebut the evidence with competent evidence of [his] own.” *Country Oven*, 2019 USPQ2d 443903, at *10 (citing *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003)).

Applicant did not carry that burden. As noted above, his primary argument is that the relatedness of the goods based on their complementary use is not obvious and that, as a result, the Examining Attorney must show “something more” than that the goods may be used together. 6 TTABVUE 9 (quoting *St. Helena Hosp.*, 113 USPQ2d at 1087). Applicant’s reliance on *St. Helena Hosp.* for that proposition is misplaced for two reasons. First, that case addressed what must be shown to establish the relatedness of goods to services, *St. Helena Hosp.*, 113 USPQ2d at 1086-87, a factual scenario that is not present here. Second, the Examining Attorney does not rely on the complementary use of the goods (although the websites in the record show that the goods may be used together in certain settings), but rather on the fact that they are commonly sold under the same mark, a sufficient basis on which to find relatedness. *Embiid*, 2021 USPQ2d 577, at *22-23.

²⁶ *Id.* at TSDR 74-78.

²⁷ *Id.* at TSDR 79-90.

We find that the goods identified in the cited registration are related to a number of the goods identified in the application, and the second *DuPont* factor thus supports a conclusion that there is a likelihood of confusion.

C. Other *DuPont* Factors Referenced by Applicant

As discussed above, in addition to discussing the two key *DuPont* factors, Applicant purports to invoke “the fame of the contesting mark, concurrent use without actual confusion, dilution of the ‘WIFE’ term in the class, and extent of potential confusion.” 6 TTABVUE 8. We have addressed the claimed “dilution of the ‘WIFE’ term” above in our analysis of the first *DuPont* factor. Applicant’s other arguments allude to the fifth, eighth, and twelfth *DuPont* factors, which we discuss briefly below.

1. The Fame of the Cited Mark

The fifth *DuPont* factor “requires us to consider the fame of the mark in the cited registration.” *In re Mr. Recipe, LLC*, 116 USPQ2d 1084, 1085 (TTAB 2016). “Because of the nature of the evidence required to establish the fame of a registered mark, the Board does not expect Trademark Examining Attorneys to submit evidence as to the fame of the cited mark in an *ex parte* proceeding,” and, as here, “they do not usually do so.” *Id.* at 1086. Rather, as Applicant acknowledges, 6 TTABVUE 11, “in an *ex parte* appeal the ‘fame of the mark’ factor is normally treated as neutral because the record generally includes no evidence as to fame.” *Mr. Recipe*, 116 USPQ2d at 1086.

Applicant argues that “the cited mark is primarily in use in relation to a [sic] cosmetic and scent businesses that operate through online portals,” and that the

“cited mark is not in active use outside of this area, as the businesses associated with the mark do not operate outside of the area.” 6 TTABVUE 11. He concludes that “the fame of the mark would not indicate any inherent risk of confusion” and that “the risk of confusion between the marks is infinitesimal, as the two businesses are vastly separated in both scope and purpose, since the cited marks are only active in connection with cosmetic products, whereas Applicant’s mark is specifically intended for use in candles.” *Id.* The Examining Attorney responds that Applicant’s “argument does not establish fame nor explain how any such fame would mitigation [sic] confusion.” 8 TTABVUE 7.

We confess difficulty in understanding Applicant’s argument. He seems to be saying that because the involved marks are actually used on different goods, such that the “two businesses are vastly separated in both scope and purpose,” 6 TTABVUE 11, confusion is unlikely because there is no evidence that the cited mark is famous and such fame might extend the scope of protection to which the cited mark is entitled. Such a position is meritless. As noted above, under the second *DuPont* factor, we must compare the goods as identified in the involved application and cited registration, without reference to “any extrinsic evidence of actual use,” *In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018) (citing *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014)), and in that comparison above, we have found that the record shows that the identified goods are related. Whether or not the cited mark has any degree of fame under the fifth *DuPont*

factor is irrelevant here, as it is in almost every *ex parte* appeal, and the fifth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

2. Absence of Evidence of Actual Confusion

“The eighth *DuPont* factor considers ‘the length of time during and conditions under which there has been concurrent use without evidence of actual confusion.’” *Embiid*, 2021 USPQ2d 577, at *39 (quoting *DuPont*, 177 USPQ at 567). Applicant merely alludes to this factor twice in his appeal brief, first mentioning “concurrent use without actual confusion,” 6 TTABVUE 8, and then mentioning simply “concurrent use.” *Id.* at 11. He cites no evidence in support of either mention.

As the Board explained in *In re Guild Mortg. Co.*, 2020 USPQ2d 10279 (TTAB 2020), the eighth *DuPont* factor has limited applicability in *ex parte* proceedings because the cited registrant is not a party, *id.*, at *7, and, unlike other *DuPont* factors, it involves a fact-intensive analysis of the circumstances of the actual uses of the marks in the application and cited registration. *Id.*, at *6. The implicit suggestions of Applicant’s counsel that there has been no actual confusion between the marks are “no substitute for evidence,” *Embiid*, 2021 USPQ2d 577, at *40 (citation omitted), and, in any event, there is no evidence regarding the duration and extent of the actual uses of the involved marks that would enable us to determine whether there has been a meaningful opportunity for confusion to have occurred. *Id.*, at *40-41. The eighth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

3. The Extent of Potential Confusion

“The twelfth *DuPont* factor discusses ‘[t]he extent of potential confusion, i.e., whether de minimis or substantial.’” *Made in Nature, LLC v. Pharmavite LLC*, 2022

USPQ2d 557, at *62 (TTAB 2022) (quoting *DuPont*, 177 USPQ at 567). As with the eighth factor, Applicant merely alludes to the twelfth factor twice in his appeal brief, first mentioning the “extent of potential confusion” early in his brief, 6 TTABVUE 8, and then mentioning the “risk of confusion” at the end, *id.* at 11, and he again cites no evidence in connection with these mentions. As with the eighth factor, in the absence of any relevant evidence, we find that this factor is neutral.

D. Summary of the *DuPont* Factors

The key first and second *DuPont* factors support a conclusion that confusion is likely. The WIFEY and WIFEYSCENTS marks are quite similar in all means of comparison, and the involved goods are related because they are commonly sold under the same mark. The other *DuPont* factors alluded to by Applicant are neutral. We conclude that there is a likelihood that consumers familiar with one of the involved marks who separately encounters the other mark for related goods will believe mistakenly that the involved goods have a common source or that there is a relationship between their sellers.

Decision: The refusal to register is affirmed.