

This Opinion is Not a
Precedent of the TTAB

Mailed: January 25, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re USAPARK LLC
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Serial No. 88808668
—

James A. Sheridan of Sheridan Law LLC for USAPARK LLC.

Vivian Micznik First, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Acting Managing Attorney.

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

Opinion by Larkin, Administrative Trademark Judge:

USAPARK LLC (“Applicant”) seeks registration on the Principal Register of the composite word-and-design mark shown below

The logo for USAPARK.net features the word "USAPARK" in a bold, blue, sans-serif font. The letter "A" is red. To the right of "USAPARK" is a small, stylized icon of a parking lot with a car. To the right of the icon is the word ".net" in a blue, sans-serif font.

for “Airport passenger shuttle services between the airport parking facilities and the airport; Parking lot services; Parking space reservation service; Providing a website

featuring information on airport parking; Rental of parking spaces; Rental of car parking spaces” in International Class 39.¹

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 USA PARKING (PARKING disclaimed), registered on the Principal Register for “vehicle parking services” in International Class 39,² as to be likely, when used in connection with one or more of the services 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. 88808668 was filed on February 24, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use of the mark and first use of the mark in commerce at least as early as May 1, 2006. Applicant describes its mark as follows: “The mark consists of the letters ‘USA’ in blue, immediately followed by the letters ‘PARK’ in red, immediately followed by a multicomponent wheel forming a dot symbol in black, and immediately followed by the letters ‘NET’ in blue. The color white represents background and is not claimed as a feature of the mark.” The colors red, blue, and black are claimed as a feature of the mark. Applicant has claimed that the mark as a whole has acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

² The cited Registration No. 1886343 issued on March 28, 1995 based on a showing of acquired distinctiveness under Section 2(f), and has been renewed.

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. The TTABVUE page numbers do not correspond to the numbered pages in the briefs. Applicant’s brief appears at 6 TTABVUE and the Examining Attorney’s brief appears at 8 TTABVUE.

I. Prior Appeal in Serial No. 88808161

In deciding this appeal, we are not writing on an entirely clean slate. On February 28, 2022, before this appeal was filed and briefed, the panel affirmed a Section 2(d) refusal to register Applicant's standard-character mark USAPARK.NET for the same services identified in the current application. That refusal was issued by the same Examining Attorney based on the same registration of USA PARKING that is cited in this appeal. *In re USAPARK LLC*, Serial No. 88808161 (TTAB Feb. 8, 2022) (the "Prior Decision"). Applicant did not appeal the Prior Decision, and Application Serial No. 88808161 became abandoned.

Notwithstanding issuance of our Prior Decision, the record and briefing in this appeal are extremely similar to their counterparts in the prior appeal, and the Section 2(d) issue is as well. The primary substantive difference between the appeals is that Applicant's USAPARK.NET mark in the prior application appeared in standard characters, while the USAPARK.NET mark in the current application appears in colors and a particular font, and includes a design element.

We will, of course, decide this case on its particular facts, but we will look to our Prior Decision and the prior appeal for guidance where appropriate.

II. Record on Appeal⁴

The record on appeal includes Applicant's specimens of use,⁵ dictionary definitions of "USA" and "park,"⁶ USPTO electronic records regarding the cited registration,⁷ a table listing third-party registrations of marks for parking-related services containing the letters "US" in some form;⁸ and a "Consent Agreement" between Applicant and another company, Ennis, Inc. ("Ennis"), regarding the coexistence of

⁴ Citations in this opinion to the application record, including the request for reconsideration and its denial, are to the electronic version of pages in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO"). During the prosecution of the current application, the Examining Attorney initially cited multiple registrations owned by the owner of Registration No. 1886343, but issued a final Office Action only as to that registration. October 14, 2021 Final Office Action at TSDR 1. Accordingly, we will not summarize record evidence regarding the other cited marks.

⁵ February 24, 2020 Application at TSDR 3-5; November 12, 2020 Response to Office Action at TSDR 34-35.

⁶ May 12, 2020 Office Action at TSDR 2-17; November 12, 2020 Response to Office Action at TSDR 16; April 4, 2022 Request for Reconsideration at TSDR 18. As in the prior appeal, Applicant twice submitted the same dictionary definition and a table of third-party registrations, and it was again unnecessary and counterproductive to make this evidence of record more than once.

⁷ May 12, 2020 Office Action at TSDR 21-22; April 4, 2022 Request for Reconsideration at TSDR 19-35.

⁸ November 12, 2020 Response to Office Action at TSDR 17-33. As in the prior appeal, Applicant attached a dictionary definition of "park" and the table to its brief as Appendices B and C. 6 TTABVUE 16-28. We reiterate that the Board strongly discourages this practice. "Parties to Board cases occasionally seem to be under the impression that attaching previously-filed evidence to a brief and citing to the attachments, rather than to the original submission is a courtesy or convenience to the Board. It is neither." *In re Michalko*, 110 USPQ2d 1949, 1950 (TTAB 2014). As the Board explained in *Michalko*, "[w]hen considering a case for final disposition, the entire record is available to the panel," and "[b]ecause we must determine whether attachments to briefs are properly of record, citation to the attachment requires examination of the attachment and then an attempt to locate the same evidence in the record developed during the prosecution of the application," which requires "more time and effort than would have been necessary if citations directly to the prosecution history were provided." *Id.* at 1950-51.

various USAPARK and USPARK-formative marks in applications filed by the two parties, which are exhibits to the Consent Agreement.⁹

III. Applicant's Request for Remand

Applicant “requests a remand to the Examining Attorney inasmuch as the Final Office Action dated October 4, 2021 was premature as the SUSPENSION NOTICE of December 7, 2020 indicates that the Section 2(d) refusal is withdrawn.” 6 TTABVUE 6. The Examining Attorney responds “that [TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”)] section 1203.01 states that the content of the applicant’s brief should not include a request for remand.” 8 TTABVUE 3 at n.1.

The December 7, 2020 Suspension Notice stated that the “Section 2(d) refusal” and various informalities “are satisfied/withdrawn.”¹⁰ The Suspension Notice was preceded by a first Office Action in which registration was refused under Section 2(d) based on the cited Registration No. 1886343 and other cited registrations,¹¹ to which Applicant responded with arguments and evidence directed to the refusal.¹²

⁹ May 17, 2021 Response to Suspension Notice at TSDR 3-89. The Examining Attorney had cited these applications as possible bars to registration of Applicant’s mark, May 12, 2020 Office Action at TSDR 1, and had suspended examination of the application pending their disposition. December 7, 2020 Suspension Notice at TSDR 1. Following Applicant’s submission of the Consent Agreement, the Examining Attorney withdrew the reference to these applications as a possible bar to registration. October 4, 2021 Final Office Action at TSDR 1.

¹⁰ December 7, 2020 Suspension Notice at TSDR 1.

¹¹ May 12, 2020 Office Action at TSDR 1.

¹² November 12, 2020 Response to Office Action at TSDR 3-5, 14, 16-33.

Applicant also addressed the reinstated final refusal based on Registration No. 1886343 in its Request for Reconsideration.¹³

The TBMP summarizes the Board's approach to remand requests as follows:

Requests for remand are generally filed by applicants because they wish to make additional evidence of record, or because they wish to amend the application. Applicants may also request remand so that the examining attorney can consider a refusal in light of a recently decided case or amended Trademark Rule. . . . No matter what the purpose, the request for remand must include a showing of good cause. . . . In determining whether good cause has been shown, the Board will consider both the reason given and the point in the appeal at which the request for remand is made.

TBMP § 1209.04 (citations omitted).

Applicant does not offer any reason why the application should be remanded other than its claim that the final Office Action was "premature." 6 TTABVue 6. It is unfortunate that Applicant was first told that the Section 2(d) refusal was withdrawn in its entirety, only to have it reinstated and made final as to Registration No. 1886343, but the Examining Attorney's issuance of a final Office Action reinstating the refusal was not premature. Registration No. 1886343 had been cited in the first, non-final Office Action, and Applicant was given the opportunity to address it, and did address it, both in its response to that Office Action and in its Request for Reconsideration of the final refusal. Notably, Applicant did not claim in its Request for Reconsideration that the final Office Action was premature, but instead addressed

¹³ April 4, 2022 Request for Reconsideration at TSDR 2-8, 16, 18-35.

the final refusal on the merits.¹⁴ Indeed, Applicant “thank[ed] the Office for the indication of (1) withdrawal of the Section 2(d) refusals based on [the other cited registrations], (2) withdrawal of the disclaimer requirement, and (3) acceptance and entry of the substitute drawing, specimen, and Section 2(f) claim into the record,” and offered various arguments against the renewed citation of Registration No. 1886343 under the heading “**In response to Final Office Action.**”¹⁵

Because Applicant did not show good cause for a remand, we deny Applicant’s request and will decide the appeal on the merits. *Cf. In re Cnty. of Orange*, 2022 USPQ2d 733, at *4 (TTAB 2022) (considering appeal of refusal to register that had first been withdrawn after the applicant argued against it, but was then reinstated and subsequently made final).

IV. Analysis of Refusal

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 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*

¹⁴ *Id.*

¹⁵ *Id.* at TSDR 2 (emphasis supplied by Applicant).

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).

“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)). As in the prior appeal, Applicant focuses on the first *DuPont* factor regarding the similarity or dissimilarity of the marks, 6 TTABVue 8-10, and also argues that the cited USA PARKING mark is weak, and entitled only to a very narrow scope of protection, because of the inherent weakness of its elements and the existence of the Consent Agreement and third-party registrations of US-formative marks, *id.* at 10-13, and that there has been no actual confusion between its mark and the cited mark or third-party marks. *Id.* at 13-14.

A. Similarity or Dissimilarity of the Services and Channels of Trade

The second and third *DuPont* factors respectively consider “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” and “the similarity or dissimilarity of established, likely-to-continue trade channels.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). As in the prior appeal,

“[a]pparently conceding the issue, Applicant did not address these *du Pont* 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).

The services identified in the application are “Airport passenger shuttle services between the airport parking facilities and the airport; Parking lot services; Parking space reservation service; Providing a website featuring information on airport parking; Rental of parking spaces; Rental of car parking spaces.”¹⁶ The services identified in the cited Registration are “vehicle parking services.” As in the prior appeal, we agree with the Examining Attorney that the unrestricted and broadly identified “vehicle parking services” in the cited registration encompass at least the “Parking lot services” identified in the application, 8 TTABVUE 6, making those services legally identical. *In re Info. Builders Inc.*, 2020 USPQ2d 10444, at *3 (TTAB 2020). “Thus, the second *DuPont* factor strongly supports a finding of likelihood of confusion.” *Id.*

Because we have found that the services are legally identical in part, “we must presume that [they] travel through the same channels of trade and are offered or rendered to the same or overlapping classes of purchasers.” *Id.* (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Yawata Iron &*

¹⁶ “The Examining Attorney need not prove, and we need not find, similarity as to each [service] listed in the description of [services]. ‘[I]t is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of [services] 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) and citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)).

Steel Co., 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968)). “Thus, the third *DuPont* factor also weighs in favor of finding a likelihood of confusion.” *Id.*

B. 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.* (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 ordinary consumers seeking to temporarily park their vehicles at locations other than where they are ordinarily parked. Because the “services are legally identical, the degree of similarity between the marks necessary

to support a determination that confusion is likely declines.” *In re RiseSmart, Inc.*, 104 USPQ2d 1931, 1935 (TTAB 2012).

The mark shown in the cited registration is USA PARKING in standard characters, while Applicant’s mark in the current appeal is



Applicant argues that its “mark and the cited references do not have a similar appearance in that Applicant’s mark is a unitary term . . . while the cited reference includes the wording USA PARKING.” 6 TTABVUE 8. According to Applicant,

[t]he overall impression is different because applicant’s mark is a single term with a TLD of .NET in contrast to the cited reference which contains the two separate words USA PARKING. Furthermore, the word PARKING is highly descriptive of the parking lot services (the cited registration includes the disclaimer of the word PARKING) The descriptiveness of the term PARKING is notably in contrast to the word PARK which has multiple meanings, including, but not limited to, an enclosed piece of ground stocked with game; a piece of ground in or near a city or town kept for ornament and recreation; a space occupied by military vehicles; an enclosed arena or stadium used especially for ball games; an area designed for a specified type of use amusement parks. . . . Applicant respectfully submits that [its mark] must be viewed as a whole with at least some weight given to the entire unitary term . . . including the TLD .NET having a stylized portion with a graphical symbol of a multicomponent wheel extending from the letter K that forms a portion of the Mark, to provide a complete analysis of the Mark.

Id. at 9 (citations omitted).

Applicant “submits that the Examining Attorney has not addressed either the unitary nature of the Mark nor the stylized graphical symbol of a multicomponent

wheel in any of the Office action refusals,” *id.*, and that the Examining Attorney “did not acknowledge that Applicant’s mark includes **a multicomponent wheel forming a dot symbol in black** which Applicant asserts, together with the other terms of the mark, creates a distinct commercial impression from the descriptive wording USA PARKING.” *Id.* at 10 (emphasis supplied by Applicant). Applicant concludes that “the term USAPARK.NET is a unitary term having multiple meanings, and this mark creates a distinct commercial impression from the descriptive wording USA PARKING.” *Id.*

Applicant also argues that its third-party registrations “are probative to demonstrate that USA or US has been adopted by a number of other users as a laudatory designation,” *id.* (citations omitted), and that the cited mark contains “a weak term in that the wording USA PARKING is subject to a Section 2(f) claim in the registration and, accordingly, should be given only limited area of coverage.” *Id.* at 10 (citations omitted). Applicant “submits that the proper scope of protection extended to a merely descriptive or even a highly suggestive term has been limited to substantially identical notation for substantially similar goods,” and argues that its mark “having a stylized portion with a graphical symbol of a multicomponent wheel extending from the letter K is not substantially identical notation as the descriptive wording USA PARKING.” *Id.* at 10-11 (emphasis supplied by Applicant).

The Examining Attorney responds that

The marks are similar because they combine the geographic designation USA with a form of the word PARK. The applicant’s mark represents the domain name version of the registered mark. Although there is a slight

difference in the sound and appearance of “USA PARKING” and “USAPARK.NET” because the applicant’s mark uses PARK while the registered mark uses PARKING, consumers are likely to overlook the slight difference in the sound and appearance of the literal portion of the marks because the overall connotation and commercial impression are the same – parking services for cars in the United States

. . . .

[A] non-source-identifying gTLD is less significant in creating a commercial impression in the minds of consumers, and is generally given little weight when comparing marks [and] the .NET suffix in applicant’s mark does little more than informs consumers that applicant has a .NET website address.

8 TTABVUE 7-8.

The Examining Attorney rejects Applicant’s argument that the word PARK in its mark has multiple meanings because “[s]ince the definition provided by applicant also includes the meaning ‘parking lot,’ the word PARK in the applicant’s mark shares a meaning with PARKING which is also descriptive of the parking lot and associated services with which it is used.” *Id.* at 8. She further argues that the differences between the verbal elements of Applicant’s mark and the cited mark are insignificant, *id.* at 8-9, and that “the wheel design forming the dot symbol visually separates the wording USAPARK on the left of the wheel design from NET on the right of the design,” the “blue color of the term USA contrasts with the red color of PARK, emphasizing that the combined term USAPARK consists of the two separate words USA and PARK,” and “the colors and design in the applicant’s mark highlight the first part of applicant’s mark and its components (i.e., USA and PARK) and the similarities between applicant’s mark and USA PARKING.” *Id.* at 10.

The Examining Attorney “concur[s] that the ‘USA PARKING’ mark of the registrant is inherently weak because the components are descriptive and geographically descriptive,” but, citing Applicant’s statement in its brief, argues that “even a weak mark is entitled to protection against the registration of a similar mark for closely related goods or services.” *Id.* (citing 6 TTABVue 10).

The Examining Attorney rejects Applicant’s argument that the Consent Agreement

is persuasive as to the current likelihood of confusion analysis because it signifies that marks pairing a geographic abbreviation for the United States, such as US or USA, with a form of the word PARK can coexist with one another without resulting in actual confusion. However, the marks that are the subject of the coexistence agreement are pending marks that have not registered. Information pertaining to the coexistence of non-registered marks is not probative of likelihood of confusion since it does not represent actual use of the marks referenced therein, or whether that use has been so extensive that consumers have become accustomed to distinguishing between various marks.

Id. at 11.

The Examining Attorney also notes that the Consent Agreement “does not appear to be an agreement between two unrelated entities” because “the parties to the agreement (applicant and Ennis, Inc.) share the same address 1615 California Street, Suite 7070 Denver, Colorado 80202), the same officer (Panayes J. Dikeou, who signed the consent agreement on behalf of both parties), and the same attorney (James A. Sheridan).” *Id.* at 12. According to the Examining Attorney, the apparent relatedness of the parties supports her “position that consumers encountering parking service marks which combine an abbreviation of United States (i.e., US, USA) and a variation

of PARK would understand the similar marks to mean that the services share a common source or sponsorship.” *Id.*

Finally, the Examining Attorney rejects the probative value of Applicant’s list of third-party registrations because

only the mark in Registration No. 5871951 (P TRUCK PARKING USA THE TRUCKER COMMUNITY and design) includes the term US/USA and a variation of PARK. This third-party registration differs from the marks at issue because it has a prominent design featuring a truck, and the phrase TRUCK PARKING USA wherein PARKING precedes the geographic abbreviation for the United States. The amount of applicant’s third-party registration evidence amounts to a single registration which does not establish that the elements of the cited mark are so descriptive that consumers will be able to distinguish that mark from USAPARK.NET based on “minor differences.”

Id. at 12 (citations omitted).

We begin with Applicant’s claim that the cited USA PARKING mark is so weak that the proper scope of its protection should be limited to a “substantially identical notation for substantially similar goods.” 6 TTABVUE 11 (emphasis supplied by Applicant). “A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).” *Morinaga*, 120 USPQ2d at 1745 (quoting *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010)). As we found in our Prior Decision, 10 TTABVUE 13-14 (Serial No. 88808161), there is no question, as the Examining Attorney acknowledges, that the cited mark USA PARKING is conceptually weak for “vehicle parking services.” The initialism USA is geographically descriptive for services rendered in

the United States,¹⁷ and the word PARKING is at least descriptive of, if not generic for, those services, and has been disclaimed. The cited registration issued under Section 2(f) of the Trademark Act, which constitutes an admission by the registrant that the USA PARKING mark as a whole is not inherently distinctive. *See, e.g., RiseSmart*, 104 USPQ2d at 1932 (citing *Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988)).

The fact that the cited mark is conceptually weak does not end our analysis, however, because Applicant acknowledges that “even a weak mark is entitled to protection against the registration of a similar mark for closely related goods or services,” 6 TTABVUE 11, and we have found above that the involved services are not just “closely related” but legally identical. We must determine whether the record shows that USA PARKING is so weak conceptually and commercially as to be protectable only against what Applicant calls a “substantially identical notation.” *Id.*

We answered that question in the negative in our Prior Decision, which considered the same evidence of weakness that Applicant offers here. 10 TTABVUE 13-20 (Serial No. 88808161). Here, as in the prior appeal, there is no evidence of the commercial weakness of the cited mark because Applicant offers no evidence of use of any third-party mark. *Embiid*, 2021 USPQ2d 577, at *34-39. Applicant relies instead solely on its list of registrations of marks containing the letters “US” in some fashion for some

¹⁷ Applicant characterizes the initialisms USA and US as “laudatory designation[s].” 6 TTABVUE 10-11. Applicant offers no explanation for that claim, but whether the initialisms USA and US are laudatory or geographically descriptive, they are not inherently distinctive for the identified services.

form of parking-related services, which Applicant submitted during prosecution,¹⁸ and reproduced as Appendix C to its brief. As in our Prior Decision, 10 TTABVUE 14-15 (Serial No. 88808161), we will consider this evidence notwithstanding that “[t]he Board does not take judicial notice of registrations and a list of registrations does not make those registrations of record,” *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018) (citations omitted), because the Examining Attorney does not object in her brief to Applicant’s list, arguing instead, as noted above, that the registrations are insufficient in quality and quantity to make confusion unlikely.

As we explained in our Prior Decision, “[t]hird-party registrations are 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.’” 10 TTABVUE 16 (Serial No. 88808161) (quoting *Embiid*, 2021 USPQ2d 577, at *34-35 (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015)). “Third-party registrations used in this manner are not evidence that customers are accustomed to seeing the use of other, similar, marks in the marketplace, but rather evidence that a term is suggestive or descriptive of the relevant goods or services,” and “[s]uch terms may be conceptually weak because the more descriptive a term is, the less likely prospective purchasers are to attach source-identifying significance to it.” *Id.* (quoting *Morinaga*, 120 USPQ2d at 1745-46).

¹⁸ November 12, 2020 Response to Office Action at TSDR 17-33.

Applicant's table lists the same seven third-party registrations that we discussed in our Prior Decision, 10 TTABVUE 16-17 (Serial No. 88808161), and they serve Applicant no better here because only the registration of the composite mark shown below



contains both the initialism USA and the word PARKING,¹⁹ and only one other registration, of the composite mark shown below for, inter alia, “aircraft parking” services, contains the initialism USA:



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“The other five registrations are of marks containing the letters ‘US,’ which can be an initialism for ‘United States,’ but only [two] of those marks, US VALET [and USV and design] for various parking services owned by the same registrant, use[] the

¹⁹ November 12, 2020 Response to Office Action at TSDR 19-20.

²⁰ *Id.* at TSDR 20-23.

letters in that manner.” *Id.* (Serial No. 88808161).²¹ “The other [three] use the letters US to form words or initialisms that do not abbreviate ‘United States.’” *Id.* (Serial No. 88808161).²²

As we found in our Prior Decision, Applicant’s third-party registration evidence “does not come remotely close to showing that the USA portion of the cited mark USA PARKING is so descriptive that consumers will be able to distinguish that mark from Applicant’s composite USAPARK.NET mark based on ‘minor differences.’” *Id.* (Serial No. 88808161) (quoting *Morinaga*, 120 USPQ2d at 1745 and citing *Embiid*, 2021 USPQ2d 577, at *38-39 (three third-party registrations of PROCESS-formative marks for clothing offered to show the weakness of the cited mark TRUST THE PROCESS for clothing were “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* [*Ausrüstung Fur Draussen GmbH & Co. v, New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129 (Fed. Cir. 2015)] and *Juice Generation*”) (quoting *Inn at St. John’s*, 126 USPQ2d at 1746)).

As we found in our Prior Decision, Applicant’s reliance on the Consent Agreement “is similarly unavailing.” 10 TTABVUE 18 (Serial No. 88808161). The Examining Attorney correctly notes that Applicant and Ennis do not appear to be unrelated parties for the reasons that we discussed in making such a finding in our Prior

²¹ *Id.* at TSDR 17-18. These two registrations are owned by the same registrant and, for that reason, we assume that the mark USV and the design of a star and stripes would be understood to be an abbreviation of UNITED STATES VALET.

²² *Id.* at TSDR 18-19 (RYDE WITH US), 23-29 (ALOEUS), 29-33 (DAY USE and design).

Decision. *Id.* at 18-19 (Serial No. 88808161). We find, as we found in our Prior Decision, that the Consent Agreement and the co-existence of Applicant’s USAPARK.NET composite word-and-design mark “with the USAPARK-formative marks of its de facto affiliate Ennis is not probative of the weakness of the cited mark USA PARKING, or the ability of Applicant’s . . . mark to co-exist with the cited mark without creating a likelihood of confusion,” *id.* at 20 (Serial No. 88808161), for the reasons set forth in our Prior Decision. *Id.* at 18-20 (Serial No. 88808161).

Accordingly, although the cited USA PARKING mark is conceptually weak, the scope of its protection is not limited to a “substantially similar notation.” 6 TTABVUE 11.

The cited USA PARKING mark is a standard-character mark, and “may be presented in any font style, size, or color, including the same font, size and color as the literal elements of Applicant’s mark.” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018). Accordingly, we must assume that the cited mark may be presented as shown immediately below:

USA PARKING

in a display that approximates the size, font, and colors of the term USAPARK in Applicant’s mark. A consumer whose mind’s eye contains a general rather than specific impression of the cited mark displayed in the manner shown above who separately encounters Applicant’s composite mark shown below



is likely to view Applicant's mark as quite similar in appearance to the cited mark. The identical word USA appears at the front of each mark in blue, and the words PARKING and PARK that follow USA in red are similar.

The marks differ visually because there is no space between the words in Applicant's mark, but as we found in our Prior Decision, "[t]he presence or absence of a space between two terms is usually an inconsequential difference that even if noticed by consumers would not serve to distinguish these marks." 10 TTABVUE 10 (Serial No. 88808161) (quoting *Chutter*, 2021 USPQ2d 1001, at *37). A consumer with a general rather than specific impression of the cited mark USA PARKING who separately sees Applicant's USAPARK.NET composite mark is not likely to distinguish the marks in appearance because the term USA PARKING consists of two words while USAPARK is one compound word.

The marks also differ visually because the ".NET" suffix is not present in the cited mark, and in Applicant's mark, the "dot" is formed by a wheel design. These differences are insufficient to distinguish the marks in appearance. Although the "dot" in Applicant's mark is decorative, in the context of the mark in its entirety, there is no doubt that it would be viewed as forming the first part of the .NET TLD, and as we found in our Prior Decision, the ".NET suffix in Applicant's mark has no meaningful source-identifying significance because 'the term '.net' is a generic top level domain name indicator.'" 10 TTABVUE 12 (Serial No. 88808161) (quoting *Apple Computer v. TVNET.net, Inc.*, 90 USPQ2d 1393, 1396 (TTAB 2007)). Even though it

is modestly decorative, the “-.NET suffix in Applicant’s mark merely indicates the Internet address of ‘USAPARK,’ and for a consumer with a general rather than a specific impression and recollection of the cited mark USA PARKING, it could readily be [viewed] as identifying USA PARKING’s Internet address.” *Id.* at 13 (Serial No. 88808161). We find that the marks are similar in appearance.

With respect to sound, there is no doubt that the marks are similar aurally when they are verbalized respectively as “USA PARKING” and “USAPARK.NET.” Both marks begin with the same initialism “USA” followed by “PARKING” and “PARK,” words that sound very much alike. As we found in our Prior Decision, Applicant’s mark could easily be misunderstood as identifying the Internet address of USA PARKING. *Id.* (Serial No. 88808161). We find that the marks are similar in sound.

Finally, with respect to meaning, we again reject Applicant’s argument for dissimilarity in connotation and commercial impression because the word “park” in its mark has multiple meanings. As we explained in our Prior Decision, “Applicant is correct that ‘the word PARK . . . has multiple meanings’ . . . but this fact is irrelevant because we must determine the meaning of PARK in Applicant’s mark not in the abstract, but rather in the context of the ‘Parking lot services’ for which it is used. *Id.* at 11 (Serial No. 88808161) (citations omitted). Here, as there,

[w]hen Applicant’s mark . . . is viewed, heard, and considered in the context of its use for “Parking lot services,” there is no doubt that the word PARK in the mark would be understood to refer to “parking” rather than “an enclosed piece of ground stocked with game,” “a piece of ground in or near a city or town kept for ornament and recreation,” “a space occupied by military vehicles,” “an enclosed arena or stadium used especially for ball games,”

or “an area designed for a specified type of use...amusement parks.”

Id. at 12 (Serial No. 88808161). As we found in our Prior Decision, *id.* (Serial No. 88808161), Applicant’s original specimen here confirms this meaning through its reference to “Airport Parking”:



23

and its substitute specimen shown below



24

similarly reinforces this meaning of PARK in Applicant’s mark.

We find here, as we found in our Prior Decision, that the “cited mark USA PARKING and the source-identifying portion of Applicant’s mark, USAPARK, are essentially identical in connotation and commercial impression in the context of the

²³ February 24, 2020 Specimen at TSDR 1.

²⁴ November 12, 2020 Response to Office Action at TSDR 34.

involved services because each connotes parking services provided in the United States of America.” 10 TTABVUE 12 (Serial No. 88808161).

Despite the stylization and design element in Applicant’s mark, we find, as we found in our Prior Decision, that the cited mark and Applicant’s mark “are sufficiently similar for confusion to be likely when they are used in connection with legally identical services, and the first *DuPont* factor supports a finding of a likelihood of confusion.” *Id.* at 20 (Serial No. 88808161).

C. The Absence of Evidence of Actual Confusion

Applicant “asserts a lack of actual confusion with Applicant’s mark and the cited references over a period of **more than sixteen years**,” 6 TTABVUE 13 (emphasis supplied by Applicant), and “a lack of actual confusion of applicant’s mark, the cited references, and third-party marks as identified in a co-existence agreement between the parties of Applicant’s mark and third-party marks of the co-existence agreement, which include the marks USPARK.NET owned by” Ennis. *Id.* Applicant “submits this consent agreement is probative of third-party marks (Ennis, Inc. and Applicant) co-existing with one another without actual confusion” and that Ennis “and Applicant have experienced no actual confusion with Registrant.” *Id.* at 13-14.

The eighth *DuPont* factor considers “[t]he length of time during which and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567. As we explained in our Prior Decision, “[o]ur analysis under this factor differs from our analysis regarding the second and third *DuPont* factors, where we must focus on ‘the identifications **as set forth** in the

application and the cited registration,’ and may not consider “evidence of how Applicant and Registrant are **actually rendering** their services in the marketplace.” 10 TTABVUE 20-21 (Serial No. 88808161) (quoting *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at *6 (TTAB 2020) (citing *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014)). Under the eighth *DuPont* factor, “we must ‘look at **actual market conditions**, to the extent that there is evidence of such conditions of record,” *id.* at 21 (Serial No. 88808161) (quoting *Guild Mortg.*, 2020 USPQ2d 10279, at *6), but as in the prior appeal, “[t]here is no such evidence of record here.” *Id.* (Serial No. 88808161).

As we found in our Prior Decision, Applicant’s “assertions regarding the lack of actual confusion ‘are unsupported by sworn statements or other evidence, and ‘[a]ttorney argument is no substitute for evidence.’” *Id.* (Serial No. 88808161) (quoting *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, at *15 (TTAB 2019) (quoting *Cai*, 127 USPQ2d at 1799 (internal quotation omitted)). Instead, we “have only a few paragraphs in Applicant’s brief, and the hearsay statements in the Consent Agreement, which we have found above lacks any probative value on the issue of likelihood of confusion.” *Id.* (Serial No. 88808161).

Once again, “there is a ‘lack of evidence that **in the actual marketplace**, the **same** consumers have been exposed to **both** marks for the respective services, such that we could make a finding as to the ‘length of time during and conditions under which there has been concurrent use without evidence of actual confusion.’” *Id.* at 22 (Serial No. 88808161) (quoting *Guild Mortg.*, 2020 USPQ2d 10279, at *8 (internal quotation

omitted)). We again “find that the eighth *DuPont* factor is neutral in our analysis of the likelihood of confusion.” *Id.* (Serial No. 88808161).

D. Summary

As we found in our Prior Decision, the “first, second, and third *DuPont* factors support a finding of a likelihood of confusion, as the marks are more similar than dissimilar, and the services, channels of trade, and classes of purchasers are legally identical in part,” and the “eighth *DuPont* factor is neutral.” *Id.* (Serial No. 88808161). “Although the cited mark is conceptually weak, there is no evidence that it is also commercially weak, and it is entitled to protection against registration of Applicant’s confusingly similar mark for legally identical services.” *Id.* (Serial No. 88808161). We find on the basis of the record as a whole that Applicant’s USAPARK.NET composite word-and-design mark so resembles the cited USA PARKING mark as to be likely, when used in connection with the “parking lot services” identified in the application, to cause confusion.

Decision: The refusal to register is affirmed.