

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: April 29, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

—  
Trademark Trial and Appeal Board

—  
*In re Nano Magic, LLC*

—  
Serial No. 88879556

—  
Mikhail Murshak of Loomis, Ewert, Parsley, Davis & Gotting PC,  
for Nano Magic, LLC.

Sasha Rios, Trademark Examining Attorney, Law Office 125,  
Heather Biddulph, Managing Attorney.

—  
Before Shaw, English and Lebow,  
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Nano Magic, LLC, seeks to register the mark POWERED BY SCIENCE. WORKS LIKE MAGIC., in standard characters on the Principal Register, for “cleaning preparations, namely, cleaning solutions and disposable wipes impregnated with cleaning solutions for the cleaning of surfaces, glass, porcelain, ceramic, mirrors, doors, vehicles, household items and devices, and electronic devices; all-purpose cleaning preparations,” in International Class 3.<sup>1</sup>

—  
<sup>1</sup> Application Serial No. 88879556 (“the Application”) was filed on April 20, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a

The Trademark Examining Attorney refused registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with the aforementioned goods, is likely to cause confusion with the mark WORKS LIKE MAGIC POWERED BY SCIENCE, also in standard characters on the Principal Register, for "deodorants for refrigerators; deodorizing products, namely, all purpose deodorizer preparations for household, commercial and industrial use," in International Class 5.<sup>2</sup>

When the refusal was made final, Applicant appealed and requested reconsideration, which was denied. The appeal has been briefed.

We affirm the refusal.

#### I. Likelihood of Confusion

The fundamental purpose of Trademark Act Section 2(d) is to prevent confusion as to source, and to protect registrants from damage caused by registration of marks likely to cause confusion. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985). Our analysis is based on all of the probative evidence of record. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567

---

bona fide intent to use the mark in commerce. The Application, as filed, also identified goods in Classes 1 and 5. However, the Class 1 goods were subsequently divided out to a new (child) application, Serial No. 88982646 and are not at issue in this appeal (*see* August 20, 2021 Notice That Processing of Request to Divide is Completed), and the Class 5 goods were deleted from the Application (July 13, 2021 Request for Reconsideration, at TSDR 3).

The TTABVUE and Trademark Status & Document Retrieval ("TSDR") citations refer to the docket and electronic file database for the Application, and specifically to the downloadable .pdf version of the documents.

<sup>2</sup> Registration No. 5785906 ("the Registration"), issued June 25, 2019 in the name of OxiScience LLC ("Registrant").

(CCPA 1973) (“*DuPont*”) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”).

In making our determination, we consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *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.”).

#### A. Comparison of the Marks

The first *DuPont* factor considers the “similarities or dissimilarities of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *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.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019).

Our focus is on the recollection of the average purchaser, who normally retains a general, rather than specific, impression of trademarks. *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007). Consumers may not necessarily encounter the marks in close proximity and must rely upon their recollections of them over time. *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1468 (TTAB 1988). Thus, “marks must be considered in light of the fallibility of memory and not on the basis of side-by-side comparison.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014).

Applicant’s mark is POWERED BY SCIENCE. WORKS LIKE MAGIC. and Registrant’s mark is WORKS LIKE MAGIC POWERED BY SCIENCE. As the Examining Attorney notes, the marks are “reverse combinations of [] two identical phrases[.]”<sup>3</sup> The Board has often held marks to be confusingly similar when they are a “reverse combination” of the same words or elements or a “transposition of the words” that make up the marks when the overall meanings of the marks remain the same. *See, e.g., In re Wine Soc’y of Am. Inc.*, 12 USPQ2d 1139, 1142 (TTAB 1989) (affirming refusal to register THE WINE SOCIETY OF AMERICA & Design based on registration of AMERICAN WINE SOCIETY 1967 & Design, finding that “the

---

<sup>3</sup> 8 TTABVUE 7 (Examining Attorney’s Brief).

transposition of words does not change the overall commercial impression”); *In re Nationwide Indus., Inc.*, 6 USPQ2d 1882, 1884 (TTAB 1988) (RUST BUSTER and BUST RUST held confusingly similar noting that “the reversal in one mark of the essential elements of another mark may serve as a basis for a finding of no likelihood of confusion only if the transposed marks create distinctly different commercial impressions.”); *Fisher Sci. Co. v. Ipco Hosp. Supply Corp.*, 165 USPQ 471, 472 (TTAB 1970) (sustaining opposition to MIX O THERM based on THERMIX used for identical goods, stating “they are in their essentials merely reverse combinations of the same words, and such being the case, would more than likely convey substantially the same commercial impressions”); *Royal Crown Cola Co. v. Bakers Franchise*, 150 USPQ 698, 700 (TTAB 1966), *aff’d*, 404 F.2d 985, 160 USPQ 192 (CCPA 1969) (“RITE DIET is merely DIET-RITE transposed” and the marks “create substantially the same commercial impressions . . .”). Likewise, we find here that a reverse combination of the phrases POWERED BY SCIENCE and WORKS LIKE MAGIC does not result in a different overall commercial impression; the terms convey the same meaning in the context of Applicant’s cleaning preparations and Registrant’s deodorizers.

Applicant disagrees, contending that “the Applicant’s mark and the Registrant’s mark utilize the phrases ‘POWERED BY SCIENCE’ and ‘WORKS LIKE MAGIC’ in different order so as to give separate and distinct commercial impressions, emphasis and meaning.”<sup>4</sup> Applicant elaborates:

In the applicant’s mark, the phrase “POWERED BY SCIENCE” is used before “WORKS LIKE MAGIC”. The emphasis of POWER first is a very

---

<sup>4</sup> 6 TTABVUE 16 (Applicant’s Brief).

differed [sic] connotation than focusing on the term WORKS. POWER connotes strength and control and POWERED BY SCIENCE connotes that scientific principals provide said strength and control. This signifies an initial consumer impression that the product is strong, reliable, and backed by testing and evidence, the hallmarks of science and scientific research. The words “POWERED BY SCIENCE” being the first words of the slogan seduces the purchaser to feel confidence and strength that the product is supported by research and reliable testing. ... Ending the slogan with “WORKS LIKE MAGIC” is a playful turn of phrase to connect the slogan with the product source “NANO MAGIC” having the common term “MAGIC” and also an almost contradicting connotations [sic] of MAGIC (supernatural – surpassing laws of nature, illusion, unexplained, etc.) and “SCIENCE” (evidence based, adhering to the laws of nature). Hence, the slogan is effective because it first connotes strength, grounded in evidence, and playfully shifts to providing a result that feels supernatural and unexplained.

In contrast, the Registrant’s mark provides a completely different connotation because of the order. Seemingly, this makes sense since odor is often invisible and a mystery and the deodorizing effect of the products “WORKS LIKE MAGIC” alluding to the sometimes mysterious and unexplained source of undesirable odors, like odors from a refrigerator. The term WORKS places the emphasis on the effectiveness of the product and the analogy term MAGIC connotes that the product is effective in a way that is mysterious and unexplainable, similar to the odor intended to be eliminated. Completion of the slogan with “POWERED BY SCIENCE” provides the consumer with a degree of confidence that the effectiveness of the product can safely be relied upon despite its “magical” qualities resulting from the metaphor “works like magic”. The commercial impression of the registrant’s slogan is different by placing the emphasis on the effectiveness of the product rather than the strength and control like the Applicant’s slogan. Moreover, the registrant’s slogan has no connection to the name of the product source like NANO MAGIC and there is no way to interpret it in a playful, almost, whimsical “tongue and cheek” ironic way.<sup>5</sup>

We, like the Examining Attorney, find this argument unpersuasive because “both slogans, when considered as a whole, reference the idea of using science to create the

---

<sup>5</sup> *Id.* at 16-17.

goods, and that the goods work well, as if by magic.”<sup>6</sup> Furthermore, we are evaluating just the similarity of marks at issue, not those marks along with some other term or mark, such as Applicant’s company name, NANO MAGIC, LLC, so Applicant’s use of its mark with some other term is irrelevant.

While we often consider the first term in a mark to be the feature that will be called for, and so remembered, by consumers, this is not invariably the case. *See Stone Lion*, 110 USPQ2d at 1161 (“[T]he Board did not err in finding that ‘STONE LION CAPITAL’ is ‘similar in sight, sound, meaning, and overall commercial impression’ to ‘LION CAPITAL’ and ‘LION.’”); *In re Chatam Int’l Inc.*, 71 USPQ2d at 1946 (“Viewed in their entireties with non-dominant features appropriately discounted, the marks [GASPAR’S ALE for beer and ale and JOSE GASPAR GOLD for tequila] become nearly identical.”). In this case, each mark consists of the same two phrases in reverse order, and both phrases are comprised by terms that suggest puffery. The “POWERED BY SCIENCE” portion touts that the products being offered are technologically advanced, and the WORKS LIKE MAGIC portion touts the purported amazing results obtained through use of the products being offered. Consumers, therefore, are unlikely to latch on to either phrase, solely, as a source-identifier. *See Neutrogena Corp. v. Bristol-Myers Co.*, 410 F.2d 1391, 161 USPQ 687, 688 (CCPA 1969) (many consumers “may have but dim recollections from having previously seen or heard one or the other of the involved marks.”).

Applicant also argues that the marks are distinguishable because “the Applicant’s

---

<sup>6</sup> 8 TTABVUE 8 (Examining Attorney’s Brief).

Mark separates the two phrases by a period. Conversely, the Registrant's Mark lacks any punctuation. The periods in Applicant's Mark punctuate each statement, giving each thought or concept its own weight and further clarifying and emphasizing the impression that the product is the result of scientific principles."<sup>7</sup> "Thus," Applicant concludes, "in addition to creating a distinct visual and auditory impression (when the mark is spoken aloud), the periods contribute to the distinct impressions created by the two marks by emphasizing the different connotations created by the ordering of the phrases."<sup>8</sup>

While the periods in Applicant's Mark, POWERED BY SCIENCE. WORKS LIKE MAGIC., may cause a reader to pause slightly when saying the mark aloud, they are inconsequential here because it is unlikely that the periods in Applicant's Mark would even be noticed or remembered because they do not distinguish Applicant's Mark from Registrant's Mark. *See In re Lyphomed Inc.*, 1 USPQ2d 1430, 1431 (TTAB 1986) (addition of periods following the letters is not enough to distinguish between "PTE" and "P.T.E."); *In re Promo Ink*, 78 USPQ2d 1301, 1305 (TTAB 2006) (finding the mark PARTY AT A DISCOUNT! to be merely descriptive, specifically noting that "[t]his punctuation mark does not significantly change the commercial impression of the mark. It would simply emphasize the descriptive nature of the mark to prospective purchasers . . ."); *see also In re Litehouse, Inc.*, 82 USPQ2d 1471, 1474 (TTAB 2007) and cases cited therein (finding the mark CAESAR!CAESAR! to be merely descriptive

---

<sup>7</sup> 6 TTABVUE 18 (Applicant's Brief).

<sup>8</sup> *Id.*

and noting that “neither the mere repetition of the word CAESAR . . . nor the presence of the exclamation points in the mark, nor both of these features combined, suffices to negate the mere descriptiveness of the mark as a whole”). We therefore agree with the Examining Attorney that “[t]he addition of the period[s] in Applicant’s mark does not alter the commercial impression of the mark.”<sup>9</sup>

We find that the marks POWERED BY SCIENCE. WORKS LIKE MAGIC. and WORKS LIKE MAGIC POWERED BY SCIENCE are highly similar in appearance, sound, connotation and commercial impression, causing the first *DuPont* factor to weigh strongly in favor of finding of likelihood of confusion.

#### B. Comparison of the Goods and Channels of Trade

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration...,” and the third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567; *Stone Lion*, 110 USPQ2d at 1161. The goods need not be identical or even competitive to find a likelihood of confusion. *See 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 (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 [they] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012)

---

<sup>9</sup> 8 TTABVUE 8 (Examining Attorney’s Brief).

(quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

The Application identifies “cleaning preparations, namely, cleaning solutions and disposable wipes impregnated with cleaning solutions for the cleaning of surfaces, glass, porcelain, ceramic, mirrors, doors, vehicles, household items and devices, and electronic devices; all-purpose cleaning preparations,” and the Registration identifies “deodorants for refrigerators; deodorizing products, namely, all purpose deodorizer preparations for household, commercial and industrial use.” Essentially, we are comparing cleaning preparations and deodorizing preparations.

The Examining Attorney provided evidence consisting of pages from nine third-party websites of companies that produce and offer for sale both cleaning and deodorizing preparations, sometimes together in one product.<sup>10</sup> These examples of third-party use show that in the context of the marketplace, consumers are exposed to the same mark used for the respective goods, indicating a single source for both. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272-73 (TTAB 2009) (website evidence shows same or overlapping channels of trade). They also show various cleaning and deodorizing preparations, offered on the same website under the same mark in overlapping channels of trade. *Id.* For example:

- Lysol (lysol.com) offers both disinfecting wipes and deodorizing sprays on its website and through Home Depot (homedepot.com):<sup>11</sup>

---

<sup>10</sup> July 23, 2020 Office Action, TSDR at pgs. 7-35; January 13, 2021 Final Office Action, TSDR at pgs. 6-60.

<sup>11</sup> July 23, 2020 Office Action, TSDR at pgs. 7, 10.



### Lysol® Neutra Air® Sanitizing Spray - Fresh



Lysol Neutra Air® Sanitizing Spray kills odor-causing bacteria for clean, fresh-smelling air.

#### Product Features

- Kills 99.9% of bacteria
- Destroys bacterial odors at the source and in the air
- Air so clean you can smell the difference

• Clorox ([clorox.com](http://clorox.com)) offers both cleaning preparations and deodorizers on its website and through Amazon ([amazon.com](http://amazon.com)):<sup>12</sup>



Clorox®  
Disinfecting Wipes<sup>1</sup>



Clorox®  
Clean-Up® Cleaner +  
Bleach

---

<sup>12</sup> *Id.* at pgs. 11-26.



- Arm & Hammer (armandhammercleans.com) offers both cleaning preparations and deodorizers on its website:<sup>13</sup>



- 3M (3m.com) offers both cleaning preparations and deodorizers on its website:<sup>14</sup>

---

<sup>13</sup> *Id.* at pgs. 27-35.

<sup>14</sup> January 13, 2021 Final Office Action, TSDR at pgs. 6-17 (highlighting by Examining Attorney).

**3M™ TB Quat Disinfectant Ready-To-Use Cleaner, Quart, 12/Case**  
3M ID 70071593175, UPC 50048011296123

<b>Overview</b>
Specifications
Details
Resources
Product Support



- Kills SARS-CoV-2 (SARS-Related Coronavirus 2) on hard non-porous surfaces
- 5 minute contact time
- Kills Hepatitis C
- READY-TO-USE disinfectant kills mold, mildew, and disinfects

**3M™ Deodorizer, Fresh Scent Concentrate 13A, 0.5 Gallon, 4/Case**  
3M ID 70071658788, UPC 50051125858293

★★★★★ (0) Write a review

<b>Overview</b>
Specifications
Details
Resources
Customer Reviews
Product Support



- Low odor
- Has a fresh scent
- Fast acting
- Removes odors

- Zep (zep.com) offers both cleaning preparations and deodorizers on its website:<sup>15</sup>



**Antibacterial Disinfectant & Cleaner with Lemon**

Antibacterial Disinfectant & Cleaner with Lemon kills 99.9 percent of germs, neutralizing odors and cutting through grease and tough soil. The ready-to-use formula is perfect for cleaning kitchens, bathrooms, offices, schools and anywhere there are germs and bacteria. Zep Antibacterial Disinfectant & Cleaner with Lemon kills the virus that causes COVID-19 (SARS-Related Coronavirus 2) on hard non-porous surfaces in 60 seconds when used according to disinfection directions.

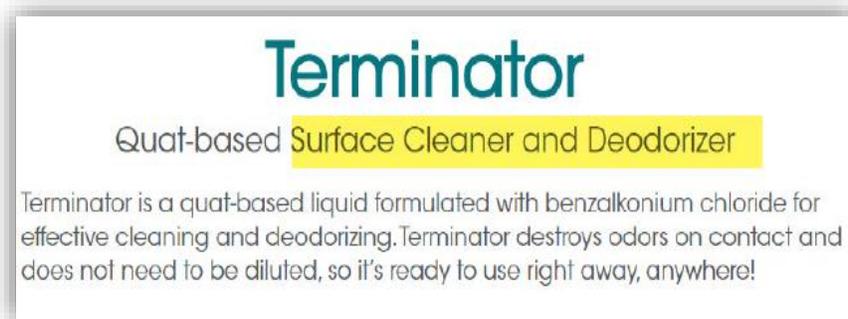
- Kills 99.9 percent of germs and bacteria and kills HIV, MRSA and influenza
- Neutralizes odors and cuts through grease and tough soils
- Ready to use formula is great for cleaning kitchens, bathrooms, offices, and anywhere there are germs and bacteria
- Easily removes soap scum

Antibacterial Disinfectant & Cleaner with Lemon - 32 fluid

<sup>15</sup> *Id.* at pgs. 52-60.



- Fresh Products (freshproducts.com), Gonzo (gonzoproducts.com), and Multi-Clean (multi-clean.com), each offers products that both clean and deodorize:<sup>16</sup>



(Fresh Products)

<sup>16</sup> *Id.* at pgs. 18-21 (Fresh Products), 22-25 (Gonzo), 26-36 (Multi-Clean) (highlighting by Examining Attorney).



**DISINFECTANT DEODORIZER & CLEANER - LAVENDER**

Be the first to review this product.

Eliminates odors leaving surfaces smelling clean and fresh. Eliminates odors caused by bacteria and mildew, mold and mildew, and non-fresh foods, leaving restroom, kitchen surfaces smelling clean and fresh. Is a cleaner and odor-neutralizer designed for general cleaning, and disinfecting, deodorizing and controlling mold and mildew on hard, non-porous surfaces. Is a one-step cleaner. **VIRUCIDAL PERFORMANCE:** This product kills the following viruses in 10 minutes on hard, non-porous surfaces with 5% soil: Human Coronavirus (ATCC VR-740)

**\$9.99**

**FOR USE AS A ONE-STEP, GENERAL DISINFECTANT, VIRUCIDE\*, DEODORIZER, CLEANER:**

(Gonzo)



**Magico - Concentrated Deodorizing Cleaner**

Magico is an amazing product that cleans and deodorizes in one step. Magico is the one product for all of your cleaning needs! Use on floors, walls, countertops and other washable surfaces. Great for restrooms, kitchens, office buildings, schools, retail stores or anywhere a deodorizing cleaner is desired. The long lasting lavender fragrance leaves surfaces smelling fresh and clean. [Learn More About Magico Here](#)

(Multi-Clean)

- OdoBan (odoban.com) offers a product that “cleans, disinfects, sanitizes, freshens and eliminates odors”:<sup>17</sup>

---

<sup>17</sup> *Id.* at pgs. 48-51.



This evidence, showing that the same entity commonly provides both kinds of goods under the same mark, supports the Examining Attorney’s position that Applicant’s and Registrant’s goods are related for likelihood of confusion purposes. As the Court of Appeals for the Federal Circuit has stated, evidence that “a single company sells the goods ... of both parties, if presented, is relevant to a relatedness analysis.” *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). *See also In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (crediting relatedness evidence that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that [provides] both”).

Notwithstanding this evidence, Applicant maintains that its goods “are not identical, **or even similar to** Registrant’s goods.”<sup>18</sup> Citing various definitions of record, Applicant explains at great length that cleaning is technically different than deodorizing:

The term “clean” as used in Applicant’s goods is clearly meant to free surfaces, glass, etc. of dirt, foreign matter and to make clean. In contrast, the products listed under Registrant’s mark are intended to provide a desired result of reduced or eliminated odor; the term “odor” is central to any product classified as a deodorizer or variation, and the clear purpose of such products is to eliminate or neutralize odor. Odor elimination or prevention is independent and unrelated to a product that is used to make something clean and vice versa. A deodorizer can be used on surfaces or areas that are not clean at all and there would be no expectation that it would result in making something clean. A deodorizer can also be used from preventing odor from developing, regardless of whether the targeted surface or area is clean or not and whether it stays clean or not. Again, the primary purpose of a deodorizer is to eliminate or neutralize odor and this is well recognized by the consuming public. By contrast, a cleaning product can be used to eliminate dirt or make something clean. This is independent of any odor reducing, eliminating, or neutralizing functionality. Plenty of cleaning products are deliberately intended to be odorless. In today’s world where cleaning, sanitizing, and removal of undesired foreign matters like viruses and droplets, imagine how safe consumers would feel if a deodorizer was used rather than a cleaner to treat a surface. Consumers are well aware of the vast difference between deodorizers and cleaners. It therefore follows that, while a consumer purchasing registrant’s products intends to eliminate odor (for example to use with cat litter or other pet-related areas), a consumer purchasing Applicant’s products intends to clean a surface and eliminate the presence of foreign objects or dirt.<sup>19</sup>

Applicant’s argument, however, falls flat in the face of the Examining Attorney’s evidence, which shows, definitively, that despite their different primary functions,

---

<sup>18</sup> 6 TTABVUE 12 (Applicant’s Brief).

<sup>19</sup> *Id.* at 13-14.

cleaners and deodorizers are complimentary goods that are commonly sold together by the same manufacturers, under the same mark, and often within the same all-in-one type of product. Indeed, as shown in the specimen of use submitted with Registrant’s underlying application that Applicant made of record, Registrant also offers a combined cleaner and deodorizing product:



Of course, a deodorizer **that is not also a cleaner** “can be used on surfaces or areas that are not clean at all and there would be no expectation that it would result in making that something clean.”<sup>20</sup> But, if the deodorizer also cleans, as many deodorizers do according to the evidence, then there would indeed be such an expectation. Additionally, if “clean” means “free from foreign or extraneous matter” as Applicant points out, then “clean” also means free from foreign or extraneous matter that can cause odor. Based on the third-party use evidence, consumers would consider cleaners and deodorizers related for likelihood of confusion purposes; they

---

<sup>20</sup> *Id.* at 14.

go hand-in-hand.

Applicant urges that “[t]he differences in goods, their functions, and the consumers purchasing them is augmented by the types of products listed on the registrant’s website and Amazon page, which are meant for deodorizing for pets and refrigerators.”<sup>21</sup> Applicant explains:

There ... would be no expectation that these products would also clean or remove foreign objects from a surface like glass or to “clean” a desired surface. This would be like telling an athlete after a practice to just put on deodorant rather than taking a shower to get clean or asking someone to merely deodorize a pet area like the cat litter rather than clean the room or the litter box. One product is directed to odor and the other to removal of dirt.<sup>22</sup>

Applicant’s argument, which relies on extrinsic evidence to characterize Registrant’s goods, rather than the description of goods in the Registration, is unavailing. Contrary to Applicant’s suggestion, the scope of the Registration is not limited to refrigerator and pet deodorizers; pets are not even mentioned in the Registration’s description of goods. Also identified in the Registration are “all purpose deodorizer preparations for household, commercial and industrial use,” which broadly describes all preparations with a deodorizing function for use in virtually any context. We cannot resort to extrinsic evidence to read limitations into the identification of goods (e.g., restricting deodorizing preparations to refrigerator and pet deodorizers). *In re i.am.symbolic*, LLC, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) (“There

---

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"); *In re Thor Tech*, 90 USPQ2d 1634, 1638 (TTAB 2009) ("We have no authority to read any restrictions or limitations into the registrant's description of goods.").

The record shows that "deodorizer preparations" are often also cleaning preparations, and vice-versa. Registrant's "all purpose deodorizer preparations" and Applicant's "all purpose cleaning preparations" thus overlap and encompass one another. Consequently, there may well be an expectation by consumers that a "deodorizing preparation" such as Registrant's also cleans. As to Applicant's hypothetical, it would not be like telling an athlete to deodorize rather than to take a shower; rather, it would be like telling an athlete to use a good body wash that both cleans and deodorizes, or telling her to put on deodorant after showering. The two product functions go hand-in-hand.

Applicant also argues that the goods are unrelated because "the goods themselves exist in different classifications. Class 003 is Cosmetic and Cleaning Preparations whereas Class 005 is Pharmaceuticals."<sup>23</sup> Applicant additionally argues that the Examining Attorney's evidence showing the same companies provide both cleaning and deodorizing is "irrelevant since these companies are some of the biggest in the world and their list of available products is massive."<sup>24</sup> Applicant elaborates:

Clorox, for example, has registrations in classes 001, 003, 005, 007, 009,

---

<sup>23</sup> *Id.* at 15.

<sup>24</sup> *Id.*

010, 011, 013, 016, 017, 021, 022, 024, 025, 027, and 031. Clorox is a fortune 500 company with over 6 billion in annual revenue. It is unreasonable to deduce consumer confusion based on the product portfolios of multi-national consumer products companies like Clorox, Lysol and 3M, where it is commonly known and understood that they sell almost everything under the sun. This is not probative of likelihood of confusion but rather that large companies with well-known brands can sell a lot of different products.<sup>25</sup>

Applicant conflates two arguments, both of which are unavailing. First, classification of the goods is irrelevant to our analysis. “The classification system was established for the convenience of the [Patent and Trademark] Office rather than to indicate that goods in the same class are necessarily related or that classification in different classes indicates that they are not related.” *Nat’l Football League v. Jasper All. Corp.*, 16 USPQ2d 1212, 1216 n.5 (TTAB 1990); *see also Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting *Jean Patou Inc. v. Theon Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993) (classification is for the convenience of the Office and is “wholly irrelevant to the issue of registrability under section 1052(d), which makes no reference to classification”)).

Second, the fact that some of the companies identified in the Examining Attorney’s third-party use evidence that provide both deodorizing and cleaning preparations are large companies with substantial product lines does not diminish the probative value of that evidence, and Applicant provides no authority to suggest that it does. The majority of evidence comes not from brick and mortar department stores such as Macy’s or other “big box” retailers selling a wide variety of goods as Applicant

---

<sup>25</sup> *Id.*

suggests, but rather from companies specializing in cleaning and deodorizing products via their own direct-to-consumer sales websites, as well as other virtual retail store websites, and thus is highly probative of the close relationship between the identified goods. *See In re Ox Paperboard, LLC*, 2020 USPQ2d 10878 at \*6 (TTAB 2020). Collectively, the evidence demonstrates consumer exposure to the same source using the same mark for goods like those identified in both the Application and Registration. *See, e.g., In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355-56 (TTAB 2015); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009).

Applicant further contends that because “the conflicting marks are slogans and, as presented in any actual packaging on products, are associated with the brand owner and/or product name,” “[t]his pushes the determination of confusion towards Applicant even further.”<sup>26</sup> Applicant elaborates:

A purchaser of deodorizer is sophisticated enough to know that the slogan is typically associated with the product and/or company name on that product. Similarly, if that purchaser were to find a completely different product (cleaner versus deodorizer) in a completely different category, and associated with a completely different name, that confusion is highly unlikely.<sup>27</sup>

This argument, which depends on consideration of hypothetical extrinsic evidence as to how products are “typically” marketed, is unavailing. As noted above, our determination under Section 2(d) is based on the probative facts in evidence. *DuPont*, 177 USPQ at 567. We therefore must “focus on the application and registration[] rather than on real-world conditions, because ‘the question of registrability of an

---

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 15-16.

applicant's mark must be decided on the basis of the identification of goods set forth in the application." *Stone Lion*, 110 USPQ2d at 1162 (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)).

Moreover, "[t]o help further understand and bolster the position that confusion is not likely," Applicant provided screenshots from "3 different product searches on Amazon for 'deodorize', 'lens cleaner' and 'glass cleaner,'" explaining that "[n]owhere in the search results were cleaning products provided in the Amazon search for deodorizers and vice versa when searching for cleaning products."<sup>28</sup> Neither identification of goods, however, describes lens cleansers. Furthermore, Applicant's characterization of the search is erroneous. For example, Applicant's Amazon search for "deodorizers" revealed the below-shown "X-O" products consisting of a concentrated "odor neutralizer mild cleaner," a "PLUS Odor neutralizer/cleaner," and a "Bastion Garbage Disposal Cleaner and Deodorizer Drops" product:<sup>29</sup>

---

<sup>28</sup> *Id.* at 16.

<sup>29</sup> July 13, 2021 Request for Reconsideration, TSDR at pgs. 33, 38-39.



Sponsored ⓘ

X-O Odor Neutralizer Mild  
Cleaner Concentrated (32oz,  
1gallon, 5gallons) - All-



Sponsored ⓘ

XO PLUS Odor  
Neutralizer/Cleaner  
Concentrated (32oz, 1gallon,



Garbage Disposal Cleaner and  
Deodorizer Drops- [[50-  
Count]] Lemon Zest Scented  
Kitchen Sink Freshener Pods ...

A “commercial ozone generator” on the same Amazon page is an air purifier, sterilizer and deodorizer:



To “purify” is to “to make something clean by removing dirty or harmful substances from it,”<sup>30</sup> and to “sterilize” mans “to kill all the bacteria on or in something and to make it completely clean, for example by heating it to a very high temperature.”<sup>31</sup>

Finally, Applicant argues that the respective goods are provided through different trade channels, explaining that:

Here, applicant’s goods are used as cleaning solutions and wipes. Applicant’s glass/surface/lens solution and wipes are marketed towards manufacturers as well as individual consumers to protect their glass products. Registrant’s goods of deodorizers and deodorants do not

---

<sup>30</sup> <https://www.macmillandictionary.com/us/dictionary/american/purify>, accessed April 27, 2022. The Board may take judicial notice of dictionary definitions from online sources when the definitions themselves are derived from dictionaries that exist in printed form or have regular fixed editions. See *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, at \*7 n.29; *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013).

<sup>31</sup> <https://www.macmillandictionary.com/us/dictionary/american/sterilize>, accessed April 27, 2022.

market to these manufacturers or individuals in any way whatsoever. On the contrary, registrant's goods of deodorizers and deodorants would be marketed towards individuals looking to reduce or eliminate odors or hide/neutralize undesired smells, particularly for refrigerators and pets. Therefore, the products are being marketed and used by different target audiences and are very different types of products.<sup>32</sup>

However, because the identifications of goods in the Application and Registration do not include those restrictions or limitations as to channels of trade, we may not read those restrictions into them. *See In re i.am.symbolic, LLC*, 123 USPQ2d at 1748 (“It is well established that the Board may not read limitations into an unrestricted registration or application.”); *In re Thor Tech*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant's description of goods.”). Therefore, we must presume that Applicant's cleaning preparations and Registrant's deodorizing preparations are offered in all channels of trade and to all classes of consumers interested in cleaning and deodorizing preparations, which in this case is corroborated by the Examining Attorney's third-party use evidence showing overlapping channels of trade.

In sum, we find that Applicant's and Registrant's goods are closely related and overlapping, often provided together in a single product and by the same source, under the same mark, through the same trade channels. The second and third *DuPont* factors thus strongly favor a finding of likelihood of confusion.

### C. Collateral Attack Not Permitted

Applicant argues that Registrant's mark “is Weak and Not Validly Registered”

---

<sup>32</sup> 6 TTABVUE 19-20 (Applicant's Brief).

because Registrant “failed to provide an appropriate specimen of use in 2018 during prosecution of the [underlying] application” and “[t]he only specimen of record is [sic] screenshot of an Amazon.com storefront showcasing the slogan on the page but not on the packing,” which “is mere advertising for a good and in no way shows how the mark is connected to or travels with the goods themselves.”<sup>33</sup> Applicant further contends that “the Examiner in that application falsely allowed the presentation of the Amazon page to satisfy the specimen requirement without satisfying the URL and date rules. There is no way to tell when that screenshot was taken or the specific URL.”<sup>34</sup> Finally, Applicant notes that although Registrant “provides a website, oxiscience.com, to promote and provide information about its products,” and as “an Amazon storefront,” “[t]he registered mark, ‘WORKS LIKE MAGIC POWERED BY SCIENCE’, cannot be found anywhere associated with any of their products,” making it “apparent that the mark has been abandoned.”<sup>35</sup>

This argument is an improper collateral attack on the cited registration and may not be made during ex parte prosecution. *See In re Dixie Rests.*, 105 F.3d 1405, 1408, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997) (applicant’s “argument that DELTA is not actually used in connection with restaurant services amounts to a thinly-veiled collateral attack on the validity of the registration”); *In re Peebles Inc.*, 23 USPQ2d 1795, 1797 n.5 (TTAB 1992) (“[A]n attack on the validity of registrant’s registration

---

<sup>33</sup> *Id.* at 20.

<sup>34</sup> *Id.* at 21.

<sup>35</sup> *Id.*

... is not permitted in an ex parte appeal proceeding.”). A trademark registration on the Principal Register is prima facie evidence of the validity of the registration and Registrant’s exclusive right to use the mark in commerce in connection with the specified goods. 15 U.S.C. § 1057(b).

## II. Conclusion

Applicant notes that “[i]n some cases, a determination that there is no likelihood of confusion may be appropriate, even where the marks are similar and the goods/services are related, because these factors are outweighed by others, such as differences in the relevant trade channels of the goods/services, the presence in the marketplace of a significant number of similar marks in use on similar goods/services, the existence of a valid consent agreement between the parties, or another established fact probative of the effect of use.”<sup>36</sup> This is not one of those cases.

Having considered all evidence and arguments bearing on the relevant *DuPont* factors, including the similarity of the marks, goods, and trade channels, we conclude that Applicant’s mark POWERED BY SCIENCE. WORKS LIKE MAGIC. for “cleaning preparations, namely, cleaning solutions and disposable wipes impregnated with cleaning solutions for the cleaning of surfaces, glass, porcelain, ceramic, mirrors, doors, vehicles, household items and devices, and electronic devices; all-purpose cleaning preparations,” is likely to cause confusion with Registrant’s mark WORKS LIKE MAGIC POWERED BY SCIENCE for “deodorants for refrigerators; deodorizing products, namely, all purpose deodorizer preparations for household,

---

<sup>36</sup> *Id.* at 10.

commercial and industrial use.”

***Decision:*** The refusal to register is affirmed under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).