

This Opinion is Not a
Precedent of the TTAB

Mailed: December 8, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Maesa LLC

Serial No. 88901053

Scott D. Locke of Dorf & Nelson LLP,
for Maesa LLC.

Sara A. Helmers, Trademark Examining Attorney, Law Office 130,
John Lincoski, Managing Attorney.

Before Greenbaum, Lynch, and English,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Maesa LLC (“Applicant”) seeks registration on the Principal Register of the mark

goodbaths

for “Body cream; Body lotion; Body scrub; Body

wash; Fragrances; Non-medicated soaps for the body; Non-medicated soaps for the

hands; Non-medicated skin care preparation, namely, body mist” in International Class 3.¹

The Examining Attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with the previously registered

Goodbath

mark for “Bath linen, except clothing; Textile material, namely, towels, table napkins; Bed linen; Towels of textile; shower curtains of textile or plastic” in International Class 24.² After the Examining Attorney made the refusal final, Applicant filed a request for reconsideration and appealed. The Examining Attorney denied reconsideration, the appeal proceeded, and Applicant and the Examining Attorney filed briefs. However, Applicant then requested and was granted a remand to submit a proposed amendment to its mark.³ Applicant also filed an amendment to allege use.⁴

The Examining Attorney accepted the amendment to the mark and the amendment to allege use. However, she found Applicant’s evidence and arguments

¹ Application Serial No. 88901053 was filed May 5, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s alleged bona fide intent to use the mark in commerce. Applicant subsequently filed an amendment to allege use. The application includes the following description: “The mark consists of the term ‘GOODBATHS’ in lower case stylized print letters.” Color is not claimed as a feature of the mark.

² Registration No. 5090024 issued November 29, 2016, and has been maintained. Color is not claimed as a feature of the mark.

³ 10 TTABVue. Previously, Applicant’s proposed mark appeared in standard-character format.

⁴ December 8, 2021 Amendment to Allege Use at TSDR 1-2.

unpersuasive to overcome likely confusion, and therefore issued a new final refusal, maintaining the Section 2(d) refusal.⁵ The appeal resumed, and Applicant and the Examining Attorney filed supplemental briefs.

For the reasons set forth below, we affirm the refusal to register.

II. Likelihood of Confusion

Our determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). The Board considers only those *DuPont* factors for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *see also Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, **3 (Fed. Cir. 2020) (“Not all *DuPont* factors are relevant in each case”). Two key considerations are the similarities between the marks and the relatedness of the goods. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (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.”).

⁵ 11 TTABVUE.

A. Similarity of the Marks

We compare the marks “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). We assess not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

We compare Applicant’s mark, **goodbaths**, to the cited mark,

Goodbath

. We find the marks similar in appearance and nearly identical in sound because the wording in Applicant’s mark is the plural form of the wording in the cited mark, a minor distinction without source-indicating significance. *See Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (“It is evident that there is no material difference, in a trademark sense, between the singular and plural forms of the word ‘Zombie’ and they will therefore be regarded here as the same mark”); *Swiss Grill Ltd. v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2011 n.17 (TTAB 2015)

(singular and plural of SWISS GRILL deemed “virtually identical”); *Weider Publ’ns, LLC v. D & D Beauty Care Co.*, 109 USPQ2d 1347, 1355 (TTAB 2014) (singular and plural forms of SHAPE considered essentially the same mark). While both marks are stylized, with Applicant’s mark in a bolder print font, and the cited mark in cursive, the marks nonetheless retain a similar overall appearance because they depict the same compound term consisting of two recognizable English words joined without a space between them.

As to the marks’ connotations and commercial impressions, we also find them similar. Consumers would attribute the same meaning to, and derive the same general impression from, the wording in Applicant’s and the cited mark. While Applicant’s and Registrant’s goods do not overlap, the application and cited registration each include bath-related products, and the combination of “good” and “bath(s)” carries the same laudatory meaning in the context of, for example, Applicant’s bath soap and Registrant’s bath towels.

We are not persuaded by Applicant’s argument that the stylization of its mark distinguishes it from the cited mark. We remain mindful that “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). Neither Applicant’s mark, nor the cited mark, is so stylized as to create a unique commercial impression apart from the literal element. “The stylization of the [wording] is not so extreme or striking that when viewing the marks in their entireties, the stylization overwhelms the underlying [wording]” *Nike, Inc. v.*

WNBA Ent., LLC, 85 USPQ2d 1187, 1199 (TTAB 2007). Thus, the different stylizations do not obviate the similarities between Applicant's mark and the cited mark, arising from their use of a nearly identical term.

We do not find the non-precedential cases cited by Applicant analogous to this case or probative to dictate finding Applicant's mark dissimilar to the cited mark. As an initial matter, while non-precedential cases may be cited and considered for whatever persuasive value they may have, citing them is not encouraged because they not binding on the Board. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1203.02(f) (2022); *see also In re Tapio GmbH*, 2020 USPQ2d 11387, at *10 n.30 (TTAB 2020) ("Generally, the practice of citing non-precedential opinions is not encouraged."); *In re the Procter & Gamble Co.*, 105 USPQ2d 1119, 1120-21 (TTAB 2012) (citation to non-precedential opinions permitted but not encouraged; non-precedential decisions not binding on the Board). Also, non-precedential decisions decided on different records are unlikely to carry much persuasive value. We do not consider the marks addressed in the decisions cited by Applicant, such as various letter-only marks in different fonts, analogous to the marks at issue here. *See In re Gen. Mills IP Holdings II, LLC*, 124 USPQ2d 1016, 1027 (TTAB 2017) (comparisons to other cases "are rarely helpful, because the critical facts of different cases almost always differ substantially").

Given their overall resemblance in appearance, sound, connotation and commercial impression, we find Applicant's mark and the cited mark similar.

B. The Relatedness of the Goods

In analyzing the relatedness of the goods under the second *DuPont* factor, we look to the identifications in the application and cited registration. *See In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018); *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). The application recites goods that include body wash, mist, cream, lotion and scrub, fragrances, and soap. The cited registration's goods include towels and bed and bath linens. It is sufficient for a finding of likelihood of confusion as to a single-class application such as this one if relatedness is established for any one of the identified goods within the class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd*, 123 USPQ2d 1744 (Fed. Cir. 2017).

To demonstrate the relatedness of Applicant's and Registrant's goods, the Examining Attorney introduced numerous screenshots from various third-party websites offering both types of goods under the same mark.⁶ Examples include:

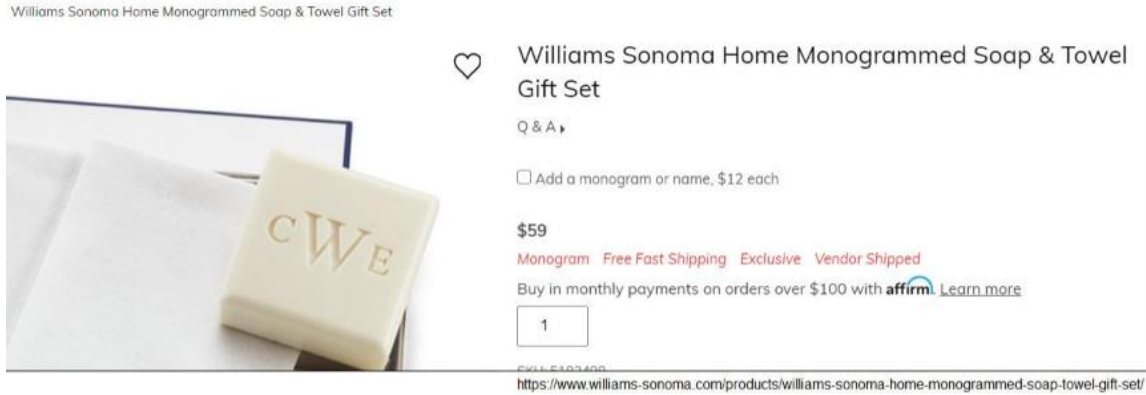
The Le Cadeaux website offers towels and soap under the same LE CADEAUX mark, and even packaged together as sets that bear the LE CADEAUX mark, as shown below.⁷

⁶ We do not consider the PriceSmart website evidence, which appears to come from Jamaica. July 16, 2021 Denial of Reconsideration at TSDR 4-5.

⁷ December 31, 2020 Office Action at TSDR 12-13 (lecadeaux.com).



Similarly, the Williams Sonoma website offers a soap-and-towel set under the WILLIAMS SONOMA mark as shown below.⁸



Along the same lines, the Anthropologie website features the LOVED AND FOUND Unwind Gift Box with soap and a towel packaged together under that mark.⁹

The CR Shops by Canyon Ranch website offers under the CANYON RANCH mark body cream, body scrub, body

⁸ December 31, 2020 Office Action at TSDR 23 (williams-sonoma.com).

⁹ July 16, 2021 Denial of Reconsideration at TSDR 6 (anthropologie.com)

mist, as well as the CANYON RANCH Organic Cotton Towel.¹⁰

The Olive & Loom website offers soaps and towels under the OLIVE & LOOM mark.¹¹

The Efrem website offers fragrances and towels under the EFREM mark.¹²

The Morihata International Ltd. Co. website features towels and soap, both under the BINCHOTAN mark.¹³

The same site also offers SASAWASHI soap as well as SASAWASHI towels.¹⁴

This evidence supports the relatedness of the goods in the application and the cited registration by showing that consumers are accustomed to encountering them offered under the same mark. *See Detroit Ath. Co.*, 128 USPQ2d at 1050 (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 sells both”); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”). The marketplace evidence that soap and towels are packaged together emphasizes their complementary nature, and

¹⁰ July 16, 2021 Denial of Reconsideration at TSDR 2-3 (shop.canyonranch.com).

¹¹ July 16, 2021 Denial of Reconsideration at TSDR 18 (oliveandloom.com).

¹² July 16, 2021 Denial of Reconsideration at TSDR 19-20 (efremwillis.com).

¹³ July 16, 2021 Denial of Reconsideration at TSDR 22 (morihata.com).

¹⁴ July 16, 2021 Denial of Reconsideration at TSDR 22 (morihata.com).

reflects a practice in the retail market of presenting these products in a single package, under a single mark. This is especially compelling relatedness evidence.

In addition, the Examining Attorney introduced 16 relevant use-based, third-party registrations showing that the same entity has registered a single mark identifying goods identical to those in the subject application as well as goods identical the cited registration.¹⁵ Such registrations are relevant to show that the respective goods are of a type that may emanate from a single source under one mark. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1140 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d* (unpublished), No. 88-1444, 864 F.2d 149 (Fed. Cir. Nov. 14, 1988).

Applicant also submitted third-party registration evidence -- eight pairs of allegedly similar marks registered to different parties for some of the same goods at issue. According to Applicant, this “demonstrates that it is common for the same or similar marks to be used by one entity for personal care products such as those recited in the ‘053 Application and by a second entity for textiles such as those recited in the ‘024 Registration.”¹⁶

While this evidence may have some probative value as to the views of coexisting mark owners, we lack contextual information about the underlying marketplace at

¹⁵ July 16, 2021 Denial of Reconsideration at TSDR 23-33; June 3, 2020 Office Action at TSDR 5-47. Some additional registrations involved goods that Applicant initially identified in the application but deleted during prosecution.

¹⁶ 6 TTABVUE 12 (Applicant’s first brief).

the time of the subsequent registration in each pair and any consent agreements or other considerations that may be distinguishable from the case at hand. Additionally, the coexistence of these pairs of registrations “does not prove that they coexisted during that time without confusion in the marketplace.” *In re Thomas*, 79 USPQ2d 1021, 1028 (TTAB 2006). Also, this showing of issued pairs of registrations does not take account of the unknown number of applicants who may have been refused registration of marks for one type of the relevant goods, based on a prior registration of the same or a similar mark for the other type of relevant goods. *See In re Ala. Tourism Dep’t*, 2020 USPQ2d 10485, *11 (TTAB 2020).¹⁷ Applicant’s citation of *In re Thor Tech.*, 90 USPQ2d 1634 (TTAB 2009) does not support its contentions here. In *Thor Tech.*, the Board did not find the applicant’s pairs of registrations persuasive, and regardless, at best, the registration pairs were offered “to suggest that the listed goods are of a type which may emanate from different sources.” *Id.* at 1636. The fact that the respective goods *may* emanate from different sources does not negate the suggestion from other registration evidence that the goods may in other instances emanate from the same source.

¹⁷ We do not agree with Applicant’s contention that the *Ala. Tourism Dep’t* should be deemed inapplicable for the proposition that a sampling of issued registrations presents an incomplete picture of USPTO examination practice, simply because that case involved a Section 2(b) flag refusal and this case involves Section 2(d). The case is relevant in holding that proof of the existence of some registrations does not necessarily reflect a USPTO policy or practice. Applicant here maintains that the Examining Attorney is unreasonable in pointing out this incomplete picture of USPTO practice because for Applicant, it would not be possible to “assess[] how often registration was refused when applying for rights in personal care products such as those in the applicant’s pending application for similar registrations over textiles.” 13 TTABVUE 9 (Applicant’s Supplemental Brief). Applicant’s point illustrates why we generally do not infer a USPTO policy or practice based on the issuance of particular registrations.

The Board rejected arguments and evidence similar to Applicant's in *In re Toshiba Medical Systems Corp.*:

Applicant points to six pairs of registrations and argues that the USPTO "has allowed similar marks for MRI and ultrasound equipment."... We note that "the third party registrations relied on by applicant cannot justify the registration of another confusingly similar mark." *Plus Products v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983). *See also Curtice-Burns, Inc. v. Northwest Sanitation Products, Inc.*, 530 F.2d 1396, 189 USPQ 138 (CCPA 1976); *Accord In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court").

91 USPQ2d 1266 (TTAB 2009).

Ultimately, the prior decisions and actions of other trademark examining attorneys in registering other marks are not binding, as an indication that goods are not related, upon the USPTO or the Board.

We also have considered Applicant's reliance on *Fruit of the Loom, Inc. v. Fruit of the Earth, Inc.*, 3 USPQ2d 1531 (TTAB 1987) for the proposition that the types of goods at issue are not related, but are not persuaded. Our precedent points out "the limited utility of reliance, in lieu of supporting evidence, on past decisions in which the Board has or has not found various [goods] to be related." *In re Embiid*, 2021 USPQ2d 577 at *26 (TTAB 2021). We must rely on the evidentiary record before us regarding potential relatedness, including the marketplace evidence and current registration evidence, rather than the holding of a 35-year-old case that was based on a different evidentiary record compiled by the involved parties at that time. While prior decisions assessing the relatedness of goods may be valuable for their

instruction on what kinds of evidence resulted in the Board's conclusions, they do not constitute evidence to support relatedness or unrelatedness in another proceeding. *See Hyde Park Footwear Co. v. Hampshire-Designers, Inc.*, 197 USPQ 639, 643 (TTAB 1977). Ultimately, "each case must be decided on its own facts and the differences are often subtle ones." *In re St. Helena Hosp.*, 113 USPQ2d at 1087.

We find Applicant's goods related to those in the cited registration. The second *DuPont* factor weighs in favor of likely confusion.

C. The Trade Channels and Classes of Consumers

Turning to the trade channels, the third-party retail website evidence discussed above establishes that goods such as Applicant's and Registrant's travel in some of the same channels of trade to the same classes of consumers. The record also contains additional online retail evidence showing the same provider selling linens, towels, and the same types of bath and body products Applicant identifies.¹⁸ Thus, the third *DuPont* factor weighs in favor of likely confusion.

D. Conclusion

The similarity of the marks for related goods that move in some of the same channels of trade to the same classes of customers renders confusion likely. 15 U.S.C. § 1052(d).

¹⁸ *E.g.*, December 31, 2020 Office Action at TSDR 9-11 (Ivy Luxury Bath Essentials website offers towels and soaps); *id.* at 15-16 (Remember Provence website offers soaps and towels); *id.* at 17-22 (SIJO website offers linens, body wash and body scrub); July 16, 2021 Denial of Reconsideration at TSDR 12 (Bathing Culture website offers body wash and towels); *id.* at 13-16 (Urban Outfitters website offers linens, towels, soap, body wash, body cream).

Serial No. 88901053

Decision: The refusal to register Applicant's mark is affirmed.