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Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Mark Feldberg

Serial No. 90406741

Wensheng Ma and Jason Bergeron of LegalForce RAPC Worldwide, P.C., for Mark Feldberg.

Stephen Stanwood, Trademark Examining Attorney, Law Office 115,
(Daniel Brody, Managing Attorney).

Before Cataldo, Goodman and Lebow,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Mark Feldberg, filed an application to register on the Principal Register the mark INFLATION DEFENDER in standard characters, identifying the following services, as amended: "Financial services, namely, hedge fund investment services and trading funds for others," in International Class 36.[1]

[1] Application Serial No. 90406741 was filed on December 23, 2020 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant's assertion of a bona fide intent

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground of likelihood of confusion with the cited registered mark INFLATION DEFENSE in standard characters, identifying the following services: "Platform as a service (PAAS) featuring computer software platforms for financial services, namely, providing an online platform for accessing, reviewing, selecting and allocating funds to investments, exchange-traded funds, equity securities and/or fixed-income instruments," in International Class 42.[2]

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board.[3] We affirm the refusal to register.

I. Likelihood of Confusion

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.,* 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.,*

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to use the mark in commerce. Applicant disclaimed "INFLATION" apart from the mark as shown.

[2] Registration No. 5870188 issued on the Principal Register on September 24, 2019.

[3] All citations to documents contained in the Trademark Status & Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018). References to the briefs on appeal refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable. *See also, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, *2 n.1 (TTAB 2020).

575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); s*ee also In re Guild Mortg. Co.,* 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019).

We have considered each *DuPont* factor that is relevant, and have treated other factors as neutral. *See Cai v. Diamond Hong, Inc.,* 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) ("Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.")); *ProMark Brands Inc. v. GFA Brands, Inc.,* 114 USPQ2d 1232, 1242 (TTAB 2015) ("While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.").

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) ("the various evidentiary factors may play more or less weighty roles in any particular determination").

Two key considerations are the similarities between the marks and the relatedness of the services. *See 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 [or services] and differences in the marks."); *In re FabFitFun, Inc.,* 127 USPQ2d 1670, 1672 (TTAB 2018).

A. The Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's INFLATION DEFENDER mark and the registered INFLATION DEFENSE mark in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital v. Lion Capital,* 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee 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)); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.").

Applicant's INFLATION DEFENDER mark is highly similar to the registered INFLATION DEFENSE mark in appearance and sound, sharing the identical leading term and highly similar following terms DEFENDER and DEFENSE. The significance of the identical term INFLATION is reinforced by its location as the first word in both of the marks. *Presto Products Inc. v. Nice-Pak Products, Inc.,* 9 USPQ2d 1895, 1897) TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered"); *see also, e.g., In re Denisi,* 225 USPQ 624, 626 (TTAB 1985) (PERRY'S PIZZA for restaurant services

specializing in pizza likely to be confused with PERRY'S for restaurant and bar services).

We are not persuaded by Applicant's arguments regarding the different numbers of letters and syllables comprising the marks at issue.[4] "The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks omitted); *see also Mini Melts, Inc. v. Reckitt Benckiser LLC,* 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). Consumers may not necessarily encounter the marks in close proximity and must rely upon their recollections over time. *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1468 (TTAB 1988), *aff'd mem.*, 864 F.2d 149 (Fed. Cir. 1988).

Applicant's disclaimer of INFLATION does not reduce the similarities between the marks. It is well established that the existence of a disclaimer is of no legal significance in determining likelihood of confusion. Rather, the disclaimed matter must be considered. *See, e.g., Kellogg Co. v. Pack "Em Enterprises Inc.*, 14 USPQ 2d 1545 (TTAB 1990). Consumers viewing the mark are unaware of what, if any, portions of a mark may be disclaimed in a federal registration. *See In re National Data Corp.,* 224 USPQ 749 (Fed. Cir. 1985).

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[4] 5 TTABVUE 9 (Applicant's brief).

With regard to meaning, we note the following definitions: defend – "to make or keep safe from danger, attack, or harm;"[5] defender – "a person who defends (someone or something);[6] and defense – "something that defends, as a fortification, physical or mental quality, or medication."[7] Based upon these definitions, we find INFLATION DEFENDER connotes someone that prevents harm from inflation and INFLATION DEFENSE connotes something that prevents harm from inflation. These connotations are highly similar, with both marks suggesting the identified services will provide protection from inflation. Applicant's arguments to the contrary notwithstanding, there is little, if any, evidence that INFLATION DEFENDER and INFLATION DEFENSE significantly differ in meaning.

Aside from the above definitions, there is little evidence regarding the relative strength or weakness of the INFLATION DEFENSE mark.[8] *Cf., e.g., Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (evidence of the extent of third-party use or registrations may indicate that a

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[5] Applicant's February 20, 2022 Request for Reconsideration at 54 (American Heritage Dictionary of the English Language 5th ed.).

[6] *Id.* at 56 (American Heritage Dictionary of the English Language 5th ed.).

[7] Random House Unabridged Dictionary (2022). The Board may take judicial notice of definitions from dictionaries, including online dictionaries that exist in printed format. *E.g.*, *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018). We so exercise our discretion in this instance.

[8] In his brief, Applicant asserts "The number and nature of similar marks in use on similar goods or services" (5 TTABVUE 7) as a relevant *DuPont* factor in this case. However, Applicant did not introduce evidence in support of this contention. Applicant's "assertions are unsupported by sworn statements or other evidence, and 'attorney argument is no substitute for evidence.'" *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, *14 (TTAB 2019) (quoting *Cai v. Diamond Hong,* 127 USPQ2d at 1799 (internal quotation omitted)).

term carries a suggestive or descriptive connotation and is weak for that reason)); *In re I-Coat Co., LLC,* 126 USPQ2d 1730, 1735 (TTAB 2018) (third-party registrations can be used to demonstrate that a term may have a commonly accepted meaning).

Applicant argues: "The Cited mark 'INFLATION DEFENSE' has no commercial impression of their [sic] own. The Cited mark is so weak that it has always been used with the Cited owner's other registration STASH having registration numbers 5092055 and 5245955."[9] In support of this contention, Applicant relies upon printouts of screenshots from the registrant's website.[10] However, in our determination of the similarity or dissimilarity of the marks, we must compare them as they appear in the drawing of the application and in the registration. We do not consider the manner in which Applicant or the registrant actually use their marks in the marketplace. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 1324, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017)).

Thus, the registrant's putative use of its INFLATION DEFENSE mark in connection with its house mark, brand name or other indicia does not support Applicant's contention that the cited mark is weak and entitled to a narrow scope of protection. On this record, we find INFLATION DEFENSE is afforded the ordinary scope of protection.

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[9] 5 TTABVUE 11.

[10] Applicant's July 27, 2021 Response to Office Action at 22-27; February 10, 2022 Request for Reconsideration at 42-53.

We further are not persuaded by Applicant's citation to other decisions in which this tribunal or a reviewing court found no likelihood of confusion. "It has been said many times that each case must be decided on its own facts." *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010) (internal citation omitted). The registrability of unrelated marks not at issue in this proceeding does not compel a different result in this case.

We recognize the difference between the marks. Nonetheless, viewing the marks as a whole, we find purchasers may reasonably assume that Applicant's services offered under his mark emanate from the same source as the services identified in the cited registration. As a result, consumers encountering these marks could mistakenly believe the two are a variation of each other, but nonetheless emanating from a common source.

For these reasons, we find that the marks are far more similar than dissimilar. The first *DuPont* factor thus weighs in favor of finding a likelihood of confusion.

B. The Services 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," *Stone Lion,* 110 USPQ2d at 1159; *Hewlett-Packard Co. v. Packard Press, Inc.,* 281 F.3d 1261, 62 USPQ2d 1001, 1004; *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). "This factor considers whether 'the consuming public may perceive [the respective goods and services of the parties] as related enough to cause confusion about the source or origin of the goods and

services.'" *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard*, 62 USPQ2d at 1004).

In support of the refusal of registration, the Examining Attorney introduced into the record[11] printouts from the following third-party websites showing use of the same marks, brand names and trade names to identify the source of various hedge fund investment and funds trading as well as software used for investing in various investment instruments:

- Northern Trust offers hedge fund investment and investment portfolio management software for insurance companies;
- State Street offers hedge fund investment, funds trading and a cloud-native software platform providing investment data for investment and wealth managers;
- UBS offers hedge fund investment and an interactive web-based platform providing investment search, monitoring and overview of investments and funds;
- Charles Schwab offers hedge fund investment and an interactive web portal providing investment information, monitoring and consulting;
- Morgan Stanley offers hedge fund investment, funds trading and an online software platform providing investment information, monitoring and trading;
- HSBC provides hedge fund investment and an online platform providing account management;
- Axos provides hedge fund investment, fund management and an online banking platform providing account management, monitoring, transfers and analysis;

[11] June 23, 2021 first Office Action at 8-12; August 11, 2021 final Office Action at 11-37; February 28, 2022 Denial of Request for Reconsideration at 7-22.

- Bank of America offers hedge fund investment, alternate investments and an online banking platform providing account management, transfers and monitoring;

- PNC offers hedge fund investment and an online banking platform for account management and payments;

- US Bank offers hedge fund investment and an online client portal for investment and account management, transfers and payments;

- JP Morgan offers hedge fund investment and an online banking platform providing account balances, holdings, transfers and monitoring; and

- Wells Fargo offers hedge fund investment and an online banking platform for investment management, monitoring and trading.

This evidence establishes that these third parties offer hedge fund and other fund investment services provided by Applicant, and various banking software platforms of the kind identified in the cited registration under the same house marks, trade names or trademarks.

The Examining Attorney also introduced into the record[12] copies of nineteen use-based, third-party registrations for marks identifying, *inter alia*, both hedge fund investment and various financial software for account and investment monitoring, transfers and trading. The following examples are illustrative:[13]

Reg. No. 6158703 for the mark ENTORO, identifying

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[12] June 23, 2021 first Office Action at 19-35; August 11, 2021 final Office Action at 39-73; February 28, 2022 Denial of Request for Reconsideration at 23-27.

[13] All three marks appear in typed or standard characters.

> Financial services, namely, raising debt and equity capital for others; Private placements of hedge funds, private equity funds, securities and derivatives for others; financial consulting and advising in the field of mergers, acquisitions and divestitures; financial valuations; financial services, namely, providing rating and valuation services with respect to digital or other virtual securities, and
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> Platform as a service (PAAS) featuring a digital computer software platform for connecting accredited investors to investment opportunities relating to hedge funds, private equity funds, securities and derivatives;

Reg. No. 5957956 for the mark DUQUESNE, identifying

> Investment fund management services for hedge funds and private asset managers; and financial advisory and consultancy services for hedge funds and private asset managers, and
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> Software as a service (SAAS) services, namely, providing temporary use of non-downloadable software for providing position, pricing, and accounting reporting to hedge funds, family offices and asset managers;

Reg. No. 5769833 for the mark BLOCKSTRIKE, identifying, *inter alia*,

> Providing on-line trading of financial instruments, shares, options and other derivative products featuring transaction order entry, order directing and order confirmation services to customers in the field of investing; Financial services, namely, automated securities brokerage services; electronic trading of financial instruments, commodities, foreign currencies, securities, share options, hedge funds, and mutual funds; trading of financial securities; hedge fund/mutual fund investment management services; management of financial investment accounts; securities brokerage services; online trading of securities; securities trade execution services, and
>
> Providing temporary use of online, non-downloadable software and SAAS (software as a service) services, featuring technology that enables users to perform financial order entry, order directing and order confirmation services to customers in the field of investing.

As a general proposition, although use-based, third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar

with them, they nonetheless have some probative value to the extent they serve to suggest that the goods and services are of a kind that emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *Mucky Duck Mustard*, 6 USPQ2d at 1470 n.6. In this case, the totality of the website and third-party registration evidence demonstrates that consumers would readily expect that hedge fund investment and services of providing various financial software as a service or platform as a service are likely to emanate from the same source.

Applicant argues:

> Applicant's and Registrant's services are entirely unrelated, but for the fact that both may be broadly considered "financial services." Goods and services "may fall under the same general product category but operate in distinct niches. … Here, the only relationship between Applicant's "hedge fund services" and the "computer software platforms for non-hedge fund services" services in the cited registration is the fact that both exist under the same broad category of "financial services."[14]

However, the Examining Attorney's evidence discussed above demonstrates that third parties identify both hedge fund investment and financial software, available as PAAS and SAAS among other platforms, used for accessing, monitoring, reviewing, trading and transferring between financial funds, investments, accounts and other instruments, under the same trademarks, trade names and house marks. This evidence shows that Applicant's services are provided by the same entities as services related to those identified in the cited registration. Thus, the services are

[14] 5 TTABVUE 13-14.

more closely related than merely being broadly identified as "financial services." Applicant is mistaken in his argument that while his services are only available to qualified investors with high income and net worth, the services in the cited registration are available to small investors[15] because there is nothing in the identification of the registrant's services limiting their availability to small investors. In other words, the services offered by the registrant may also be utilized by qualified investors with high income and net worth.

Applicant is correct that his services are distinguishable from the registrant's services.[16] However, it is not necessary for us to find that the services are indistinguishable or are even competitive to find a likelihood of confusion. *See, e.g., On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). They need only be "related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the services] emanate from the same source." *Coach Servs.,* 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

With regard to the third *DuPont* factor, the similarity of the trade channels in which the services are encountered, we must base our likelihood of confusion determination on the services as they are identified in the application and registration at issue. *In re Elbaum,* 211 USPQ 639, 640 (TTAB 1981); *In re William*

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[15] 5 TTABVUE 14-15.

[16] 5 TTABVUE 14.

Hodges & Co., Inc., 190 USPQ 47, 48 (TTAB 1976). *See also Octocom*, 16 USPQ2d at 1787 ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods [or services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods [or services], the particular channels of trade or the class of purchasers to which the sales of goods [or services] are directed").

Neither Applicant's services nor the services identified in the cited registration are limited to any particular trade channel and we cannot consider asserted marketplace realities not reflected in the identifications. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000). In the absence of trade channel limitations in the identification of services in the involved application and cited registration, we must presume that these services are offered in all customary trade channels therefor. *See Citigroup v. Capital City Bank Grp.*, 98 USPQ2d at 1261; *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). Further, evidence of record demonstrates that both Applicant's services and the registrant's services may be encountered by the same classes of consumers under the same marks and trade names in at least one common trade channel, e.g., websites of financial institutions offering both hedge fund investment and financial software services under the same trade names, brand names and trademarks.

We find that the *DuPont* factors of the relatedness of the services, channels of trade and classes of consumers weigh in favor of likelihood of confusion.

C. Conditions of Purchase

Under the fourth *DuPont* factor, we consider "[t]he conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing." *DuPont*, 177 USPQ at 567. In his brief as noted above, Applicant argues that his services are available only to qualified, wealthy investors with high income and net worth.[17]

Even if we accept, in considering the fourth *DuPont* factor, Applicant's assertion that his services may be the subject of sophisticated purchases, even careful consumers are likely to be confused by highly similar marks. As stated by the Federal Circuit, "[t]hat the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods [or services]. 'Human memories even of discriminating purchasers ... are not infallible.'" *In re Research and Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) quoting *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970). Therefore, the fact that the purchasers may exercise care before engaging these services does not mean there can be no likelihood of confusion. We note in addition the absence of evidence in the record that high net worth and income necessarily translate to sophistication in selection of financial and investment services.

In the present case, the high degree of similarity of the marks and the relatedness of the services as identified and on this evidentiary record outweigh any sophisticated

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[17] 5 TTABVUE 18-20

purchasing decision. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods).

The fourth *DuPont* factor is neutral or only slightly favors a finding of no likelihood of confusion.

D. Conclusion

When we consider the record and the relevant likelihood of confusion factors, and all of Applicant's arguments relating thereto, including those arguments and evidence not specifically addressed herein, we conclude that consumers familiar with the registrant's services offered under its INFLATION DEFENSE mark would be likely to believe, upon encountering Applicant's INFLATION DEFENDER mark, that the services in the cited registration and Applicant's services originated with or are associated with or sponsored by the same entity.

Decision: The refusal to register Applicant's mark is affirmed under Section 2(d) of the Trademark Act.