

This Opinion is not a  
Precedent of the TTAB

Mailed: May 8, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Dileep Essentials Pvt. Ltd.*

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Serial No. 90978154

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Stephen P. McNamara and Samantha M. Gerold of St. Onge Steward  
Johnston & Reens LLC for Dileep Essentials Pvt. Ltd.

Shaila Settles Lewis, Trademark Examining Attorney, Law Office 114,  
Nicole Nguyen, Managing Attorney.

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Before Goodman, Coggins and Thurmon,  
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Dileep Essentials Pvt. Ltd. (“Applicant”) seeks registration on the Principal Register of the mark ELLEMENTRY (in standard characters) for the following goods and services:<sup>1</sup>

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<sup>1</sup> Application Serial No. 90978154 is the child application of Application Serial No. 90542201 (Class 4), after Applicant filed a request to divide. The child application retains the parent application’s filing date of February 23, 2021, *see* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1110.01 (November 2023). The identified goods and services are based on foreign registrations under Section 44(e), 15 U.S.C. § 1126(e), or on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), by preliminary amendment made by Applicant on May 4, 2022 deleting dual filing bases for the goods or services. In the September 17, 2021 Priority action pp. 2-3, the

International Class 8: (Based on Section 44(e)): Flatware, namely, forks, knives, and spoons; Scissors for kitchen use; Tableware, namely, knives, forks and spoons; Bread knives; Kitchen knives; Table cutlery, namely, forks, knives, and spoons;

International Class 11: (Based on Intent to Use) Table lamps;

International Class 16: (Based on Section 44(e)) Book ends; Desk sets; Gift-wrapping paper; Graphic prints and representations; Paper mache; Paper mache figurines; Place mats of paper;

International Class 20: (Based on Section 44(e)) Benches; Cushions; Furniture; Pillows; Cabinets; Mirrors; Tables; Towel racks; Chairs; Non-metal knobs made of wood, shell, or of plastics; Non-metal clothes hooks made of wood, shell, or of plastics; Picture frames; Side tables; Tea tables; Towel hooks not of metal made of wood, shell, or of plastics; Wood knobs;

International Class 21: (Based on Section 44(e)): Dishes; Jugs; Mugs; Pans; Plates; Vases; Baskets for waste paper littering for household purposes; Bottles, sold empty; Candle holders; Lazy susans; Mortars and pestles for kitchen use; Napkin rings; Pot holders; Rolling pins; Scoops for household purposes; Serving forks; Serving platters; Serving spoons; Serving trays; Trays for domestic purposes; Tumblers for use as drinking glasses; Bottle stoppers specially adapted for use with wine bottles; Bread boards; Cheese boards; Cooking spoons; Cutting boards; Dish covers; Earthenware jars; Fruit bowls; Glass bowls; Glass dishes; Glass stoppers for bottles; Mixing bowls; Oven mitts; Salad bowls; Serving dishes; Wooden cooking spoons;

International Class 24: (Based on Section 44(e)) Bath linen; Bath towels; Bed linen; Bed sheets; Table linen of textile; Tablecloths of textiles; Textile place mats; Curtains of textile; Dining linens; Dish towels;

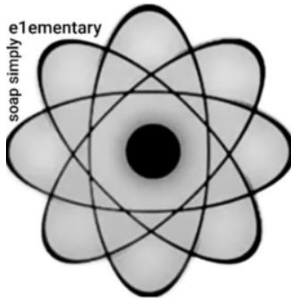
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Examining Attorney found that some of the goods identified in some of the classes exceeded the scope of the foreign registrations. Initially, the Examining Attorney indicated that two prior pending applications could be the basis for a Section 2(d) refusal in Class 4 only, which resulted in Applicant seeking to divide the application. September 17, 2021 Priority action, p. 2; November 29, 2021 Suspension letter p. 1.

Citations to the application record refer to the .pdf version of the USPTO's Trademark Status & Document Retrieval (TSDR) system. Citations to the briefs on appeal refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket number; coming after this designation are the page references, if applicable. Applicant's brief is at 4 TTABVUE. The Examining Attorney's brief is at 6 TTABVUE.



following goods: “Non-medicated skin cleansing and exfoliating preparations; pads for cleaning impregnated with cosmetics; Nonmedicated soaps; perfumes; essential oils; cosmetics; make-up; make-up removing preparations; lipstick; beauty masks” in International Class 3;<sup>3</sup> and



(SOAP disclaimed) for “body cream soap” in International Class 3.<sup>4</sup>

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the subsequent office and final actions, the Examining Attorney stated that “copies of the registrations have been provided previously.” February 23, and July 11, 2023 Office actions. Despite the failure of the Examining Attorney to submit the registrations, we consider the registrations to be stipulated into the record as Applicant argued the merits of the refusal and referred to the marks and registration numbers in its responses. *See In re Melville Corp.*, Ser. No. 73736814, 1991 WL 325859, at \*3, n.2 (TTAB 1991) (while merely listing registrations does not make them of record, because the Examining Attorney referred to the registrations, they were considered stipulated into the record).

As part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases, this opinion varies from the citation form recommended in the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2023). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board and the Director, this decision cites to the WESTLAW (WL) legal database. This decision cites only precedents of the Board, and includes in the citation, where available, the application serial number or proceeding number. The pilot is ongoing, using various citation forms. Until further notice, practitioners should continue to adhere to the citation form recommended in TBMP § 101.03.

<sup>3</sup> Registration No. 6635162 issued February 8, 2022. The description of the mark states: “The mark consists of the wording ‘ELEMENTRE’ with two lines above and below the wording and an accent line over the letter ‘E.’”

<sup>4</sup> Registration No. 6556579 issued November 9, 2021. The description of the mark states: “The mark consists of a design of a nucleus with a shaded circle located exactly in the middle of the nucleus. The word ‘E1EMENTARY,’ written in lowercase letters, is spelled with the number one instead of the letter ‘L.’ It is found on the top-left corner and written horizontally.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board.

We reverse the refusal to register.

## I. Evidentiary Issues

Both Applicant and the Examining Attorney submitted dictionary definitions with their briefs and we take judicial notice of them.<sup>5</sup>

Applicant has objected to screenshots of webpage shopping carts created by the Examining Attorney in the July 11, 2023 Office action:

The screenshots obtained by the Examiner of designer brand websites show online shopping carts created by the Examiner to support the refusal. These specially created assemblies of goods in a shopping cart are not evidence a consumer would normally encounter. Although it is a standard technique of Examiners to use screenshots for various reasons in support of a rejection, the use of fabricated evidence specially created to support a rejection is unreasonable and inconsistent with the Federal Rules of Evidence, T.M.E.P. §710.[01], and conventions of administrative procedure. ... Online shopping carts are by their nature ephemeral objects that come into being and disappear. The absence of an explanation of the specific search that was conducted and how the resulting items were compiled into a shopping cart that was screenshot and relied on as evidence provides the Applicant with no opportunity to investigate the relied-on evidence and determine what contradictory evidence was omitted from the office action attachments or otherwise rebut the

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The word ‘SOAP SIMPLY’ is in all lowercase letters, and is written vertically alongside top-left corner of the nucleus.”

<sup>5</sup> 4 TTABVUE 148 (“Exhibit E,” definition of “elementary”); 6 TTABVUE 19-42 (definitions of “macron,” “ll,” and “y”). The Board may take judicial notice of dictionary definitions in print and online format. *In re Red Bull GmbH*, Ser. No. 75788830, 2006 WL 936983, at \*3 (TTAB 2006). *See also In re Well Living Lab Inc.*, Ser. No. 86440401, 2017 WL 2876809, at \*3, n.9 (TTAB 2017) (judicial notice taken of definition attached to an applicant’s appeal brief).

Applicant also submitted copies of unpublished Board decisions referenced in its brief.

evidence. ... Applicant submits that while the better rule for the future will be to limit Examiner evidence to static webpages or webpages as presented to a user without any alterations, and to prohibit any evidence created by or assembled by the Examiner, at least, as a matter of fairness, the requirements of T.M.E.P. §710.[01](a) should be met before alleged evidence that is created by an Examiner by selective use of search terms can be used in a trademark examination.

4 TTABVUE 12-14.

The point of requiring a URL and date displayed for internet evidence that the Board set forth in *In re Mueller*, Ser. No. 87209946, 2018 WL 2277503, at \*1 (TTAB 2018) (citing *Safer Inc. v. OMS Inv. Inc.*, Opp. No. 91176445, 2010 WL 985355, at \*8 (TTAB 2010)), is to allow for verification and rebuttal by the applicant or examining attorney. *See Safer Inc.*, 2010 WL 985355, at \*8 (The date and URL source information on the face of internet documents allows the non-offering party the opportunity to verify the documents). As Applicant points out, due to the transitory nature of the virtual shopping cart which is tied to an individual's webpage site session and cookies, this by itself is not verifiable evidence.<sup>6</sup> Additionally, we do not find probative the "recently viewed" evidence showing various items the Examining Attorney viewed as being probative of how the consumer will view the goods on the website, as this historical information is generated from an algorithm by viewing particular products on the webpage. Therefore, aside from the inability of Applicant

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<sup>6</sup> Although the Examining Attorney argues that Applicant has the ability to recreate the shopping cart, 6 TTABVUE 16, it should not be required to do more than access the website and the particular webpage; in any event, there is always the possibility that the goods identified and added to the cart by the Examining Attorney are no longer available for purchase.

to verify the virtual shopping cart, we find that this evidence is not probative of how the consumer encounters the goods on the online marketplace webpages where a listing of goods is shown, and we do not consider it.

Applicant also argues that the website screenshots are hearsay and “lack authenticity.” 4 TTABVue 14-15. However, in *ex parte* proceedings, the Board routinely takes “a somewhat more permissive stance with respect to the admissibility and probative value of evidence.” TBMP § 1208; *In re Sela Prods. LLC*, Ser. No. 77629624, 2013 WL 2951800, at \*2 (TTAB 2013) (“the Board does not, in *ex parte* appeals, strictly apply the Federal Rules of Evidence, as it does in *inter partes* proceedings”). Because this evidence includes the URLs and date of capture, we will consider the Examining Attorney’s internet materials from the fashion designer websites (Gucci, Versace, Louis Vuitton and Versace) for whatever probative value they may have, and consider Applicant’s other substantive arguments as to the weight this evidence should be given.

## II. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, or to cause mistake, or to deceive. 15 U.S.C. § 1052(d). Our determination of 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 Nemours & Co.*, 476 F.2d 1357, 1361-62 (CCPA 1973) (“*DuPont*”). See also *In re*





elementrē

Applicant's mark and the                                  mark for the non-medicated soap and cleansing goods would suffice by itself to bar registration of Applicant's mark under Section 2(d), and conversely, if we find no likelihood of confusion with this mark, there would be no likelihood of confusion with the "nucleus" mark either. *See In re Max Cap. Grp. Ltd.*, Ser. No. 77186166, 2010 WL 22358 at \*2 (TTAB 2010). We

elementrē

therefore refer to Registration No. 6635162 and                                  as the cited registration in the remainder of this decision.

A. Strength or Weakness of ELEMENTARY or Phonetic Equivalent

In connection with evaluating the cited registration's conceptual strength, active third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive, suggestive, or so commonly used in a particular industry that the public will look to other elements to distinguish the source of the goods.<sup>7</sup> *See Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338-39 (Fed. Cir. 2015). *See also Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed. Cir. 2015) ("[E]vidence of third-party registrations is relevant to 'show the sense in which . . . a mark is used in ordinary parlance.'"); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 917 (CCPA 1976) (third-

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<sup>7</sup> There is no evidence regarding the cited registration's commercial or marketplace strength. In an ex parte appeal, the owner of the cited registration is not a party, and the Examining Attorney is under no obligation to demonstrate exposure to or recognition of the cited registration in the marketplace. *See, e.g., In re Thomas*, Serial No. 78334625, 2006 WL 1258862, at \*6, n.11 (TTAB 2006) (fame is not normally a factor in ex parte proceedings).

party registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”); *In re Guild Mtg. Co.*, Ser. No. 86709944, 2020 WL 1639916, at \*5 (TTAB 2020) (same).

The existence of third-party registrations for the same term (or phonetic equivalent) for the same or closely related goods can provide an inference that the Office has allowed registration of marks with the identical term, as long as there has been some difference between the marks as a whole and that trademark owners of registrations with the same term believe they can co-exist provided there are minimal differences between the marks. *See Plus Prods. v. Natural Organics, Inc.*, Opp. No. 91055487, 1979 WL 24902, at \*7-8 (TTAB 1979) (the Board drew an inference that the Office has historically registered PLUS marks for vitamins to different parties so long as there has been some difference, not necessarily created by a distinctive word, between the marks as a whole, e.g., VITAMINS PLUS and IRON PLUS, and that trademark owners believe that marks containing the term PLUS for vitamins can be registered side by side without confusion provided there are minimal differences).

Applicant argues that “Elementary” “is a common element of trademarks in Class 3.” 4 TTABVUE 25. In support, Applicant points to the two cited registrations, and a third-party registration (Registration No. 4986302) for ITS ELEMENTARY for “soaps for personal use,” (September 19, 2022 Response to Office action at pp. 11-14), as showing that “the USPTO has previously concluded that the three ‘Elementary’ marks are distinguishable and can be registered, all in Class 3.” 4 TTABVUE 25-26.

Applicant submits that “if these prior trademarks can coexist with each other, then Applicant’s mark can also coexist with the Cited Registrations.” 4 TTABVue 26.

However, the existence of these three registrations does not show that there are a large number of registrations using the term ELEMENTARY (or its phonetic equivalent) to make this inference. By way of comparison, in *Juice Generation*, there were at least twenty-six relevant third-party uses or registrations of record, 794 F.3d 1338 n.1, and in *Jack Wolfskin*, there were at least fourteen, 797 F.3d at 1373 n.2. In addition, we are not privy to the facts surrounding the examination or registration of the marks in the cited registrations or the additional third-party registration.

In any event, prior decisions and actions of other trademark examining attorneys are not binding upon the USPTO or the Board. See *In re Cordua Rests. Inc.*, 823 F.3d 594, 600 (Fed. Cir. 2016) (citing *In re Nett Designs, Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Design’s application, the PTO’s allowance of such registrations does not bind the Board or this court.”)).

We find the strength or weakness of the cited registration is neutral in the likelihood of confusion analysis.

#### B. Similarity or Dissimilarity of the Marks

We turn next to the first *DuPont* factor, the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d

1369, 1371 (Fed. Cir. 2005). Similarity in any one of these elements may be sufficient to find the marks confusingly similar. *In re Davia*, Ser. No. 85497617, 2014 WL 2531200, at \*2 (TTAB 2014) (citations omitted).

Our determination as to the similarity of the marks is based on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *In re Cynosure, Inc.*, Ser. No. 76653359, 2009 WL 1268438, at \*2 (TTAB 2009) (citation omitted). A consumer relies on the recollection of the various marks that he or she has previously seen in the marketplace; given the fallibility of memory, recollection is based on an overall general impression and not minute details or specific characteristics of the marks.

Applicant's mark is ELLEMENTRY (in standard characters) and Registrant's

elementrē

mark is the composite word and design mark: \_\_\_\_\_ .

Applicant's mark is in standard characters, which means that the mark can be depicted in any font style, size, or color. Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a). Applicant's mark could therefore be displayed in lower case and in a font style similar to Registrant's word and design mark. *See In re Aquitaine Wine USA, LLC*, Ser. No. 86928469, 2018 WL 1620989, at \*5 (TTAB 2018) (“[T]he rights associated with a standard character mark reside in the wording per se and not in any particular font style, size, or color.”) (citation omitted).

Applicant contends that its mark and Registrant's mark are visually and phonetically distinct. 4 TTABVUE 26. In particular, Applicant argues that “[t]he visual appearance of elementrē with its lower case logo and accent mark on the

terminal ‘e’ is clearly distinct from Applicant’s mark ELLEMENTRY.” *Id.* Applicant also argues that the consumer can distinguish “elementrē” and “ellementry” as they “are NOT the same word.” (emphasis in original). *Id.* Applicant submits that “[t]he marks are not phonetically identical as the accent mark on the terminal “e” in [elementrē] is pronounced “elemen-tray” while “Applicant’s mark, in contrast, is pronounced “elemen-tree.” *Id.*

The Examining Attorney argues that the marks are phonetic equivalents and similar in sound:

The components ‘ELLE’ and ‘ELE’ can be pronounced the same because two L’s in English have the same sound as a single letter ‘L,’ as shown in the attached dictionary evidence. LL, Collins COBUILD English Language Dictionary, (2024). ... The second letter ‘E’ in each mark will most likely be pronounced by consumers in the same manner as the word ‘elementary’ because it is obvious that each mark is an intentional misspelling of this word. The endings of each mark, namely, ‘MENTRY’ and ‘MENTRĒ,’ are pronounced the same because the macron over the last letter ‘E’ in the registered mark is pronounced in the same manner as the letter ‘Y’ in the ending position of a word, as shown in the attached dictionary evidence. Ma’cron, Webster’s 1913 Dictionary (1913); Y, Collins COBUILD English Language Dictionary, (2024).

6 TTABVUE 10 (end note omitted).

The Examining Attorney also argues that the marks are similar in overall commercial impression and have the same connotation of the word “elementary.” *Id.*

As the Examining Attorney points out, the straight bar above the ending letter “e” in Registrant’s mark appears to be a macron, which is a pronunciation symbol

indicating a long vowel sound;<sup>8</sup> it is a minor distinction easily overlooked by consumers. *Cf. Goodyear Tire & Rubber Co. v. Dayco Corp.*, Opp. No. 91057845, 1978 WL 21284, at \*3 n.4 (TTAB 1978) (Fast-Finder with hyphen is in legal contemplation substantially identical to Fastfinder without hyphen). The design element in Registrant's mark consists of horizontal lines running over and under the literal element of the mark. The horizontal lines in Registrant's mark simply serve to frame the mark and reinforce the wording; they are not distinctive features. *See In re Hughes Furniture Indus.*, Ser. No. 85627379, 2015 WL 1734918, at \*6 (TTAB 2015) (“[C]ommon design elements (consisting of a rectangle enclosing the literal elements and two horizontal lines) . . . merely serve as carriers for the wording and do not include a distinctive element with strong source-identifying characteristics.”). This most simple design element also does little to distinguish the marks.

Applicant's and Registrant's marks are very similar in appearance as to the letter portions “ELLEMENTR” and “ELEMENTR” and differ by the additional letter “l” in Applicant's mark along with the ending letters “y” and “e,” respectively, in each mark. The strong visual similarity between the marks is not diminished by these slight distinctions. *See Mag Instr. Inc. v. Brinkmann Corp.*, Opp. No. 91163534, 2010 WL 3253200, at \*10 (TTAB 2010) (slight differences in marks do not normally distinguish

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<sup>8</sup> *See Webster-dictionary.org/definition/macron*, 6 TTABVUE 19, “n. 1.(Pron.). A short, straight, horizontal mark [-], placed over vowels to denote that they are to be pronounced with a long sound; as, ā, in dāme; ē, in sēam, etc.” WEBSTER'S 1913 DICTIONARY, *websters-dictionary.org*.

them; difference of a single letter does not suffice to distinguish MAG STAR from MAXSTAR). We find the marks are similar in appearance.

While there is no correct pronunciation of a trademark that is not a known word, *In re Belgrade Shoe Co.*, 411 F.2d 1352, 1353 (CCPA 1969), and it is not possible for a trademark owner to control how purchasers will vocalize its mark, *Centraz Indus., Inc. v. Spartan Chem. Co.*, Opp. No. 91159335, 2006 WL 236413, at \* 4 (TTAB 2006), here, we find that Applicant's and Registrant's marks are a misspelling or phonetic equivalents of "elementary." The dictionary definition with pronunciation provided for "elementary" that we have taken judicial notice of supports the Examining Attorney's position. Elementary is pronounced as "e-lə-'men-tə-rē" or "men-trē," and both Applicant's and Registrant's marks can be pronounced with a long e sound, with the double "l" in Applicant's mark is pronounced as a single "l."<sup>9</sup> Given that the marks are very similar (ELEMENTRĒ and ELLEMENTRY) with only slight differences, the marks could be pronounced the same or similarly. *See In re Viterra Inc.*, 671 F.3d 1358, 1367 (Fed. Cir. 2012) (XCEED and X-SEED similar).

Applicant also references in its brief the definition of the word "elementary" which means "of, relating to, or dealing with the simplest elements or principles of something."<sup>10</sup> To the extent that consumers view Applicant's and Registrant's marks as a misspelling or the phonetic equivalent of "elementary," the marks have similar a connotation.

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<sup>9</sup> See n. 7 and COLLINS DICTIONARY, collinsdictionary.com (American English), 6 TTABVUE 28, 40; MERRIAM-WEBSTER DICTIONARY, Exhibit E, 4 TTABVUE 148.

<sup>10</sup> MERRIAM-WEBSTER DICTIONARY Exhibit E, 4 TTABVUE 148.

Viewed in their entireties, the marks are highly similar, based on the visual and phonetic similarities discussed above. Additionally, many consumers are likely to perceive both marks to be variations on, or misspellings of, and the phonetic equivalent of “elementary.”

In view of the similarities in appearance, sound, and likely similar connotation for many consumers as a misspelling or phonetic equivalent of “elementary,” with the same meaning, we find the overall commercial impressions of the marks to be very similar. *See e.g., Boliden AB v. Bolidt Maatschappij tot Exploitatie van Kunststoffen en Bouwwerken B.V.*, Can. No. 92011627, 1980 WL 30171, at \*4 (TTAB 1980) (BOLIDT and BOLIDTAN are similar in sound and appearance to opposer’s mark BOLIDEN and create substantially the same commercial impressions).

The overall similarity of the marks weighs in favor of a finding of likelihood of confusion.

### C. Similarity or Dissimilarity of the Goods and Services

The second *DuPont* factor considers “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *DuPont*, 476 F.2d at 1361.

In determining the similarity or dissimilarity of the goods and services, we must focus on the goods and services as they are identified in the involved application and cited registration. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 1327 (Fed. Cir. 2017); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990). It



is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods or services within a particular class. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981).

The Examining Attorney argues that all of Applicant's goods as identified in every class are related to the goods in the cited registration (i.e., "non-medicated skin cleansing and exfoliating preparations; pads for cleaning impregnated with cosmetics; Nonmedicated soaps; perfumes; essential oils; cosmetics; make-up; make-up removing preparations; lipstick; beauty masks"). To demonstrate relatedness, the Examining Attorney relies on webpages from Anthropologie, Urban Outfitters, Louis Vuitton, Gucci, Versace and Aerin.

Applicant argues that "evidence from 'big box' retail stores or online retailers selling a wide variety of goods is considered not probative" to show relatedness nor is evidence of house marks and designer marks offering a wide-variety of products under a mark. 4 TTABVUE 16, 17.

The Anthropologie webpages show third-party brands Blue Capri and Launis soap<sup>11</sup> (June 15, 2022 Office action pp. 12, 14).<sup>12</sup> The webpage also shows Cl. 8 cutlery

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<sup>11</sup> The Examining Attorney also had a separate subpage for a search of "skin care" which yielded sunscreen, eye balm, and eye serum, but none of these goods are identified in the cited registration or Application. June 15, 2022 Office action, p. 16.

<sup>12</sup> Although the search for "bath" on the Anthropologie website did identify two examples of soap buried within a long listing of towels and other bath items (e.g., vanities, mirrors, towels, light fixtures, mats), which may go unnoticed by the consumer, it is unclear from this search evidence whether the actual separate subpage categories of "Health & Beauty," or a search of "soap" would display these other bath items together. None of the other retailer or designer subpages provided by the Examining Attorney showed soap and towels offered for sale on the same subpage.

(flatware) (*Id.* at 17), Cl. 11 lamps (*Id.* at 20 ), Cl. 16 bookends (*Id.* at 21), Cl. 20 furniture (e.g., desk, buffet, bookshelf, bench *Id.* at 21-23), Cl. 21 dinner plates (*Id.* at 17, 18), Cl. 24 bath towels (*Id.* at 11, 13, 14), Cl. 24 dish towels (*Id.* at 25), and Cl. 27 rugs (*Id.* at 6, 11, 26-34).

The Urban Outfitters webpages show third-party brand perfume by Gourmand Eau De Parfum (June 15, 2022 Office action pp. 37 38, 39), third-party brand makeup by Benefit—lip stain and blush (*Id.* at 41, 43), third-party brand Beauty Creations liquid eyeliner (*Id.* at 37), third-party brand Sweetums cleansing wipes (*Id.* at 43) and third-party brand Kitty Candy scrub (*Id.* at 41). It also shows Cl. 11 lamps (*Id.* at 55-63), Cl. 16 Bookends (*Id.* at 64-66) Cl. 20 desks, (*Id.* at 67-72), Cl. 21 dishes (*Id.* at 77, 78, 81), and Cl. 27 rugs (*Id.* at 83-91). The webpages do not show any Cl. 8 cutlery or Cl. 24 towels; the webpages also do not appear to show any soap products.

We find this evidence does not support a finding of relatedness under *DuPont* factor two. None of the soap, fragrance or cosmetic/makeup products are offered under the Anthropologie or Urban Outfitters marks but are third-party products offered under third-party marks. This evidence is more akin to department store evidence as it shows the offering of a wide variety of differently-branded goods by a retailer. The landing webpages for these websites also show that these products are offered under different categories and different subpages (e.g., Anthropologie: “Home & Furniture” subpage and “Beauty and Wellness” subpage; Urban Outfitters “Home” subpage and “Beauty” subpage). *Id.* at 6, 36.

“It has long been held that the mere fact that two different items can be found in a supermarket, department store, drugstore or mass merchandiser store is not a sufficient basis for a finding that the goods are related.” *Morgan Creek Prods., Inc. v. Foria Int’l, Inc.*, Opp. No. 91173806, 2009 WL 1719597, at \*8 (TTAB 2009) citing *Recot Inc. v. Becton*, 214 F.3d 1322, 1330 (Fed. Cir. 2000) (“the law is that products should not be deemed related simply because they are sold in the same kind of establishments”); *Federated Foods*, 544 F.2d at 1103 (“A wide variety of products, not only from different manufacturers within an industry but also from diverse industries, have been brought together in the modern supermarket for the convenience of the customer. The mere existence of such an environment should not foreclose further inquiry into the likelihood of confusion from the use of similar marks on any goods so displayed”); *Shoe Factory Supplies Co. v. Thermal Eng’g Co.*, Opp. No. 91060214 1980 WL 30144, at \*9 (TTAB 1980) (“This contention [to equate different or unrelated goods by urging that they are all sold in supermarkets, department stores, and similar establishments] has been rejected...”). *Cf. In re Mucky Duck Mustard Co. Inc.*, Ser. No. 73603019, 1988 WL 252484, at \*1 n.6 (TTAB 1988) (third-party registrations were not persuasive to show that the goods were related because two of the four registrations which were based on use were issued to owners of a large department store and an amusement or theme center, respectively, where a wide variety of goods are sold).

The remaining evidence consists of webpages from four large fashion designers.<sup>13</sup>

The Louis Vuitton webpages show perfumes (“All Fragrances” subpage, February 23, 2023 Office action, pp. 14-17). These webpages also show Cl. 21 cups, plates, and glasses (“Art of Dining” subpage, *Id.* at 11-12), and Cl. 20 third-party branded furniture (“Furniture” subpage, *Id.* at 7-10). There is no webpage evidence of goods in Cl. 8, 11, 16, 24, or 27, and no webpages showing the offering of soap products under the Louis Vuitton mark.

The Gucci webpages show perfume, eye makeup, and lip makeup (“Gucci Beauty” subpage, February 23, 2023 Office action, pp. 18-22). The Examining Attorney also provided a separate webpage from a different website, Stylemyle, for Gucci perfume soap, *Id.* at 29, and a separate webpage from the Nordstrom department store for Gucci perfume, *Id.* at 30. The Gucci website webpages also show Cl. 20 furniture under (“Gucci Décor” subpage, *Id.* at 23-28). There are no Cl. 8, 11, 16, 21, 24, or 27 goods shown on the webpages.

The Versace webpages show shower gel and perfume (Women’s Perfumes subpage, February 23, 2023 Office action, pp. 40-43). They also show Cl. 8 cutlery (“Cutlery Sets” subpage, *Id.* at 53), Cl. 20 furniture (“Versace Furniture” subpage, *Id.* at 34), Cl. 21 luxury plates (“Luxury plates” subpage, *Id.* at 44-48), Cl. 21 wine glasses (“Wine & Cocktail accessories” subpage, *Id.* at 50, 51), and Cl. 24 towels (“Bed & Bath

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<sup>13</sup> As indicated, we have excluded the shopping cart evidence. In any event, the furniture items identified by the Louis Vuitton shopping cart are third-party branded items by different known furniture designers and identified by their name.

Linen” subpage, *Id.* at 53, 56, 58, 59). There are no Cl. 11, 16, or 27 goods shown on the webpages.

The Aerin webpages show Aerin perfume (February 23, 2023 Office action pp. 83, 87, 89, 91), Aerin soap, (*Id.* at 83), and Aerin lipstick (*Id.* at 88). The webpages also show Cl. 20 picture and photo frames, (*Id.* at 72, 73, 75, 79), Cl. 20 tables (furniture) (*Id.* at 72, 75, 77), Cl. 21 dishes (*Id.* at 71, 77), Cl. 21 vases (*Id.* at 72, 74, 77, 79, 80, 81 82), and Cl. 21 candlesticks (*Id.* at 74). There are no Cl. 8, 11, 24, or 27 goods shown on the webpages.

As shown, many of the designer marks do not provide evidence of goods in certain of the identified classes in the involved application, and the Louis Vuitton webpage shows third-party branded furniture.

Third-party designer marks are well-recognized as covering a wide variety of products, and they are of little value in showing that consumers will perceive the listed goods as emanating from a single source. *Cf. In re Donnay Int’l, Societe Anonyme*, Ser. No. 74160268, 1994 WL 515456, at \*1, n.3 (TTAB 1994) (minimizing the significance of two third-party registrations for house marks “since house marks can be used to identify a broad range of products”). Outside of the designer mark context, there is no inherent relatedness between soap, perfume, and cosmetics, on the one hand, and cutlery, furniture, flatware, dishes and plates, photo frames, vases, candlesticks, on the other hand, as shown on these webpages.

Because house marks and designer brands are used on such a wide variety of goods, consideration of internet evidence for house marks and designer brands to

show that the goods at issue are related could create a situation where widely disparate goods are considered related. As Applicant points out,<sup>14</sup> there is no evidence indicating that either Applicant or Registrant is a designer, or that consumers would perceive Applicant's and Registrant's marks as referring to designers. Thus, we do not view this case as falling within the purview of the designer mark cases wherein more varied goods were found to be related because of the practice of designers to license their names for a wide variety of goods and both marks involved designer marks. *Cf. Nina Ricci S.A.R.L. v. Haymaker Sports Inc.*, 1962 WL 8579, at \*3 (TTAB 1962) (RICCI OF HAYMAKER on clothing with Ricci naming the designer, confusingly similar with the designer name NINA RICCI or RICCI for women's apparel); *Nina Ricci, S.A.R.L. v. ETF Enters., Inc.*, Opp. No. 58461, 1979 WL 24870, at \*7 (TTAB 1979) (fictitious name VITTORIO RICCI for forward fashion (clothing) and high quality expensive shoes and designer mark NINA RICCI for apparel confusingly similar).

Accordingly, there is no basis to find, on this record, that offering soap, cosmetics, and perfume, and well as various home goods under the same mark is a common practice such that the public expects these items to originate from the same source.

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<sup>14</sup> Applicant states that the cited marks are product marks, not designer marks, and there is no evidence in the record showing that the cited marks are designer marks. 4 TTABVUE 17. The Examining Attorney states that there is no evidence of a specific meaning attributed to Applicant's and Registrant's marks when applied to Applicant's and Registrant's respective goods. 6 TTABVUE 8.

The webpage evidence provided by the Examining Attorney does not support relatedness of Applicant's and Registrant's goods.

The Examining Attorney argues that the goods and services are related "because they travel in the same trade channels and have no limitations as to the classes of consumer," 6 TTABVUE 13, and concludes "[t]he evidence of record in this case shows that American consumers are accustomed to seeing applicant's goods sold in the same channels of trade as the goods sold by the registrants because many of the most popular brands in the United States offer those goods together." 6 TTABVUE 15.

Applicant asserts that "[i]f all that was needed to show relatedness of the goods was to show that the goods were sold through a common platform, then based on the wide variety of goods available at Amazon.com, or Costco, or Walmart, all goods would have to be considered related to every other good." 4 TTABVUE 17.

It appears that the Examining Attorney conflates the arguments as to relatedness of the goods and similarity of the trade channels, which we analyze separately below. As the court stated in *Recot*, 214 F.3d at 1330, "the law is that products should not be deemed related simply because they are sold in the same kind of establishments." (citing *Federated Foods*, 544 F.2d at 1103). See also *Hi-Country Foods Corp. v. Hi Country Beef Jerky*, Opp. No. 91715844, 1987 WL 123839, at \*2 (TTAB 1987) (there is "no 'per se' rule that all food products are related goods by ... virtue of their capability of being sold in the same food markets."). For purposes of relatedness of the goods or services under *DuPont* factor 2, we do not find the Examining Attorney's trade channel argument persuasive.

Turning to Applicant's Class 35 services, retail store services have frequently been found to be related to goods that are identified as sold by them. *See, e.g., In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464 (BIGGS for retail grocery and general merchandise store services likely to be confused with BIGGS for furniture); *In re Thomas*, 2006 WL 1258862, at \*3 ("It is clear that consumers would be likely to believe that jewelry on the one hand and retail stores selling jewelry on the other emanate from or are sponsored by the same source if such goods and services are sold under the same or similar marks."); *In re Peebles Inc.*, Ser. No. 74073163, 1992 WL 215315, at \*2 (TTAB 1992) ("As we have said before there is no question that store services and the goods which may be sold in that store are related goods and services ...").

Applicant's retail store services do not identify the soap goods, cosmetic/makeup, or fragrance goods or any of the other goods identified in the cited registration. We do not find any other evidence in the record that establishes the relatedness of Applicant's retail store services and any of the goods in Registration No. 6635162.

The second *DuPont* factor weighs against a finding of likelihood of confusion.

#### D. Similarity or Dissimilarity of Trade Channels and Classes of Consumers

The third *DuPont* factor considers "the similarity or dissimilarity of established, likely-to-continue trade channels." *DuPont*, 476 F.2d at 1361. We also discuss "the portion of the fourth *DuPont* factor that addresses the 'buyers to whom sales are made.'" *Sabhnani v. Mirage Brands, LLC*, Can. No. 92068086, 2021 WL 6072822, at \*9 (TTAB 2021) (quoting *DuPont*, 476 F.2d at 1361).



With regard to the channels of trade and classes of consumers, we must make our determinations under these factors based on the goods and services as they are identified in the application and registration. *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014).

Both the cited registration and the subject application are unrestricted as to trade channels. Moreover, in the absence of specific limitations in the respective identifications, we must assume that the products set forth in the identifications are sold in all normal channels of trade for goods of that type and that Applicant's identified retail store services would move through all the usual trade channels for services of that type. *See DeVivo v. Ortiz*, Opp. No. 91242863, 2020 WL 1227592, at \*14 (TTAB 2020) (“[A]bsent an explicit restriction in the application, the identified goods in the application must be presumed to move in all channels of trade that would be normal for such goods and to all usual prospective purchasers for goods of that type”). The goods identified in the subject application and cited registration are general consumer goods, and the consumers of Applicant's goods and services and Registrant's goods are the general public.

The webpages show that these retailers sell these goods on their websites, although the various categories of goods are sold on different subpages. We find this evidence supports a finding that, as to Applicant's identified goods, they are offered in at least one common channel of trade, that is, the websites operated by the third-party specialty retailers.

The third *Dupont* factor weighs in favor of likelihood of confusion as to the goods but is neutral as to the identified services due to insufficiency of evidence.

### III. Conclusion

The first *Dupont* factor weighs in favor of a finding of likelihood of confusion; the third *DuPont* factor weighs in favor of likelihood of confusion as to the goods but is neutral as to the identified services. The strength of the cited registration is neutral. The second *DuPont* factor weighs against a finding of likelihood of confusion. In balancing the two key *DuPont* factors, we find that the lack of relatedness of the goods and services outweighs any similarity of the marks for Classes 8, 11, 16, 20, 21, 24, 27 and 35 and any overlap in trade channels for the goods. *See Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375 (Fed. Cir. 1998) (the Federal Circuit has “upheld Board determinations that one *DuPont* factor may be dispositive in a likelihood of confusion analysis”). In view of the lack of relatedness of the goods and services with Registration No. 6635162, we find confusion unlikely.<sup>15</sup>

**Decision:** The Section 2(d) refusal to register Applicant’s mark ELLEMENTRY is reversed.

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<sup>15</sup> As indicated supra, because we find no likelihood of confusion with Registration No. 6635162 as to non-medicated soap and cleansing goods, we would not find likelihood of confusion with respect to the other cited “nucleus” registration’s (Registration No. 6556579) “body cream soap” goods either.