

This Opinion is not a
Precedent of the TTAB

Mailed: January 29, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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White Horse Wash, LLC

v.

White Horse Auto, LLC
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Opposition No. 91230312

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Ralph M. Tener and Joseph A. Figueroa of McCandlish & Lillard, P.C.
for White Horse Wash, LLC.

Andrea H. Evans of The Law Firm of Andrea Hence Evans LLC
For White Horse Auto, LLC.

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Before Shaw, Adlin and Lynch,
Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant White Horse Auto, LLC seeks registration of WHITE HORSE AUTO, in standard characters and with AUTO disclaimed, for “automobile dealerships.”¹ In its amended notice of opposition, White Horse Wash, LLC alleges prior use of, and ownership of a pending application to register, WHITE HORSE AUTO WASH, in standard characters and with AUTO WASH disclaimed, for “automobile and vehicle

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¹ Application Serial No. 86860864, filed December 29, 2015 under Section 1(b) of the Trademark Act, based on an alleged bona fide intent to use the mark in commerce.

washing; automobile and vehicle detailing.”² Opposer also specifically alleges that “Applicant maintains an automobile dealership in Warrenton, Virginia, less than two miles from Opposer’s car wash location in Warrenton, Virginia.” 4 TTABVUE 7. As grounds for opposition, Opposer alleges that use of Applicant’s mark is likely to cause confusion with Opposer’s mark. In its answer, Applicant admits that Opposer’s pleaded application has been suspended based on a potential finding of likelihood of confusion with Applicant’s mark, 6 TTABVUE 3, but otherwise denies the salient allegations in the amended notice of opposition.³

I. The Record

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), the file of Applicant’s involved application. In addition, Opposer introduced:

Affidavits of third party witnesses David Hartman (“Hartman Aff.”) and Dean Neiman (“Neiman Aff.”); 15 TTABVUE 2-7;

Affidavit of Karen Nalls, its Director of Logistics (“Nalls Aff.”); *id.* at 8-9;

Affidavit of Garrett Giles, its District Manager (“Giles Aff.”); *id.* at 10-11;

² Application Serial No. 87064740, filed June 8, 2016 under Section 1(a) of the Trademark Act, alleging first use dates of October 2, 2010.

³ Applicant also asserted certain affirmative defenses which it failed to pursue at trial or address in its brief, and which are accordingly waived. *Miller v. Miller*, 105 USPQ2d 1615, 1616 n.3 (TTAB 2013); *Baroness Small Estates Inc. v. Am. Wine Trade Inc.*, 104 USPQ2d 1224, 1225 n.2 (TTAB 2012).

Affidavit of Robert Rust, its member (“Rust Aff.”); 16 TTABVUE 84-86; and

Notice of Reliance on the discovery deposition of Waleed Ahsan, Applicant’s owner and member (“Ahsan Tr.”). 16 TTABVUE.

Applicant introduced the Declaration of Mr. Ahsan and the exhibits thereto. 21 TTABVUE.⁴

II. The Parties

Opposer was organized in 2008, and opened its Warrenton, Virginia carwash in 2010. 16 TTABVUE 84 (Rust Aff. ¶ 2). Its name and mark WHITE HORSE AUTO WASH “comes from a fishing rock on the east side of the Shenandoah River, when the water level rises the water rushing over the fishing rock looks like a white horse.” *Id.* (Rust Aff. ¶ 4).

Applicant opened its Warrenton used car dealership in November 2015. 16 TTABVUE 18 (Ahsan Tr. 12). Applicant is a horse lover, and he “knew that if I was going to open up a company whether it be a car dealership, whatever it was, consulting, it was going to be White Horse Consulting, White Horse whatever. It was going to start with White Horse.” 17 TTABVUE 39 (Ahsan Tr. 33). Prior to adopting and using WHITE HORSE AUTO, Applicant was aware of Opposer’s WHITE HORSE AUTO WASH, but when asked whether he thought about that when he named WHITE HORSE AUTO, Mr. Ahsan testified that “[i]t didn’t cross my mind.” *Id.* at 45

⁴ Applicant’s Consented Motion to Accept Late Trial Evidence, filed September 7, 2018, is granted. Trademark Rule 2.127(a); 21 TTABVUE.

(Ahsan Tr. 39). While the details are designated confidential, suffice it to say that Applicant and Opposer had a business relationship for a short period of time in 2015, which terminated due to Applicant's dissatisfaction. *Id.* at 28-29 (Ahsan Tr. 22-23).

III. Standing

Applicant's concession that Opposer's pending application was suspended based on Applicant's involved application establishes Opposer's standing. 6 TTABVUE 3 (Answer ¶ 14); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028, 213 USPQ 185, 189 (CCPA 1982) ("Thus, to have standing in this case, it would be sufficient that [plaintiff] prove that it filed an application and that a rejection was made because of [defendant's] registration); *Tri-Star Mktg., LLC v. Nino Franco Spumanti S.R.L.*, 84 USPQ2d 1912, 1914 (TTAB 2007) ("[P]etitioner has standing to bring the petition for cancellation based on the fact that its application to register [its mark] was refused registration by the office under Section 2(d) based on a likelihood of confusion with respondent's previously registered mark"). Opposer's use of WHITE HORSE AUTO WASH for car washing services also establishes its standing. 16 TTABVUE 84 (Rust Aff. ¶ 2); *Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009) ("Petitioner has established his common-law rights in the mark DESIGNED2SELL, and has thereby established his standing to bring this proceeding."); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (testimony that opposer uses its mark "is sufficient to support opposer's allegations of a reasonable belief that it would be damaged ..." where opposer alleged

likelihood of confusion). *See also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014)

IV. Priority

Priority is not in dispute. Mr. Rust testified that Opposer has operated a Warrenton car wash under the mark WHITE HORSE AUTO WASH since 2010. 16 TTABVUE 84 (Rust Aff. ¶ 2). Applicant did not file its application or commence use of its mark until 2015. *Id.* at 18 (Ahsan Tr. 12).

V. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the 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); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000). We consider the likelihood of confusion factors about which there is evidence or argument, and treat the remaining factors as neutral.

A. The Marks

The marks are almost identical “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, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). Indeed, they are identical but for the generic and disclaimed term WASH at the end of Opposer’s mark. This distinction is insignificant.

In fact, WHITE HORSE is the dominant portion of both marks, for two reasons. First, the terms AUTO in Applicant’s mark and AUTO WASH in Opposer’s mark are at best descriptive, and disclaimed. We therefore assign them less weight in our analysis. *Cunningham*, 55 USPQ2d at 1846 (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)). Second, the shared term WHITE HORSE is the dominant portion of both marks because it appears first. *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). *See also, Palm Bay Imps., Inc.*, 73 USPQ2d at 1692; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

We are not persuaded by Applicant’s argument that WHITE HORSE is “weak,” because Warrenton is “an area that is known nationwide as horse country.” 21

TTABVUE 28 (Ahsan Dec. ¶ 2). This assertion is supported only by a printout from a horse-focused website which lists several horse-related businesses in the Warrenton area. 21 TTABVUE 4-8. This evidence does not establish that the public associates WHITE HORSE, or any term including the word HORSE, with the Warrenton area. In any event, even if it did, the question is whether WHITE HORSE is commonly used for automobile-related services, and here there is no evidence that it is. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1751-52 (Fed. Cir. 2017) (“Symbolic has not pointed to any record evidence to support a finding that multiple third parties use the mark I AM for the listed goods in its class 3 and 9 applications.”); *In re Inn at St. Johns, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018); *Century 21 Real Estate*, 23 USPQ2d at 1701 (“The relevant *du Pont* inquiry is ‘[t]he number and nature of similar marks in use on *similar goods*’ ... It is less relevant that ‘Century is used on unrelated goods or services such as ‘Century Dental Centers’ or ‘Century Seafoods.’”) (quoting *Weiss Assocs. v. HRL Assocs.*, 902 F.2d 1546, 14 USPQ2d 1840, 1842 (Fed. Cir. 1990)).⁵

In short, the marks look and sound almost identical, differing by only one non-distinctive word at the end of Opposer’s mark. They also convey highly similar meanings. In fact, while Applicant is correct that Opposer’s mark conveys a car wash,

⁵ Mr. Ahsan’s testimony about White Horse Auto Concierge in Fairfax, Virginia is based on a document which was not introduced into the record, and his vague testimony about a conversation concerning that business constitutes hearsay. *See* 17 TTABVUE 60 (Ahsan Tr. 54) (citing “Exhibit 3” which is not of record). Mr. Ahsan’s testimony about “White Horse Automotive” in New York and New Jersey is similarly vague and unsupported. *Id.* at 40 (Ahsan Tr. 34).

that does not necessarily distinguish the meaning of the two marks, because Applicant's mark does not specify how it relates to automobiles. That is, consumers could perceive Applicant's mark as identifying any number of automobile-related products or services, perhaps including products or services related to washing or detailing cars. Nothing about Applicant's mark necessarily conveys dealership services any more than other automobile-related products or services. This factor weighs heavily in support of finding a likelihood of confusion.

B. Actual Confusion

Opposer relies heavily on evidence of what it alleges to be actual confusion.

Specifically:

Mr. Hartman, who knows Opposer's owner Mr. Rust "personally," testified that he had two cars detailed by Opposer in 2014, and in 2016 sought a receipt for the 2014 work. He mistakenly called Applicant about the receipt, however, believing it to be Opposer. 15 TTABVUE 2 (Hartman Aff. ¶¶ 2, 5-8). According to Mr. Hartman, the person he spoke to at Applicant's dealership "informed me that 'White Horse' was under new management and that the old owners went out of business. They informed me that the old business had gone bankrupt." *Id.* at 3 (Hartman Aff. ¶ 9).

Mr. Neiman, who also knows Mr. Rust "personally," is familiar with both Opposer and Applicant, and thought that Applicant "was owned by or otherwise associated with" Opposer "because of the similarity of the names of the businesses and because both businesses are related to cars and other vehicles." *Id.* at 5 (Neiman Aff. ¶¶ 2-6).

Ms. Nalls, Opposer's Director of Logistics, testified that a friend of hers asked if everything was "okay" at Opposer's Warrenton location, because he heard a report over a police scanner that the police were sent there to investigate a report of a stolen vehicle. Ms. Nalls later learned that the

vehicle was actually at Applicant's place of business. *Id.* at 8-9 (Nalls Aff. ¶¶ 2-8).

Mr. Giles, Opposer's District Manager, testified that he is "personally aware of at least six occasions in which people have called White Horse Wash intending to call White Horse Auto. These callers called White Horse Wash asking about the purchase of used cars." *Id.* at 10 (Giles Aff. ¶¶ 2-6).

Mr. Rust testified that he "first became aware of the used car business using the mark 'White Horse Auto' when they first opened for business in Warrenton, Virginia, around May 2016. I also live in the Town of Warrenton, and I found out after receiving several calls from its customers, friends, and neighbors inquiring if I had opened a used car dealership." In addition, Mr. Rust "experienced multiple instances of customers or potential customers of White Horse Wash and White Horse Auto confusing the two businesses." 16 TTABVUE 85 (Rust Aff. ¶¶ 7, 10).

In addition, Mr. Ahsan himself provided evidence of actual confusion. He testified as follows:

Q Has anyone ever called White Horse Auto when they actually meant to call White Horse Auto Wash?

A Yes. We one time had a -- a customer call. She Googled White -- just White Horse. And I do a lot of SEO and stuff. Our number -- our name came up. She called and said, hey, is my car ready. And we said, sorry, this is the car -- car dealership, not the wash. That happened once. And this was when we first opened up.

Q Has anyone delivered any packages to White Horse Auto intending to actually send them to the auto wash?

A Yes. When we first opened up we ordered a part from -- I think it was either Sheehy Ford or Toyota. My mechanic called and just said White Horse. We did not have an account with them. White Horse Auto Wash has an account with them. So they put it under the auto wash account. And they delivered it to him. It happened once. And I went to -- I think it was Sheehy Ford; opened up an account. And it's never happened again.

17 TTABVUE 54-55 (Ahsan Tr. 48-49).⁶

Actual confusion “is strongly indicative of a likelihood of confusion.” *Thompson v. Haynes*, 305 F.3d 1369, 64 USPQ2d 1650, 1655 (Fed. Cir. 2002). Here, at the very least, the evidence reveals some confusion about whether there is an affiliation between Opposer and Applicant.

Mr. Hartman’s mistaken call to Applicant and Mr. Neiman’s mistaken assumption of an affiliation are evidence of actual confusion. *Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1552-53 (TTAB 2012) (mistaken assumption by one witness that, and question from another witness whether, one party offered another party’s goods found to constitute actual confusion). Moreover, Mr. Neiman’s testimony makes clear that the reason for the apparent confusion was the similarity of the parties’ marks, which

⁶ While this evidence was designated “confidential,” Applicant referred to it in its publicly-filed brief. 22 TTABVUE 14. In any event, it is not clear how this testimony could qualify as confidential under the Board’s standard protective order, or how this evidence constitutes a trade secret, or sensitive or competitive information. See Trademark Rule 2.116(g), 37 C.F.R. § 2.116(g) (“The Board may treat as not confidential that material which cannot reasonably be considered confidential, notwithstanding a designation as such by a party.”).

bolsters the probative value of this evidence. *Cf. Toys “R” Us, Inc. v. Lamps R Us*, 219 USPQ 340, 346 (TTAB 1983) (“One important defect, which might have been revealed had the involved customers been available for cross-examination, is that there is nothing to indicate whether the reason for the question as to affiliation was the result of the similarity of the marks.”).⁷ Mr. Ahsan provided analogous evidence, against Applicant’s interest, and his testimony concerning actual confusion is therefore reliable.⁸

When we consider this evidence as a whole, we find that it is sufficient to establish that there has been at least some actual confusion. All told, the witnesses describe a meaningful number of mistaken inquiries and assumptions about these two businesses that are two miles apart in a relatively small town, and use essentially the same marks in connection with automobile-related services. *Cf. The Fin. Co. of Am. V. BankAmerica Corp.*, 205 USPQ 1016, 1035 (TTAB 1979) (“No matter how

⁷ Applicant’s hearsay objections to the actual confusion evidence are overruled, because the evidence is of present sense impressions and states of mind. Fed. R. Evid. 803(1) and (3); *Edom Laboratories*, 102 USPQ2d at 1552 (citing cases); *Nat’l Rural Elec. Coop. Ass’n. v. Suzlon Wind Energy Corp.*, 78 USPQ2d 1881, 1887 n.4 (TTAB 2006). In any event, “since most of the third-party statements were offered not for the truth of the statements but rather simply for the fact that they were made,” they are not hearsay in the first place. *Corporate Fitness*, 2 USPQ2d at 1690.

⁸ The testimony from Mr. Rust and his employees is entitled to less weight, however. *Edom Laboratories*, 102 USPQ2d at 1552 (“[T]he testimony is of minimal probative value in the absence of testimony from the third parties themselves ‘as to whether they were confused and, if so, what caused their confusion’”) (quoting *Corp. Fitness Programs, Inc. v. Weider Health and Fitness, Inc.*, 2 UPQ2d 1682, 1691 (TTAB 1987), *set aside on other grounds*, 7 USPQ2d 1828 (TTAB 1988)).

these matters occurred, whether from listings in the telephone directories, errors by Postal Service employees, or the like, the fact is that they did occur and in such large numbers and frequency that there can be no common denominator for them other than the similarities between the marks themselves.”). This factor also weighs in favor of finding a likelihood of confusion, but because it is not qualitatively or quantitatively robust, not as heavily as the similarity of the marks.

C. The Services, Channels of Trade, Classes of Consumers and Conditions of Sale

Applicant correctly points out that its automobile dealership services and Opposer’s car wash services are specifically different. Furthermore, even though the parties both provide automobile-related services, that is not enough by itself to establish a relationship between the services. Indeed, “a finding that the goods are similar is not based on whether a general term or overarching relationship can be found to encompass them both.” *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010) (citing *Harvey Hubbell Inc. v. Tokyo Seimitsu Co., Ltd.*, 188 USPQ 517, 520 (TTAB 1975)); *In re W.W. Henry Co.*, 82 USPQ2d 1213, 1215 (TTAB 2007) (“[T]o demonstrate that goods are related, it is not sufficient that a particular term may be found which may broadly describe the goods”); *see also, Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1310 (Fed. Cir. 2002) (stating, in dicta, that “a broad general market category is not a generally reliable test of relatedness of products”).

On the other hand, because the parties’ marks are so highly similar, the degree of similarity between the services that is required to support a finding of likelihood

of confusion is reduced. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) (“[E]ven when the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source”); *Time Warner Entm’t. Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002); and *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). “[L]ikelihood of confusion can be found ‘if the respective [goods and services] are 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) (internal citations omitted); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984).

Here, despite the differences between the parties’ services, we find that their similarities, including the “circumstances surrounding their marketing,” as well as the similarities in trade channels and consumers, results in a likelihood of confusion as to the source of the services. The evidence regarding Applicant’s common law use establishes that consumers who purchase a car from Applicant’s WHITE HORSE AUTO, or are aware of WHITE HORSE AUTO and own a car, would by definition be potential customers of Opposer’s WHITE HORSE AUTO WASH, located just two miles away. Similarly, consumers who frequent or are aware of WHITE HORSE AUTO WASH could assume that Opposer expanded to offer used cars or other automobile-related services at the almost identically-named WHITE HORSE AUTO. Some of these consumers could assume that there is but one source of the services.

The marks themselves would seem to suggest this, with WHITE HORSE AUTO apparently identifying a dealership, or another automobile-related business, and WHITE HORSE AUTO WASH seemingly identifying an affiliated carwash. Consumers could very well perceive WHITE HORSE as an “umbrella” mark or name for a group of local automobile-focused businesses each of which provides different goods or services.

Stated differently, the parties’ manner of use of almost identical marks in the automotive field are the most relevant “circumstances surrounding” the marketing of their services, which makes their trademarks and services “likely to be seen by the same persons.” These circumstances could give rise to a mistaken belief that the parties’ services originate from or are associated with the same source. *L.C. Licensing, Inc. v. Berman*, 86 USPQ2d 1883, 1889 (TTAB 2008).

In some ways, this case is analogous to *Int’l Harvester Co. v. BP Corp.*, 181 USPQ 595 (TTAB 1974), in which we found PAY-LO for gasoline and automobile service station services likely to be confused with PAYLOADER for tractors and related products and other PAY-formative marks for trucks and farm and construction equipment. We held that “there is some relationship between the goods and services of the parties in that purchasers and/or operators of construction equipment and trucks bearing one or more of opposer’s marks may well encounter or use one of applicant’s ‘PAY-LO’ service stations selling diesel fuel.” *Id.* at 597. In this case, customers who buy their used cars from Applicant’s dealership may very well encounter or use one of Opposer’s car washes.

In short, while the parties' services are "different from, and thus not related to, one another in kind, the same [services] can be related in the mind of the consuming public as to the origin of the [services]." *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). We find that to be the case here, given that the parties' are offering services in the same general field, under virtually identical marks, and the record reveals that the parties operate in the same small town, two miles apart. This factor also weighs in favor of finding a likelihood of confusion.

Because neither party's identification of services contains any limitations with respect to either channels of trade or classes of consumers, we must presume that the services travel in all channels of trade normal therefor. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) ("An application with 'no restriction on trade channels' cannot be 'narrowed by testimony that the applicant's use is, in fact, restricted to a particular class of purchasers.'"); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). In this case, the channels of trade and classes of consumers overlap to the significant extent that both parties by definition target their sales and advertising to motorists, car owners and car buyers. For example, the record reveals that Opposer advertises a variety of car washing packages, at different price points, with each package including different services, and each costing more for SUVs than sedans. Thus Opposer targets sedan

and SUV owners. 21 TTABVUE 10-12. Applicant sells used sedans and SUVs. *Id.* at 9, 13-22, 24-27.

Furthermore, given the types of businesses in this case, their services are unlike manufactured products or telecommunications services distributed nationwide. Rather, the services are by nature provided primarily locally. Thus, they travel in primarily local trade channels, with Opposer's customers by definition having to bring their cars to Opposer's place of business for a wash, and most of Applicant's customers having to visit Applicant's place of business to negotiate for, or ultimately pick up, a car. In doing so, some are likely to encounter the other business with a similar name, simply by driving by it, or being exposed to, for example, its Warrenton-focused marketing efforts, heightening the likelihood of confusion.⁹ This factor weighs in favor of finding a likelihood of confusion.¹⁰

Finally, we agree with Applicant that the likelihood of confusion is lessened because Applicant's services are significantly more expensive than Opposer's and Applicant's customers are likely to exercise much more care in purchasing than Opposer's customers. At the same time, however, the indicia of a connection between the parties – virtually identical marks, used in the same general field in local trade

⁹ Alternatively, this could be considered “[a]ny other established fact probative of the effect of use,” the 13th *du Pont* factor.

¹⁰ Applicant testified that while some of its customers have found its cars online and traveled long distances to pick them up, for the most part, “if you’re buying a used car, statistics say when you go to cars.com you search within a 50-mile radius and search for the best price. So any dealer within a 50-mile radius that has similar inventory is my competition.” 17 TTABVUE 35 (Ahsan Tr. 29).

channels – are so strong that we would expect even some careful and sophisticated consumers to be confused. On balance, however, this factor weighs against a finding of likelihood of confusion.

VI. Conclusion

While the parties' services are specifically different, the relationship between them is sufficient to establish a likelihood of confusion under the circumstances of this case. Specifically, the marks are almost identical, and travel in the same local trade channels where they are exposed to the same potential consumers, all of which outweigh any consumer sophistication or care. Accordingly, confusion is likely.

Decision: The opposition is sustained on Opposer's likelihood of confusion claim under Section 2(d) of the Trademark Act, and registration of Applicant's mark is refused.