

This Opinion Is Not a
Precedent of the TTAB

Mailed: March 18, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

First Coast Energy, L.L.P.

v.

Dhukani Holdings, LLC

Opposition No. 91231925

John C. McElwaine and Christopher D. Casavale of Nelson Mullins Riley & Scarborough, LLP, for First Coast Energy, L.L.P.

Christopher D. Keirs of Blank Rome LLP,
for Dhukani Holdings, LLC.



Before Adlin, Hightower, and Larkin,
Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

Applicant Dhukani Holdings, LLC seeks registration on the Principal Register of the mark DAILY FILL in standard characters for “retail store services featuring convenience store items and gasoline” in International Class 35.¹ Opposer First Coast Energy, L.L.P. opposes registration under Section 2(d) of the Trademark Act, 15

¹ Application Serial No. 87022465 was filed May 3, 2016, based on Applicant’s 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).

U.S.C. § 1052(d), alleging a likelihood of confusion between Applicant's mark and its DAILY'S-formative marks. Opposer pleaded the following five registrations:²

Mark	Registration No.	Date Issued	Services and International Class
DAILY'S	2900193	11/2/04	Retail store services featuring convenience store items and gasoline (Class 35)
	2848175 ³	6/1/04	Retail store services featuring convenience store items and gasoline (Class 35)
DAILY'S IT'S NICER HERE.	3179065	12/5/06	Retail store services featuring convenience store items and gasoline (Class 35); car washing (Class 37)
	4507094	4/1/14	Restaurant and take-out food services (Class 43)
DAILY'S REWARDS ("rewards" disclaimed)	4917340	3/15/16	Administration of a customer loyalty program which provides incentives in the form of free goods and services based on customer purchases, as well as which provides coupons for discounted convenience store merchandise; Arranging and conducting incentive reward programs to promote the sale of vehicle fuel and convenience store goods and services (Class 35)

² The first three registrations listed have been renewed. All three word marks are either in standard characters or typeset form, the legal equivalent. See TMEP § 807.03(i) (Oct. 2018). Color is not claimed as a feature of any of the marks.

³ Although this registration does not appear on the opposition cover sheet, it is pleaded in the Notice of Opposition and admitted in the Answer. 1 TTABVUE 5-6 ¶ 2; 4 TTABVUE 2-3 ¶ 2.


Opposer also pleaded common-law rights in the mark DAILY'S, in plain and design forms, in connection with “services including retail store services featuring convenience store items and gasoline, and car washing services.” Notice of Opposition ¶ 6, 1 TTABVUE 7.

We sustain the opposition.

I. Accelerated Case Resolution (ACR)

After discovery closed, Opposer filed a motion for summary judgment, which was denied. 12 TTABVUE. Subsequently, the parties entered into a joint evidentiary stipulation providing for introduction into the trial record of declarations and exhibits from the summary judgment motion, as well as printouts of results of searches of the USPTO Trademark Electronic Search System (TESS) database. 14 TTABVUE.

The parties also stipulated to numerous facts. 13 TTABVUE. Some of the most pertinent stipulated facts are:

- Opposer owns common-law rights in the mark . ¶ 4, 13 TTABVUE 3.
- Opposer has used its DAILY'S word mark in connection with retail store services featuring convenience store items and gasoline since at least as early as November 1, 2003. ¶ 6, 13 TTABVUE 3.
- Opposer's services and Applicant's services are similar in nature. ¶ 13, 13 TTABVUE 4.
- Opposer's services and Applicant's services “are/would be marketed to the same class of consumers through the same established, likely-to-continue trade channels.” ¶ 14, 13 TTABVUE 4.
- Opposer operates 37 retail convenience stores under the DAILY'S mark. ¶ 18, 13 TTABVUE 4.

- Opposer’s stores have averaged nearly \$370,000 per store in annual total gross revenue since 2013. Combined, they average nearly 39,000 daily “in store” customer transactions (i.e., convenience store item purchases and restaurant and take-out food purchases), for which customers spend approximately \$11.11 per transaction, and average nearly 34,000 daily “outside” transactions (i.e., gasoline and car washes), for which customers spend approximately \$27.85 per transaction. ¶¶ 19-23, 13 TTABVUE 4.
- Opposer spends more than \$1.1 million annually on advertising and marketing the DAILY’S marks. ¶ 25, 13 TTABVUE 5. The parties also stipulated to numerous specific advertising and marketing activities by Opposer. ¶¶ 26-50, 13 TTABVUE 5-8.

The Board accepts the stipulations and commends the parties for cooperating in their adoption, which expedited adjudication of this proceeding.

II. Record

The record consists of the pleadings and, without any action by the parties, the file of the involved application. Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1).

The record also comprises the evidence summarized below.

A. Opposer’s Evidence

Opposer made the following evidence of record:

- Copies of its five pleaded registrations, which were submitted via current printouts from the USPTO’s Trademark Status & Document Retrieval (TSDR) electronic database attached as Exhibit A to the Notice of Opposition pursuant to Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1). 1 TTABVUE 10-24.
- Testimony declarations of Kenneth Allen, chief financial officer of Opposer’s management company Petro Services, Inc. (“Allen Dec.,” 15 TTABVUE 2-6), and Ralph E. Byrd III, marketing director of Petro Services, Inc. (“Byrd Dec.,” 15 TTABVUE 7-15).
- Three notices of reliance, comprising certain of Applicant’s responses to Opposer’s discovery requests (Notice of Reliance No. 1, Exhibits 1-2, 16 TTABVUE 2-28); documents relating to Opposer’s advertising and marketing (Notice of Reliance No. 2, Exhibits 3-27, 16 TTABVUE 29-186); printouts from third-party gas station/convenience store websites (*id.*, Exhibit 28, 16 TTABVUE 187-202); and dictionary definitions of the word “fill” (Notice of Reliance No. 3, Exhibits 29-31, 17 TTABVUE).

B. Applicant's Evidence

Applicant also submitted three notices of reliance, comprising printouts of the results of searches of the USPTO TESS database (Notice of Reliance No. 1, Exhibits 1-4, 18 TTABVUE 9-26); a dictionary definition of the word "daily" (Notice of Reliance No. 2, Exhibit 5, 18 TTABVUE 2-8); and TESS printouts of three third-party registrations, discussed below (Notice of Reliance No. 3, Exhibits 6-8, 20 TTABVUE).

III. Opposer's Standing and Priority

Standing is a threshold issue that must be proven by the plaintiff in every *inter partes* case. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); see also, e.g., *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1344 (TTAB 2017). Opposer's standing to oppose registration of Applicant's mark is established by its pleaded registrations, which the record shows to be valid and subsisting, and owned by Opposer. See, e.g., *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 (TTAB 2015).

Because Opposer's pleaded registrations are of record, and Applicant has not counterclaimed to cancel any of them, priority is not at issue with respect to the marks and services identified in Opposer's pleaded registrations. Opposer also has established priority at common law in connection with retail store services featuring convenience store items and gasoline. Indeed, the parties stipulated that Opposer has used the DAILY'S word mark since at least as early as November 1, 2003, in connection with those services, and that Applicant has not yet commenced use in

commerce of the DAILY FILL mark. Joint Stipulations of Fact ¶¶ 6, 15, 13 TTABVue 3-4. Opposer's first use was long before Applicant's constructive use priority date of May 3, 2016, when it filed its application under Trademark Act Section 1(b).

Because Opposer has established its standing and priority as to its pleaded marks, we turn to the question of likelihood of confusion.

IV. Likelihood of Confusion

Our determination under Trademark Act Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods or services, the first two *du Pont* factors. *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."). Opposer bears the burden of proving its claim of likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848.

We focus our likelihood of confusion analysis on Opposer's pleaded mark DAILY'S for "retail store services featuring convenience store items and gasoline," Registration No. 2900193. If we find that there is a likelihood of confusion between this mark and Applicant's mark DAILY FILL, there is no need for us to consider the likelihood of confusion with Opposer's other pleaded marks. Conversely, if we find there is no

likelihood of confusion with this mark, we would find no likelihood of confusion with Opposer's other pleaded marks, each of which contains additional matter that may distinguish it from Applicant's mark. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010). We address in turn each of the *du Pont* factors bearing on our decision for which the parties submitted evidence or argument.

A. Similarity of the Services, Customers, and Channels of Trade

We begin with the second and third *du Pont* factors, assessing the similarity or dissimilarity of the parties' services and their trade channels. The services identified in the subject application and Opposer's Registration No. 2900193 are identical: "retail store services featuring convenience store items and gasoline." We must presume that these identical services are offered in the same channels of trade to the same classes of purchasers. *See, e.g., In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1437 (TTAB 2014). The parties, moreover, stipulated that their services are similar in nature and marketed to the same class of consumers through the same trade channels. Joint Stipulations of Fact ¶¶ 13-14, 13 TTABVUE 4. The second and third *du Pont* factors weigh heavily in support of a finding that confusion is likely.

B. Conditions of Purchase

The fourth *du Pont* factor is the "conditions under which and buyers to whom sales are made i.e., 'impulse' vs. careful, sophisticated purchasing." *du Pont*, 177 USPQ at 567. The parties stipulated that Opposer's customers spend approximately \$11.11 per transaction on convenience store and food purchases, and \$27.85 per transaction on

gasoline and car washes. Joint Stipulations of Fact ¶¶ 20-23, 13 TTABVUE 4. These types of transactions are commonplace and relatively inexpensive, and by their nature convenience store purchases are often prompted by impulse or immediate need. “Purchaser sophistication may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1695 (Fed. Cir. 2005); *see also Starbucks U.S. Brands, LLC v. Ruben*, 78 USPQ2d 1741, 1752 (TTAB 2006) (finding that consumers devote limited attention to the purchase of inexpensive goods and services and thus are more susceptible to confusion). We find that the fourth *du Pont* factor also weighs in favor of a likelihood of confusion.

C. Strength of Opposer’s Mark

We next analyze the strength of Opposer’s mark to determine the scope of protection to which it is entitled. The fifth *du Pont* factor is the fame of the prior mark, and the sixth factor is the number and nature of similar marks in use for similar goods or services.

In determining a mark’s strength, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition. *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014); *see also In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength

(distinctiveness) and its marketplace strength (secondary meaning).”).⁴ Commercial strength may be measured indirectly, by volume of sales and advertising expenditures and factors such as length of use of the mark, widespread critical assessments, notice by independent sources of the goods identified by the mark, and general reputation of the goods. *Weider Publ’ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1354 (TTAB 2014).

1. Sales, Advertising, and Length of Use of Opposer’s Mark

The record indicates that Opposer’s mark likely has some consumer recognition, even if only in Florida. Opposer has used its mark for more than 15 years and operates 37 DAILY’S stores, all in Florida, with average annual gross revenue exceeding \$369 million per year. Allen Dec. ¶¶ 3, 5, 15 TTABVUE 3-4; *see also* Joint Stipulations of Fact ¶¶ 6-7, 18, 13 TTABVUE 3-4. Customers transact business with Opposer on average more than 73,000 times per day. Allen Dec. ¶ 6, 15 TTABVUE 4; Joint Stipulations of Fact ¶¶ 20-21, 13 TTABVUE 4. As noted above, the parties stipulated that Opposer spends more than \$1.1 million annually on marketing and advertising. Joint Stipulations of Fact ¶ 25, 13 TTABVUE 5. Opposer’s promotional activity appears to be targeted to the Jacksonville, Florida area, where it is based. *See* Joint Stipulations of Fact ¶¶ 26-50, 15 TTABVUE 5-8; *see also* Byrd Dec. ¶¶ 13-37, 15 TTABVUE 10-13. Its sponsorship of THE PLAYERS Championship on the PGA Tour,

⁴ Citing cases from the U.S. Court of Appeals for the Sixth Circuit, Opposer argues that marks with incontestable status are presumed to be conceptually strong. Opposer’s Brief at 17-18, 22 TTABVUE 27-28. In Board proceedings, the fact that a federally registered mark has achieved incontestable status “means that it is conclusively considered to be valid, but it does not dictate that the mark is ‘strong’ for purposes of determining likelihood of confusion.” *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031, 1036 (TTAB 2010).

however, likely has a broader reach; the majority of fans who attend the golf tournament come from outside the Jacksonville area. *See* Joint Stipulations of Fact ¶¶ 32-34, 15 TTABVUE 6.

2. Third-Party Registration and Use of Similar Marks

Opposer's mark DAILY'S is registered on the Principal Register without a showing of acquired distinctiveness and therefore presumed to be inherently distinctive under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b). *See Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006).

Third-party registrations may be relevant to show the sense in which a mark is used in ordinary parlance; that is, an element common to both parties' marks may have a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is inherently relatively weak. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *see also In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) (“[T]hird-party registrations are relevant evidence of the inherent or conceptual strength of a mark or term because they are probative of how terms are used in connection with the goods or services identified in the registrations.”). In addition, evidence of third-party use of similar marks on similar goods can show that customers have been educated to distinguish between different marks on the basis of minute distinctions. *Jack Wolfskin*, 16 USPQ2d at 1136 (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)).

Applicant does not contend that DAILY'S has a descriptive meaning in association with the parties' services. Rather, Applicant argues that Opposer's marks are entitled to a narrow scope of protection in view of three third-party registrations – two with the same owner – incorporating the term DAILY for retail convenience store services in International Class 35. Applicant's Brief at 7-9, 23 TTABVUE 8-10. These are DAILY PIX for “retail convenience store services featuring a section of the store for merchandising the most routinely purchased items,” owned by Publix Asset Management Company (Registration No. 2743806); and TWICE DAILY and TWICEDAILY, both for “retail convenience stores,” owned by Tri Star Energy, LLC (Registration Nos. 4106913 and 4106914). 20 TTABVUE 2-10.

This evidence shows that two third parties have registered marks incorporating DAILY for retail convenience store services. It does not, however, support any conclusions about use of those marks; the manner, nature, or extent of any use; or consumer exposure to the marks. *See, e.g., Palm Bay*, 73 USPQ2d at 1693.

Although we find this evidence probative, we do not find it sufficient to establish that DAILY formatives are so widespread for convenience stores that consumers have come to distinguish marks containing them based on minute differences. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (stating that evidence of third-party use “falls short of the ubiquitous or considerable use of the mark components present in [applicant's] cited cases”) (quotations omitted); *cf. Jack Wolfskin*, 116 USPQ2d at 1136 (discussing “voluminous evidence” of registration and use of paw print design elements); *Juice Generation*, 115 USPQ2d at 1674-75 (referencing evidence of “a fair number” of third-party marks).

Applicant also submitted printouts of the results of four different searches of the TESS database for marks incorporating the term DAILY in International Class 35. 18 TTABVUE 9-26. Except for the three registrations noted above, the registrations listed are not of record, and the lists have little, if any, probative value. We cannot determine from mere listings like this the precise nature of the services.⁵ See, e.g., *Edom Labs., Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012). Furthermore, some of the search results include applications, which are evidence of nothing more than that they were filed with the USPTO. See, e.g., *In re Binion*, 93 USPQ2d 1531, 1535 n.3 (TTAB 2009). And many of the marks listed appear to contain substantial additional matter.

3. Conclusion as to Strength of Opposer's Mark

Considering the record as a whole, Opposer's mark is inherently distinctive and likely has some consumer recognition. We find no evidence that Opposer's mark has a descriptive meaning in association with retail convenience store services featuring convenience store items and gasoline. At most, DAILY-formative marks may suggest that consumers avail themselves of such services frequently. Also, we find three third-party registrations for marks incorporating the term DAILY for such services, with no evidence of actual use, insufficient to limit the scope of protection due to Opposer's inherently distinctive mark. Applicant has not shown that Opposer's mark DAILY'S is so weak that it is entitled only to a narrow scope of protection.

⁵ We observe, however, that the most relevant search – for live applications and registrations on the Principal Register for services in Class 35 containing the word “convenience” – returned only eight results: the subject application, four of Opposer's pleaded registrations, and the three third-party registrations discussed above. 18 TTABVUE 16.

The fifth and sixth *du Pont* factors are neutral. We accord Opposer's mark the normal scope of protection afforded to inherently distinctive marks.

D. Similarity of the Marks

Finally, we consider the first *du Pont* factor, the similarity of the parties' marks. We bear in mind that where, as here, the marks would be used in association with services that are identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

In a likelihood of confusion analysis, we compare the marks in their entireties for similarities and dissimilarities in appearance, sound, connotation and overall commercial impression. *Palm Bay*, 73 USPQ2d at 1691. "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) (quotation omitted). The similarity of the marks is determined based on the marks in their entireties, so our analysis is not predicated on dissecting the marks into their various components. *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1353 (TTAB 2015).

On the other hand, in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.

In re Nat'l Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *See, e.g., Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016). Here, the average consumer is a convenience store customer, whom we found above to exercise a lesser degree of purchasing care.

Applicant argues that its mark and Opposer's make different commercial impressions: "DAILY FILL is a common expression for a quantity that satiates for a 24-hour period. DAILY'S is a possessive that implies a business owned or operated by a person named Daily." Applicant's Brief at 4, 23 TTABVUE 5.

We agree that under our precedent, use of the possessive in Opposer's mark DAILY'S may contribute to a perception that it is a surname. *See, e.g., In re Beds & Bars Ltd.*, 122 USPQ2d 1546, 1551 (TTAB 2017). Yet we also have found that marks may not be meaningfully distinguished by use of the same term in possessive form. *See, e.g., Sw. Mgt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1024 (TTAB 2015); *cf. In re Binion*, 93 USPQ2d at 1534 ("The absence of the possessive form in applicant's mark BINION has little, if any, significance for consumers in distinguishing it from the cited mark," BINION'S ROADHOUSE); *Winn's Stores, Inc. v. Hi-Lo, Inc.*, 203 USPQ 140, 143 (TTAB 1979) (finding confusion likely between composite marks WIN-WAY DOLLAR STORE and WINN'S for retail variety store services). There is no evidence that anyone associated with Opposer has the surname "Daily," and the dictionary definition of record does not refer to "Daily" as a surname. 18 TTABVUE 5-8. We cannot conclude on this record that consumers necessarily will perceive Opposer's mark to be the possessive form of that name. Our analysis must take into

account the fact that “daily” also is a common word that is suggestive in association with the identified services and could be perceived as conveying this meaning even in possessive form.

As for Applicant’s mark, there is no evidence that DAILY FILL is a common expression. The first word, DAILY, is nearly identical to Opposer’s entire mark, DAILY’S. The lead element in a mark has a position of prominence; it is likely to be noticed and remembered by consumers and so to play a dominant role in the mark. *See, e.g., In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (“The identity of the marks’ initial two words is particularly significant because consumers typically notice those words first.”); *Palm Bay*, 73 USPQ2d at 1696 (affirming holding of likely confusion between VEUVE ROYALE for sparkling wine and VEUVE CLICQUOT and VEUVE CLICQUOT PONSARDIN for champagne); *Century 21*, 23 USPQ2d at 1700 (stating that, “upon encountering each mark, consumers must first notice this identical lead word”). The nearly identical shared lead term creates similarities in appearance, sound, and meaning between Applicant’s and Opposer’s marks when they are considered in their entireties.

While there is no rule that likelihood of confusion automatically arises where Applicant’s mark encompasses Opposer’s mark, here, the fact that Opposer’s mark is essentially subsumed by Applicant’s mark increases the similarity in overall commercial impression between the two. *See, e.g., In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (affirming decision finding ML similar to ML MARK LEES); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406, 407 (CCPA 1967) (affirming that THE LILLY is likely to be confused with

LILLI ANN); *Coca-Cola Bottling Co. of Memphis, Tenn., Inc. v. Joseph E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL LANCER likely to cause confusion with BENGAL); *Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1660-61 (TTAB 2014) (finding PRECISION similar to PRECISION DISTRIBUTION CONTROL); *In re El Torito Rests. Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (MACHO COMBOS confusingly similar to MACHO); *Johnson Publ'g Co. v. Int'l Dev. Ltd.*, 221 USPQ 155, 157 (TTAB 1982) (EBONY DRUM likely to cause confusion with EBONY).

For all these reasons, we find that consumers of retail store services featuring convenience store items and gasoline, who are likely to shop on impulse and retain only a general impression of marks, would be likely to assume a connection between the parties due to the similarity of the marks DAILY'S and DAILY FILL, considered in their entireties. The first *du Pont* factor also supports a finding that confusion is likely.

E. Conclusion

We have carefully considered all arguments and evidence properly of record, including any not specifically discussed herein, as they pertain to the relevant likelihood of confusion factors. To the extent that any other *du Pont* factors for which no evidence was presented by Opposer or Applicant nonetheless may be applicable, we treat them as neutral.

We have found that the parties' recited services, customers, and channels of trade are identical; their services are inexpensive and subject to impulse purchase; Opposer's marks are entitled to the normal scope of protection accorded inherently

distinctive marks; and the parties' marks are sufficiently similar that persons who encounter them would be likely to assume a connection between the parties.

Considering the record as a whole, we find that Opposer has carried its burden to establish by a preponderance of the evidence that Applicant's mark DAILY FILL is likely to cause consumer confusion with Opposer's mark DAILY'S when used in association with the services identified in the application.

Decision: The opposition to registration of application Serial No. 87022465 is sustained.