

Response to Office Action

The table below presents the data as entered.

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LAW OFFICE ASSIGNED	LAW OFFICE 120
MARK SECTION	
MARK	https://tmng-al.uspto.gov/resting2/api/img/88119700/large
LITERAL ELEMENT	SCENT TRUNK
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font style, size or color.
ARGUMENT(S)	
Arguments attached as PDFs.	
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DESCRIPTION OF EVIDENCE FILE	Arguments and evidence in support of Applicant's mark are attached as PDFs/Jpegs.
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RESPONSE SIGNATURE	/Kate Montgomery/
SIGNATORY'S NAME	Kate Montgomery
SIGNATORY'S POSITION	Attorney of Record, Arizona Bar Member
SIGNATORY'S PHONE NUMBER	6503906452
DATE SIGNED	04/18/2019
AUTHORIZED SIGNATORY	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Thu Apr 18 14:54:29 EDT 2019
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Response to Office Action

To the Commissioner for Trademarks:

Application serial no. **88119700** SCENT TRUNK(Standard Characters, see <https://tmng-al.uspto.gov/resting2/api/img/88119700/large>) has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

Arguments attached as PDFs.

EVIDENCE

Evidence in the nature of Arguments and evidence in support of Applicant's mark are attached as PDFs/Jpegs. has been attached.

Original PDF file:

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Converted PDF file(s) (19 pages)

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[Evidence-3](#)

[Evidence-4](#)

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[evi_184176140165-20190418132238254562 . Exhibit II.pdf](#)

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SIGNATURE(S)

Response Signature

Signature: /Kate Montgomery/ Date: 04/18/2019

Signatory's Name: Kate Montgomery

Signatory's Position: Attorney of Record, Arizona Bar Member

Signatory's Phone Number: 6503906452

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the owner's/holder's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the owner/holder in this matter: (1) the owner/holder has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the owner/holder has filed a power of attorney appointing him/her in this matter; or (4) the owner's/holder's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

Serial Number: 88119700

Internet Transmission Date: Thu Apr 18 14:54:29 EDT 2019

TEAS Stamp: USPTO/ROA-XXX.XXX.XXX.XXX-20190418145429

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**Applicant’s Response to Office Action
Trademark Act Section 2(d) - 15 U.S.C. § 1052(d)**

Pursuant to 15 U.S.C. § 1062(b), the Applicant (Serial No. 88119700) responds to the Oct 18, 2018 office action (the “Office Action”) refusing registration under Trademark Act Section 2(d) on the grounds that Applicant’s mark, when used in connection with the identified services so resembles the mark in U.S. Registration No. 3325239 (the “Cited” mark) as to be likely to cause confusion, to cause mistake, or to deceive. Applicant disagrees with this conclusion and in further support of its original application (the “Application”), respectfully submits the following response, requesting that the Examining Attorney reconsider the refusal of the Application.

I. Applicant’s Mark

Applicant seeks protection for the standard character mark containing the literal elements: SCENT TRUNK. This Application fits into International Class 003 for “Fragrances; Perfumes and colognes; Custom fragrances and perfumes” and International Class 035 for “Subscription-based online fragrance or perfume delivery services”.

The examining attorney requested the applicant to disclaim the wording "SCENT" on the grounds it merely describes an ingredient, quality, characteristic, function, feature, purpose or use of applicant's goods. The Applicant disagrees with this conclusion. According to the record on TESS, 60 marks registered in class 003 whose products include perfumes do not disclaim the wording "SCENT". See *Exhibit I*. This fact strongly support the conclusion that the word “SCENT” is not descriptive. Instead, it requires multiple stages for a consumer to build connections between the word “SCENT” and perfumes or fragrances, Here, “scent” is used ironically as someone can have “sent” a trunk or a trunk can have a certain smell.. Thus, applicant believes maintaining the exclusive right to use "SCENT" since the word is not merely descriptive.

II. The Nature of the Mark the Examining Attorney Concluded Could Lead to Confusion, Mistake, or Deception under 15 U.S.C. § 1052(d)

U.S. Registration No. 3325239

The mark covered by this registration is a standard character mark containing the literal elements: TRUNK. This mark fits into International Class 035 for “Retail store services in the field of general merchandise; namely, men's, women's and children's clothing.”

III. Explanation of the *DuPont* Multi-Factor Test for the Purpose of Determining Whether Confusion, Mistake, or Deception is Likely

In an *ex parte* proceeding, the primary considerations in determining whether marks are confusingly similar are the similarity or dissimilarity of the marks in appearance, sound, connotation, and commercial impression; and the similarity or dissimilarity of the goods and/or services. *In re E.I. Du Pont Demours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) and TMEP § 1207.01. In addition to these two factors, any of the other eleven factors listed in *Du Pont*, when made of record, must also be considered. *In re Dixie Restaurants*, 105 F.3d 1405, 1406, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997); *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 640 (TTAB 1984) and TMEP § 1207.01.

Here, Applicant's mark is distinguished from the Cited mark. The first words in the two marks, which are also the dominant elements in the marks, are completely different. The Cited mark is only about half the length of Applicant's mark. The two marks are also significantly different in pronunciation and commercial impression. Besides, Applicant's goods and services are quite different from the Cited registrant's services. Applicant's mark is used on perfumes and delivery of perfumes subscribed online while the Cited mark is used on retailing apparel services. Consequently, Applicant's registration is unlikely to cause any consumer confusion.

IV. Application of the Relevant *DuPont* Factors to the Pending Application

Based on the differences between the appearance, sound, and connotation of the marks, as well as the differences between the services and other factors as explained and outlined below, there is no likelihood of consumer confusion between the marks.

A. Comparing Applicant's Mark with Relevant Registered Marks in Their Entireties Reveals Significant Differences that Make Consumer Confusion Unlikely.

DuPont requires the examining attorney to compare the marks in their entireties for similarities and dissimilarities in appearance, sound, and meaning or connotation.¹ The Trademark Trial and Appeals Board ("TTAB") has held that "Similarity of the marks in one respect – sight, sound, or meaning – will not automatically result in a determination that confusion is likely even if the goods are identical or closely related."² An Examining Attorney must determine whether the total effect conveyed by the two marks is confusingly similar, not

¹ See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); TMEP § 1207.01(b)-(b)(v); *In re 1st USA Realty Professionals, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007) (An examining attorney "must compare the marks in their entireties" whenever evaluating their potential for confusion.).

² *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

simply whether the marks have similar features.³ According to Section 1 of the Lanham Act §1, when comparing design marks in the similarity-of-the-marks, likelihood of confusion is determined on the basis of the total effect of the designation, rather than a comparison of individual features.⁴

i. *The Marks Differ in Appearance.*

Where dominant terms are to be considered, consumers are generally more inclined to focus on the first word, prefix, syllable, or element in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *See also Mattel Inc. v. Funline Merch. Co.*, 81 USPQ2d 1372, 1374-75 (TTAB 2006); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions). The first word of Applicant’s mark differs from Cited, allowing consumers to better distinguish between the mark.

The word SCENT in Applicant’s mark is not descriptive to the goods or services provided by the Applicant. As discussed above, there are more than 60 registered marks in International Class 003 for perfumes use the word “SCENT” without disclaiming it. Also, this word does not directly describe a characteristic or an ingredient of Applicant’s goods or services. Generally, “Scent” only connotes a distinctive odor without discerning whether the odor is pleasant or nasty. Only pleasant and attractive odors could be extracted for the purpose of making perfumes. Thus, it takes consumers at least two steps to build a connection between the word “SCENT” and perfumes.

The word “SCENT” is distinctive as applied to Applicant’s services. The first word which is also inherently distinctive should be the dominant term in a mark. Here, the dominant term in Applicant’s mark is SCENT and the dominant word in the Cited mark is TRUNK. The two words are totally different in their spellings and meanings. The word SCENT means a distinctive odor and the ability to sense the odor. In contrast, TRUNK means the main stem of a tree or a compartment in the rear of a car. Clearly, there is no connection in meaning between the two words.

³ “All relevant facts pertaining to appearance, sound, and connotation must be considered before similarity as to one or more of those factors may be sufficient to support a finding that the marks are similar or dissimilar.” *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *See also General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627 (8th Cir. 1987), *Sensient Technologies Corp. v. SensoryEffects Flavor Co.*, 613 F.3d 754 (8th Cir. 2010); *Boston Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1 (1st Cir. 2008); 15 U.S.C.A. § 1051.

⁴ *Id.*

Looking at the literal elements, Applicant's mark is not similar in terms of appearance to the Cited mark. While Applicant's mark is made up of 10 letters, the Cited mark is only made up of 5 letters. Applicant's mark is made up of 2 words while the Cited mark is made up of a single word. Visually, the literal elements of Applicant's mark differ the Cited mark starkly.

Viewing the marks in their entirety reveals differentiations between Applicant's mark and any Cited mark. Because the marks are dissimilar in appearance, customer confusion as to source is unlikely.

ii. *The Marks Differ in Sound and Pronunciation.*

It has been held that a difference in the sound between two marks may exist given a difference in the number of syllables between the two-word portions of a mark. See *Parfums de Coeur, Ltd. v. Lory Lazarus*, 83 USPQ2d 1012 (TTAB 2007). In this case, the marks differ phonetically as Applicant's mark is made up of 2 syllables while the Cited mark is made up of 1 syllable. Applicant contains the "l's" and "ent" sounds, which are not present or pronounced in the Cited mark.

Even if descriptive portions of a mark are disregarded elsewhere in this analysis, descriptive portions would still appear on all of the relevant offerings and be seen and thus pronounced by consumers. Thus, Applicant's mark coupled with the wording SCENT still has half of additional wording needing to be pronounced compared to simply TRUNK. Additionally, the totally different pronunciations of the first words in the two marks make the two marks even more dissimilar. The pronunciation is therefore dissimilar and no source confusion could take place.

Even if the marks were phonetically similar — which they are not — there would still be no likelihood of confusion because other differentiating factors are present. See *Nat'l Distillers & Chem. Corp. v. William Grant & Sons*, 505 F.2d 719, 184 USPQ 34 (C.C.P.A. 1974) (finding that DUVET and DUET did not have a likelihood of confusion). Ultimately, as outlined in *DuPont* and other jurisprudence above, an ultimate determination on likelihood of confusion must take into account all the various relevant factors. See also *In re National Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 750-51 (Fed. Cir. 1985) ("The basic principle in determining confusion between marks is that marks must be compared in their entireties and must be considered in connection with the particular goods or services for which they are used"). In sum, the differences in sound and pronunciation among Applicant's and the Cited marks make consumer confusion unlikely.

iii. *The Marks Have Significantly Different Connotations and Commercial Impressions.*

The similarity or dissimilarity in meaning or connotation is another factor in determining whether there is a likelihood of confusion. TMEP § 1207.01(b)(v). The meaning or connotation of a mark must be determined in relation to the named goods or services. *Id.* Whether customers can distinguish the marks in a side-by-side comparison is not the test, instead our inquiry is “whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods and services offered under the respective marks is likely to result.” *Lacoste Alligator S.A. v. Maxoly, Inc.*, 91 USPQ2d 1594, 1598 (TTAB 2009).

In cases where two marks are identical in appearance or sound, differences in connotation between the marks can be sufficient to obviate any likelihood of consumer confusion. *See In re Sears, Roebuck and Co.*, 2 USPQ2d 1312, 1314 (TTAB 1987) (finding that CROSS-OVER when applied to bras carried different connotation and/or commercial impression from CROSSOVER as applied to women’s sportswear); *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984) (finding that PLAYERS for men’s underwear carried different connotation and/or commercial impression from PLAYERS for shoes); *In re Sydel Lingerie Co., Inc.*, 197 USPQ 629, 630 (TTAB 1977) (finding that BOTTOMS UP for ladies’ and children’s underwear held a different connotation or commercial impression from BOTTOMS UP for men’s clothing).

In the *Taj Mahal* case, the marks at issue were TAJ MAHAL for an Indian restaurant and TAJ MAHAL for a casino-hotel resort. *See Taj Mahal Enterprises, Ltd. v. Trump*, 745 F.Supp. 240, 16 USPQ2d 1577 (D.N.J. 1990). The court held that there was no likelihood of confusion, as the mark TAJ MAHAL for restaurants is suggestive of Indian food, while TAJ MAHAL for casino-hotel evokes images of grandeur, opulence and extravagance. *Id.*

While Applicant’s mark, SCENT TRUNK, connotes the odor of woods, which belongs to one of the classic fragrance families, the Cited Mark, TRUNK, connotes the cases or boxes used to contain clothes or other personal articles.

Connotation and significance can be determined based upon a mark holder’s current use in commerce. *In re Nationwide Industries*, 6 USPQ2d 1882, 1884 (TTAB 1984) (“Thus, it is settled that evidence of the context in which a mark is used on labels, packaging, advertising, etc., is probative of the significance which the mark is likely to project”); *See 7-Eleven, Inc. v. Lawrence I. Wechsler*, 83 USPQ2d 1715, 1721 (TTAB 2007). The fact that the Cited mark is used in commerce in connection with retailing apparels, which is largely different from producing and selling fragrance, further supports that the Cited mark has a different connotation than Applicant’s mark.

Shared words with “normally understood and well-known meanings . . . may be an insufficient basis on which to predicate a holding of confusing similarity.” See *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066 (TTAB 2011) (internal quotations omitted); *Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313, 1315-17 (TTAB 2005). The word TRUNK has a well-known meaning as the boxes for holding or transporting clothes, personal effects or other articles and is widely used by mark owners for their retailing services. A search on TESS shows there are 23 other registered live marks in International Class 035 that contain the word TRUNK. TESS Search terms: (trunk)[bi,ti] and (registrant)[ow] and (live)[ld] and (035)[ic]. See *Exhibit II*.

In sum, the commercial context of the Applicant’s mark differs from that of the Cited mark. Such differences in commercial contexts weigh against a finding of likelihood of confusion between the marks.

B. Applicant’s Offerings are Sufficiently Different from the Cited Offerings.

The second *DuPont* factor evaluates the similarity or dissimilarity of the goods and services offered under the respective marks. To sustain a finding of likelihood of confusion, the goods or services at issue must be “related in some matter and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1370, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (“there is nothing in the record to suggest that a purchaser of test preparation materials who also purchases a luxury handbag would consider the goods to emanate from the same source”). The inquiry is whether the relevant goods and services could be related “in the mind of the consuming public” such that source confusion would occur. See *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1358, 56 USPQ2d 1351, 1355 (Fed. Cir. 2000). An examining attorney must “provide evidence showing that the goods and services are related to support a finding of likelihood of confusion.” TMEP § 1207.01(a)(vi).

i. *The Applicable Standard of Relatedness*

In circumstances where the goods or services in question “are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely.” TMEP § 1207.01(a)(i).

To establish that identified items are related, “it is not sufficient that a particular term may be found which may broadly describe” them. *In re The W.W. Henry Co., L.P.*, 82 USPQ2d 1213, 1215 (TTAB 2007). “That two goods are used together . . . does not, in itself, justify a

finding of relatedness.” *Shen Manufacturing Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1244, 73 USPQ2d 1350, 1355 (Fed. Cir. 2004) (no likelihood of confusion between RITZ for cooking classes and RITZ for kitchen textiles). That the same customer could seek out relevant goods or services is also insufficient for a finding of relatedness. *See Local Trademarks, Inc. v. Handy Boys Inc.*, 16 USPQ2d 1156, 1158 (TTAB 1990) (“even though opposer’s services and applicant’s product are or can be marketed to the same class of customers . . . these services and goods are so different that confusion is not likely even if they are marketed under the same mark”).

“Merely because parties operate in the same broad industry does not, by itself, establish that their goods and services are related.” *National Rural Electric Cooperative Ass’n v. Suzlon Wind Energy Corp.*, 78 USPQ2d 1881, 1885 (TTAB 2006); *See Steve’s Ice Cream, Inc. v. Steve’s Famous Hot Dogs*, 3 USPQ2d 1477 (TTAB 1987). Being filed in the same class or presumably available to the same class of purchasers is also not a sufficient basis to conclude that identified items are related. *7-Eleven, Inc. v. Lawrence I. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007); *See In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009).

Simply because Applicant and the Cited mark operate generally in the broad industry of fashion does not establish that the goods are related. Perfumes and clothes serve different purposes. Perfume is used in homes, cars, offices, and not just applied to the body like clothing. Perfumes impart appealing smells to people while clothes protect human bodies and change people’s visual images.

ii. *The Goods and Services at Issue Are Not Related.*

Here, Applicant’s goods are perfumes and Applicant provides subscription-based online fragrance or perfume delivery services. In contrast, the Cited registrant’s services are retail store services in the field of general merchandise; namely, men’s, women’s and children’s clothing. Clearly, perfumes are substantially different from clothes. Generally, in department stores, fragrances or perfumes are placed together with personal care products and clothes are in different sections. Also, in e-commerce marketplaces such as Amazon, perfumes and clothes are listed under different categories. On Amazon, perfumes are listed under Beauty & Personal Care while clothes are listed under Clothing, Shoes, Jewelry & Watches. On eBay, perfumes are listed under Health & Beauty while clothes are listed under Clothing, Shoes & Accessories. *See Exhibit III.*

iii. *The Third Party Evidence Offered by the Examining Attorney Is Not Sufficient to Establish That the Goods/Services Are Related.*

Examining Attorney has made a finding that Applicant's goods and services and the Cited services are related based upon third-party websites that indicate both "words Examining Attorney searched to connect third-party registrations to Applicant's mark and Cited marks."

Attempting to establish relatedness of goods and services on the exclusive basis of third party website evidence is generally disfavored by the Board. *See In re Shane Marquess*, Serial No. 86478749, (TTAB 2016) (non-precedential). Similarly, the third-party websites cited by the Examining Attorney shall not be accorded more than de minimis weights in establishing the relatedness between the Cited services and Applicant's goods and services.

Further, "[i]t 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." *Carl Walther GmbH and Umarex Sportwaffen GmbH & Co., KG v. Catharina Herriger*, Opposition No. 91215976 (TTAB 2017) (non-precedential), (citing *Morgan Creek Productions, Inc. v. Foria International, Inc.*, 91 USPQ2d 1134 (TTAB 2009) and finding different pages from Walmart's site unpersuasive as to relatedness.). *See also In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). "[W]e recognize that the mere fact that disparate products are sold in the same retail outlets does not, standing alone, establish that the goods are related for purposes of determining the likelihood of confusion." *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 U.S.P.Q.2d 1464, 1472 (T.T.A.B. 2016). The Examining Attorney cited the goods offered on the websites of Target and Walmart to show Applicant's goods and the Cited goods are related. However, both Target and Walmart are mass merchandisers that sold a wide range of products. The mere fact that fragrances and clothing are listed on their websites is insufficient does not support a conclusion that Applicant's fragrances are related to the Cited registrant's clothing.

Third party items presented in this case do not meet the applicable standard, and do not establish that the goods and services are related. It is not enough to find a particular term that may broadly define the offerings. *See General Electric Co. v. Graham Magnetics Inc.*, 197 USPQ 690 (TTAB 1977); *Harvey Hubbell Inc. v. Tokyo Seimitsu Co., Ltd.*, 188 USPQ 517 (TTAB 1975). An examination of the specific items in the identification is required. In *W.W. Henry Co.* the Board evaluated two marks that were "virtually the same" and held the goods at issue were not related despite five third-party registrations provided by the examining attorney. *In re The W.W. Henry Co., L.P.*, 82 USPQ2d 1213, 1214 (TTAB 2007). The Board explicitly discounts third-party evidence that is not indicative of actual use, and evidence that does not include the items listed in both identifications. *Id.*

1. Third Party Evidence Provided by the Examining Attorney Is of Little to No Significance Because It Covers a Wide Range of Offerings.

Evidence offered forth to show that products are related that comes from entities where a wide variety of goods and services are sold is of little to no value. *See In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). Third party registrations that contain “laundry lists” of goods and services are not commonly seen as persuasive evidence that two products are related. *Id.* Here, the Examining Attorney has presented items of third party evidence that each cover a wide swath of products and services. As such, each item is of little to no value in establishing that the offerings are related.

- Website: <https://www1.victoriasecret.com> - This third-party evidence is for Victoria’s Secret and due to the wide variety of goods sold on their website this evidence should constitute a “laundry list” and have little to no persuasive value. Goods unrelated to those at issue include body lotion, body wash, dry shampoo, body scrub, sponge, facial masks, backpacks, clutches, wallets keychains, passport case, and water bottles. *See Exhibit IV.* This wide variety of goods/services that are unrelated to the goods/services at issue shows that this evidence constitutes a “laundry list” that should not be seen as persuasive evidence.
- Website: <https://www.ralphlauren.com> - This third-party evidence is for Ralph Lauren and due to the wide variety of goods sold on their website this evidence should constitute a “laundry list” and have little to no persuasive value. Goods unrelated to those at issue include pillows, towels, bedding sets, wine totes, candles, plates, dinnerware, lighting, furniture, bar ware, coffee, watches, handbags, toys. *See Exhibit V.* This wide variety of goods that are unrelated to the goods at issue shows that this evidence constitutes a “laundry list” that should not be seen as persuasive evidence.
- Website: <https://bananarepublic.gap.com> - This third-party evidence is for Banana Republic and due to the wide variety of goods sold on their website this evidence should constitute a “laundry list” and have little to no persuasive value. Goods unrelated to those at issue include handbags, jewelry, sunglasses, umbrellas, shampoos, conditioners, face washes, and combs. *See Exhibit VI.* This wide variety of goods that are unrelated to the goods at issue shows that this evidence constitutes a “laundry list” that should not be seen as persuasive evidence.
- Website: <https://www.target.com> - This third-party evidence is for Target and due to the wide variety of goods sold on their website this evidence should constitute a “laundry list” and have little to no persuasive value. Goods unrelated to those at issue include baby nursery, diapers, furniture, kitchenware, dinnerware, electronics, toys, groceries,

household essentials and etc. *See Exhibit VII.* This wide variety of goods that are unrelated to the goods at issue shows that this evidence constitutes a “laundry list” that should not be seen as persuasive evidence.

- Website: <https://www.walmart.com> - This third-party evidence is for Walmart and due to the wide variety of goods sold on their website this evidence should constitute a “laundry list” and have little to no persuasive value. Goods unrelated to those at issue include toys, electronics, video games, sports equipment, furniture, kitchenware, beddings, mattress, house cleanings, rugs, lightings, jewelry, watches, outdoor equipment, home improvements, tires, foods and etc. *See Exhibit VIII.* This wide variety of goods that are unrelated to the goods at issue shows that this evidence constitutes a “laundry list” that should not be seen as persuasive evidence.

Additionally, the Examining Attorney has not shown that perfume is sold under the same brand name of the clothing or retail store services. Perfume at Target is sold under their in-house brand “Good Chemistry” while women’s clothing is sold under the in-house brand “Prologue.” *Exhibit VII.* Thus, “perfume” is not generally sold under the same brand as “women’s clothing” and consumers are unlikely to be confused

iv. *Third Party Registrations Suggest Confusion Is Unlikely.*

An applicant may submit sets of third-party registrations to suggest that the Office has registered the same mark to different parties for the goods at issue⁵. Such a “pattern of registrations” can exemplify “long-standing and extensive practice within the Patent and Trademark Office and, necessarily, equally long-standing beliefs . . . of business people that uses of those marks would be feasible and helpful in their businesses.”⁶ Evidence of “the same or very similar marks owned by different entities” for the offerings at issue can establish that the relevant public recognizes that the goods at issue “are offered by different companies under the same or similar marks.”⁷ The Board found such evidence suggests “that businesses in these two industries believe their respective goods are distinct enough that confusion between even identical marks is unlikely.”⁸

Even assuming that Applicant’s mark is similar to a Cited mark, the plethora of similar marks registered alongside each other for the goods at issue indicates that customer confusion is unlikely. The following registrations are attached as *Exhibit IX*.

⁵ *In re G.B.I. Tile and Stone, Inc.*, 92 USPQ2d 1366, (TTAB 2009).

⁶ *Keebler Company v. Associated Biscuits Ltd.*, 207 USPQ 1034 (TTAB 1980).

⁷ *In re Thor Tech, Inc.*, 113 USPQ2d 1546, 1549 (TTAB 2015)

⁸ *Id.*

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Pair	Owner	ID	Mark	Mark	ID	Owner
01	CUTTING EDGE BRANDS, LLC	Class 003 perfumes	RENEGADE Reg: 4085517	RENEGADE Reg: 4544129	Class 035 retail apparel stores	Renegade Stores LLC
02	ZELA INTERNATI ONAL LLC	Class 003 fragrances	MODE Reg: 2913199	MODE Reg: 4571482	035 retail apparel stores	Mama Mia, Inc.
03	CHTY(CHIN A)LIMITED	Class 003 air fragrancing preparations	CTY Reg: 5355135	CTY Reg: 4607011	Class 035 retail apparel stores	OTG Experience, LLC
04	BEAUTY ENTREPRIS E SARL	Class 003 fragrances and perfumery	FRAGRANCE REPUBLIC Disclaims: "FRAGRANCE" Reg: 4548059	RUN REPUBLIC Disclaims: "RUN" Reg: 5607946	Class 035 retail apparel stores	Nakamura, Joseph Davisson
05	SATOR SQUARE PTE. LTD.	Class 003 perfumes	THE CALLING Reg: 5239483	THE CALLING OUTDOORS Disclaims: "OUTDOORS" Reg: 5270395	Class 035 online retail apparel stores	Moore, Michael Blake DBA The Calling Outdoors
06	Bath & Body Works Brand Management, Inc.	Class 003 scented room sprays, home fragrance oils	GAMEDAY Reg: 4823165	GREEK GAMEDAY Reg: 4641934	Class 035 retail apparel stores	Plum Pretty Sugar Inc.
07	HOPE FRAGRANC ES LLC	Class 003 perfume	HOPE Reg: 1386494	HOPE AVE. Reg: 5124806	Class 035 retail apparel stores	DownEast Outfitters, Inc

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08	CROCKER, JESSICA ANDERSON	Class 003 pet fragrance	BATH BAR Disclaims: "BATH" Reg: 4050791	SHIRT BAR Disclaims: "SHIRT" Reg: 4502205	Class 035 retail apparel stores	BEN SHERMAN IP HOLDINGS LP
09	EMANUEL UNGARO ITALIA S.R.L.	Class 003 perfumes and toilet water	UNGARO Reg: 1237914	UNGARO Reg: 1759963	Class 025 shirts	LEUNAME
10	MARILYN MIGLIN, L.P.	Class 003 perfumes	VANDERBILT Reg: 1333913	VANDERBILT Reg: 1076493	Class 025 gloves	Wenzhou Chengzhao International TradingCo., Ltd.
11	OSCAR DE LA RENTA, LLC	Class 003 perfume	OSCAR Reg: 1081451	OSCAR Reg: 1996585	Class 025 jackets	ACADEMY OF MOTION PICTURE ARTS AND SCIENCES
12	CHANEL, INC.	Class 003 perfume	CHANCE Reg: 2003332	CHANCE Reg: 4323768	Class 025 t-shirts	Leach, Julia
13	MARILYN MIGLIN, L.P.	003 perfumes	DESTINY Reg: 1295487	DESTINY Reg: 5436399	025 hats	Wenzhou Chengzhao International TradingCo., Ltd.
14	GABET, RENEE A.	003 perfume	ANNIE Reg: 1864483	ANNIE Reg: 4584158	025 footwear	TJK FOOTWEAR LLC
15	JEAN PATO	003 perfume	SUBLIME Reg: 1825709	SUBLIME Reg: 3998379	025 hats	JAKE AND TROY BRAND LLC

Applicant respectfully asserts that the goods and services offered under Applicant’s mark and the Cited mark are distinguishable on their face. Applicant further asserts that the Examining Attorney has not put forth sufficient evidence to establish that the goods and services are related under the applicable standard. As such, Applicant respectfully concludes that the goods and services cannot be determined to be related, and thus, there is no likelihood of confusion between the marks.

C. There is no Likelihood of Confusion Arising from a Similarity of Trade Channels.

The differing identified items *are* the restrictions in the identifications that defeat a bald presumption of identical trade channels. A mere lack of geographic or other limitations in the relevant identifications does not establish that the relevant goods and services travel in the same trade channels. Here, the differences between fragrances and clothing are so strong that no reasonable consumers would believe they are related. Hence, without additional evidence, the Applicant’s goods and the Cited registrant’s goods are not presumed to transfer in the same channels of trade to the same class of purchasers.

D. The Weakness of the Cited Mark Weighs Against Confusion

When determining the scope of protection a mark should be accorded, a vital consideration is the strength of the registered mark. When evaluating the strength of a mark, the commercial strength of the mark is considered along with the inherent strength of the mark. *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).” *Id.* It is well established that when analyzing a mark, the Board will “consider both its inherent strength based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark.” *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011).

The USPTO has been comfortable registering marks sharing a weak element alongside one another. The mere fact that two marks incorporate a form of a common identifying word does not render the marks too similar. *See, e.g. In re Hearst Corp.*, 982 F.2d 493, 494, 25 USPQ2d 1238, 1239 (Fed. Cir. 1992) (VARGA GIRL and VARGAS are sufficiently different to negate the likelihood of confusion); *Conde Nast Pubs., Inc. v. Miss. Quality, Inc.*, 507 F.2d 1404, 1407, 184 USPQ 422, 425 (C.C.P.A. 1975) (COUNTRY VOGUES and VOGUE publications “do not look or sound alike”).

Here, Applicant’s mark is not identical to the Cited Mark, and the weakness of the Cited mark supports that consumers are unlikely to be confused. Here, the differences between Applicant’s and Cited marks are NOT identical and result in separate and distinctive commercial

impressions. For instance, the additional wording SCENT, which is also the dominant term in Applicant's mark makes the two marks different in appearance, sound, and connotations. Similar to how the Board found to be PAPER a weak element because of its wide use in the relevant industry, the common element between Applicant's and Cited marks, TRUNK, is weak and widely used.

i. The Element at Issue Lacks Inherent Strength

A vital consideration is the strength of marks cited by an examining attorney in order to determine the scope of protection to be accorded to those registered marks. Weaker marks are entitled to a narrow scope of protection, permitting closer similarities with an applicant's mark "without causing a likelihood of confusion." *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015); *See* TMEP § 1207.01(b)(ix). Highly suggestive or descriptive marks are entitled to a narrower scope of protection. *See In re The W.W. Henry Co., L.P.*, 82 USPQ2d 1213 (TTAB 2007) ("Purchasers are simply unlikely to assume that all [goods] offered under these highly suggestive marks emanate from the same source.").

The weakness of registered matter is a relevant consideration "because it is well established that the scope of protection afforded a merely descriptive or even a highly suggestive term is less than that accorded an arbitrary or coined mark." *In re Hunke & Jochheim*, 185 USPQ 188, 189 (TTAB 1975). Where a term is considered to be weak, "minor alterations could effectively negate any confusing similarity between the" marks. *See, e.g. Freedom Sav. & Loan Ass'n v. Way*, 757 F.2d 1176, 1183, 226 USPQ 123, 128 (C.A.11 Fla. 1985) ("Freedom Savings and Loan" and "Freedom Realty" marks "lack ... confusing similarity"); *Pacquin-Lester Co. v. Charmaceuticals, Inc.*, 484 F.2d 1384, 179 USPQ 45 (C.C.P.A. 1973) ("SILK 'N SATIN" beauty and bath lotion and oil not similar to "SILK" face cream).

Ultimately whether an addition is sufficient to prevent confusion in a particular instance depends upon the strength of the main part of the mark and the distinctiveness of the additional feature. USPTO has been comfortable registering marks sharing a weak element alongside one another "so long as there has been some difference between the marks as a whole or between the goods or services." *See In re FiftyThree, Inc.*, Serial No. 86180291, (TTAB 2017) (non-precedential) (PAPER not likely to be confused with BAMBOO PAPER for identical in part goods when it was shown that PAPER is widely used and weak in the relevant industry).

ii. The Market at Issue is a Crowded Field, which Weighs Against Confusion

Widespread third-party use "can serve to diminish the strength of a mark and thus the scope of protection to which a mark is entitled." *Nike, Inc. v. WNBA Enterprises, LLC*, 85

USPQ2d 1187 (TTAB 2007); *See also In re Coors Brewing Co.*, 343 F.3d 1340, 1345, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003); TMEP § 1207.01(d)(iii). “Extensive evidence of third-party use and registrations is powerful on its face, even where the specific extent and impact of the usage has not been established.” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGaA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1373-74, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015). Evidence of third-party use shows that customers in the relevant industry are likely “to distinguish between different marks on the basis of minute distinctions.” *Juice Generation, Inc.*, 794 F.3d at 1338, 115 USPQ2d at 1674 (internal quotations omitted).

The possibility for the same consumer to purchase items sold under Applicant’s and the Cited marks does not itself establish a likelihood of confusion as to the source of those goods. *See The Sports Authority Michigan, Inc. v. The PC Authority, Inc.*, 63 USPQ2d 1782, 1794 (TTAB 2001). There is nothing in the record that suggests that the consumer would consider the goods as likely to emanate from the same source or have the same sponsorship. Instead, the multitude of third-party marks that all share the same element, TRUNK, suggests that consumers are unlikely to be confused as to the source of these goods.

If other registrations appear that are owned by more than one registrant, the dilution of those terms among several users indicates that there is no likelihood of confusion between the Applicant’s mark and a Cited mark. *See* TMEP § 1207.01(d)(x). Applicant notes that there are over 20 marks found marks utilizing a variation of the element TRUNK or phonetic equivalents thereof in International Class 035. TESS Search terms: (trunk)[bi,ti] and (registrant)[ow] and (live)[ld] and (035)[ic]. Given such widespread use of the element TRUNK consumers are more likely to acknowledge slight variances among its uses.

In this regard, Applicant respectfully submits the following representative sample of use-based registrations for the same and closely related goods and services. Registrant has coexisted with these marks without any evidence of confusion. These registrations are attached as *Exhibit X* and listed below:

#	MARK	U.S. Reg. No.	OWNER	SERVICES/GOODS
01	JUNK IN THE TRUNK	5476256	Junk In The Trunk Trio L.L.C.	Class 035: Retail store services featuring home furnishings, home accessories and furniture; On-line retail store services featuring home furnishings, home accessories and furniture Class 042: Interior design; Interior design consultation

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02	POPTHATTRUNK	5504380	Dani's Auto Sales, Inc	Retail store services featuring automotive products in the nature of motor vehicles
03	GRAND TRUNK	5127043	The Travel Hammock Inc.	Class 035: On-line retail store services featuring outdoor, camping, adventure and travel gear and equipment; On-line retail store services featuring travel bags, pillows, sleeping bags, hammocks, blankets, towels, portable seating, travel seats, travel cushions, travel eyemasks, travel hangers, wallets, fanny packs, dop kits, toiletry kits, shelters, hammock straps, hammock hanging kits, mosquito nets, luggage, and travel organizers.; Computerized on-line retail store services in the field of outdoor, camping, adventure and travel gear and equipment
04	TRUNK AND DRAWER	5459855	Momentum Retail, LLC	Class 035: Retail store services featuring men's undergarments, swimwear, socks, pajamas, and belts; On-line retail store services featuring men's undergarments, swimwear, socks, pajamas, and belts
05	J. S. TRUNK CO	5013366	Samsonite IP Holdings S.à.r.l.	Class 035: Retail store services feature a variety of luggage, bags, packs, travelling bags, and cases, carrying cases, protective bags, covers, sleeves and cases for electronic devices, umbrellas, travel related goods and accessories, gift items, personal goods
06	TENNIS TRUNK	5053146	Tennis Trunk, LLC	Class 035: Subscription-based order fulfillment services in the field of Tennis supplies

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07	TASTE TRUNK	4621717	Shipley, Michael	On-line shopping mall services, namely, providing on-line retail store services featuring household décor and prepackaged foods
08	TAYLOR TRUNK	3705807	Taylor Trunk Company, Inc.	Class 035: Retail store services featuring luggage, gifts, travel accessories, writing instruments, and leather goods; on-line retail store services featuring luggage, gifts, travel accessories, writing instruments, and leather goods
09	THE DRESS UP TRUNK	4322193	The Dress-Up Trunk, Inc.	Class 035: On-line retail store services featuring children's costumes and accessories; Retail store services featuring children's costumes and accessories
100	TRUNK KEEPER		MJC Acquisition, LLC	Class 035: Independent sales representatives in the field of children's and adult clothing; the bringing together, for the benefit of others, of a variety of goods and services, enabling customers to conveniently view and purchase those goods and services from an Internet web site particularly specializing in the marketing of the sale of goods and services of others

Attached as *Exhibit X*, these third-party registrations are evidence that Registrant is not entitled to the broad scope of protection initially suggested by the Examining Attorney.

International Class 035 is a crowded field with marks contain “TRUNK” and the Cited mark is a weak mark, therefore consumers are unlikely to be confused by the registration of Applicant’s mark. In sum, this DuPont factor should weigh in favor of a finding that there is no likelihood of confusion between Applicant’s and Cited marks.

E. Applicant’s and Cited Marks Have Coexisted for a Significant Period of Time Without Evident Confusion, Showing That Confusion Is Unlikely.

The “absence of actual confusion, or a negligible amount of it, between two products after a long period of coexistence on the market is highly probative in showing that little likelihood of confusion exists.”⁹ A lack of evidence of actual confusion between two marks operating together over a significant period is evidence “that the marks are not so easily confused.”¹⁰

For example, in *In re Strategic Partners, Inc.*, 102 USPQ2d 1397 (TTAB 2012), the Board found no likelihood of confusion between ANYWEAR, for “footwear,” and ANYWEAR BY JOSIE NATORI, for “jackets, shirts, pants, stretch T-tops and stoles.” Following the standard in *Strategic Partners*, the literal elements of Applicant’s mark differ from the Cited mark since the dominant terms in the two marks are completely different and the identifications of each marks’ goods or services are not identical or similar. Therefore, Applicant’s registration is unlikely to cause any consumer confusion.

In *Oreck Corp. v. U.S. Floor Sys., Inc.*, 803 F.2d 166, 231 USPQ 634 (5th Cir. 1986), the Fifth Circuit found that **17 months** of concurrent use without evidence of actual confusion is “highly significant” and weighs against a likelihood of confusion.¹¹ The court held that “We cannot think of more persuasive evidence that there is no likelihood of confusion between these marks than the fact that they have been simultaneously used for five years without causing any consumers to be confused as to who makes what.” *Id.* The Trademark Trial and Appeals Board found there was no likelihood of confusion; or at most a possibility of confusion with evidence of no actual confusion for years.¹²

Applicant’s and the Cited marks have been available together on the market for **more than 4 years**. Thus, *DuPont* factors seven and eight weigh against a finding of likelihood of confusion.

F. The Extent of Potential Confusion Between Applicant’s and the Cited Marks is De Minimis.

The extent of potential confusion is a relevant factor in determining likelihood of confusion between marks. *See, e.g., IDV North America, Inc. v. Chatam International Incorporated*, Opposition No. 101522, (TTAB 1999) (non-precedential); *Franklin Loufrani v.*

⁹ *Aktiebolaget Electrolux v. Armatron International Inc.*, 999 F.2d 1, 4, 27 USPQ2d 1460, 1463 (1st Cir. 1993).

¹⁰ *Mr. Hero Sandwich Sys., Inc. v. Roman Meal Co.*, 781 F.2d 884, 889, 228 USPQ 364, 367 (Fed. Cir. 1986).

¹¹ *See also Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 50 USPQ2d 1545, 1555-56 (9th Cir. 1999)

¹² *Cosmair, Inc. v. Jean Alexander Cosmetics, Inc.*, Lexis 805 (TTAB 2001)

Wal-Mart Stores, Inc., Opposition No. 91152145, (TTAB 2009) (non-precedential). When “there is not a practical likelihood of confusion” applications should be permitted to proceed, because the likelihood of confusion analysis is “not concerned with the mere theoretical possibilities of confusion, deception or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.” See *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1414 (TTAB 2010) (quoting *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992)) (internal quotations omitted). Where the extent of potential confusion is *de minimis*, the factor should weigh against a finding of likelihood of confusion. See *Bose Corp. v. Custom Electronic Design & Installation Assoc.*, Cancellation No. 92042327, (TTAB 2007) (non-precedential).

The Federal Circuit has stated that more than a mere possibility of confusion must be shown --- a likelihood of confusion must be demonstrated. See *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992), quoting *Witco Chemical Co. v. Whitfield Chemical Co.*, 418 F.2d 1403, 164 USPQ 43 (CCPA 1969) (“We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark law deals”).

Applicant’s products and the Cited registrant’s products have significantly different functions and are for significantly different purposes. Fragrances and perfumes are used to diffuse certain unpleasant odors or to make people using them more appealing in the smell. However, clothing is used to cover human bodies and to make people wearing them more pretty in their looks. Thus, the two products target different groups of consumers and consumers of one product are unlikely to be exposed to the other product. Furthermore, the Cited mark is registered in a crowded field with marks contain the element “TRUNK”. Consumers are trained to discern the minor differences between different service providers while the differences between the Cited mark and Applicant’s mark are more than trivial. Accordingly, the extent of potential confusion is *de minimis*. The twelfth *DuPont* factor should weigh in favor of no confusion.

V. Conclusion

For the reasons outlined above, Applicant respectfully submits that confusion between these marks is not likely. It is well settled that a refusal under Section 2(d) of the Lanham Act requires a determination that there is a probability, rather than a mere possibility, of consumer confusion. That standard has not been met in this case. Therefore, Applicant requests that the Examining Attorney withdraw the refusal to register and approve this application for publication in the *Official Gazette*.