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Mailed: May 20, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

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*In re Tempo CC, Inc.*

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Serial No. 98264392

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Ross Brandborg of FireCastle,
for Tempo CC, Inc.

Christopher Hoffman, Trademark Examining Attorney, Law Office 128,
Colleen Cassidy, Managing Attorney.

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Before Lykos, Elgin, and Lavache,
Administrative Trademark Judges.

Opinion by Lavache, Administrative Trademark Judge:

Tempo CC, Inc. ("Applicant") seeks registration on the Principal Register of the standard character mark **EVEN HOUSE** (HOUSE disclaimed) for services ultimately identified as "Entertainment services in the nature of organizing social entertainment events; organizing sporting events, namely, golf simulator

competitions; providing recreational facilities for use of electronic golf simulator," in International Class 41.[1]

The Trademark Examining Attorney refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground of likelihood of confusion, citing the standard character mark **EVEN** and the special form marks  and , all three of which have the same owner and are registered on the Principal Register for "Bar services; Cafe services; Hotel accommodation services; Restaurant services; Snack-bar services; Provision of conference, exhibition and meeting facilities," in International Class 43.[2]

After the Examining Attorney issued a final refusal under Trademark Act Section 2(d), Applicant appealed. Both Applicant and the Examining Attorney filed briefs. For the reasons explained below, we **affirm** the refusal to register under Section 2(d).

## I. Likelihood of Confusion

Trademark Act Section 2(d), in relevant part, prohibits registration of a mark that "so resembles a mark registered in the Patent and Trademark Office . . . as to be likely, when used on or in connection with the goods [or services] of the applicant, to cause confusion." 15 U.S.C. § 1052(d). To determine whether confusion is likely, we analyze all probative evidence relevant to the factors set out in *In re E. I. du Pont de*

[1] Application Serial No. 98264392, filed November 15, 2022, based on a bona fide intention to use the mark in commerce, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

[2] Registration No. 7188189 (standard character mark) issued on October 10, 2023; Registration No. 7403116 (stylized, no color claim) issued on May 28, 2024; and Registration No. 7482958 (stylized, in green) issued on August 20, 2024.

*Nemours & Co.,* 476 F.2d 1357, 1361 (CCPA 1973) ("*DuPont*").[3] *See In re Majestic Distilling Co.,* 315 F.3d 1311, 1315 (Fed. Cir. 2003).

In every Section 2(d) case, two key *DuPont* factors are the similarity or dissimilarity of the marks and the relatedness of the respective services, because the "fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the [services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976). Here, we have considered each *DuPont* factor that is relevant and for which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

Varying weight may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.,* 637 F.3d 1344, 1356 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 1205 (Fed. Cir. 1993) ("[T]he various evidentiary factors may play more or less weighty roles in any particular determination."). Ultimately, however, "each case must be decided on its own facts and the differences are often subtle ones." *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 1199 (CCPA 1973).

[3] Case citations in this opinion are in a form recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board and the Director of the USPTO, this opinion cites to the Lexis legal database and, in the initial full citation of a case, also identifies the number of the Board proceeding, if available. Practitioners should also adhere to the practice set forth in TBMP § 101.03.

**A. Focus on Registration No. 7188189**

Although the Examining Attorney cited three registrations (Registration Nos. 7188189, 7403116, and 7482958) as a bar to the registration of Applicant's mark, we need not consider all three in our analysis. The services in each registration are the same and, of the three registered marks, the standard character mark EVEN in Registration No. 7188189 is the most similar to Applicant's mark. Therefore, we will focus our analysis on that registered mark. A finding of likelihood of confusion as to EVEN in standard characters alone suffices to affirm the Section 2(d) refusal. And, if we were to find no likelihood of confusion as to EVEN in standard characters, then we would also find no likelihood of confusion as to the registered special form marks. *See In re Morinaga Nyugyo K.K.*, Ser. No. 86338392, 2016 TTAB LEXIS 448, at *7-8 (TTAB 2016); *In re Max Cap. Grp. Ltd.*, Ser. No. 77186166, 2010 TTAB LEXIS 1, at *4-5 (TTAB 2010).

**B. Strength of the Cited Mark**

Before we compare the marks at issue, we consider Applicant's argument that the term "EVEN" is weak.[4] We do so because a determination of the strength or weakness of the mark helps inform us as to its scope of protection. *See Morinaga Nyugyo*, 2016 TTAB LEXIS 448, at *17-18 ("[T]he strength of the cited mark is—as always—relevant to assessing the likelihood of confusion under the *du Pont* framework.").

[4] *See* Applicant's Brief, 4 TTABVUE 11.

The TTABVUE and Trademark Status and Document Retrieval (TSDR) citations in this opinion refer to the docket and electronic file database for the involved application.

When evaluating the strength or weakness of a mark, we look at the mark's inherent conceptual strength based on the nature of the term itself and its commercial strength in the marketplace. *See Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) ("There are two prongs of analysis for a mark's strength under the sixth factor: conceptual strength and commercial strength."); *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (measuring both conceptual and marketplace strength); *Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 TTAB LEXIS 228, at *24 (TTAB 2022).[5]

**1. Conceptual Strength of the Cited Mark**

Conceptual strength is a measure of a mark's distinctiveness and may be placed "in categories of generally increasing distinctiveness: . . . (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992). Because the cited mark issued on the Principal Register without a claim of acquired distinctiveness, the mark is presumed to be inherently distinctive as to the services listed in the cited registration. 15 U.S.C. § 1057(b); *Tea Bd. of India v. Republic of Tea, Inc.*, Opp. No. 9118587, 2006 TTAB LEXIS 330, at *62 (TTAB 2006) ("A mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover,

[5] The fifth *DuPont* factor examines the extent to which the public perceives the mark as indicating a single source of origin, i.e., its fame or commercial strength. *DuPont*, 476 F.2d at 1361. However, as is typical in an ex parte appeal, where the owner of the cited registration is not a party to the proceeding, the record in this case provides no basis for finding that the cited mark is commercially strong when used in association with Registrant's services. We thus consider the fifth DuPont factor neutral. *See In re Mr. Recipe, LLC*, Ser. No. 86040643, 2016 TTAB LEXIS 80, at *4 (TTAB 2016) (citing *In re Thomas*, Ser. No. 78334625, 2006 TTAB LEXIS 135, at *18 n.11 (TTAB 2006)).

in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods [or services].").

However, the U.S. Court of Appeals for the Federal Circuit has held that if there is evidence that a mark, or an element of a mark, is commonly adopted by many different registrants, that may indicate that the mark or common element has some conceptual weakness as an indicator of a single source. *See Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed. Cir. 2015) ("[E]vidence of third-party registrations is relevant to 'show the sense in which a mark is used in ordinary parlance,' . . . that is, some segment that is 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 relatively weak.'") (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015)).

Here, Applicant's brief mentions the purported "weakness" of "EVEN" only in passing, when listing the reasons Applicant believes confusion is unlikely here.[6] But, during prosecution, Applicant argued that "'EVEN' is highly diluted and widely used across various registrations,"[7] attaching certificates of registration for the following two used-based third-party registrations in support:[8]

- EVEN KEEL FISH SHACK (FISH SHACK disclaimed) (Reg. No. 6723323) for "Restaurant; restaurant and bar services; Restaurant services featuring Seafood," in International Class 43; and

[6] *See* Applicant's Brief, 4 TTABVUE 11.

[7] September 12, 2024 Response to Nonfinal Office Action at TSDR 12.

[8] *Id.* at 4-7.

- EVEN STEVENS (Reg. No. 4618584) for "restaurant services" in International Class 43.

Applicant also submitted a copy of a Notice of Allowance for Application Serial No. 97873614 for the mark EVEN COAST for "Restaurant and bar services," in International Class 43, filed on an intent-to-use basis.[9]

This evidence falls far short of establishing that the term "EVEN" is conceptually weak as applied to the services at issue here. Significantly, Registration No. 4618584 for the mark EVEN STEVENS is cancelled.[10] Thus it has no probative value except to show that a registration once issued. *See Made in Nature,* 2022 TTAB LEXIS 228, at *31.

In addition, the copy of the Notice of Allowance for Application Serial No. 97873614 is not proper evidence of the registration of the mark identified in the Notice of Allowance. *In re Jump Designs, LLC*, Ser. No. 76393986, 2006 TTAB LEXIS 209, at *6 (TTAB 2006) ("To make a third-party registration of record, a copy of the registration, either a copy of the paper USPTO record, or a copy taken from the electronic records of the Office, should be submitted."), *overruled on other grounds by In re Driven Innovations, Inc.*, Ser. No. 77073701, 2015 TTAB LEXIS 179, at *13 (TTAB 2015). That said, the Examining Attorney did not specifically object to the submission of the Notice of Allowance during prosecution, and instead noted that only two of the third-party registrations submitted by Applicant were active, used-based,

[9] *Id.* at 8-9.

[10] Registration No. 4618584 was cancelled on April 18, 2025.

and not cited against applicant.[11] Therefore, any potential objection to the submission of the Notice of Allowance has been waived and we consider it for whatever limited probative value it has.[12] *Cf. In re Team Jesus LLC*, Ser. No. 88105154, 2020 TTAB LEXIS 503, at *17 n.29 (TTAB 2020) (noting that "an application would be evidence only of the fact that it was filed").

That leaves a single third-party registration for the mark EVEN KEEL FISH SHACK, which arguably has a distinct commercial impression in view of the meaning of the wording "even keel."[13] Simply put, the evidence of record does not establish that the term "EVEN," by itself, has a normally understood and well-recognized descriptive or suggestive meaning in connection with the services in the cited registration, such that the term could be considered conceptually weak. *Cf. Jack*

[11] September 13, 2024 Nonfinal Office Action at TSDR 5. We presume that the two third-party registrations referenced by the Examining Attorney are Registration Nos. 4618584 and 6723323, both of which were active when the Examining Attorney issued the relevant Office action.

[12] The Board does not take judicial notice of the fact that a submitted third-party application has since matured into registration. *See In re Binion*, Ser. No. 76590702, 2009 TTAB LEXIS 701, at *11 n.3 (TTAB 2009) ("The [third-party] applications are evidence of nothing more than that they were filed, and there is no indication that either application matured into a registration; the Board does not take judicial notice of status changes in third-party applications made of record.").

[13] The phrase "on an even keel" or "on even keel" refers to being "in a sound or stable condition." *See* MERRIAM-WEBSTERDICTIONARY, https://www.merriam-webster.com/dictionary/even (accessed on May 14, 2025). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed form or regular fixed editions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, Opp. No. 91061847, 1982 TTAB LEXIS 146, at *7 (TTAB 1982), *aff'd*, 703 F.2d 1372 (Fed. Cir. 1983); *In re Red Bull GmbH*, Ser. No. 75788830, 2006 TTAB LEXIS 136, at *7 (TTAB 2006); TBMP § 1208.04.

*Wolfskin*, 797 F.3d at 1373-74 (involving "extensive evidence of third-party registrations"); *Juice Generation*, 794 F.3d at 1339 (same).

**2. Commercial Strength of the Cited Mark**

To assess commercial strength of the cited mark, we consider the number and nature of similar marks **in use** on similar services. *DuPont*, 476 F.2d at 1361; *see Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, Opp. No. 91217095, 2016 TTAB LEXIS 604, at *11 (TTAB 2016). If the evidence establishes that the consuming public is exposed to widespread third-party use of similar marks for similar services, it "is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection." *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1373 (Fed. Cir. 2005).

Here, Applicant submitted no evidence of third-party marketplace uses of marks identical or similar to the cited EVEN mark. And the single third-party registration discussed above does not establish that the relevant consuming public has been exposed to widespread use of similar marks.

**3. Conclusion as to the Strength of the Cited Mark**

In short, the evidence of record does not establish that the cited mark is either conceptually or commercially weak. Thus, we deem the cited mark to have the normal scope of protection afforded an inherently distinctive mark. *See Thomas*, 2006 TTAB LEXIS 135, at *18.

Accordingly, we find that the sixth *DuPont* factor is neutral in our analysis.

**C. Comparison of the Marks**

We turn now to the first *DuPont* factor, which focuses on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. *See Palm Bay Imps.*, 396 F.3d at 1371 (quoting *DuPont*, 476 F.2d at 1361). Similarity as to any one of these elements may be sufficient to support a finding that the marks are confusingly similar. *See Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 732 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion."); *In re Inn at St. John's, LLC*, Ser. No. 87075988, 2018 TTAB LEXIS 170, at *13 (TTAB 2018), *aff'd*, 777 Fed. Appx. 516 (Fed. Cir. 2019).

When determining whether confusion is likely, "[t]he 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." *In re i.am.symbolic, llc*, 866 F.3d 1315, 1324 (Fed. Cir. 2017) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012)). "The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks." *In re Box Sols. Corp.*, Ser. No. 76267086, 2006 TTAB LEXIS 176, at *14 (TTAB 2006).

All elements of the respective marks must be considered. *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). However, "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." *Id.*

Here, Applicant's mark is **EVEN HOUSE** and the cited mark is **EVEN**, both in standard characters.

Applicant argues that "[w]hile Applicant's mark and Registrant's mark share the term 'EVEN,' that term is conceptually related to a golf score reference and used in that context."[14] In other words, this argument implies that, because some of Applicant's services involve golf simulators and related competitions, "EVEN," when used in Applicant's mark, will have a golf-related connotation that the cited mark does not.

The Examining Attorney points out that the known golf-related use of the term "EVEN" is the phrase "even par," not "even" alone.[15] In any event, Applicant has not provided any evidence in support of its argument, such as a relevant definition of the term "even" or other evidence of the term "even" being used as a golf score reference. And, as the Examining Attorney notes, "attorney argument is no substitute for evidence." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (quoting *Enzo Biochem v. Gen-Probe, Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005)). Assuming, however, that "EVEN" could be construed as connoting a golf score reference, Applicant has not proved that this connotation carries through when Applicant's mark, EVEN HOUSE, is considered as a whole.

[14] Applicant's Brief, 4 TTABVUE 9.

[15] Examining Attorney's Brief, 6 TTABVUE 6.

On that point, Applicant has disclaimed HOUSE, conceding that the term is not inherently distinctive. *See, e.g.*, *In re Six Continents Ltd.*, Ser. No. 88430142, 2022 TTAB LEXIS 35, at *23 (TTAB 2022) (noting that the disclaimer of SUITES in ATWELL SUITES mark "is a concession that 'Suites' is not inherently distinctive") (citing *In re DNI Holdings Ltd.*, Ser. No. 76331011, 2005 TTAB LEXIS 515, at *25 (TTAB 2005) ("[I]t has long been held that the disclaimer of a term constitutes an admission of the merely descriptive nature of that term . . . at the time of the disclaimer."). Indeed, the evidence of record shows that "house" can refer to "a place of business or entertainment"[16] and Applicant concedes that the term "suggest[s] a dedicated venue."[17] Because this wording is merely descriptive and has been disclaimed, and given that EVEN appears first in Applicant's mark, we find that EVEN is the dominant element of the mark. *See In re Hughes Furniture Indus.*, Ser. No. 85627379, 2015 TTAB LEXIS 65, at *16 (TTAB 2015) ("Disclaimed matter generally will not constitute the dominant part of a mark."); *Presto Prods., Inc. v. Nice-Pak Prods. Inc.*, Opp. 91074797, 1988 TTAB LEXIS 60, at *8 (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.").

Often, where, as here, the entirety of one mark is the dominant element of another mark, the likelihood of confusion is increased. *See, e.g.*, *Hunter Indus., Inc. v. Toro Co.*, Opp. No. 91203612, 2014 TTAB LEXIS 105, at *33 (TTAB 2014) ("Likelihood of

[16] June 18, 2024 Nonfinal Office Action at TSDR 58 (definition of "house" from www.merriam-webster.com).

[17] Applicant's Brief, 4 TTABVUE 9.

confusion often has been found where the entirety of one mark is incorporated within another."); *see also Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1320-22 (Fed. Cir. 2014) (affirming Board's finding that the marks at issue were similar where the applicant's mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION); *Double Coin Holdings Ltd. v. Tru Dev.*, Can. No. 92063808, 2019 TTAB LEXIS 347, at *20-23 (TTAB 2019) (finding "the parties' marks are similar in their entireties" after noting that respondent's "junior mark, ROAD WARRIOR contains [petitioner's] entire mark WARRIOR"). We find that to be the case here.

Indeed, because cited mark is identical to the dominant element Applicant's mark, we find that the marks look and sound similar. *See, e.g.*, *In re Charger Ventures*, 64 F.4th 1375, 1382 (Fed. Cir. 2023) ("[A]n additional word or component may technically differentiate a mark but do little to alleviate confusion."). Consequently, consumers could reasonably assume that Applicant's services offered under the EVEN HOUSE mark constitute another line of services from the same source as the services offered under the cited EVEN mark with which they are acquainted or familiar, and that Applicant's mark is merely a variation of, or derivative of, the cited mark. *See, e.g.*, *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, Opp. No. 91197659, 2013 TTAB LEXIS 314, at *32 (TTAB 2013) ("Purchasers of opposer's GOTT and JOEL GOTT wines are likely to assume that applicants goods, sold under the mark GOTT LIGHT and design, are merely a line extension of goods emanating from opposer."); *In re Comexa Ltda.*, Ser. No. 75396043, 2001 TTAB LEXIS 274, at *12 (TTAB 2001)

(applicant's use of term AMAZON and parrot design for chili sauce and pepper sauce is likely to cause confusion with registrant's AMAZON mark for restaurant services); *SMS, Inc. v. Byn-Mar Inc.*, Opp. Nos. 91068062 & 91068063, 1985 TTAB LEXIS 32, at *4 (TTAB 1985) (applicant's marks ALSO ANDREA and ANDREA SPORT were "likely to evoke an association by consumers with opposer's preexisting mark [ANDREA SIMONE] for its established line of clothing.").

Applicant argues that the addition of "HOUSE" to its mark "creates a distinct commercial impression"[18] because of its suggestion of "a dedicated venue—a concept not inherent in Registrant's use of EVEN."[19] But Applicant does not explain what distinct commercial impression the combination of EVEN and HOUSE creates in view of Applicant's proffered connotations for the component terms when used in connection with Applicant's identified services. Nor are we able to discern one. We therefore presume that whatever commercial impression EVEN HOUSE creates in the minds of consumers could be the same or similar for the cited mark.

Accordingly, we find that, overall, EVEN HOUSE and EVEN are highly similar in sound, appearance, connotation, and overall commercial impression, because of the shared identical and dominant term EVEN. *See In re Coors Brewing Co.*, 343 F.3d 1340, 1344 (Fed. Circ. 2003) (noting that "similarity is not a binary factor but is a matter of degree").

The first *DuPont* factor thus weighs in favor of finding a likelihood of confusion.

[18] Applicant's Brief, 4 TTABVUE 9.

[19] *Id.*

**D. Relatedness of the Services**

We next consider the second *DuPont* factor, which concerns the similarity or dissimilarity and nature of the respective services. *DuPont*, 476 F.2d at 1361. In determining the relatedness of the services, we must consider the services as they are identified in Applicant's application and the cited registration. *See Stone Lion*, 746 F.3d at 1323 (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990)). Evidence of the relatedness of services may include copies of use-based registrations of the same mark for both the applicant's services and the services listed in the cited registration; news articles or other Internet evidence showing that the relevant services are used together or used by the same purchasers; and advertisements showing that the relevant services are advertised together or offered by the same provider. *See In re Country Oven*, Ser. No. 87354443, 2019 TTAB LEXIS 381, at *5 (TTAB 2019) (citing *In re Davia*, Ser. No. 85497617, 2014 TTAB LEXIS 214, at *18-25 (TTAB 2014) (basing finding of relatedness on evidence that included website excerpts showing the goods at issue were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores).

Registration may be refused if Applicant's mark for any of its identified services is likely to cause confusion with Registrant's mark for any of the services listed in the cited registration. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 1041 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981) (indicating that likelihood of confusion must be found if there is likely

to be confusion with respect to any item that comes within the identification of goods or services in the application).

To reiterate, Applicant's services are "Entertainment services in the nature of organizing social entertainment events; organizing sporting events, namely, golf simulator competitions; providing recreational facilities for use of electronic golf simulator," in International Class 41; and Registrant's services are "Bar services; Cafe services; Hotel accommodation services; Restaurant services; Snack-bar services; Provision of conference, exhibition and meeting facilities," in International Class 43.

Applicant argues that, "[a]bsent evidence that consumers view these distinct sets of offerings as emanating from the same source, there can be no likelihood of confusion"[20] and that, here, "Registrant's services revolve around on-site consumption of food and beverages, lodging, and hosting of business-related meetings or conferences, whereas Applicant's services focus on immersive recreational experiences specifically electronically simulated golf competitions."[21]

The Examining Attorney counters that the services at issue here "are unquestionably closely related,"[22] because the evidence of record does, in fact, show that entities that provide electronic golf simulators and organize social entertainment events or golf simulator competitions may also offer bar services, cafe services,

[20] *Id.* at 4.

[21] *Id.*

[22] Examining Attorney's Brief, 6 TTABVUE 9.

restaurant services, or snack-bar services, all under the same mark.[23] Specifically, the Examining Attorney submitted the following evidence from third-party websites:

- Revolution Golf and Grille (revolutiongolfandgrille.com) offers golf suites with golf simulators, live music, event/party booking, and a dining area featuring American cuisine;[24]

- Parciti (parciti.com) offers golf simulators, member night events, league nights,[25] social and corporate event hosting, and food;[26]

- Five Iron Golf (fiveirongolf.com) offers golf simulators, event hosting, player leagues, and restaurant and bar services;[27]

- X Golf (playxgolf.com) offers golf simulators, player leagues, tournaments, and restaurant and bar services;[28]

- The Shack Indoor Golf Club (theshackgolfclub.com) offers golf simulators, player leagues, event hosting and party planning, and sports bar services featuring food and drinks;[29]

- Fairway Tavern (fairway-tavern.com) offers golf simulators, event hosting, and dining services;[30]

- CitySwing (cityswing.com) offers golf simulators, event hosting, and food and drinks;[31]

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[23] *See id.* at 9, 12-13.

[24] June 18, 2024 Nonfinal Office Action at TSDR 15-26.

[25] We grant the Examining Attorney's unopposed request that we "take judicial notice of a dictionary definition for 'league', meaning 'a group of athletic teams organized to promote mutual interests and to compete chiefly among themselves.'" 6 TTABVUE 13 (referencing an excerpted dictionary entry for "league" from www.dictionary.com, at *id.* 19); *See Univ. of Notre Dame du Lac*, 1982 TTAB LEXIS 146, at *7. Based on this definition, we recognize that "leagues" can involve competitions of the sort referenced in Applicant's identification.

[26] *Id.* at 31.

[27] *Id.* at 39-45.

[28] *Id.* at 47-55.

[29] September 13, 2024 Nonfinal Office Action at TSDR 16-22.

[30] *Id.* at 23-28.

[31] December 9, 2024 Final Office Action at TSDR 7-17.

- Hackers Bar & Grille (hackersathilltop.com) offers golf simulators, event hosting, and bar and restaurant services;[32]

- 9° Golf (9degreegolf.com) offers golf simulators, event hosting, and restaurant services;[33] and

- The Clubhouse (theclubhousenj.com) offers golf simulators, live music, social entertainment events, event hosting, and restaurant and bar services.[34]

We agree with the Examining Attorney that Applicant's services are related to some of Registrant's services because the record shows consumers are accustomed to encountering the respective services being offered either separately or together by the same source under the same mark. *See, e.g.*, *Naterra Int'l, Inc. v. Bensalem*, 92 F.4th 1113, 1117 (Fed. Cir. 2024) ("[T]estimony that third-party companies sell both types of goods [or services] is pertinent to the relatedness of the goods [or services]."); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1328-29 (Fed. Cir. 2000) (finding the Board "erred when it refused to consider the lay evidence that several large companies produce and sell both pet and human food in deciding whether a consumer would reasonably believe that . . . dog treats originated from the same source as . . . human snacks"). In particular, the website evidence referenced above shows that it is not uncommon for consumers to enjoy restaurant and bar services at venues that also provide golf simulators, golf simulator competitions, and other social entertainment events. *See Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002)

[32] *Id.* at 18-25.

[33] *Id.* at 26-35.

[34] *Id.* at 37-46.

("[E]vidence, such as whether a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis."). Further, this evidence establishes that these services are complementary in nature in that they are advertised together and typically provided together. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567 (Fed. Cir. 1984) ("[C]omplementary use has long been recognized as a relevant consideration in determining a likelihood of confusion."); *In re Cook Med. Techs. LLC*, Ser. No. 77882876, 2012 TTAB LEXIS 496, at *10 (TTAB 2012) ("If goods [or services] are complementary in nature, or used together, this relatedness can support a finding of likelihood of confusion.").

Applicant argues that "none of this evidence shows that the Registrant actually markets a golf simulator experience" and thus "[t]his evidence is insufficient to show likelihood of confusion."[35] This argument is misguided, however. As the Examining Attorney notes, when considering the relatedness of the services at issue, "establishing an applicant provides a registrant's services, or vice versa, is not the evidentiary burden required . . . under Trademark Act Section 2(d)."[36] Indeed, the issue is not whether consumers would confuse Applicant's services with Registrant's services, but rather whether there is a likelihood of confusion as to the source of the services. *L'Oreal S.A. v. Marcon*, Opp. No. 91184456, 2012 TTAB LEXIS 77, at *16 (TTAB 2012); *In re Rexel Inc.*, Ser. No. 73241423, 1984 TTAB LEXIS 57, at *2 (TTAB 1984). Thus, it is sufficient that the services are related in some manner, or that the

[35] Applicant's Brief, 4 TTABVUE 7.

[36] Examining Attorney's Brief, 6 TTABVUE 16.

conditions and activities surrounding their marketing are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs.*, 668 F.3d at 1369. And that is the case here.

We therefore find that Applicant's services are closely related to at least some of Registrant's services. Accordingly, the second *DuPont* factor weighs in favor of a finding likelihood of confusion.

**E. Similarity of Trade Channels and Classes of Consumers**

Next, we consider established, likely-to-continue channels of trade, the third *DuPont* factor. *DuPont*, 476 F.2d at 1361.

Applicant argues that its services "are promoted through specialized entertainment venues, event planners, and recreational activity networks,"[37] while Registrant's services "are marketed through traditional hospitality channels, including travel platforms, dining guides, and lodging directories,"[38] and that "[n]othing in the record indicates that the Registrant's services are marketed to the same consumers as Applicant's."[39] However, beyond specifying the nature of the services, neither Applicant's identification of services nor Registrant's identification services has any restrictions as to channels of trade or classes of customers.

Thus, we presume that the identifications encompass all services of the type described, that the services travel through all normal channels of trade for such

[37] Applicant's Brief, 4 TTABVUE 8.

[38] *Id.*

[39] *Id.*

services, and that they are available to all classes of purchasers of such services. *See Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1373 (Fed. Cir. 2013); *In re Guild Mortg. Co.*, Ser. No. 86709944, 2020 TTAB LEXIS 17, at *15 (TTAB 2020) ("With regard to the channels of trade, in the absence of specific limitations in the cited registration and the application, we must presume that Applicant's mortgage banking services and Registrant's investment advisory services will travel in all normal and usual channels of trade and methods of distribution for those services."). And, contrary to Applicant's assertions, the evidence of record discussed above plainly establishes that Applicant's services and at least some of Registrant's services are offered through the same trade channels, and thus marketed to and encountered by at least some of the same classes of consumers.

Therefore, we find that the third *DuPont* factor also weighs in favor of a finding of likelihood of confusion.

**F. Purchasing Conditions and Sophistication of Purchasers**

Under the fourth *DuPont* factor, we consider "[t]he conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing." *DuPont*, 476 F.2d at 1361. Applicant contends that "[c]onsumers purchasing Applicant's services—including corporate groups, sporting event enthusiasts, and serious recreational participants—are highly discerning when selecting

entertainment experiences"[40] and that "[t]his care and selectivity further mitigate any risk of confusion."[41]

However, Applicant has failed to provide any evidence to support this contention. In any event, "we must make our determination based on the least sophisticated consumer." *Guild Mortg.* 2020 TTAB LEXIS 17, at *17 (citing *Stone Lion*, 746 F.3d at 1325). Here, in the absence of evidence to the contrary, we presume that the least sophisticated of Applicant's and Registrant's overlapping consumers will not exercise anything other than ordinary care in selecting the services. And even sophisticated purchasers are not immune from source confusion, especially where, as here, the respective services are closely related and are offered under highly similar marks. *See Shell Oil*, 992 F.2d at 1208 (citing *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 1548 (Fed. Cir. 1990) (affirming the Board's reasoning that even sophisticated purchasers may be confused by similar marks)).

Accordingly, we find the fourth *DuPont* factor to be neutral in our analysis.

## II. Conclusion

Having carefully considered all of the arguments and evidence of record pertaining to the relevant *DuPont* factors, we find that the marks are highly similar; that Applicant's services are closely related to at least some of Registrant's services; and that the parties' closely related services travel in overlapping trade channels and

[40] *Id.* at 9.

[41] *Id.*

are offered to some of the same classes of purchasers. We deem the fourth and sixth *DuPont* factors to be neutral. Therefore, we find that confusion as to source is likely.

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