

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Treetop Development, LLC

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Serial Nos. 86425371 and 86425390

Joseph Agostino of Greenberg Traurig LLP
for Treetop Development, LLC.

Rebecca Lee, Trademark Examining Attorney, Law Office 122,
John Lincoski, Managing Attorney.

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Before Mermelstein, Wolfson, and Gorowitz,
Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

Treetop Development, LLC (“Applicant”) seeks registration on the Principal Register of the marks TREETOP (in standard characters)¹ and TREETOP DEVELOPMENT & design² as set forth below:

¹ Application Serial No. 86425390 was filed based on Applicant’s allegation of use in commerce since July 2006, under Section 1 (a) of the Trademark Act.

² Application Serial No. 86425371 was filed on the basis of Applicant’s allegation of use in commerce since July 2006, under Section 1 (a) of the Trademark Act. The word “DEVELOPMENT” is disclaimed and the application includes the following description of the mark: The mark consists of a stylized “T” in the shape of a tree, consisting of two rectangles depicting the tree trunk, three squares above the rectangles depicting the treetop, and the words “TREETOP DEVELOPMENT” below the stylized “T.” For searching



for:

Real estate management of residential apartments and condominiums and retail space; real estate operations, namely, management of residential apartments and condominiums and retail space; leasing and rental of real estate; leasing and rental of residential apartments and condominiums and retail space in International Class 36; and

Real estate development; real estate development and reconstruction of residential apartments and condominiums and retail space, in International Class 37.

The Trademark Examining Attorney refused registration of Applicant's marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that both of Applicant's marks so resemble the mark TREETOPS & design,



for "planning and laying residential communities and athletic facilities for others" in Class 37,³ as to be likely to cause confusion, mistake or deception.

purposes, the literal portion of the mark was input into the USPTO database as TREETOP.

³ Registration No. 1583750 issued on February 20, 1990; second renewal granted. The registration includes goods and services in International Classes 25 and 41, which are not relevant to the current decision and therefore are not discussed.

When the refusals were made final, Applicant appealed. The appeals were consolidated upon motion by the Examining Attorney, filed on September 22, 2016 and granted on September 27, 2016.⁴ We affirm the refusals to register.

I. Evidentiary Issue.

Before proceeding to the merits of the refusal, we address an evidentiary matter. Applicant submitted the declaration of Amnon Wenger, Applicant's general counsel, with its appeal brief. The Examining Attorney objected to the submission of this evidence as being untimely. We agree. Evidence submitted after an appeal has been filed is untimely and will not ordinarily be considered by the Board. Trademark Rule 2.142(d); 37 CFR § 2.142(d). Accordingly, the objection is sustained and the declaration has not been considered. However, some of the exhibits were submitted with Applicant's response to the Office Action dated December 27, 2015. These have been considered.

II. Likelihood of Confusion.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See*

⁴ All references to documents filed during the prosecution of the applications are to documents filed in Serial No. 86425371, unless otherwise noted. The majority of the documents filed in each application are mostly identical. Differences will be discussed, *infra*.

Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

A. Similarity of services, channels of trade and classes of customers.

We start our analysis with the second and third *du Pont* factors, the similarity of the goods, the channels of trade, and the classes of customers. When determining the relationship between the services,

[i]t is well settled that the issue of likelihood of confusion between applied-for and registered marks must be determined on the basis of the [services] as they are identified in the involved application and cited registration, rather than on what any evidence may show as to the actual nature of the [services], their channels of trade and/or classes of purchasers.

In re Total Quality Group Inc., 51 USPQ2d 1474, 1476 (TTAB 1999). See also *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-62 (Fed. Cir. 2014). The services need not be identical or even competitive to support a finding of likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). The respective services need only be “related in some manner and/or the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Applicant's Class 37 services are identified as: "real estate development; real estate development and reconstruction of residential apartments and condominiums and retail space." Applicant's Class 36 services are identified as "real estate management of residential apartments and condominiums and retail space; real estate operations, namely, management of residential apartments and condominiums and retail space; leasing and rental of real estate; leasing and rental of residential apartments and condominiums and retail space." We will start by looking at Applicant's Class 37 services.

"Real estate" is "property in the form of land or buildings."⁵ "Real estate development" or "property development" is "the process of buying, improving, and selling buildings and land, and arranging for new buildings to be built."⁶ Accordingly, Applicant's real estate development services encompass arranging for new buildings to be built.

The relevant services in the cited registration are "planning and laying residential communities for others." "Planning" is "the process of deciding how land in a particular area will be used and designing plans for it."⁷ Since the Registrant's services are limited to planning and laying residential communities, they lie squarely

⁵ We take judicial notice of the dThe Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format, *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014); *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁶ We take judicial notice of the

⁷ We take judicial notice of the definition of "planning" from the © Cambridge University Press; <http://dictionary.cambridge.org/us/dictionary/english/planning>.

within the definition of real estate development services which includes “arranging for new buildings to be built.” As such, Applicant’s broadly worded “real estate development services” and Applicant’s more narrowly defined, “real estate development and reconstruction of residential apartments and condominiums,” are either closely related or identical to the registrant’s services. Further evidence of the relationship between the services can be found on the Harvard University website (<http://www.gsd.harvard.edu/academic-programs/urban-planing-design/urban-planning/degree-programs/areas-of-concentration/real-estate-and-urban-development-urban-development.html>), which states:

The Area of Concentration courses for Real Estate and Urban Development may be divided into four main parts: development analysis; *physical planning, design and construction*; finance and deal structuring; and implementation.⁸

(emphasis added). The Harvard University website, in stating that an area of concentration for an educational program in “real estate and urban development” includes the study of “physical planning, design, and construction,” reflects the already established relationship between “planning and laying residential communities” and “real estate development.”

Having established that Applicant’s Class 37 services identified as “real estate development; real estate development and reconstruction of residential apartments and condominiums,” are related to the services in the cited registration, if likelihood of confusion is established, the finding will also apply to the additional Class 37

⁸ Office Action dated January 24, 2015, TSDR at 9.

services identified as “real estate development and reconstruction of retail space.” See *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (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 in the same class).

In addition to real estate development services, Applicant offers real estate management and real estate leasing and rental services. Independent of Applicant’s own services, as depicted in website evidence submitted with the Office Action dated February 4, 2015, the Examining Attorney has established that real estate development and real estate management are related:

- Greystar (<http://www.greystar.com/inside.php>) “provides word-class service in the multifamily real estate business ... [whose] innovative business model integrates the management, development and investment disciplines of the multifamily industry ...” (TSDR p. 11);
- Hunt (<http://www.huntcompanies.com/what-we-do>) “is a privately-owned company dedicated to building value through the development, investment and management of real assets.” (TSDR p.12);
- Newland (<http://www.newlandco.com>) is a “diversified real estate company leveraging a national platform and over 45 years of experience to perform challenging and diverse development, investment, management, and advisory services across a wide range of real estate.” (TSDR p. 15);
- Confer (<http://www.coniferllc.com>) is a nationally ranked, full-service real estate company that develops, constructs, owns and manages high-quality affordable housing.” (TSDR p. 16); and

- Mercy Housing (<https://www.mercyhousing.org/affordable-housing-development>) is “one of the largest and most experience nonprofit affordable housing developers in the country, Mercy Housing has the ability to handle every aspect of affordable real estate development including project financing, community outreach and planning, construction management, property management, and asset management. (TSDR p. 19).

Accordingly, we find that the Class 37 services are in-part legally identical and in-part closely related to the cited services and that the Class 36 services are closely related to the cited services.

Applicant does not deny the relationship between the services, as identified, but instead argues that the channels of trade are different since “Applicant is a New Jersey based real estate company specializing in the purchase and sale of multi-family apartment buildings, condominiums, and retail space in the New York metropolitan area”;⁹ and the registrant’s “Treetops’ services under Class 37 are limited to the planning and laying of residential homes only in Gaylord, Michigan and on or in very close proximity to the Treetops Resort golf course.”¹⁰

As discussed, *supra*, we rely on the identifications (recitations) of services to determine both the relationship between the services and the channels of trade or the class of purchasers to which the sales are directed.

It [is] proper, however, for the Board to focus on the application and registrations rather than on real-world conditions, because ‘the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application.’ *Octocom*

⁹ Appeal Brief, 5 TTABVUE 8.

¹⁰ *Id.*, at pg. 9.

Sys., Inc. v. Houston Computs. Servs. Inc., 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). This is so “regardless of what the record may reveal as to the particular nature of an applicant’s goods [and services], the particular channels of trade or the class of purchasers to which sales of the goods [and services] are directed.” *Id.*

Stone Lion, 110 USPQ2d at 1162. Further, the geographic locations of the registrant and the Applicant are not relevant to our determination. As the Examining Attorney correctly argued:

The owner of a registration without specified limitations enjoys a presumption of exclusive right to nationwide use of the registered mark under Trademark Act Section 7(b), 15 U.S.C. § 1057(b), regardless of its actual extent of use. *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F. 2d 1565, 1568, 218 USPQ 390, 393 (Fed. Cir. 1983).

Examining Attorney’s Brief, 9 TTABVUE 12. Any geographic limitations to the Applicant’s or Registrant’s business practices are irrelevant unless they are “specifically set forth as limitations in the application.” *Tuxedo Monopoly*, 209 USPQ 988.

Since the services are in-part identical, we consider the services to be sold in the same channels of trade to the same classes of purchasers. Accordingly, the second and third *du Pont* factors favor a finding of likelihood of confusion.

B. Sophistication of purchasers.

Applicant contends that both its services and the services offered by the Registrant are purchased by sophisticated purchasers. Applicant includes “condominium owners” and “prospective home owners” in its definition of sophisticated purchasers. Appeal Brief, 5 TTABVUE 10-11. Although there is no

evidence supporting Applicant's contention that these customers would be knowledgeable about real estate development or management services, we agree that the purchase of these services is likely to entail careful, sophisticated purchasing.

However, even assuming that these purchasers are sophisticated or knowledgeable in the fields of real estate development or management, this does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *See Stone Lion*, 110 USPQ2d at 1163-64; *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011). Moreover, the fact that "the relevant class of purchasers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar marks for similar [goods and] services. Human memories even of discriminating purchasers are not infallible." *In re Research and Trading Corp.*, 793 F2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986).

Based on the foregoing, we find the fourth *du Pont* factor, sophistication of purchasers, slightly favors the Applicant.

C. Similarity or dissimilarity of marks.

We next determine the similarity or dissimilarity of the marks in their entirety. Applicant's marks are: TREETOP (in standard characters) and TREETOP DEVELOPMENT and design, as set forth below:



The cited mark, which is set forth below, consists of the word TREETOPS with a depiction of a treetop entwined with the stylized letter, “T.”



In comparing the marks we must consider their appearance, sound, connotation and commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1691 (quoting *du Pont*, 177 USPQ at 567). “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) (citation omitted). Moreover, the emphasis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1645 (TTAB 2009), citing *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

While “the similarity or dissimilarity of the marks is determined based on the marks in their entireties ... 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 a consideration of the marks in their entireties.” *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

When evaluating a composite mark containing both words and designs, the verbal portion of the mark is typically the one most likely to indicate the origin of the goods [or services] to which it is affixed because it is the portion of the mark that consumers would use to refer to or request the goods [or services]. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908, 1911 (Fed. Cir. 2012)¹¹ *See also, In re Dakin’s Miniatures Inc.*, 59 USPQ2d 1593, 1593-95 (TTAB 1999).¹²

The dominant portion of the cited mark is the literal word “TREETOPS,” which is the plural of Applicant’s mark TREETOP (in standard characters). “[A]n applied-for mark that is the singular or plural form of a registered mark is essentially identical in

¹¹ XCEED found similar to  .

¹²  found similar to DAKIN,  ,  and  .

sound, appearance, meaning, and commercial impression, and thus the marks are similar.” *Swiss Grill Ltd., v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2011 n.17 (TTAB 2015) (“[I]t is obvious that the virtually identical marks [the singular and plural of SWISS GRILL] are confusingly similar”).” *See also, Wilson v. DeLaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (“It is evident that there is no material difference, in a trademark sense, between the singular and plural forms of the word ‘Zombie’ and they will therefore be regarded here as the same mark.”); *In re Sarjanian*, 136 USPQ 307, 308 (TTAB 1962).

In the *Swiss Grill* case, the Applicant’s mark consisted of the term SWISS GRILLS in standard characters. The cited mark consisted of the singular term SWISS GRILL



with a design element: . The analysis in that case is similar to the analysis in this case, wherein the cited mark includes a design element which is the equivalent of the one of the literal terms in the mark.

Accordingly, we find that the literal element of the mark in Serial No. 86425390, TREETOP (in standard characters), is very similar to the literal element of the cited mark TREETOPS & design.

Next, we look at the mark in Serial No. 86425371, TREETOP DEVELOPMENT and design:



Applicant's mark TREETOP DEVELOPMENT and design differs from its mark TREETOP (in standard characters) by the inclusion of the disclaimed descriptive word "Development," which is depicted in smaller print below the word "Treetop," and the design, which is described as a stylized "T" in the shape of a tree, consisting of two rectangles depicting the tree trunk and three squares above the rectangles depicting the treetop.

As our primary reviewing Court has stated:

[T]he presence of an additional term in the mark does not necessarily eliminate the likelihood of confusion if some terms are identical. *See, e.g., China Healthways Inst., Inc. v. Wang*, 491 F.3d 1337, 1341 [83 USPQ2d 1123] (Fed. Cir. 2007) (the common word in CHI and CHI PLUS is likely to cause confusion despite differences in the marks' designs); *In re West Point–Pepperell, Inc.*, 468 F.2d 200, 201 [175 USPQ 558] (CCPA 1972) (WEST POINT PEPPERELL likely to cause confusion with WEST POINT for similar goods); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324 [153 USPQ 406] (CCPA 1967) (THE LILLY as a mark for women's dresses is likely to be confused with LILLI ANN for women's apparel including dresses); *In re United States Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (CAREER IMAGE for women's clothing stores and women's clothing likely to cause confusion with CREST CAREER IMAGES for uniforms including items of women's clothing)."

In re Mighty Leaf Tea, 94 USPQ2d at 1260 (finding the mark ML similar to



MARK LEES). In this case, Applicant's mark and the mark in the cited registration contain the virtually identical word, TREETOP[S] and the addition of the disclaimed, descriptive word "DEVELOPMENT" does not eliminate the likelihood of confusion between the two marks, nor does the design elements, which we note both include depictions of trees and/or treetops. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), quoting, *In re National Data Corp.*, 224 USPQ at 752 ("Regarding descriptive terms, this court has noted that the descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion"); *In re Dixie Rests. Inc.*, 41 USPQ2d at 1533-34; *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often "less significant in creating the mark's commercial impression"). Further, the design elements, which we note both include depictions of trees and/or treetops, do not serve to distinguish the marks. The analysis must be based on the entire marks, not just on part of the marks. *In re National Data Corp.* 224 USPQ at 751. *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 23, 234 (CCPA 1981) ("It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion"). Given the near identity in their dominant literal portions, and due to the presence of similar design elements, we find that the marks are similar in appearance, pronunciation, connotation and overall commercial impression.

Accordingly, we find that both of Applicant's marks are similar to the mark in the cited registration and that the first *du Pont* factor favors a finding of likelihood of confusion.

D. Conclusion.

After considering all the evidence and argument on the relevant *du Pont* factors, we find the services are legally identical in part and otherwise related, their channels of trade and classes of consumers are unrestricted and that as used in connection with such services, the marks are highly similar. The sophistication of purchasers we view as slightly favoring a finding of no likelihood of confusion. However, the legal identity in part and similarity of the services and the similarity between the marks outweigh any sophisticated purchasing decision. In view thereof, we find that Applicant's marks, as used in association with the services identified in the applications, are likely to cause confusion.

Decision: The refusals to register Applicant's marks TREETOP and  are affirmed.