

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Spires Management Inc.

Serial No. 87099315

Marina L. Lang of Socal IP Law Group LLP
for Spires Management Inc.

Anna H. Rosenblatt, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.


Before Cataldo, Adlin, and Lynch,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Spires Management Inc. (“Applicant”) seeks registration on the Principal Register



of the mark , with SPA CARE disclaimed, for the following goods, as amended during prosecution:

Chemical analysis kit for testing swimming pool water for consumer use;
Chemical preparations for testing swimming pool water for consumer use;
pH value measurement indicators made of paper for consumer use; Reagent bearing test strips for testing swimming pool water for consumer use in International Class 1.¹

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the registered mark AMERSEP in standard characters for:

Chemicals for use in industry; chemicals for use in industrial water treatment; chemicals for use as neutralizing agents, scavengers or metal precipitation; chemicals for use in pulp and paper manufacturing; chemicals for the treatment of water and wastewater; chemicals for the treatment in boiler and cooling treatment; chemicals for industrial purposes for use in the mining, bio-refining, oil and gas, food and beverage processing, chemical processing and power industries; surface coating removal chemicals and tank surface and media cleaning chemicals for municipal water systems; chemicals for use in reverse osmosis systems and other membrane applications; chemicals for industrial use to reduce or remove fouling in reverse osmosis systems and other membrane systems;

¹ Application Serial No. 87099315 was filed July 11, 2016 based on an allegation of use in commerce as of November 2011 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). The description of the mark states: “The mark consists of the silhouette of a woman from behind shown sitting supporting herself with her right arm in front of the words ‘AMERSE SPA CARE.’ The wording ‘SPA CARE’ appears below the word ‘AMERSE’ to the right of stylized lines depicting moving water.” Color is not claimed as a feature of the mark.

polymers for use in industrial and municipal wastewater and water treatment applications for liquid and solid separation; chemical charge control agents for use in industrial and municipal wastewater and water treatment applications; chemical demulsifiers for use in the field of oil exploration, production and processing; foam control agents and antifoam agents for use in industrial systems; hydrophobic sizing agents that provide liquid and grease resistance to substrates and promote water resistance in water soluble, sensitive systems; unprocessed synthetic wet strength resins for use in the manufacture of substrates in order to impart strength to substrates; chemical dry strength additives for use in the manufacture of substrates in order to impart strength to substrates; chemical synthetic temporary wet strength additives used in the pulp and paper industry in order to impart strength to substrates; chemical creping and release aids for use in the manufacture of paper and paper board; chemicals for use in pulping cellulosic materials, repulping aids, namely, chemicals used in the manufacture of paper and paper products; unprocessed formaldehyde-free synthetic resins for use in the building products industry; polymer based compositions that impart toughness to formulations and improve adhesion to low surface energy substrates used in the manufacture of commercial, industrial and domestic goods; chemicals for control of organic and inorganic deposits in the pulp and paper manufacturing; chemical retention, drainage and clarification agents for use in the pulp and paper industry for liquid and solid separation; chemicals for use in the pulp and paper industry in International Class 1.²

After the refusal, Applicant narrowed its original identification of goods in an attempt to differentiate them from those in the cited registration. However, the Examining Attorney made the refusal final. Applicant requested reconsideration, and included a further amendment deleting goods that included water treatment chemicals, finalizing the identification as shown above. The Examining Attorney denied reconsideration and supplemented the record with evidence directed to the relatedness of Applicant's remaining goods to the goods in the cited registration.

² Registration No. 5101910 issued December 13, 2016.

Applicant appealed, and the case is fully briefed. For the reasons set out below, we affirm the refusal.

II. Likelihood of Confusion

The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*du Pont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). Also, “it is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.” *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); *see also Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

A. Similarity of the Marks

We compare the applied-for and cited marks “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps., Inc. v. Veuve*

Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). The test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods and services offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); see also *Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

The cited mark is in standard characters – AMERSEP, while Applicant’s mark is



. As the first and by far the largest word in Applicant’s mark, we find AMERSE “most likely to be impressed upon the mind of a purchaser and remembered.” *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). The remaining wording, SPA CARE, is displayed in much smaller font and is disclaimed as descriptive, diminishing its significance in the comparison of marks. See *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat’l Data Corp.*, 753 F.2d 1056, 1060, 224 USPQ 749, 752 (Fed. Cir. 1985). Although we agree with Applicant that the design element in its mark is large and prominent, when a mark comprises both wording and a design, greater weight typically is given to the wording, which consumers will use to call for the goods. See, e.g., *Viterra*, 101 USPQ2d at 1911; see also *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010) (holding that the addition of a design element to a word that is identical to another mark does not avoid likely confusion,

noting that the “addition of a column design to the cited mark ... is not sufficient to convey that [the] marks ... identify different sources for legally identical insurance services”). Overall, we find that AMERSE stands out in Applicant’s mark.

The word AMERSEP forms the entirety of the cited mark, and AMERSE is the dominant word in Applicant’s mark. The record includes no information that either word has a translation or ordinary meaning. We therefore view them as coined terms that differ by only one letter, the final “P” in AMERSEP. This similar term creates a significant visual resemblance between the cited mark and Applicant’s mark, especially considering that the cited standard-character mark could appear in the same font used for Applicant’s stylized wording. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012) (holding that the specific font style of a mark cannot serve as the basis to distinguish it from a mark in standard character form). The terms are also phonetically similar, an important consideration in the analysis, because consumers use the wording in marks to “call for” the goods. *See id.* at 1911. While we agree with Applicant that the concluding “P” in AMERSEP likely would be pronounced, rather than silent, we disagree that it is enough to make the marks so “audibly distinct” as to avoid likely confusion.³ The difference is minimal, especially considering that in Applicant’s mark, the next sound after the S-sound at the end of AMERSE and the beginning of SPA is the P-sound from the “P” in SPA. Thus, even when the “P” in AMERSEP is pronounced, the word sounds similar to AMERSE SPA.

³ *See* 4 TTABVUE 8 (Applicant’s Brief).

We further find the connotation and commercial impression of the marks to be close. As we previously noted, AMERSE and AMERSEP have no ordinary meaning or translation and differ by only a single letter. If any particular impression is conveyed by these coined terms, in the context of these chemicals for water testing and water treatment, AMERSE and AMERSEP both may be somewhat suggestive of water because of the phonetic similarity to the word “immerse,” which means “to plunge into something that surrounds or covers; especially: to plunge or dip into a fluid.”⁴ The design element in Applicant’s mark reinforces the suggestion of water by depicting a female figure, as Applicant describes it, above “moving water.” In Applicant’s mark, SPA CARE would be understood as describing the purpose of the goods, and the wording does not contribute significantly to the mark’s overall commercial impression.

Considering the marks in their entirety, given the resemblance in sound, appearance, connotation and commercial impression, we find Applicant’s mark similar to the cited mark. The *du Pont* factor regarding the similarity of the marks thus weighs in favor of a likelihood of confusion.

⁴ We take judicial notice of the Merriam-Webster online dictionary entry for “immerse.” The Board may take judicial notice of dictionary entries, *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), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

B. The Goods and Trade Channels

We next address the second and third *du Pont* factors, the relatedness of the goods and the channels of trade and classes of customers.

1. Relatedness of the Goods

The relevant test is not whether consumers would be likely to confuse the goods, but rather whether they would be likely to be confused as to their source. *In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012). Therefore, to support a finding of likelihood of confusion, the goods need not be identical or even competitive. “Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such, that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or there is an association or connection between the sources of the goods.” *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

The subject application includes “[c]hemical preparations for testing swimming pool water for consumer use,” and the cited registration includes “chemicals for the treatment of water” among the identified goods. The Examining Attorney asserts that Registrant’s water treatment chemicals encompass water testing chemicals such as Applicant’s, but Applicant maintains that the goods are used for different purposes and therefore are unrelated. To the extent Applicant attempts to limit the identified goods to particular types of water treatment chemicals based on Registrant’s supporting specimen of use, we reject the argument, as we must compare the goods

as identified, not based on extrinsic evidence of actual use. *See Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

The Examining Attorney submitted screenshots of third-party websites promoting and offering both types of goods. The ServAPure website features a general category of “Water Test Kits and Chemicals,” and shows chlorine test kits and hardness test kits, as well as “Water Treatment Chemicals” such as water softeners.⁵ The Softub Direct website features “Softub chemicals” “to maintain the quality and enjoyment of your spa water” as well as “Test Strips.”⁶ The Cannon Water Technology Inc. website features “Water Treatment Chemicals,” including “Grease Trap, Drain Line, Septic System Treatment” and “Well Water Treatment,” as well as “Testing Chemicals,” including an alkalinity test kit.⁷ This evidence shows consumer exposure to goods such as Applicant’s and water treatment chemicals emanating from the same source.

As further support for this finding, the prosecution history of Applicant’s use-based application also shows that Applicant originally sought registration of its mark for various water treatment chemicals, in addition to the goods that now remain. *See Octocom Systems* 16 USPQ2d at 1786 (finding a relationship between the applicant’s “modems” and the opposer’s “computer programs,” finding that the relationship

⁵ *Id.* at 6-9 (servapure.com).

⁶ *Id.* at 10-11 (no URL visible).

⁷ *Id.* at 12-20 (cannonwater.com). *See also* Applicant’s TSDR July 11, 2016 Specimen showing spa care kits that address alkalinity.

between the goods “is shown,” in part, “by [applicant’s] original application, which indicates [applicant] itself used the mark OCTOCOM for both modems and computer programs”). Applicant’s original identification included, for example, “[c]hemicals for the treatment of hot water systems” as well as “[w]ater treatment chemicals, namely, sizing agents” and “[w]ater treatment chemicals for use in swimming pools and spas,” consistent with Applicant’s website specimen (first page excerpted below) featuring “The Amerse Spa Care line of water treatment products.”⁸ Although Applicant deleted these goods in response to the likelihood of confusion refusal,⁹ the record reflects that Applicant asserted use of its mark in connection with both types of goods.

⁸ TSDR July 11, 2016 Specimen.

⁹ TSDR March 16, 2017 Response to Office Action and TSDR July 12, 2017 Request for Reconsideration.

Amerse Spa Care



The Answer to Clean, Clear Water!

The Amerse Spa Care line of water treatment products were developed with three things in mind:

- Crystal Clear Water
- Ease of Use
- Peace of Mind

Amerse Spa Care was designed as a stand alone spa care program, but can also be used in conjunction with more sanitizing methods than any other spa care system. Amerse is compatible with chlorine and bromine, Spa Frog or Nature² Mineral Sanitizers, and ozone equipped spa systems.



AMERSE™ WATER CARE KITS



Chlorine Kit
#2446 \$26.95

INCLUDES:

- | | |
|-----------------------|---------------------------|
| Chlorine Sanitizer | Water Test Strips |
| Shock Oxidizer | Measuring Cup |
| Metal & Stain Control | Spa Care Guide |
| pH & Alkalinity Up | Laminated Reference Guide |
| pH & Alkalinity Down | |



Chlorine Kit with Nature²
#2448 \$36.95

INCLUDES:

- | | |
|--|---------------------------|
| Nature ² Spa Mineral Purifier | Water Test Strips |
| Chlorine Sanitizer | Measuring Cup |
| Shock Oxidizer | Spa Care Guide |
| Metal & Stain Control | Laminated Reference Guide |
| pH & Alkalinity Up | |
| pH & Alkalinity Down | |



Bromine Kit
#2447 \$26.95

INCLUDES:

- | | |
|-----------------------|---------------------------|
| Bromine Tablets | Water Test Strips |
| Shock Oxidizer | Measuring Cup |
| Metal & Stain Control | Spa Care Guide |
| pH & Alkalinity Up | Laminated Reference Guide |
| pH & Alkalinity Down | |

1 | **BLACK #'s** ship from GA or CA • **RED #'s** ship from GA Only

* Items with an [*] do not qualify for free freight.

Other evidence also shows the generally complementary nature of water testing chemicals and water treatment chemicals. The website for AquaPhoenix Scientific¹⁰ features a page for “Industrial Water Treatment Test Kits” and also features water treatment chemicals such as orthophosphate, “primarily added to control scaling” and “as a corrosion inhibitor.” Although we recognize that these goods differ from Applicant’s, in that they appear to involve *industrial* water testing, the webpage and its explanation of the water testing goods nonetheless suggest that water testing, including testing for pH, is done to determine the need for water treatment, such that these types of goods would be used together. Applicant’s specimen also shows the complementary nature of the relevant goods, as it features water testing and water treatment chemicals together as components of “Amerse Water Care Kits.”¹¹

Accordingly, we find Applicant’s goods related to the goods in the cited registration. As noted above, likelihood of confusion applies as to *all* goods in the class if there is likelihood of confusion involving *any item* in the identification of goods in that class. *Tuxedo Monopoly*, 209 USPQ at 988; *see also Aquamar*, 115 USPQ2d at 1126 n.5 (“it is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.”). This *du Pont* factor also weighs in favor of likely confusion.

¹⁰ TSDR August 2, 2017 Denial of Reconsideration at 2-5 (aquaphoenixsci.com).

¹¹ TSDR July 11, 2016 Specimen.

2. Trade Channels

Turning to the trade channels, unlike some of the identified goods in the cited registration that are explicitly “industrial” in nature, the relevant “chemicals for the treatment of water” in the cited registration have no trade channel or consumer class limitations. *See In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1166 & n.4 (TTAB 2013) (finding that semicolon separates identified services into discrete categories and refusing to limit one particular service based on trade channel restrictions for other services). They encompass all types of water treatment chemicals, and are not limited to industrial chemicals purchased by “governments, oil and gas refineries, paper mills, etc.,”¹² as Applicant proposes. Rather, these goods are presumed to move in all channels of trade usual and appropriate for such goods and are available to all potential classes of ordinary consumers. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, “we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods”); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). The relatedness evidence described above establishes that water treatment chemicals move in the same retail trade channels and reach the same consumers as goods such as Applicant’s swimming pool water testing chemicals for consumer use. We reject Applicant’s argument that “[t]he chemicals of the cited registration would be sold subject to carefully negotiated contracts in very large industrial-application volumes that would require specialized

¹² 4 TTABVUE 10 (Applicant’s Brief).

delivery methods.”¹³ We must “focus on the application and registration[] 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.’” *Stone Lion Capital Partners*, 110 USPQ2d at 1162 (quoting *Octocom Sys.*, 16 USPQ2d at 1787). We therefore remain unpersuaded by Applicant’s claims and evidence about the alleged marketplace realities of the Registrants’ goods being sold only by particular methods. *See Cunningham*, 55 USPQ2d at 1848 (holding that the appellant “misstates the law” in arguing that the Board must focus on the goods as sold in the marketplace, and stating that “the Board must look to the registrations themselves to determine the scope of goods covered”).

This *du Pont* factor also clearly weighs in favor of likely confusion.

C. Sophisticated Purchasing

In its Brief, Applicant asserts, without supporting evidence, that “consumers are very careful regarding products to test and maintain their pools and spas, because pools and spas are expensive investments and they must be carefully maintained to preserve their value and safety.”¹⁴ However, “attorney argument without support in the record . . . does not overcome the prima facie case.” *In re Consol. Specialty Rests. Inc.*, 71 USPQ2d 1921, 1929 (TTAB 2004). Bearing in mind that “Board precedent requires the decision to be based ‘on the least sophisticated potential purchasers,’” *Stone Lion Capital Partners*, 110 USPQ2d at 1163, this factor is neutral.

¹³ *Id.*

¹⁴ *Id.* at 11.

D. Actual Confusion

Applicant argues that the lack of actual confusion evidence weighs against finding likely confusion. Applicant asserts that “the marks have coexisted for more than five years,” and states in its Brief that it has not received notification of any confusion.¹⁵ The seventh and eighth *du Pont* factors concern “[t]he nature and extent of any actual confusion,” and “[t]he length of time during and conditions under which there has been concurrent use without evidence of actual confusion”. *du Pont*, 177 USPQ at 567. While evidence of actual confusion can be persuasive, “[t]he lack of evidence of actual confusion carries little weight, especially in an ex parte context.” *Majestic Distilling Co.*, 65 USPQ2d at 1205 (internal citations omitted) (“uncorroborated statements of no known instances of actual confusion are of little evidentiary value”). Moreover, lack of actual confusion does not equate to no *likelihood* of confusion. *See Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983); *J & J Snack Foods Corp. v. McDonald’s Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991). We find the *du Pont* factors relating to actual confusion neutral.

III. Conclusion

The overall similarity of these marks for related goods that move in the same channels of trade to the same classes of customers renders confusion likely.

Decision: The refusal to register Applicant’s mark is affirmed.

¹⁵ *Id.* at 12.