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Precedent of the TTAB

Hearing: July 25, 2017 Mailed: July 28, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Guild Mortgage Company

Serial No. 86709944

Joel L. Incorvaia and G. Ehrich Lenz of Incorvaia & Associates,
for Guild Mortgage Company.

Verna B. Ririe, Trademark Examining Attorney, Law Office 104,
Dayna Browne, Managing Attorney.

Before Bergsman, Ritchie, and Greenbaum,
Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Guild Mortgage Company ("Applicant") seeks registration on the Principal Register of the mark GUILD MORTGAGE COMPANY, and design, shown below, for "mortgage banking services, namely, origination, acquisition, servicing, securitization and brokerage of mortgage loans," in International Class 36:[1]

[1] Application Serial No. 86709944 was filed on July 30, 2015, under Section 1(a) of the Trademark Act, claiming dates of first use and first use in commerce on January 28, 2009, and disclaiming the exclusive right to "MORTGAGE COMPANY" apart from the mark as shown.

The mark contains the following description of the mark:

> The mark consists of the name Guild Mortgage Company with three lines shooting out above the letters I and L. Color is not claimed as a feature of the mark.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when applied to the identified services, so resembles the previously registered mark, GUILD INVESTMENT MANAGEMENT,[2] in standard character format, for "investment advisory services," in International Class 36, as to be likely to cause confusion, mistake, or to deceive.

When the refusal was made final, Applicant filed this appeal, which is fully briefed. Applicant also requested a hearing, which was presided over by this panel. For the reasons discussed below, we affirm the refusal to register.

[2] Registration No. 3657486 issued July 21, 2009, and disclaiming the exclusive right to "INVESTMENT MANAGEMENT" apart from the mark as shown.

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all 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 Company, Inc.,* 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 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). We consider the *du Pont* factors for which there were arguments and evidence. The others, we consider to be neutral.

<u>The Similarity/Dissimilarity of the Marks</u>

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). In comparing the marks, we are mindful that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.,* 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.,* 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd mem.,* No. 92-1086 (Fed. Cir. June 5, 1992).

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.,* 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.,* 190 USPQ 106, 108 (TTAB 1975). Because Applicant's services are, in essence, mortgage lending services, the average customers are home buyers, homeowners looking to refinance their existing mortgages, and investors seeking to finance rental properties. This universe of customers incorporates a broad scope of consumer sophistication from first time home buyers, including those with poor credit who get turned down, to sophisticated investors.

The mark in the cited registration is GUILD INVESTMENT MANAGMENT, where the term "INVESTMENT MANAGEMENT" is descriptive and disclaimed. Applicant's mark is GUILD MORTGAGE COMPANY, and design, where the term "MORTGAGE COMPANY" is descriptive and disclaimed. While the marks have obvious differences in sight and sound, they also have clear similarities in commercial impression. We consider each mark in its entirety. There is, however, nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided that our ultimate conclusion rests upon a comparison of the marks in their entireties. *In re National Data Corp*., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). "Indeed, this type of analysis appears to be unavoidable." *Id*. While we note that Applicant's mark contains a design element, we generally give less weight to the style and design elements of a mark than to the wording, because it is the wording that would be used by consumers to request the

goods. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012). Moreover, with respect to Applicant's mark, the design is not so distinctive as to serve to distinguish Applicant's mark from the registered mark. We thus find the term "GUILD" to be dominant in both marks.

Applicant argues that the shared term "GUILD" is weak in International Class 36, and thus the mark in the cited registration is entitled to a very narrow scope of protection. To this end, Applicant argues that the term "GUILD" in the cited registration refers to the last name of Registrant's founder. Applicant submitted evidence from Registrant's website inviting consumers to "Meet the Team" and noting that Chief Investment Officer Monty Guild founded Guild Investment Management in 1971.[3] Despite this, there is no evidence that consumers are aware of the derivation of term "GUILD" in the mark in the cited registration. *Cf. Hercules Inc. v. Nat'l Starch and Chem. Corp.,* 223 USPQ 1244, 1248 (TTAB 1984) ("It has long been held that in the absence of evidence establishing that purchasers would be aware of the term or terms from which the marks were derived, how the marks came to be adopted is immaterial to the issue whether confusion is likely from contemporaneous use." [cites omitted]); *In re Burroughs Corp.*, 2 USPQ2d 1532 n.4 (TTAB 1986) (finding "derivation is irrelevant" where consumers would not be aware of it).

Applicant also submitted a declaration from its counsel, G. Erich Lenz, stating

> At the time I searched the TESS system for trademark registrations that contained the word "Guild," the TESS system indicated that there were 315 registered trademarks containing the word 'Guild' in some form. Exhibits 12 through 31 are a representative example of the use of

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[3] Attached to Applicant's March 23, 2016 Response to Office Action, at 32.

> trademarks containing the word "Guild" in conjunction with the sale of a variety of different goods and services in a variety of different industries.[4]

As noted, Applicant submitted 20 printouts of third-party registrations, of which only one is in International Class 36. The Examining Attorney submitted into the record this same registration, along with five others, for a total of six third-party registrations, owned by five different entities, with services in International Class 36 and that contain the term "GUILD": [5]

MARK	REGISTRATION NO.	SERVICES
BROKERS GUILD	3658667	". . . arranging for real estate financing for others; . . . "
Independent Member Brokers Brokers Guild Classic Real Estate Services, and design	3658668	"real estate brokerage franchising services . . . "
The Balalaika Guild, and design	3021392	". . . providing financial assistance to orchestras, musicians, conductors, teachers, and guest artists"
LIGHTHOUSE GUILD	4782688	"charitable fundraising . . ."
NATIONAL COUNCIL OF URBAN LEAGUE GUILDS	4181195	"charitable fund raising"
ALLIED ARTS GUILD	3311944	"rental of shopping center space for artists' studios, shops and restaurants"

We observe that evidence of third-party registrations is relevant to "show the sense in which . . . a mark is used in ordinary parlance." *Juice Generation, Inc. v. GS*

[4] Attached to Applicant's March 23, 2016 Response to Office Action, at 176.

[5] Attached to May 2, 2016 Final Office Action, at 41-58.

Enters. LLC, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015), citing J. Thomas McCarthy, 2 McCarthy on Trademark and Unfair Competition § 11:90 (4th ed. 2015); *see also Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports,* S.L.U., 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015). We also take judicial notice of the relevant dictionary definition of the word "GUILD" as referring to "An association of people with similar interests or pursuits; *especially*: a medieval association of merchants or craftsmen" and whose synonyms include "institution; institute" and "consortium."[6]

Taken together, this evidences that the term "GUILD" is at least somewhat suggestive in International Class 36, at least when referring to a collective or consortium. However, we keep in mind the similarity of Applicant's mark in commercial impression to the mark in the cited registration, particularly given that the additional terms in each mark are descriptive and disclaimed. We further note that while we do not find the mark in the cited registration to be particularly weak, even weak marks are entitled to the presumptions of validity under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), and are entitled to protection against registration of confusingly similar marks. *See King Candy Co. v. Eunice King's Kitchen, Inc.,* 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

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[6] Merriam-Webster.com. The Board may take judicial notice of dictionary definitions, including definitions or entries from references that are the electronic equivalent of a print reference work. *See 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) (dictionary definitions); *In re Red Bull GmbH,* 78 USPQ2d 1375, 1377 (TTAB 2006) (online dictionaries that exist in printed format or regular fixed editions).

Thus we find that when considered in their entireties, the similarities of the marks, as to their commercial impressions, outweigh differences in sight and sound, and this first *du Pont* factor favors finding a likelihood of confusion.

Services/Channels of Trade/Classes of Purchasers

We consider next the relatedness of the services. The cited registration identifies "investment advisory services." Applicant identifies "mortgage banking services, namely, origination, acquisition, servicing, securitization and brokerage of mortgage loans." We look to see if the services are of a type that consumers will believe emanate from a common source. In this regard, the Examining Attorney submitted copies of use-based third-party registrations that include mortgage banking services, as identified in the application on the one hand, and investment advisory services, as identified in the cited registration, on the other hand. Furthermore, at least four of the registrations identify very specifically the "mortgage banking services, namely, origination, acquisition, servicing, securitization and brokerage of mortgage loans," as set forth by Applicant. These include ANDROSCOGGIN SMARTER BANKING (Registration No. 4801120);[7] WE HELP PEOPLE, BUSINESSES, AND OUR COMMUNITIES. (Registration No. 4785000);[8] FREEDOM BUSINESS (Registration No. 4724919);[9] and FSF (Registration No. 4917776).[10]

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[7] Owned by Androscoggin Savings Bank DBA Androscoggin Savings Bank Corporation Maine.
[8] Owned by Alpine Bancorporation, Inc.
[9] Owned by Freedom Portfolio Services Corporation Texas.
[10] Owned by First State Financial, Inc.

Applicant argues that these third-party registrations are not probative for two reasons. First, Applicant argues that they are not probative because the services offered by Registrant in this case may be narrowly defined as "discretionary" investment services being offered to "high net worth" individuals.[11] Second, Applicant argues that they are not probative because the referenced third-party registrations are owned by banks and the services listed therein include not only the services offered by Applicant and Registrant but also an array of other banking services. As to the first argument, it is axiomatic that we must base our analysis on a review of the identifications themselves. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) ("It was proper, however, for the Board to focus on the application and registrations rather than on real-world conditions"), *citing Octocom Sys. Inc. v. Houston Comp. Servs. Inc.,* 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990). As to the second argument, there is no evidence that the services listed in the third-party registration are over-inclusive, nor does Applicant argue that they extend beyond the banking and financial industry such as to render them non-probative in our analysis as to consumer perceptions of what services would derive from a common source for purposes of this proceeding.

With regard to the channels of trade, in the absence of specific limitations in the cited registration and the application, we must presume that Registrant's investment advisory services and Applicant's mortgage banking services will travel in all normal and usual channels of trade and methods of distribution. *See Stone Lion Capital* 110

[11] 4 TTABVUE 4.

USPQ2d at 1161-1162; *see also In re Linkvest S.A.,* 24 USPQ2d 1716, 1716 (TTAB 1992) (because there are no limitations as to channels of trade or classes of purchasers in either the application or the cited registration, it is presumed that the services in the registration and the application move in all channels of trade normal for those services, and that the services are available to all classes of purchasers for the listed services). In this regard, we find that the same consumers may seek investment advisory services and mortgage banking services so that both services are rendered to the same individuals and move in the same channels of trade. Since there are no limitations on the channels of trade in Applicant's identification of services either, we must make the same presumption with regard to Applicant's services. These *du Pont* factors also favor a finding of likelihood of confusion.

<u>Degree of Consumer Care</u>

Applicant urges us to consider the consumer sophistication and degree of purchaser care likely to be exercised for the services at issue in this proceeding given, again, in particular, Applicant's argument that Registrant caters to "high net worth" individuals. We emphasize again that we are bound by the identifications, which are not limited to particular investors or investment amounts. Furthermore, we must make our determination based on the least sophisticated consumer. *Stone Lion Capital*, 110 USPQ2d at 1163 (likelihood-of-confusion decision must be based "on the least sophisticated potential purchasers"). Nevertheless, we expect that consumers may exercise a certain degree of care in investing money, if not perhaps in seeking a

mortgage loan for which they simply wish to get funded. Overall, we find this factor to slightly weigh against finding a likelihood of confusion.

Conclusion

On balance, after considering all of the arguments and evidence of record as they pertain to the relevant *du Pont* factors, we find that despite the suggestiveness of the term "GUILD," the marks have the same dominant term, and are substantially similar in commercial impression, and that the services are related and overlapping and would be expected to travel through some of the same channels of trade to some of the same consumers. Although some of the consumers would be likely to exercise an increased degree of care, we find, on balance, that there is a likelihood of confusion between Applicant's mark GUILD MORTGAGE COMPANY, and design, and the mark in the cited registration, GUILD INVESTMENT MANAGEMENT, for the identified services.

Decision: The refusal to register is affirmed under Section 2(d).