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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re BankAtlantic Bancorp, Inc.

Serial Nos. 75618643 and 75618644

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Before Drost, Kuhlke, and Mermelstein, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On January 7, 1999, applicant, BankAtlantic Bancorp, Inc., filed two applications to register on the Principal

¹ Despite a consolidation order, which applicant followed, the examining attorneys filed separate briefs. They are for the most part the same except for the discussion of the design feature in the '644 application. Our references to the record will be to that case because of the additional design feature discussion.

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Register the marks BANKATLANTIC (No. 75618643) and BANKATLANTIC and design shown below (No. 75618644).



The services in both applications are identified as "banking services" in Class 36. The dates of use first use anywhere and in commerce are listed as August 14, 1987 ('643 application) and May 12, 1998 ('644 application). The '644 application contains a disclaimer of the term "Bank."

The examining attorney² has refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) because of a prior registration for the mark ATLANTIC BANK, in typed or standard character form, for "banking services" in Class 36. Registration No. 1533587 issued April 4, 1989 (affidavits under Sections 8 and 15 accepted and acknowledged). The registration contains a disclaimer of the term "Bank" and the current owner is identified as New York Community Bancorp, Inc.

² Initially, the same examining attorney handled both applications. Subsequently, the applications were transferred to two different examining attorneys. We will use the singular when referring to the "examining attorney."

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After extensive prosecution and several requests for remand and reconsideration, applicant has now appealed to this board.

Cases involving refusals under Section 2(d) require us to consider the facts as they relate to the relevant factors set out by the Court of Customs and Patent Appeals in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003) and *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). Oftentimes, in likelihood of confusion cases, the "fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We begin by looking at the services. In this case, the applications and registration all identify the services as "banking services," therefore there are identical.

"When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23

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USPQ2d 1698, 1701 (Fed. Cir. 1992). Furthermore, because the services "are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers." *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994).

Next, we examine "the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.'" *Palm Bay Imports 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). Applicant's marks are

BANKATLANTIC and . Registrant's mark is ATLANTIC BANK. The examining attorney argues that the "the marks consist of the identical word components 'ATLANTIC' and 'BANK.'" Applicant's mark is merely and legally the registrant's mark transposed, with an addition of a design portion." Brief at unnumbered p. 5. The "transposition, at bar, results in a term which has the same meaning and commercial impression." Brief at 6.

In response, applicant argues that the marks are dissimilar.

Where, as here, both terms are suggestive and weak for banking services, the cited mark should be entitled to a very narrow scope of protection, limited to the

identical or virtually identical mark for identical or very closely related products or services. Moreover, where a mark consists of suggestive, widely-used terms, as is the case here, reversing those terms often avoids a likelihood of confusion.

Brief at 19.

In a somewhat similar case, the board held:

Comparing applicant's marks "AMERIBANC" and design and "AN AMERIBANC BANK" and design to opposer's marks "BANKAMERICA" and "BANK OF AMERICA", it is readily apparent that the most significant portion of applicant's marks, i.e., the word "AMERIBANC", is essentially a transposition of the features of opposer's marks. As noted by the Board in the case of *In re Sybron Corporation*, 165 USPQ 410 (TTAB 1970), the fact that two marks are composed of reverse combinations of the same elements is not necessarily conclusive on the issue of likelihood of confusion since registration may be permitted if the transposed marks create distinctly different commercial impressions. See: *Murphy, Brill and Sahner, Inc. v. New Jersey Rubber Company*, 102 USPQ 420 (Comr., 1954) [FLITE TOP for hosiery -- TOPFLITE for shoe soles -- registration permitted]; *Marriott-Hot Shoppes, Inc. v. Hedwin Corporation*, 161 USPQ 742 (TTAB, 1969) [TALK O' THE TABLE for coasters, trays, napkin rings, and lazy susans -- TABLE TALK for a periodical publication -- registration permitted]; *In re Mavest, Inc.*, 130 USPQ 40 (TTAB 1961) [SQUIRETOWN for men's sport coats -- TOWN SQUIRES for men's shoes -- registration permitted]; *Ex parte Loft Candy Corp.*, 92 USPQ 279 (Comr., 1952) [JOYPOPS for candy -- POPJOY and design for popped and unpopped corn -- registration refused]; *The Hardware Company v. Bush*, 119 USPQ 271 (TTAB 1958) [DORWINDO for doors, windows and jalousies -- WIN-DOR for similar goods -- registration refused]; *McNamee Coach Corporation v. Kamp-A-While Industries, Inc.*, 148 USPQ 765 (TTAB, 1965) [KING KAMPER for camping trailers -- KAMP KING KOACHES for campers -- registration refused]; *Royal Crown Cola Co. v. Bakers Franchise Corporation*, 150 USPQ 698 (TTAB 1966) [RITE DIET for low fat fluid milk -- DIET-RITE for dietetic soft drinks -- registration refused]; *In re Inco*, 154 USPQ 629 (TTAB 1967) [GUARDIAN OF POSTURE for

mattresses -- POSTURGUARD for mattresses -- registration refused]; *In re Sybron Corporation, supra* [VACUUM AIRE for dental equipment and accessories -- AIRVAC for similar goods -- registration refused]; *Carlisle Chemical Works, Inc. v. Hardman & Holden Limited*, 168 USPQ 110 (CCPA, 1970) [COZIRC for driers for paints and varnishes -- ZIRCO for catalytic agents used in the manufacture of drier compositions -- registration refused]; *In re Atlantic Gulf Service*, 184 USPQ 828 (TTAB 1974) [ATLANTIC GULF SERVICE for cargo transportation by ship -- GULF ATLANTIC for distribution services, namely, public commercial warehousing, shipside terminal operations, and common carrier and contract trucking services -- registration refused]; and *In re Wm. E. Wright Co.*, 185 USPQ 445 (TTAB 1975) [FLEXI-LACE for garment findings, seam bindings, and hem tapes -- LACE-FLEX for laces in the piece -- registration refused]. In the present case, the words "BANKAMERICA" and "BANK OF AMERICA", on the one hand, and "AMERIBANC", on the other, convey the same meaning and create substantially similar commercial impressions. In view thereof, and considering that this is not a case where the marks of the parties are likely to be encountered by purchasers on a side-by-side basis, and that the average person is not infallible in his recollection of trade designations and may well transpose the elements of a mark in his mind, we do not believe that the differences between the marks of opposer and applicant, considered in their entireties, are sufficient to preclude the likelihood that the contemporaneous use of these marks in connection with the similar services here involved will result in confusion or mistake or deception. In arriving at this conclusion, we have not overlooked the fact that the words "AMERICAN" and "BANK" commonly appear in the names of banks.

Bank of America National Trust and Savings Association v. American National Bank of St. Joseph, 201 USPQ 842, 845 (TTAB 1978).

Subsequently, the board faced the issue of whether the term KEY was weak when applied to banking services. *In re*

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Hamilton Bank, 222 USPQ 174 (TTAB 1984). In that case, the board held:

What this case boils down to is the fact that the term "KEY" is part of at least twenty registered service marks adopted in the banking field. The term has weak trademark significance in this field because of its suggestiveness, which is evidenced by its widespread adoption and registration. In the case at hand the applicant's mark is no more likely to cause confusion with the five cited registered marks than the five cited marks are likely to cause confusion with the fifteen other registered marks which contain the term "KEY." Applicant's mark is distinguishable because of its design element and because it has no other elements in combination with the term "KEY." Each cited registered mark uses other matter in combination with the term which distinguishes that mark from applicant's mark and from the other registered marks.

Id. at 179.

We conclude that the marks BANKATLANTIC and ATLANTIC BANK are more similar than they are different because they consist of the same words "Bank" and "Atlantic." Both marks would have the same meaning, a bank near the Atlantic Ocean. Examining Attorney's Brief at 6-7 ("[P]urchasing public will perceive that those services, sold under the marks, originate from banks located near the Atlantic Ocean or along the Eastern seaboard of the United States"). Thus, both marks are suggestive of banks located near the Atlantic Ocean. Since they have the same words in different order (applicant's without a space), they are somewhat similar in appearance. Also, their commercial

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impressions have some similarity because they consist of the same words although, as we will discuss subsequently, these words are not very distinctive.

We add that the '644 application has a design element. This simple element would not normally lead potential consumers to believe that the services come from different sources. The simple rectangular box with three lines is not very distinctive. See *In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) (Federal Circuit held that, despite the addition of the words "The" and "Cafe" and a diamond-shaped design to registrant's DELTA mark, there still was a likelihood of confusion). See also *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988) (BIGG'S (stylized) for grocery and general merchandise store services found likely to be confused with BIGGS and design for furniture); *Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and surfer design likely to be confused with CONCEPT for hair care products). However, when marks are very suggestive, the presence of a design may be a more significant factor. See *Hamilton Bank*, 222 USPQ at 179. While we conclude that the marks are similar, we must also

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consider the strength of the marks, which we will do subsequently.

Normally, with the services, channels of trade, and prospective purchasers being identical and the marks being a simple transposition of the identical words, we would conclude that there is a likelihood of confusion. However, applicant has submitted a substantial amount of evidence that requires that we look at the likelihood of confusion issue from additional angles.

We must first dispose of an erroneous argument that applicant has raised. Applicant submitted a copy of a non-precedential decision of the board. *In re First Citizen's Bancshares, Inc.*, Serial No. 75165513 (TTAB July 28, 1999) (Examining attorney's refusal to register ATLANTIC STATES BANK because of the mark ATLANTIC BANK registered for the same services reversed). Applicant maintained that "the Board's unpublished decision ... is binding on and must be considered by the Examining Attorney in this case." Applicant's Request for Reconsideration dated January 16, 2007 at 3. Applicant also argues that "the most relevant and controlling DuPont factors in this cases are: (1) the Board's prior decision in First Citizen's holding the cited Atlantic Bank mark 'weak' and 'not entitled to a broad scope of protection....'" Brief at 4. Despite a recent

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change in board policy permitting citation of all board decisions, it is still true that a "decision designated as not precedential is not binding upon the TTAB." OG Notice dated January 23, 2007. As such, it is not binding on the examining attorneys either, and it cannot be a controlling factor in a case. While it "may be cited for whatever persuasive value it might have," neither the board nor the examining attorney can err by failing to follow a non-precedential decision, except under circumstances not relevant here. See TBMP § 101.03 (2d ed. rev. 2004).

Next, we consider the other evidence that applicant has made of record. Applicant asserts that it previously obtained registrations for the marks BANKATLANTIC (typed) (No. 1554045 issued August 29, 1989) and BANKATLANTIC and ship design (No. 1557206 issued September 19, 1989) for "providing savings and loan services" in Class 36. Both registrations were cancelled in 1996 under Section 8 of the Trademark Act. Applicant has also submitted a declaration that indicates that it is located in Florida where it has "70 branches, and is one of the largest and oldest financial institutions based in Florida" and that it provides "a full range of commercial and individual banking products." White October 8, 2004 dec. at 2. It also has a website, www.bankatlantic.com, and approximately 58,000

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online customers. *Id.* In addition, applicant has "more than 601,000 accounts spanning approximately 266,000 households. Although most account holders have Florida addresses, many have addresses in a number of states, including approximately 2000 customers who receive statements at New York addresses." *Id.* at 3. The declarant also maintains that it is aware of no instance of confusion between its mark and the Atlantic Bank mark. *Id.* at 4.

Furthermore, applicant has submitted significant evidence of the registration and use of various marks involving the term "Atlantic" for identical and related services. Applicant summarizes its evidence as follows:

Applicant has submitted evidence of 300+ uses of ATLANTIC for banking and financial services relied on by the Board in *First Citizen's*; evidence of 270+ additional entities providing banking and financial services under ATLANTIC-formative trade names and marks from Dun and Bradstreet and Nexis; and evidence of approximately 360 financial institutions and banks operating under ATLANTIC-formative names and marks in the United States Federal Reserve System.

Reply Brief at 6-7.

Some of the most relevant examples are set out below:

No. 1533587 - ATLANTIC BANK ("Bank" disclaimed) for banking services" in Class 36. Cited registration. Hieber Ex. 1 (evidence of use).

No. 1341446 - BANCO ATLANTICO ("Banco" disclaimed) for "banking services" in Class 36. The mark is translated as "Bank of the Atlantic." This mark was

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originally cited as a bar to registration but applicant entered into a consent agreement with the registrant (Request for Reconsideration dated January 16, 2007, Ex. A). Hieber Ex. 1.

No. 2449373 - ATLANTIC STATES BANK ("States Bank" disclaimed) for "Banking Services" in Class 36. Issued after refusal reversed in *In re First Citizens BancShare, Inc.* case. Hieber Ex. 1 (Evidence that "Atlantic States Bank will change its name to IronStone Bank on March 15" 2004).

Nos. 2748299 and 2835006 - ATLANTIC TRUST ("Trust" disclaimed) and ATLANTIC TRUST COMPANY ("Trust Company" disclaimed) for, inter alia, "private banking services" in Class 36. Same registrants. Hieber Ex. 1 (evidence of use).

No. 1419434 - ATLANTIC MORTGAGE & INVESTMENT CO. ("Mortgage & Investment Co." disclaimed) for "mortgage banking services" in Class 36.

Nos. 1401560 and 2769817 - FIRST ATLANTIC and FIRST ATLANTIC FEDERAL CREDIT UNION and design ("Federal Credit Union" disclaimed) for banking and banking-related services in Class 36. Hieber Ex. 1 (evidence of use)

No. 3041042 - MID-ATLANTIC FINANCIAL SERVICES, INC. and design (all wording disclaimed) for "mortgage banking and lending" in Class 36.

No. 2514180 - UNION ATLANTIC LC ("LC" disclaimed) for "investment banking services" in Class 36.

In addition to these registrations, applicant also included several others for services such as financial and investment services and mortgage brokerage services that are less directly relevant to banking services. *See, e.g.,* Registration No. 3045247 (ATLANTIC CREDIT & FINANCE INCORPORATED and design); No. 2364549 (ATLANTIC-PACIFIC);

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and No. 2343200 (ATLANTIC COVERAGE CORP. and design). We also find applicant's evidence (Hieber Exhibits 2-7) that involves other terms, such as "North," "West," "East," "United," "Bay," and "Pacific," not very relevant.

See Jaquet-Girard S.A. v. Girard Perregaux & Cie., S.A., 423 F.2d 1395, 165 USPQ 265, 266 (CCPA 1970) ("Appellant relies primarily on four prior rulings in this court on other marks but, as we have often said, prior decisions on different marks used under different circumstances are of little value in deciding a specific issue of likelihood of confusion"). Moreover, we have given the copies of the pending applications that applicant has submitted no weight. *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002) ("While applicant also submitted a copy of a third-party application ..., such has no probative value other than as evidence that the application was filed") and *Olin Corp. v. Hydrotreat, Inc.*, 210 USPQ 62, 65 n.5 (TTAB 1981) ("Introduction of the record of a pending application is competent to prove only the filing thereof").

Furthermore, applicant submitted internet evidence to show that there are other banks with the term "Atlantic" in their name that are offering or advertising services on the internet:

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Greater Atlantic Bank (www.gab.com)

Atlantic Stewardship Bank (www.asbnow.com)

Atlantic Central Bankers Bank
www.atlanticcentral.com)

Bank of the Atlantic (www.bankoftheatlantic.com)

Atlantic National Bank (www.atlanticnationalbank.com)

Atlantic Coast Federal (www.acfederal.com)

Gulf Atlantic Capital (www.gulfatlanticcapital.com) -
("a private investment bank located in Tampa,
Florida")

Applicant also submitted a report from Dun and
Bradstreet that identified numerous entities that are using
the term "Atlantic" in association with banking services.

Some of these entries include:

ATLANTIC STATES BANK - state commercial bank
(Georgia)

ATLANTIC FINANCIAL SAVINGS INC - Federal savings
institution (Pennsylvania)

ATLANTIC FINANCIAL CORP - national commercial bank
(Virginia)

ATLANTIC NATIONAL BANK NORTH - national commercial
bank (Virginia)

ATLANTIC PERMANENT SAVINGS BANK - Federal savings
institution (Virginia)

ATLANTIC INTERNATIONAL INVESTMENTS, INC - commercial
bank (Maryland)

ATLANTIC BANK - state commercial bank (New York)

ATLANTIC LIBERTY SAVINGS & LOAN ASSOCIATION - loan
brokers (New York)

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ATLANTIC BANK NA - national commercial bank (Maine)

ATLANTIC AVIATION EMPLOYEE CREDIT UNION - Federal credit union (Delaware)

ATLANTIC HUMAN RES STAFF CREDIT UNION - state credit union (New Jersey)

ATLANTIC FEDERAL CREDIT UNION - Federal credit union (New Jersey)

ATLANTIC BANK OF NEW YORK - state commercial bank (New York)

ATLANTIC CENTRAL BANKERS' BANK - commercial bank, not chartered (Arkansas)

ATLANTIC SAVINGS BANK - Federal savings institution (Florida)

ATLANTIC STEWARDSHIP BANK - state commercial bank (New Jersey)

ATLANTIC NATIONAL BANK OF FLORIDA INC - national commercial bank (Florida)

Furthermore, applicant provided a printout from the United States Federal Reserve System that "disclosed approximately 360 financial institutions and banks operating under ATLANTIC-formative names." Request for Reconsideration dated January 16, 2007 at 5. Only about 140 of these listings are for institutions identified as banks, credit unions, or savings and loan associations. The remaining entries, normally identified as "Domestic Entity Other" (e.g., Atlantic Appraisal Company and Atlantic Builders Inc.) or "Finance Company," are not

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relevant to the issue in this case. The entries simply list the name of the institution, an RSSD ID, the city, state, Institution Type, and the "As of Date." The search included entity status information as "Current" or "Non-current." Furthermore, there are numerous entries for "Atlantic Bank of ----." Many of these are for cities in Florida (St. Augustine, Tampa, Broward, Davie, Hollywood, Jacksonville, Miami, etc.). Other entries are for entities in Atlantic City, New Jersey. Since it is not clear whether there is a relationship between the entities and whether they are currently in existence, we cannot give this list much weight.

Nonetheless, applicant has submitted evidence of the use of other Atlantic marks that have been used and in some cases registered for identical or very similar services.

Indeed, the third-party use evidence in this case is stronger than that offered in Lloyd's, because here we have not only the telephone directory listings themselves, but also evidence from a search of the American Business Directory (a compilation of U.S. telephone directory listings supplemented by primary research in the form of telephone interviews to capture further data and update the directory information), as well as evidence from a search of a Dun & Bradstreet database of 9 million company/business names. Although there is, of course, a hearsay element to this evidence, there is no bias in the databases, which were not prepared for purposes of this case, but rather are maintained on an ongoing basis for general business use.

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In re Broadway Chicken Inc., 38 USPQ2d 1559, 1564-65 (TTAB 1996) (footnote omitted).

From this evidence, we conclude that the term "Atlantic" for banking services is a very weak term. It is widely used in the names of various financial institutions. The Eighth Circuit noted that: "The district court held, and FNB Sioux Falls does not dispute, that consumers tend to exercise a relatively high degree of care in selecting banking services. As a result, customers are more likely to notice what, in other contexts, may be relatively minor differences in names." *First National Bank in Sioux Falls v. First National Bank South Dakota*, 153 F.3d 885, 47 USPQ2d 1847, 1851 (8th Cir. 1998). The evidence convinces us that the same is true with financial institutions that include the term "Atlantic." The question then becomes whether the differences in this case are sufficient to prevent confusion.

One factor that we must consider is the sophistication of the purchasers and the care they exercise in using the services. Applicant argues that consumers of "banking services like those offered by Applicant and the owner of the cited mark exercise a high degree of care and deliberation when choosing such services because their choice directly affects their financial well-being." Brief

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at 20. The examining attorney does not dispute this point but instead argues that "sophisticated purchasers are not immune to source confusion." Brief at 11. Applicant cites *First National Bank in Sioux Falls*, 47 USPQ2d at 1851 (Consumers "tend to exercise a relatively high degree of care in selecting banking services") and *Amalgamated Bank of New York v. Amalgamated Trust & Savings Bank*, 842 F.2d 1270, 6 USPQ2d 1305, 1308 (Fed. Cir. 1988) ("It would be strange for the customers of the banks to be confused about whom they were dealing with, and their bankers not know it") as support for its position. We agree with applicant to the extent that the factor concerning the sophistication of consumers of banking services favors applicant.

Finally, applicant argues that despite "20 years of coexistence" (Reply Brief at 12), applicant's executive vice president has declared that applicant is not aware "of any instances of customer confusion occurring between BankAtlantic on one hand and Atlantic Bank or Banco Atlantico on the other." White October 8, 2004 dec. at 4. The lack of actual confusion is often not entitled to much weight. *Majestic Distilling*, 65 USPQ2d at 1205 ("With regard to the seventh DuPont factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary

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value"). However, in appropriate circumstances, this factor may have some weight. *In re General Motors Corp.*, 23 USPQ2d 1465, 1470-71 (TTAB 1992):

In the present case, however, we have a confluence of facts which persuasively point to confusion as being unlikely. Specifically during a nearly thirty-year interval of sustained success in the marketing of what, for the average consumer, is typically a major and expensive purchase, applicant has experienced no reported instances of actual confusion between its use of "GRAND PRIX" in connection with almost 2.7 million automobiles and registrant's use of its "GRAND PRIX" marks for related automotive replacement parts. The absence of any known incident of actual confusion in an extensive period of contemporaneous use of the marks is strong evidence that confusion is not likely to occur in the future.

See also King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974) ("In the absence of evidence to the contrary, such lack of actual confusion over so many years must be considered in this case as supportive of a finding that confusion is not likely in the future"). Here, applicant and the registrant have co-existed for more than twenty years. Applicant has submitted evidence that it has been using the mark extensively in Florida and it has customers outside the state of Florida, including several thousand in New York State. During this time, applicant can report that there have been no instances of confusion despite the use of BANKATLANTIC, ATLANTIC BANK, and BANCO ATLANTICO by three

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different entities. Therefore, applicant's evidence of no actual confusion is entitled to some weight.

Ultimately, we must weigh the evidence in this case against the *du Pont* factors. Certainly, the facts that the services are identical and the marks are similar to the extent that they are composed of the same words are factors that support a determination that there is confusion. However, it is also clear that the term "Atlantic" is a very weak, highly suggestive term for banking services. In addition, the marks here are different to the extent that the order of the words are reversed, BANKATLANTIC and ATLANTIC BANK, which changes their commercial impression. Numerous entities have used and registered the term as part of their trademarks or trade names. Furthermore, applicant and registrant have co-existed for more than twenty years without any instances of actual confusion known to applicant. We keep in mind that the question is whether confusion is likely, not simply possible. *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1393 (Fed. Cir. 1992).

Under these circumstances, we conclude that this is a circumstance where consumers would rely on what would otherwise be slight differences between applicant's

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BANKATLANTIC and  marks and registrant's ATLANTIC BANK to distinguish the marks. See, e.g., *In re Hearst Corp.*, 982 F.2d 493, 25 USPQ2d 1238, 1239 (Fed. Cir. 1992) ("The Board analyzing the marks for confusing similarity, found that 'varga' was the dominant element of the VARGA GIRL mark, and that 'girl' was merely descriptive and thus could not be afforded substantial weight in comparing VARGA GIRL with VARGAS. The Board erred in its analytic approach"); and *In re Electrolyte Laboratories Inc.*, 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990) ("We conclude that the TTAB erred in its dominant focus on the K+ in both marks, to the substantial exclusion of the other elements of both marks"). Therefore, we conclude that in this case, confusion is unlikely.

Decision: The examining attorney's refusals to register applicant's marks for "banking services" in Serial Nos. 75618643 and 75618644 on the ground that they are likely to cause confusion with the cited registered mark used in connection for the same services under Section 2(d) of the Trademark Act are reversed.