

**THIS OPINION IS NOT A
PRECEDENT OF
THE T.T.A.B.**

Mailed: February 21, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Patriot Bank

Serial Nos. 78454907 and 78454914¹

Zachary D. Messa of Johnson, Pope, Bokor, Ruppel & Burns,
LLP for Patriot Bank.

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Office 101 (Ronald R. Sussman, Managing Attorney).

Before Kuhlke, Cataldo and Mermelstein,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applications were filed by Patriot Bank, a Florida
corporation, to register the mark PATRIOT BANK in standard
character form on the Principal Register for "banking

¹ Applicant's July 5, 2006 motion to consolidate its appeals of
the examining attorney's refusal to register the marks in these
applications was granted in a Board order issued on July 8, 2006.

² The above applications originally were examined by another
examining attorney, but subsequently were reassigned to the
examining attorney whose name is shown above.

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services," in International Class 36³; and the mark shown below on the Principal Register, also for "banking services" in International Class 36.⁴



The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's marks, as intended to be used in connection with applicant's services, so resemble the mark shown below, previously registered on the Principal Register for "mortgage financing and mortgage banking services," in International Class 36⁵ as to be likely to cause confusion.

³ Application Serial No. 78454907 was filed July 22, 2004, based upon applicant's allegation of a bona fide intent to use the mark in commerce. In response to a requirement by the examining attorney, applicant disclaimed the exclusive right to use "BANK" apart from the mark as shown.

⁴ Application Serial No. 78454914 was filed July 22, 2004, based on applicant's allegation of a bona fide intent to use the mark in commerce. In response to a requirement by the examining attorney, applicant disclaimed the exclusive right to use "BANK" apart from the mark as shown.

⁵ Registration No. 2064663 issued May 27, 1997 with a disclaimer of "FUNDING" apart from the mark as shown. Section 8 affidavit accepted. Renewed.



When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed consolidated briefs on the matter under appeal.⁶

Applicant argues that the examining attorney improperly dissected its marks as well as the mark in the cited registration in determining that they are confusingly similar; that the term "PATRIOT" shared by applicant's mark and that of registrant is a weak term both in the financial field and in general; and that, taken as a whole, applicant's marks create different commercial impressions from that of the cited mark. Applicant further argues that third party registration of similar "PATRIOT" marks for

⁶ We note that applicant enclosed as exhibits to its brief copies of its original applications; the examining attorney's Office Actions; applicant's responses thereto and its motion papers before the Board; the evidence submitted with each of these filings; and orders and notices generated by the Trademark Examining Operation and Board herein. Inasmuch as these filings, by their very nature, are already of record in these consolidated proceedings, applicant's submission of copies thereof with its brief is unnecessary and duplicative.

We note in addition that the evidentiary record in these consolidated applications is essentially identical.

related services favors registration of the applied-for marks in this case; that consumers of both applicant's and registrant's services are sophisticated as a result of the importance of selecting a financial institution; that applicant is located in Florida whereas registrant confines its services to the New England area, thus reducing any likelihood of confusion; and that the case of *Sun Banks of Florida, Inc. v. Sun Federal Savings and Loan Association*, 651 F.2d 311, 211 USPQ 855 (5th Cir. 1981) "is controlling and the Examining Attorney should follow the analysis set forth therein which holds that Applicant's Marks are not likely to cause confusion with Registrant's Mark" (brief, p. 13).

The examining attorney argues that applicant's marks share the dominant term "PATRIOT" with the mark in the cited registration; that "PATRIOT" is the first word in both of applicant's marks as well as that of registrant; that, as a result, the term "PATRIOT" is most likely to be remembered by consumers; that "PATRIOT" is defined as "a person who loves, supports and defends his or her country and its interests with devotion," or "a U.S. Army antiaircraft missile with a range of 37 mi. (60 km) and a 200 lb. (90 kg) warhead, launched from a tracked vehicle

with radar and computer guidance and fire control"⁷ (brief, unnumbered p. 3); that the term "PATRIOT" thus is arbitrary and strong as applied to the recited services; that the evidence submitted by applicant is insufficient to establish that the term "PATRIOT" is a weak term as applied to the recited services; that the remaining wording and/or design elements in applicant's and registrant's marks are less significant in establishing their overall commercial impressions; and that, as a result, applicant's marks when considered in their entirety are confusingly similar to the mark in the cited registration. The examining attorney further argues that applicant's services are closely related to those of registrant; that the services as recited in the applications at issue and the cited registration contain no limitations as to the channels of trade or class of purchasers thereof; that the services thus may be encountered by the same consumers; and that applicant has introduced no evidence to support its claim that consumers of such services are sophisticated. In

⁷ The examining attorney relies upon Random House Unabridged Dictionary, (2d ed. 1998) for this definition. We grant his request that we take judicial notice of the reference. The Board may take judicial notice of dictionary entries and other standard reference works. See *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); and *In re Broyhill Furniture Industries Inc.*, 60 USPQ2d 1511 (TTAB 2001).

addition, the examining attorney argues that because neither the applications at issue nor the cited registration recite any geographic limitations, applicant's assertions regarding their respective geographic locations is irrelevant; that any absence of actual confusion fails to lessen the likelihood of confusion between these marks; and that applicant relies upon authority in support of its position that is neither on point nor binding upon this Board.

Applicant argues in reply that its evidence of third party use of the term "PATRIOT" is admissible and shows the weakness of that term; that particularly given the weakness of the term "PATRIOT," its marks differ from that in the cited registration to such an extent that confusion is unlikely; and that applicant's services differ from those of registrant in that applicant provides commercial banking services while registrant provides mortgage lending services.

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., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed.

Cir. 2003). In any likelihood of confusion analysis, however, 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 begin by comparing applicant's proposed services with those of registrant. In making our determination under the second *du Pont* factor, we look to the services as identified in the involved application and cited registration. See *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that 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 regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.") See also *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.")

In this case, applicant's services are identified as "banking services" without limitation and registrant's services are identified as "mortgage financing and mortgage banking services." Thus, on the face of the services as recited in the applications at issue, "banking services" encompass registrant's more narrowly identified "mortgage banking services." Put another way, registrant's "mortgage banking services" are a subset of applicant's more generally identified "banking services." In addition, the examining attorney has made of record a number of use-based third-party registrations which show that various entities have adopted a single mark for services that are identified in both applicant's applications and the cited registration. See Registration No. 2943396 for the mark SILICON VALLEY BANK (Section 2(f), BANK disclaimed) for, inter alia, "banking and related financial services, mortgage lending and mortgage financing, mortgage banking;" Registration No. 2830899 for the mark SHAMROCK BANK N.A. (BANK N.A. disclaimed) for, inter alia, "banking services, mortgage financing services, mortgage banking services;" Registration No. 2827968 for the mark ASB and design for, inter alia, "banking services, mortgage financing services, mortgage banking services;" Registration No. 2808814 for the mark ASB AMERISTATE BANK and design (BANK, A, S, and B

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disclaimed) for, inter alia, "banking services, mortgage financing services, mortgage banking services;" Registration No. 3016166 for the mark SUTTON BANK and design (BANK disclaimed) for, inter alia, "banking, mortgage banking;" Registration No. 3030185 for the mark BCNA for, inter alia, "banking, mortgage banking;" Registration No. 3027054 for the mark SOLANO BANK and design (BANK disclaimed) for, inter alia, "banking services, mortgage banking services;" and Registration No. 3008900 for the mark BANK TO GO (BANK disclaimed) for, inter alia, "banking services, mortgage banking." Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993).

Based upon the services recited in the challenged applications and the cited registration, as well as the above evidence of record, we find that applicant's proposed services are identical in part and otherwise closely related to those provided by registrant. As such, this *du Pont* factor weighs heavily against applicant.

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We are not persuaded by applicant's argument that because applicant and registrant "operate in two completely different geographic locations" (brief, p. 10), that is, Florida and New England, consumers are not likely to be confused as to the source of their services. First, the services as identified in the involved applications and the cited registration do not contain any such limitation. As noted above, we must base our determination upon the recitation of services in the involved applications and the cited registration. See *Octocom Systems, Inc. v. Houston Computers Services Inc.*, *supra*. Absent geographical limitations in the application and registration, our likelihood of confusion analysis must presume a nationwide right to use the mark. See Trademark Act § 7(b). Further, inasmuch as the recitation of services in the cited registration is not limited to any specific channels of trade, we presume an overlap and that the services would be offered in all ordinary trade channels for these services and to all normal classes of purchasers. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992).

Turning to our consideration of the marks at issue, we note initially that the test under the first *du Pont* factor is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether

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the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). We note that under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. *See Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259 (TTAB 1980).

We begin by observing that the mark shown below



in the cited registration consists of the wording PATRIOT FUNDING and a design consisting of a stylized flag and the outline of a building. Neither the above-noticed dictionary definition nor any evidence made of record by applicant or the examining attorney supports a finding that PATRIOT has a recognized meaning in the banking or financial field. Thus, the term PATRIOT is at least distinctive, if not arbitrary, as used or intended to be

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used with both registrant's and applicant's services. The disclaimed term FUNDING in registrant's mark appears to be descriptive of registrant's mortgage banking and financing services, and thus has little or no source distinguishing quality and is subordinate to PATRIOT. Further, the relatively minor flag and building designs are visually less significant than the wording in registrant's mark. When a mark comprises both wording and a design, the wording is normally accorded greater weight because it would be used by customers to request the identified goods or services. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). For these reasons, we consider PATRIOT to be the dominant feature of the registered mark.

Likewise, with regard to applicant's PATRIOT BANK mark (in its application Serial No. 78454907), the term "BANK" is descriptive of its banking services, and has been disclaimed by applicant pursuant to the examining attorney's requirement. PATRIOT, also being the first word of the mark, is the dominant portion of applicant's mark, and the portion that is most likely to be remembered by customers. Thus, applicant's PATRIOT BANK mark shares the term PATRIOT with registrant's mark as its most distinctive component.

With regard to applicant's mark shown below



in its application Serial No. 78454914, we again note that the term "BANK" is descriptive of its banking services, and has been disclaimed by applicant. The wording A REVOLUTION IN COMMUNITY BANKING appears in a typeface that is much smaller, and thus less visually prominent, than the above wording PATRIOT BANK. The relatively minor feather pen and line design also are less visibly prominent than the wording PATRIOT BANK. Although the marks at issue must be considered in their entirety, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). In this case, the term PATRIOT in applicant's mark in its application Serial No. 78454914, being the first word of the mark and displayed in large type font, is the dominant portion of applicant's mark, and the portion that is most likely to be remembered by customers. We find that the additional wording and design in applicant's mark fails to alter the commercial

impression between its mark and that of registrant so that confusion is unlikely.

We note applicant's contention regarding differences between its marks and registrant's mark. Nevertheless, the same portion, namely the word PATRIOT, dominates all of the marks. As such, when we compare the marks, we conclude that the similarities between applicant's marks and the mark in the cited registration far outweigh the dissimilarities. Therefore, we find that, when the marks are compared in their entirety, they are sufficiently similar in appearance, sound, connotation and commercial impression that, if used in connection with related services, confusion would be likely to occur. As such, this *du Pont* factor also weighs heavily against applicant.

In considering the involved marks, we have taken into account third-party Registration No. 2810481 of the mark PATRIOT.⁸ The registration covers the following services: "financial trading services, namely, utilizing hardware and software for providing order routing, order execution, messaging, and financial data and news for the equity marketplace." This evidence is of limited probative value.

⁸ Applicant submitted a printed copy of this registration from the United States Patent and Trademark Office's Trademark Electronic Search System (TESS).

Firstly, the registration is not evidence of use of the mark shown therein and it is not proof that consumers are familiar with said mark so as to be accustomed to the existence of similar marks in the marketplace. See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); and *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982). Secondly, the registration covers services which are not as closely related to those in the cited registration as applicant's proposed services.⁹

In addition, applicant submitted from the Office's TESS database a list of third party marks containing the term PATRIOT. For the following reasons, we find this listing to be unpersuasive. First, a mere listing of third party applications and registrations is insufficient to make them of record. See *In re Duofold, Inc.*, 184 USPQ 638, 640 (TTAB 1974) ("[T]he submission of a list of

⁹ We note that applicant submitted TESS copies of eight other "registrations" in support of its arguments regarding the asserted weakness of the term "PATRIOT" in the financial field. However, four of the marks cited by applicant, in application Serial Nos. 74294572; 74294573; 75280023; and 76461253 never matured into registrations. As noted *infra*, the applications are of very limited probative value. See *In re Phillips-Van Heusen Corp.* 63 USPQ2d 1047, 1049 n.4 (TTAB 2002). In addition, the remaining four registrations cited by applicant (Registration Nos. 1280926; 1781736; 1780558; and 2039149) were all cancelled prior to the filing of the involved applications, and have no probative value on the question of the relative strength of registrant's mark.

registrations is insufficient to make them of record.") See also TBMP §1208.02 (2d ed. rev. 2004) and the authorities cited therein. Thus, we agree with the examining attorney that applicant's proffered list of third party applications and registrations is not properly of record. See *Id.* Second, applicant's listing of applications and registrations, even if considered, has very limited probative value for the following reasons: there is no indication as to the services recited therein; a large percentage of the listed applications and registrations are dead; and the live registrations are too few in number to be persuasive. It is further settled that an application made of record in a Board ex parte proceeding is of very limited probative value, and is evidence only of its filing. See *In re Phillips-Van Heusen Corp.*, *supra*.

Furthermore, we find unpersuasive applicant's search summary from the GOOGLE Internet search engine of the phrase "Patriot Financial" as well as a sample of the results obtained thereby. First, with regard to the search summary, these results do not show use of "Patriot Financial" as a heading, link or content on a website. Use in a search summary may indicate only that the two words in an overall phrase appear separately in the website

literature, and it is possible that the words are not visible at all on the linked page. Therefore, the appearance of "Patriot Financial" in the submitted search summary is of very limited probative value. *See In re Fitch IBCA, Inc.*, 64 USPQ2d 1058, 1060 (TTAB 2002). With regard to the search results themselves, we note that a number of the submitted "screenshots" from Internet websites suggest use of PATRIOT formative marks in connection with financial services, including mortgages. However, this evidence does not indicate whether these marks are currently in use in commerce, or the extent to which the relevant consuming public has been exposed to such use. As a result, this evidence falls short of establishing that PATRIOT is a weak term as used in connection with banking and financial services.

Nor are we persuaded by applicant's submission of an Internet listing from a private website of businesses located in the State of Florida whose corporate names include the term PATRIOT that the term is weak either in general or in the financial field. As noted by the examining attorney, a mere listing of marks is not evidence that those marks are currently in use in commerce. *See In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983). It is noted in addition that the status of a significant

percentage of the listed corporations is inactive, suggesting that those corporations are not engaged in any sort of activity. In any event, the listing fails to include any information regarding the nature of the goods or services associated with the named corporations.

We accordingly find that, on the record in this case, the mark in the cited registration is entitled to more than a narrow scope of protection, particularly in the field of mortgage banking and mortgage financing services. See *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1740 (TTAB 1991), *aff'd unpub.*, (Appeal No. 92-1086, Federal Circuit, June 5, 1992). Cf. *In re Broadway Chicken, Inc.*, 38 USPQ2d 1559 (TTAB 1996).

The next *du Pont* factor discussed by applicant is that of the conditions of sale. Applicant asserts that purchasers of its services as well as those of registrant are sophisticated and will exercise care due to the importance of selecting a financial institution. However, applicant has submitted no evidence to support its contention. Moreover, given the overlap discussed above between banking, mortgage banking and mortgage financing, even sophisticated consumers may not realize that applicant's recited services do not emanate from the same source as those of registrant. Furthermore, even if some

degree of care were exhibited in making the purchasing decision, because of the similarities between the marks, even careful purchasers are not likely to distinguish between them. As a result, we also find this *du Pont* factor to weigh against applicant.

Finally, applicant strenuously argues that the decision of the Fifth Circuit in *Sun Banks of Florida, Inc. v. Sun Federal Savings and Loan Association*, 651 F.2d 311, 211 USPQ 855 (5th Cir. 1981) is controlling in this case and that in light thereof the examining attorney is required to find that its marks are not confusingly similar to that of registrant. Applicant's reliance upon this decision, however, is misplaced. First, *Sun Banks* was an inter partes trademark infringement case involving different parties, facts, and evidentiary record from the present case. As such, the decision of the Court in *Sun Banks* cannot be said to be controlling herein.¹⁰ Furthermore, the Court in *Sun Banks* found the plaintiff's mark to be weak as a result of extensive evidence of third-party use of related marks. As noted above, that is not the case here.

¹⁰ Applicant does not argue, nor do we find, that the *Sun Banks* decision prevents the examining attorney's refusals to register under the theory either of collateral estoppel or res judicata.

Applicant's evidence in this case falls short of demonstrating the asserted weakness of the term PATRIOT in the financial field. Accordingly, we do not find that the *Sun Banks* decision is either controlling or persuasive on the facts of this proceeding. For the same reasons, we do not find that the Court's decision in *First Sav. Bank F.S.B. v. First Bank System, Inc.*, 101 F.3d 645, 40 USPQ2d 1865 (10th Cir. 1996) to be persuasive of a different result herein.¹¹

Neither applicant nor the examining attorney has discussed any of the remaining *du Pont* factors. We note, nonetheless, that none seems to be applicable, inasmuch as we have no evidence with respect to them.

In light of the foregoing, we conclude that consumers familiar with registrant's services sold under its above-referenced mark would be likely to believe, upon encountering applicant's services rendered under its marks that the services originated with or are associated with or sponsored by the same entity.

Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior

¹¹ The Court in *First Sav. Bank* also found that plaintiff's asserted mark was weak in connection with its services.

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registrant. See *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 165, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.