

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 Jordan Saglio

Serial No. 88593965

Peter C. Lemire of Leyendecker & Lemire, LLC, for Jordan Saglio.

Marlene Bell, Trademark Examining Attorney, Law Office 118,
(Michael Baird, Managing Attorney).

Before Cataldo, Adlin and Lynch,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Jordan Saglio, filed an application to register on the Principal Register
the mark THE NOMADIC MOVEMENT, identifying the following services:

Entertainment services, namely, providing ongoing television programs
in the field of travel via a global computer network; Entertainment
services, namely, providing ongoing television programs in the field of
sustainable living via a global computer network; Entertainment
services, namely, providing ongoing webisodes featuring travel and
sustainable living via a global computer network; Entertainment
services, namely, an ongoing series featuring travel and sustainable

living provided through a global computer network in International Class 41.¹

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 of likelihood of confusion with the cited registered mark NOMADIC MOVEMENT, identifying the following goods: "Headwear; Headwear, namely, hats and caps; Hoodies; Shorts; T-shirts; Tank tops; Hooded sweat shirts" in International Class 25.²

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board.³ We affirm the refusal to register.

I. Likelihood of Confusion

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*,

¹ Application Serial No. 88593965 was filed on August 27, 2019 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), asserting June 14, 2017 as a date of first use of the mark anywhere and in commerce.

² Registration No. 5989422 issued on the Principal Register on February 18, 2020.

³ All citations to documents contained in the Trademark Status & Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018). References to the briefs on appeal refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable. *See, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, *2 n.1 (TTAB 2020).

575 U.S. ___, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015); *see also In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019).

We have considered each *DuPont* factor that is relevant, and have treated other factors as neutral. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”)); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”).

Two key considerations are the similarities between the marks and the relatedness of the goods and services. *See 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.”); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018).

A. The Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's THE NOMADIC MOVEMENT mark and the registered NOMADIC MOVEMENT mark in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1160; *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.").

"The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks omitted); *see also Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). Consumers may not necessarily encounter the marks in close proximity and must rely upon their

recollections over time. *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1468 (TTAB 1988), *aff'd mem.*, 864 F.2d 149 (Fed. Cir. 1988).

Applicant's THE NOMADIC MOVEMENT mark adopts the wording of the registered mark NOMADIC MOVEMENT in its entirety, adding the definite article THE to the beginning of an otherwise identical mark. A likelihood of confusion is often found where the entirety of one mark is incorporated within another. *In re Denisi*, 225 USPQ 624, 626 (TTAB 1985) (PERRY'S PIZZA for restaurant services specializing in pizza and PERRY'S for restaurant and bar services); *Johnson Publishing Co. v. Intl. Development Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner); *In re South Bend Toy Manufacturing Company, Inc.*, 218 USPQ 479, 480 (TTAB 1983)(LIL' LADY BUGGY for toy doll carriages and LITTLE LADY for doll clothing).

This is particularly the case where the only difference between the marks consists of the definite article THE, which generally is not significant in distinguishing one mark from another in a likelihood of confusion analysis. *See In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009) (finding WAVE and THE WAVE "virtually identical" marks; "[t]he addition of the word 'The' at the beginning of the registered mark does not have any trademark significance."); *In re Narwood Prods., Inc.*, 223 USPQ 1034, 1034 (TTAB 1984) ("There is no doubt that the word portion of appellant's mark and the mark subject of the cited registration are virtually identical since both consist primarily of the term 'music makers.' The fact that the presentation in the mark of the cited registration is as a single word rather than two words is

obviously insignificant in determining the likelihood of confusion. So also is the fact that appellant's mark, as it is sought to be registered, includes the definite article 'the'). *Accord Jay-Zee, Inc. v. Hartfield-Zodys, Inc.*, 207 USPQ 269 (TTAB 1980) ("Since the psychological and marketing impact of petitioner's mark in its earlier version clearly was derived from the word 'IMAGE,' the omission of the word 'THE' (the definite article serving merely to emphasize 'IMAGE') from the later version did not interrupt the continuity of use"); *U.S. Nat'l Bank of Oregon v. Midwest Savings and Loan Ass'n*, 194 USPQ 232, 236 (TTAB 1977) ("The definite article 'THE' likewise adds little distinguishing matter because the definite article most generally serves as a means to refer to a particular business entity or activity or division thereof, and it would be a natural tendency of customers in referring to opposer's services under the mark in question to utilize the article 'THE' in front of 'U-BANK' in view of their uncertain memory or recollection of the many marks that they encounter in their everyday excursion into the marketplace"). Based upon the foregoing, we find THE NOMADIC MOVEMENT is nearly identical to NOMADIC MOVEMENT in appearance and sound.

Applicant argues:

The marks have distinct commercial impressions despite their visual similarity. The addition of the definite article "THE" in the Applicant's Mark evokes an alternate definition and meaning of the word MOVEMENT. As set forth in Applicant's February 4, 2021 Response to Office Action, the definitions and therefore commercial impression conveyed by NOMADIC MOVEMENT evokes the act of traveling—physical movement in a nomadic fashion. More precisely, the word NOMADIC is an adjective meaning: of, relating to, or in characteristic of nomads; roaming about from place to place aimlessly, frequently, or without a fixed pattern of movement. The word MOVEMENT is a noun

with multiple meanings with the most common being: the act of changing physical location or position, or of having this changed. Therefore, the term NOMADIC MOVEMENT conveys the impression of continually changing one's physical location without a fixed pattern of movement.⁴

In support of this contention, Applicant submitted the following dictionary definitions:⁵

- Nomad – a member of a people who have no fixed residence but move from place to place usually seasonally and within a well-defined territory; an individual who roams about;
- Nomadic – of, relating to, or characteristic of nomads; roaming about from place to place aimlessly, frequently, or without a fixed pattern of movement;
- Movement – change of place or position or posture; a series of organized activities working toward an objective; an act of changing physical location or position or of having this changed;
- Digital nomad – someone who performs their occupation entirely over the Internet while traveling.

Relying upon these definitions, Applicant contends:

[I]n the present case inclusion of the definite article “THE” in the Applicant’s Mark does not refer to a specific person or thing, but evokes

⁴ 8 TTABVUE 6-7 (internal citations omitted).

⁵ February 5, 2021 Petition to Revive and Response to Office Action at 27-44; September 17, 2021 Request for Reconsideration at 15-18; 8 TTABVUE 21-30. We also take judicial notice of the dictionary definitions submitted by Applicant with his appeal brief. *See, e.g., In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n. 23 (TTAB 2013).

one of the alternative definitions of the word MOVEMENT, thereby changing the meaning of the phrase and creating a separate and distinct commercial impression. As shown in Exhibit A to Applicant's September 17, 2021 Request for Reconsideration, when used in conjunction with the definitive article "THE" and a modifier the definition of MOVEMENT changes to: a group of people working together to advance their shared political, social, or artistic ideas. This definition is the only definition whether [sic] the exemplative usage has both the definitive article "THE" and a modifier. Thus, the inclusion of the definite article "THE" is essential in invoking the alternative definition of MOVEMENT. THE NOMADIC MOVEMENT conveys the distinct commercial impression of a group of people working together to advance their shared political, social, or artistic ideas—i.e. the modern social phenomena of abandoning traditional work and home life in favor of a technologically driven decentralized form of business which allows an individual to live and work anywhere, typically in a converted school bus or van.⁶

Based upon the definitions of record, NOMADIC MOVEMENT connotes change of physical location or a series of organized activities with the objective of roaming from place to place. THE NOMADIC MOVEMENT very similarly connotes a more specific change of location or series of organized activities with the objective of roaming from place to place. Applicant argues that the presence of THE shifts the connotation of his THE NOMADIC MOVEMENT mark from roaming in the manner of a nomad (conveyed by NOMADIC MOVEMENT) to the advancement of a shared idea of abandoning traditional home and work life for a mobile, technology-based life anywhere. However, there is little evidence to support Applicant's contention that the presence or absence of THE results in the marks having these discreet and mutually exclusive connotations. Even the dictionary entry relied on by Applicant indicates that when the definition he considers applicable is intended, "movement" is "often

⁶ 8 TTABVue 7-8.

with modifier.”⁷ The dictionary entry notably does not indicate “often with definite article.” Put another way, there is nothing in the record to suggest that NOMADIC MOVEMENT cannot also connote a series of organized activities to advance the idea of living a technology-based life characterized by roaming from place to place. The record simply does not support a finding that THE has such an impact on the connotations of the marks that THE NOMADIC MOVEMENT and NOMADIC MOVEMENT have the different connotations suggested by Applicant.

We find that NOMADIC MOVEMENT and THE NOMADIC MOVEMENT are nearly identical in appearance and sound, and are highly similar in connotation and overall commercial impression. Even if we were to accept Applicant’s contention that the presence or absence of THE in the respective marks results in a meaningful distinction between their connotations, similarity in any one of the elements of sound, appearance, meaning, or commercial impression is sufficient to support a determination of likelihood of confusion. *See In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) (“In appropriate cases, a finding of similarity as to any one factor (sight, sound or meaning) alone ‘may be sufficient to support a holding that the marks are confusingly similar’”) (citations omitted)). Therefore, even if the marks had somewhat different connotations, the similarity in appearance and sound would still strongly support likelihood of confusion.

⁷ September 17, 2021 Request for Reconsideration at 13.

Where, as here, the dominant portion of both marks is the same, then the marks may be confusingly similar notwithstanding some differences. *See, e.g., Stone Lion*, 110 USPQ2d at 1161 (affirming TTAB's finding of confusion where applicant's mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION, and that the noun LION was the dominant part of both parties' marks); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (finding that, even though applicant's mark PACKARD TECHNOLOGIES, with "TECHNOLOGIES" disclaimed, does not incorporate every feature of opposer's HEWLETT PACKARD marks, a similar overall commercial impression is created).

We recognize the difference between the marks. Nonetheless, viewing the marks as a whole, we find purchasers may reasonably assume that Applicant's services offered under his mark emanate from the same source as the goods in the cited registration. As a result, consumers encountering these marks could mistakenly believe the two are a variation of each other, but nonetheless emanating from a common source.

For these reasons, we find that the marks are far more similar than dissimilar. The first *DuPont* factor thus weighs in favor of finding a likelihood of confusion.

B. The Goods and Services and Channels of Trade

The second *DuPont* factor concerns the "similarity or dissimilarity and nature of the goods or services as described in an application or registration," *Stone Lion*, 110 USPQ2d at 1159; *Hewlett-Packard*, 62 USPQ2d 1001; *Octocom Sys., Inc. v. Hous.*

Comput. Servs. Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “This factor considers whether ‘the consuming public may perceive [the respective goods or services of the parties] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard*, 62 USPQ2d at 1004).

In support of the refusal of registration, the Examining Attorney introduced into the record⁸ printouts from the following third-party websites showing use of the same marks and trade names to identify the source of entertainment services and related merchandise, including clothing:

- NINJA KIDZ!;
- THE PACK;
- DOCTOR WHO;
- GAME OF THRONES;
- SQUID GAME;
- NATIONAL GEOGRAPHIC and NAT GEO; and
- SMITHSONIAN.

This evidence establishes that these third parties offer entertainment services related to those provided by Applicant, and the clothing items identified in the cited registration under the same house marks or trademarks.

⁸ March 17, 2021 final Office Action at 14-20; October 15, 2021 Denial of Request for Reconsideration at 5-68. Applicant argues that certain of these screenshots do not recite entertainment services. We find, however, that we may reasonably infer the services from the contents of the web pages.

The Examining Attorney also introduced into the record⁹ copies of approximately thirty use-based, third-party registrations for marks identifying, *inter alia*, both clothing items and entertainment services featuring a wide variety of subjects. The following examples are illustrative:¹⁰

Reg. No. 5351632 for the mark THE ART OF TRAVEL, identifying T-shirts, sweat shirts, shorts, hats, footwear and providing websites in the field of travel;

Reg. No. 5776792 for the mark FLEA MARKET FANATICS (“FLEA MARKET” disclaimed), identifying tops, hats, shirts, sweatshirts, and a TV reality show provided through television, cable television, webcasts and wireless networks; and

Reg. No. 6121968 for the mark MULLETMAN, identifying shirts, hoodies, jackets and hats, and an ongoing series featuring outdoor activities, hunting and fishing distributed online.

As a general proposition, although use-based, third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have some probative value to the extent they serve to suggest that the goods and services are of a kind that emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). In this case, the totality of the website and

⁹ July 25, 2020 Office Action at 7-72; March 17, 2021 final Office Action at 21-50. The subjects of the identified entertainment services include cooking, children’s activities, off-road vehicle racing, scuba and snorkeling, diversity, culture, human rights, sports, exercise, music, talent shows, news, home improvement, comedy, politics, the paranormal, martial arts, spirituality, travel, fashion and career advice.

¹⁰ All three marks appear in typed or standard characters.

third-party registration evidence demonstrates that consumers would readily expect that television and computer network-based entertainment services offered under and promotional clothing items bearing the same mark are likely to emanate from the same source.

We agree with Applicant that the services recited in its application do not “overlap” with the goods identified in the cited registration. However, it is not necessary for us to find that the goods and services “overlap” or are even competitive to find a likelihood of confusion. *See, e.g., On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

Applicant argues:

The Examining Attorney contends that Applicant’s services are related to Registrant’s goods merely because a select number of other marks have registered which cover both entertainment services and clothing goods and that apparel is used by providers of entertainment services as a promotional tool. However, if the Examining Attorney’s rationale is universally applied, it would prevent the usage of any mark similar to a clothing brand on a completely unrelated product under the theory that for just about any product category that exists, a mark holder can and does use apparel for promotion purposes (e.g. cars, candy, food products, sporting goods, musical instruments, firearms, law firms etc.). While the secondary source argument may apply from the original source identifier to promotional clothing it is entirely improper to apply it in

the reverse direction. To do so would eviscerate the longstanding proposition that similar marks used on dissimilar goods is acceptable under United States Trademark law.¹¹


First, the evidence of record reflects current licensing and marketing practices of providing ancillary goods as tie-ins to entertainment services. *See, e.g., In re Sloppy Joe's Int'l, Inc.*, 43 USPQ2d 1350, 1356 (TTAB 1997) (“licensing of the names and/or likenesses of well-known persons for use on various goods and services is a common practice.”); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949, 951 (TTAB 1986) (“licensing of commercial trademarks for use on ‘collateral’ products (such as clothing, glassware, linens, etc.), that are unrelated in nature to those goods or services on which the marks are normally used, has become a common practice in recent years.”). Second, Applicant provides no authority for its contention that it is improper for an examining attorney to cite a mark registered for goods such as clothing that may be viewed as a secondary source of promotional goods as a bar to a mark like Applicant’s, identifying entertainment services. Applicant in this case sought registration of a mark for entertainment services that is nearly identical to a previously registered mark for clothing items that have been shown by record evidence to be related.

Applicant further relies upon our determination in *In re White Rock Distilleries, Inc.*, 92 USPQ2d 1282 (TTAB 2009) in support of its contention that the goods and services are unrelated. However, in *White Rock*, this tribunal not only found insufficient support in the record for the examining attorney’s argument that energy

¹¹ 8 TTABVUE 11 (Applicant’s brief).

vodka infused with caffeine was related to sparking fruit wine, sparking grape wine, sparkling wine and wines, but also found that the applied-for mark VOLTA was more



dissimilar from, than similar to, the registered mark . *Id.* at 1285. In the case before us, the Examining Attorney's evidence of record supports a finding that entertainment services and clothing may emanate from common sources, under the same house marks or trademarks, and as discussed above, we find the marks here far more similar than those in *White Rock*.

With regard to the third *DuPont* factor, the similarity of the trade channels in which the goods are encountered, we must base our likelihood of confusion determination on the goods as they are identified in the application and registration at issue. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). *See also Octocom*, 16 USPQ2d at 1787 ("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").

We thus are not persuaded by Applicant's arguments that

Applicant is an online multi-media business whose entertainment services are provided exclusively through on-line multimedia outlets

such as Patreon.com or YouTube.com. In contrast, the 422 Registration owner produces clothing goods that are sold on registrant's website or in person at various music festivals. Their clothing features artistic patterns and artwork that are not related to their trademark or any logo. In no way can the Registrant's goods be construed to be promotional apparel or logo ware. Due to the specialized, niche nature of Applicant's and Registrant's respective distinct target markets, it is unlikely that consumers will encounter both marks at the same time or in situations where consumers would mistakenly assume that registrant's clothing goods and Applicant's entertainment services originate from the same source.¹²

Applicant's contentions rely upon restrictions not present in either identification of goods or services. Specifically, Applicant's services do not recite a restriction to Patreon or YouTube as exclusive media outlets. Similarly, the goods in the cited registration are not limited to artistically patterned clothing items distributed at music festivals, in person or on the Registrant's website. We cannot consider asserted marketplace realities not reflected in the identifications. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000). In the absence of trade channel limitations in the identifications of goods and services in the involved application and cited registration, we must presume that these goods and services are offered in all customary trade channels therefor. *See Citigroup v. Capital City Bank Grp.*, 98 USPQ2d at 1261; *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). Further, evidence of record demonstrates that both Applicant's services and the Registrant's goods may be encountered by the same classes of consumers under the same marks in at least one common trade channel, i.e., websites of

¹² 8 TTABVUE 16-17 (internal citations omitted).

entertainment outlets and content producers who also market promotional clothing items.

We find that the *DuPont* factors of the relatedness of the goods and services, channels of trade and classes of consumers weigh in favor of likelihood of confusion.

C. Conditions of Purchase

Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. In his brief, Applicant argues that the Registrant’s goods are relatively expensive, between \$40 and \$80, and travel in a specialized niche market that is separate from the niche in which his services are encountered.¹³

However, the clothing items identified in the cited registration must be presumed to include both expensive and inexpensive varieties, available in any common channels of trade. There is nothing in the nature of these identified hats, caps, hoodies, shirts and other common articles of clothing, without any limitation as to their type, price point or intended consumers, to suggest their purchasers are particularly sophisticated or careful. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1739 (TTAB 2018). In fact, the standard of care is that of the least sophisticated potential purchaser. *Stone Lion*, 110 USPQ2d at 1163 *cited in In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) (“Board precedent requires our decision to be based on the least sophisticated potential purchasers.”). Similarly, as discussed, neither Applicant’s

¹³ 8 TTABVUE 18; February 5, 2021 Petition to Revive and Response to Office Action at 72-87.

identified services nor the goods identified in the cited registration are limited to any niche that might elevate the level of care exercised by purchasers thereof.

All in all, we have insufficient bases to find that ordinary consumers would exercise more than an ordinary degree of care. The fourth *DuPont* factor is neutral.

D. Actual Confusion

Finally, Applicant argues that there is no evidence of any actual confusion and that there has been concurrent use for “nearly 4 years.”¹⁴ We do not accord significant weight to Applicant’s contention, unsupported by any evidence, that there have been no instances of actual confusion despite contemporaneous use of the respective marks. The Federal Circuit has addressed the question of the weight to be given to an assertion of no actual confusion by an applicant in an ex parte proceeding:

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 value. *See In re Bissett-Berman Corp.*, 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, [citation omitted], especially in an ex parte context.

Majestic Distilling, 315 F.2d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003).

Accordingly, while examples of actual confusion may point toward a finding of a likelihood of confusion, an absence of such evidence is not compelling in support of a finding of no likelihood of confusion. Thus, under the circumstances, we cannot

¹⁴ 8 TTABVue 19.

conclude from the alleged lack of instances of actual confusion that confusion is not likely to occur. The eighth *DuPont* factor is neutral.

E. Conclusion

When we consider the record and the relevant likelihood of confusion factors, and all of Applicant's arguments relating thereto, including those arguments and evidence not specifically addressed herein, we conclude that consumers familiar with Registrant's goods offered under its mark would be likely to believe, upon encountering Applicant's mark, that the goods in the cited registration and Applicant's services originated with or are associated with or sponsored by the same entity.

Decision: The refusal to register Applicant's mark is affirmed under Section 2(d) of the Trademark Act.