

This Opinion is Not a
Precedent of the TTAB

Mailed: September 28, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Aleksander Chulyakov

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Serial No. 90032236

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Sean L. Sweeney of Tredecim LLC for Aleksander Chulyakov.

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

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Before Kuhlke, Larkin, and English,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Aleksander Chulyakov (“Applicant”) seeks registration on the Principal Register of the standard-character mark EVERBLAK for goods ultimately identified as “jewelry, namely, wedding rings and wedding bands” in International Class 14.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it

¹ Application Serial No. 90032236 was filed on July 2, 2020 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce.

so resembles the standard-character mark FOREVER BLACK (BLACK disclaimed), registered on the Principal Register for “clothing, namely, pants, jeans, skirts, shorts, dresses, jackets, coats and t-shirts” in International Class 25,² as to be likely, when used on or in connection with the goods identified in the application, to cause confusion, to cause mistake, or to deceive.

When the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which was denied. The case is fully briefed.³ We affirm the refusal to register.

I. Record on Appeal⁴

The record on appeal includes

- USPTO electronic records regarding the cited registration;⁵
- Dictionary definitions of “ever,” “black,” and “forever;”⁶

² The cited Registration No. 4962406 issued on May 24, 2016 and has been maintained.

³ Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant’s appeal brief appears at 9 TTABVUE and his reply brief appears at 12 TTABVUE. The Examining Attorney’s brief appears at 11 TTABVUE.

⁴ Citations in this opinion to the application record, including the request for reconsideration and its denial, are to the electronic versions of pages in the Trademark Status and Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

⁵ October 15, 2019 Office Action at TSDR 4-5. The Examining Attorney also initially refused registration under Section 2(d) based on a second registration of FOREVER BLACK owned by the same registrant for other goods, but withdrew that refusal prior to appeal.

⁶ *Id.* at TSDR 6-12.

- Third-party webpages offering various types of clothing and jewelry under the same mark,⁷ and third-party registrations covering various types of clothing and jewelry;⁸
- Pages from the website at wikiduff.com captioned “Forever vs Ever – What’s the Difference?;”⁹ and
- Numerous third-party registrations of EVER- and FOREVER-formative marks, and marks containing elements or variations of those words, for various goods in Classes 14 and 25.¹⁰

II. Analysis of Refusal

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” Our determination of the likelihood of confusion under

⁷ *Id.* at TSDR 13-23; May 17, 2021 Final Office Action at TSDR 2-18; January 5, 2022 Denial of Request for Reconsideration at TSDR 2-34.

⁸ October 15, 2020 Office Action at TSDR 24-36.

⁹ April 15, 2021 Response to Office Action at TSDR 6-7.

¹⁰ November 17, 2021 Request for Reconsideration at TSDR 5-1185. Applicant had previously made of record lists of third-party registrations from the USPTO’s Trademark Electronic Search System (“TESS”) database. April 15, 2021 Response to Office Action at TSDR 8-32. Listing registrations from the TESS database is insufficient to make the registrations of record, *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018), and the Examining Attorney advised Applicant accordingly during prosecution. May 17, 2021 Final Office Action at TSDR 1.

Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services.” *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *20 (TTAB 2022) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). “In addition to addressing both of these factors, [A]pplicant also addresses the careful, sophisticated nature of the relevant purchasers,” 9 TTABVUE 8, under the fourth *DuPont* factor, the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567.

A. Similarity or Dissimilarity of the Marks

The involved marks, FOREVER BLACK and EVERBLAK, are both in standard characters. “Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *In re Embiid*, 2021 USPQ2d 577, at *11 (TTAB 2021) (quoting *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *In re Inn at St.*

John's, LLC, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff'd*, 777 Fed. App'x 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

“The proper test regarding similarity 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.” *Id.* (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (internal quotation omitted)).

“The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than a specific impression of marks.”¹¹ *Id.* (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)).

Applicant argues that “[w]hen viewed in their entirety, there is no likelihood of confusion between the Applied for Mark and the Cited Mark.” 9 TTABVUE 9. He suggests that in comparing the involved marks in their entirety, their initial portions, EVER and FOREVER, should be given additional weight. *Id.*

With respect to similarity or dissimilarity in appearance, Applicant presents the mark in the manner shown below

¹¹ The Board recently reiterated that “[t]he weighing of the relevant [*DuPont*] factors must take into account the confusion that may flow from extensive promotion of a similar or identical mark by a junior user,” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *17 (TTAB 2021) (quoting *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993)), under the doctrine of reverse confusion. Because the identifications of goods in the application and cited registration contain no limitations on the purchasers of the identified goods, the average purchasers of the goods are ordinary members of the general public who purchase the various items of clothing identified in the cited registration, and wedding rings and wedding bands.

Applied-for Mark	Cited Mark
EVERBLAK	FOREVER BLACK

id. at 9, and argues that they differ because the cited FOREVER BLACK mark consists of 12 letters and two words, while Applicant’s mark EVERBLAK consists of eight letters and a single word, and because each mark begins with a well-known, but different, word. *Id.* at 10. With respect to sound, Applicant acknowledges that “[b]oth marks contain the phonetically equivalent ‘blak’ and ‘black’ as their final syllable,” but argues that “the sound of the initial portions of these marks forms the dominant portion, differs significantly, and easily distinguishes the sound of the two marks.” *Id.* Applicant claims that “the terms EVER and FOREVER are routine [sic] spoken by consumers in a range of scenarios and are easily distinguished.” *Id.*

Applicant devotes most of his argument under the first *DuPont* factor to the meaning of the marks. He argues that “the definition evidence submitted by the examiner must be read in light of the reality that FOREVER is a derived term of EVER,” and that “FOREVER is the combination of the terms FOR and EVER” and the “resulting word, FOREVER, is takes [sic] the word EVER, which is defined to mean ‘always’ as indicated in the definitions submitted by the examiner, and includes the prefix FOR, which adds a time element (‘for always’ as indicated in the definitions submitted by the examiner).” *Id.* He claims that “it is the addition of FOR to the term EVER that results in the primary definition of [the] word FOREVER, *i.e.*, ‘for all future time,’” while “EVER does not connote future time or the passage of time; EVER

simply means ‘always,’” *id.*, and that “[c]onsumers easily detect this difference in meaning between the two terms.” *Id.*

In support of his arguments, Applicant provides the table shown below of what he calls “well-known marketing phrases, sayings, and song and movie titles,” *id.* at 12, with both the original expression containing the word “ever” or “forever” and a modified expression in which one word is substituted for the other:

Original	Substitution
Diamonds are Forever	Diamonds are Ever
Have you ever had a bad time in Levi’s?	Have you forever had a bad time in Levi’s?
The toughest job you’ll ever love	The toughest job you’ll forever love
Strawberry Fields Forever	Strawberry Fields Ever
The Greatest Story Ever Told	The Greatest Story Forever Told
Happily Ever After	Happily Forever After

Id. He argues that “[s]witching the terms EVER and FOREVER creates an immediate incongruence in each of these examples for a simple reason: when one encounters the terms EVER and FOREVER one immediately recognizes that these terms have different meanings.” *Id.*

In a considerable understatement, Applicant also argues that he “has submitted numerous registration certificates in classes 14 and 25” to “demonstrate that marks using the terms EVER and FOREVER coexist on the Principal Register.” *Id.* According to Applicant, “class 14 contains at least 65 active registrations containing the term EVER and at least 137 active registrations containing the term FOREVER, while class 25 contains at least 189 active registrations containing the term EVER and 245 active registrations containing the term FOREVER.” *Id.*

Applicant focuses particularly on “two pairs of existing registrations” that he claims “are particularly relevant,” *id.*, “U.S. Registration No. 5499459 for the mark FOREVER PURE and U.S. Registration No. 5341991 for the mark EV[]RPUR [that] reflect the exact relationship found in the Examining Attorney’s refusal.”¹² *Id.* He argues that “[n]ot only are these registrations in classes 14 and 25, but one mark uses the term ‘forever’ in connection with the traditional spelling of the term ‘pure,’ while the second mark utilizes the term ‘ever’ concatenated with the phonetic equivalent ‘pur.’” *Id.* at 12-13. According to Applicant, the “coexistence of these registrations supports applicant’s arguments regarding the differences in appearance, sound, connotation and commercial impression and the conclusion that there is no likelihood of confusion between the Applied-for Mark and the Cited Mark.” *Id.* Applicant also cites registrations of FOREVER BELT and EVERBELT, both for belts. *Id.*¹³

The Examining Attorney responds that “[b]oth marks are presented in standard characters, and therefore have no distinguishing design elements or stylization” and the “fact that the applicant’s mark appears as a compound word and the registrant’s mark appears as two words does not diminish the similarities of the marks in sound, appearance, meaning, connotation and commercial impression.” 11 TTABVUE 3. She Attorney further argues that the “definitions of record show that the term EVER means ‘at all times; always,’” while the word “FOREVER means ‘for all future time;

¹² Registration No. 5341991 covers “moisture-wicking sports shirts,” “short-sleeved or long-sleeved t-shirts,” and “short-sleeved shirts,” November 17, 2021 Request for Reconsideration at TSDR 1180-81, while Registration No. 5499459 covers various forms of jewelry, including rings. *Id.* at TSDR 1178-79.

¹³ *Id.* at TSDR 1182-85.

for always’,” and that the word “BLACK refers to ‘being of the color black, producing or reflecting comparatively little light and having no predominant hue.’” *Id.*

According to the Examining Attorney,

[s]light differences in sound notwithstanding, the terms EVER and FOREVER both mean “always” and the terms BLAK and BLACK are phonetic equivalent terms. As such, the commercial impression or idea being imparted by both marks is “always black”. Both marks convey the same idea, stimulate the same mental reaction and convey the same overall meaning.

Id.

The Examining Attorney further argues that Applicant’s third-party registrations “are irrelevant and should not be considered nor should they be given any weight” because all of them “convey very different commercial impressions from that of the proposed mark, in that the terms EVER or FOREVER are either presented alone, or modify completely different words, and as a result, are not confusingly similar.” *Id.* at 4.¹⁴ In an unusual role reversal, the Examining Attorney accuses Applicant of dissecting the marks. According to the Examining Attorney, Applicant’s “assertion of weakness or dilution as to the terms ‘EVER’ and ‘FOREVER’ is misplaced” because

¹⁴ The Examining Attorney also argues that Applicant’s response to the non-final Office Action contained “a mere listing of third-party marks and/or registrations, all of which were not considered and should not be considered here because this evidence was not properly made of record.” 11 TTABVUE 4. In his reply brief, Applicant argues that the “Examining Attorney appears to take the position that the third party registration certificates submitted in connection with the November 17, 2021 Request for Reconsideration were not properly made of record in the applications [sic].” 12 TTABVUE 5. We do not read the Examining Attorney’s comments regarding these registrations, and her conclusion that they “are irrelevant and should not be considered nor should they be given any weight,” 11 TTABVUE 4, as indicating that she did not consider them in her brief because they were not properly made of record. In any event, as discussed below, we have considered the third-party registrations attached to Applicant’s request for reconsideration.

“[w]idespread use of a single part of a compound mark does not demonstrate that the mark as a whole is weak,” Applicant’s “analysis fails to address the complete mark for both the applicant and the registrant,” and “marks must be considered and compared in their entireties for similarities in appearance, sound, connotation, and commercial impression.” *Id.* at 5. The Examining Attorney concludes that “both marks are similar in sound and appearance, and both marks convey the same meaning, connotation and commercial impression. Accordingly, the marks are confusingly similar.” *Id.*

In his reply brief, Applicant argues that “[n]ot a single one of applicant’s arguments regarding the visual dissimilarity of the marks is addressed in the Examining Attorney’s brief,” 12 TTABVUE 7, that his “brief described significant differences in the sound of the initial portions of the marks” and the “Examining Attorney’s brief provides no response to the differences in sound identified by applicant,” *id.* at 8, and that the “Examining Attorney appears to rely entirely on the position that the marks are similar in meaning and connotation because the terms FOREVER and EVER have the same meaning,” which “is simply not true” because “while EVER means ‘always,’ the term FOREVER means ‘for all future time.’” *Id.*

Applicant also argues in his reply brief that the Examining Attorney “proceeds to completely omit the time element of the word ‘for’ and conclude that ‘the terms EVER and FOREVER both mean ‘always,’” *id.* (quoting 11 TTABVUE 3), even though the dictionary definitions of record define “ever” as “at all times; always,” and “forever” as “for all future times; for always.” *Id.*

Referring back to the table of expressions in his appeal brief, Applicant further argues in his reply brief that “[i]f the terms EVER and FOREVER truly carried the same meaning, the substitution of one term for the other would not change the meaning of the phrase. But straight substitutions do not work for the simple reason that the terms EVER and FOREVER possess different meanings.” *Id.* at 9.

The FOREVER BLACK and EVERBLAK marks “must be considered . . . in light of the fallibility of human memory’ and ‘not on the basis of side-by-side comparison.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977)). In such a comparison, we find that FOREVER BLACK and EVERBLAK are far more similar than dissimilar when considered in their entireties.

A consumer with a general recollection of one of the marks who separately sees or hears the other mark is not likely to distinguish the marks in appearance or sound because “the Cited Mark has twelve letters and is 50% longer than the Applied-for Mark, which has only eight letters,” 9 TTABVUE 10; because “the initial word in the Cited Mark is the well-known word ‘forever,’ while the initial portion of the Applied-for Mark is the equally well-known, different word ‘ever,’” *id.*; because the “Cited Mark starts with an ‘f’ sound that initiates the word ‘for,’” while Applicant’s mark “starts with the audially distinct short ‘e’ sound,” *id.*; or because “the Cited Mark contains four syllables, while the Applied-for Mark contains only three.” *Id.* The Board has long held that consumers do not process this sort of minutia when forming

their impressions of marks. *See In re John Scarne Games, Inc.*, 120 USPQ 315, 316 (TTAB 1959) (“Purchasers of game boards do not engage in trademark syllable counting[;] they are governed by general impressions made by appearance or sound, or both.”).

We agree with Applicant that there are differences in appearance between FOREVER BLACK and EVERBLAK that are apparent in the sort of artificial side-by-side comparison suggested by Applicant, 9 TTABVUE 9, and shown above, but for a consumer whose mind’s eye holds a general rather than specific recollection of one of the marks, and who separately sees the other mark, those differences may not be readily apparent. In the context of the required non-simultaneous comparison of the marks, they differ only modestly in appearance.

With respect to sound, just as marks are not viewed together when comparing them in appearance, they are not pronounced sequentially when comparing them for aural similarity or dissimilarity. Applicant acknowledges that “[b]oth marks contain the phonetically equivalent ‘blak’ and ‘black’ as their final syllable,” *id.* at 10, but argues that the marks sound different because their respective prefixes FOREVER and EVER “are routine[ly] spoken by consumers in a range of scenarios and are easily distinguished.” *Id.* This argument misses the marks. The issue here is whether EVERBLAK in its entirety sounds like FOREVER BLACK in its entirety, not whether the words FOREVER and EVER by themselves sound alike. From the standpoint of a consumer whose “mind’s ear” holds a general rather than specific recollection of the sound of one of the marks, and who separately hears the other

mark, the marks would sound alike because each begins with a word containing or consisting of “EVER” and ends with the word BLACK or its phonetic equivalent. We find that the marks are very similar in sound when considered in their entireties.

With respect to connotation and commercial impression, the Examining Attorney made of record dictionary definitions showing that “forever” means “[f]or all future time; for always,”¹⁵ and “ever” means “[a]t all times, always,”¹⁶ as well as a dictionary definition of the word “black” as meaning, among other things, “[b]eing of the color black.”¹⁷ The crux of Applicant’s position under the first *DuPont* factor is that the marks are nevertheless dissimilar in meaning because of (1) semantic differences between the words “forever” and “ever,” 9 TTABVUE 11-12, and (2) the existence of “numerous registration certificates in classes 14 and 25 [for] marks using the terms EVER and FOREVER . . .” *Id.* at 12. Both of these arguments again miss the marks.

Applicant acknowledges the dictionary definitions of “forever” and “ever,” *id.* at 11, but claims that the words have subtle differences in meaning, citing (1) the results of his search on the WikiDiff website (wikidiff.com), which enabled him to answer the question “Forever vs. Ever - What’s the difference?,” *id.* at 12,¹⁸ (2) his table of “well-

¹⁵ October 15, 2020 Office Action at TSDR 11 (OXFORD ENGLISH DICTIONARY).

¹⁶ *Id.* at TSDR 6-7 (OXFORD ENGLISH DICTIONARY).

¹⁷ *Id.* at TSDR 8 (THE AMERICAN HERITAGE DICTIONARY). Applicant does not dispute that the word BLAK in his mark also means “[b]eing of the color black.”

¹⁸ We have not located a case in which the Board has considered evidence from this website. It appears to be affiliated with the “Wiktionary,” April 15, 2021 Response to Office Action at TSDR 7, an open content source dictionary that the Board has previously considered. *See In re Luxuria, s.r.o.*, 100 USPQ2d 1146, 1148 (TTAB 2011). We have considered the WikiDiff search results for whatever probative value they may have in the context of the entire record, which includes definitions of the words “forever” and “ever” from standard dictionaries, “with the recognition of the limitations inherent in [open content sources] (e.g., that anyone can

known marketing phrases, sayings, and song and movie titles,” *id.*,¹⁹ and (3) the hundreds of third-party registrations of EVER- and FOREVER-formative marks that coexist on the Register in Classes 14 and 25. *Id.*

Applicant argues that the results of the WikiDiff search comparing “ever” and “forever” show that “it is the addition of FOR to the term EVER that results in the primary definition of word FOREVER, *i.e.*, ‘for all future time.’ In contrast, EVER does not connote future time or the passage of time; EVER simply means ‘always.’” *Id.* at 11. The definitions of “ever” and “forever” in standard dictionaries show that it is unlikely that this subtle linguistic difference would be understood by the average consumer when the marks FOREVER BLACK for clothing and EVERBLAK for wedding rings and wedding bands are separately considered in their entirety. The standard dictionary definitions of “forever” as “for always” and of “ever” as “always,” coupled with the definition of “black” as “[b]eing of the color black,” suggest that it is far more likely that the mark FOREVER BLACK will be understood as connoting clothing that is “of the color black for always” and that the mark EVERBLAK will be understood as connoting wedding rings and wedding bands that will “always be [] of the color black,” a connotation of timelessness that in the context of these goods is

edit [them] and submit intentionally false or erroneous information.” *In re IP Carrier Consulting Grp.*, 84 USPQ2d 1028, 1032 (TTAB 2007).

¹⁹ The contents of the left column in Applicant’s table, containing “well-known marketing phrases, sayings, and song and movie titles,” are not based on record evidence or a request for judicial notice of the “Original” expressions. We have nevertheless considered the table, but find that it tells us little or nothing about how the FOREVER BLACK and EVERBLAK marks would be understood when considered in their entirety and in the context of the involved goods because neither set of expressions includes all elements of the involved marks.

consistent with the timeless love and commitment that wedding rings and wedding bands symbolize. From the standpoint of a consumer with a general rather than specific impression of the marks, these connotations of FOREVER BLACK and EVERBLAK are essentially identical.

We turn now to Applicant's bevy of third-party marks. We note at the outset that "while Applicant has submitted examples of third-party registrations, [he] has not submitted any current market evidence demonstrating that third parties are using similar marks on similar goods." *Embiid*, 2021 USPQ2d 577, at *34 (quoting *Sock It to Me, Inc. v. Fan*, 2020 USPQ2d 10611, at *9 (TTAB 2020)). He thus has provided no evidence "diminish[ing] the commercial strength of Registrant's mark." *Id.*

"Third-party registration evidence may have some probative value, however, because it 'may bear on conceptual weakness if a term is commonly registered for similar goods or services.'" *Id.* (quoting *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017)). Third-party registrations may be relevant "in the manner of dictionary definitions, to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak." *New Era*, 2020 USPQ2d 10596, at *12 (quoting *Juice Generation, Inc. v. GS Enters., LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015)).

Applicant trains his sights on both the word FOREVER in the cited mark and the word EVER in his mark, even though he argues that those words differ in meaning.²⁰

²⁰ Applicant's citation of third-party registrations containing the word EVER is surprising. According to his argument, those registrations show that his own mark should be accorded a

As discussed above, he points to “at least 65 active registrations containing the term EVER and at least 137 active registrations containing the term FOREVER” in Class 14, and “at least 189 active registrations containing the term EVER and 245 active registrations containing the term FOREVER” in Class 25. 9 TTABVUE 12. We will focus on the third-party registrations in Class 25 that Applicant claims contain the word FOREVER that appears in the cited mark because the relevant issue is the conceptual weakness of that portion of the cited Class 25 mark. We must scrutinize these registrations carefully in addressing Applicant’s argument that the word FOREVER in the cited mark is conceptually weak. *Made in Nature*, 2022 USPQ2d 557, at *23-27 (analyzing the filing bases of the third-party registrations, and the marks and goods shown and identified therein, to determine their probative value in showing the conceptual weakness of the words NATURE and MADE in the opposer’s mark).

Applicant claims to have made of record 245 registrations in Class 25. 9 TTABVUE 12.²¹ A handful of the registrations issued under Sections 44 or 66 of the Trademark Act without proof of use of the registered marks in commerce.²² These

limited scope of protection because its lead word EVER is conceptually weak. He appears to retreat somewhat from this position in his reply brief, in which he states that “[t]hese registrations are referenced to simply show that both EVER and FOREVER are ubiquitous in marks registered in classes 14 and 25.” 12 TTABVUE 9. In any event, as noted above, the relevant issue is the possible conceptual weakness of the cited mark.

²¹ November 17, 2021 Request for Reconsideration at TSDR 701-1176. Applicant included the cited registration. *Id.* at TSDR 959-60. “By definition, [this is] not [a] ‘third-party registration[.]’” *Made in Nature*, 2022 USPQ2d 557, at *27. There are also a few duplicates.

²² November 17, 2021 Request for Reconsideration at TSDR 820-21, 924-25, 950-51, 973-75, 1107-09.

registrations “lack probative value and we have not considered them.” *Made in Nature*, 2022 USPQ2d 557, at *25. Some of the registrations are for marks that do not contain the word FOREVER, or that show it only in a foreign language.²³ Marks that do not contain FOREVER at all obviously have no probative value regarding the weakness of that word. Marks that contain FOREVER in a foreign language have no probative value in showing the weakness of that word for consumers who do not read the foreign language and thus do not understand the foreign word to mean “forever.” In that regard, we do not see a rationale for applying the doctrine of foreign equivalents, which is applied in the likelihood of confusion context to assess the similarity of English-language and foreign-language marks in meaning, *see generally Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, at *6-7 (TTAB 2019), to third-party registrations containing words in a foreign language, and Applicant has cited no authority that we must or should do so.

Some of the registrations cover goods other than the “pants, jeans, skirts, shorts, dresses, jackets, coats and t-shirts” for which the cited mark is registered, and Applicant did not submit proof of their relatedness to the goods in the cited registration.²⁴ *See Sabhnani*, 2021 USPQ2d 1241, at *25. These registrations “have

²³ *Id.* at TSDR 703-04, 720-21, 728-29, 736-37, 828-29, 891-92, 957-58, 963-64, 965-66, 1038-40, 1063-64, 1065-66, 1110-12, 1113-15, 1116-17, 1157, 1158, 1164-65.

²⁴ *Id.* at TSDR 718-19, 738-39, 744-45, 780-81, 792-93, 806-07, 808-09, 830-31, 836-37, 858-59, 912-13, 928-29, 990-91, 1047-48, 1049-50, 1071-72, 1127-28, 1135-36, 1141-42, 1145-46, 1161-62. One of these registrations shows the standard-character mark FOREVER AND EVER, which uses the two words in a manner suggesting their rough equivalence in meaning. *Id.* at TSDR 1141-42.

little or no probative value in showing the conceptual weakness of the term [] [FOREVER] in [the cited mark]. *Made in Nature*, 2022 USPQ2d 557, at *24.

The remaining relevant registered marks all “contain[] additional elements [or] trademark formatives of different grammatical syntax or having a differing overall commercial impression,” *id.*, at *25, that make them dissimilar to the cited FOREVER BLACK mark in varying degrees. Many are so “cluttered” with other elements as to have little or no probative value in establishing the weakness of the word FOREVER in Class 25. We set forth below some examples of these marks:



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²⁵ *Id.* at TSDR 702.

²⁶ *Id.* at TSDR 710-11.



Pregnancy is temporary,
Pregjamas are forever 28



Seek LOVE, PEACE, and
HAPPINESS, and watch HATE
disappear forever 30

²⁷ *Id.* at TSDR 722-23.

²⁸ *Id.* at TSDR 768-69.

²⁹ *Id.* at TSDR 774-75.

³⁰ *Id.* at TSDR 794-95.



MADE FROM STUFF THAT'S
BEEN AROUND FOREVER 34

³¹ *Id.* at TSDR 846-47.

³² *Id.* at TSDR 848-49.

³³ *Id.* at TSDR 850-51.

³⁴ *Id.* at TSDR 883-84.



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³⁵ *Id.* at TSDR 885-86.

³⁶ *Id.* at TSDR 926-27.

³⁷ *Id.* at TSDR 942-43.

³⁸ *Id.* at TSDR 976-77.



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DUTY HONOR VALOR AMERICA'S
VETERANS FOREVER

41

HE WHO SHEDS BLOOD WITH ME
SHALL FOREVER BE MY BROTHER

42

THE BALLPARK THAT FOREVER
CHANGED BASEBALL

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³⁹ *Id.* at TSDR 1075-76.

⁴⁰ *Id.* at TSDR 1079-80.

⁴¹ *Id.* at TSDR 1099-1100.

⁴² *Id.* at TSDR 1129-30.

⁴³ *Id.* at TSDR 1137-38.



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In addition to the word marks shown immediately above, there are numerous other registrations of standard-character word marks that begin with the word FOREVER and contain multiple additional elements, or in which the word FOREVER follows additional elements.⁴⁵ These registrations have more probative value than the marks discussed above in showing the weakness of the word FOREVER.

Nearly 50 of the Class 25 registrations show two-word marks that begin with the word FOREVER and thus have a structure that is identical to the cited mark. These are: FOREVER VIBE; FOREVER\$YUNG; FOREVER 21; FOREVERGORGEOUS; FOREVER DOG; FOREVER COWGIRL; FOREVER IMPROVING; FOREVER RAW;

⁴⁴ *Id.* at TSDR 1143-44.

⁴⁵ *Id.* at TSDR 704-05, 716-17, 718-19, 724-25, 730-31, 742-43, 746-47, 752-53, 758-59, 762-63, 770-71, 772-73, 776-77, 778-79, 800-01, 802-03, 810-11, 814-15, 816-17, 822-23, 824-25, 836-37, 838-39, 840-41, 842-43, 844-45, 852-53, 854-55, 860-61, 866-67, 870-71, 876-78, 889-90, 899-900, 901-03, 904-05, 906-07, 910-11, 914-15, 918-19, 922-23, 938-39, 948-49, 978-79, 984-85, 997-98, 999-1000, 1003-04, 1005-06, 1007-08, 1015-16, 1017-20, 1028-29, 1034-35, 1041-42, 1043-44, 1045-46, 1051-52, 1057-58, 1061-62, 1073-74, 1077-78, 1083-84, 1087-88, 1097-98, 1101-02, 1121-22, 1123-24, 1131-32, 1133-34, 1139-40, 1147-48, 1153-54, 1155-56, 1162-63, 1168-69, 1170, 1171, 1173.

FOREVER DIFFERENT; FOREVER KNOWN; FOREVER AUDREY; FOREVER SCARLET; FOREVER MAMA; FOREVER BLOND; FOREVER LOVELY; FOREVER ME; FOREVER HUNGRY; FOREVER ILL; FOREVER HIP-HOP; FOREVERH; FOREVER SPOILED; FOREVERSHINE; FOREVER EXPLORE; FOREVER FUN; FOREVER FORGIVING; FOREVER WHITE;⁴⁶ FOREVER JADE; FOREVER FREE; FOREVER WILD; FOREVER STOKED; FOREVER FLORIDA; FOREVER FLOWER; FOREVER STRONG; FOREVER SUMMER; FOREVER INDIGO; FOREVER HUMBLE; FOREVER FANATIC; FOREVER SOUTHERN; FOREVER BROOKLYN; FOREVER FADED; FOREVER UMBRELLA; FOREVER FEARLESS; FOREVER FAITH; FOREVER RAINBOWS; FOREVER BLUE; FOREVER LAZY; and FOREVER BUFFS.⁴⁷ These registrations have the most probative value on the issue of conceptual weakness of the FOREVER element of the cited mark.

Even if we counted only this last set of two-word FOREVER-prefix formative registrations, Applicant has made of record a significant number of relevant registrations. *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1746 n.8 (TTAB 2016) (noting that in *Juice Generation*, “there were at least twenty-six relevant third-party uses or registrations of record,” and that in *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. New Millennium Sports, S.L.U.*, 797 F.3d 1334, 115 USPQ2d 1129

⁴⁶ This registration and the registration of FOREVER INDIGO noted below are owned by the owner of the cited registration. *Id.* at TSDR 961-62, 1026-27.

⁴⁷ *Id.* at TSDR 712-13, 732-33, 750-51, 756-57, 760-61, 764-65, 782-83, 788-89, 812-13, 832-33, 856-57, 858-59, 864-65, 868-69, 879-80, 881-82, 895-96, 908-09, 930-31, 932-33, 934-35, 940-41, 946-47, 952-54, 955-56, 967-68, 969-70, 988-89, 992-93, 994-96, 1009-10, 1011-12, 1013-14, 1028-29, 1036-37, 1053-54, 1067-68, 1069-70, 1081-82, 1105-06, 1118-19, 1125-26, 1159, 1163, 1169, 1172, 1174-75.

(Fed. Cir. 2015), “there were at least fourteen.”). The third-party registrations leave no doubt that the word FOREVER is suggestive when used on the Class 25 clothing items identified in the cited registration. *Made in Nature*, 2022 USPQ2d 557, at *30. Because the word BLACK has been disclaimed in the cited registration, the FOREVER BLACK mark as a whole is suggestive and thus conceptually weak. *Id.* (finding the opposer’s “MADE IN NATURE trademark to be highly suggestive.”).⁴⁸

There is also no doubt that the cited FOREVER BLACK mark coexists on the Principal Register with multiple third-party EVER-formative marks for Class 14 goods identified broadly as some form of “jewelry” (which encompasses wedding rings and wedding bands) or as “rings.” These marks include EVERSLOT; EVERSTONE and design; PROMISE HER HAPPILY EVER AFTER; EVER2000; EVER HOPE; EVERKLUCKY; Ever Fairy (stylized); EVER STAR; GET YOUR HAPPILY EVER AFTER ON; EVER MOVE; Ever Dear (stylized); EVER POWERFUL IN CHRIST; EVEREVE; ABONDEVER; EVERSINE; EVERGLOW; EVERCOLOR; ARTEVER; EVER-PRETTY; DIAMONEVER; MAY THE ODDS BE EVER IN YOUR FAVOR; Ever Faith (stylized); EVERLIGHT; EVERLINKED WITH GOD; 5EVERLOVE; EVERBAND; EVER LIGHT and design; EVER & EVER; EVER & EVER (stylized);

⁴⁸ The mark is not descriptive, however, because the cited registration issued on the Principal Register without a showing of acquired distinctiveness under Section 2(f) of the Trademark Act. 15 U.S.C. § 1052(f). The FOREVER BLACK mark as a whole is thus presumed to be inherently distinctive for the clothing items identified in the registration. *Made in Nature*, 2022 USPQ2d 557, at *22 (citing *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006)).

EVER US; EVER US (stylized); EVER ONE; EVERPRECIOUS; EVER ALICE; EVERBAND and design; EVERU; and EVERGREEN ANGEL.⁴⁹

The cited FOREVER BLACK mark is conceptually weak, but “that is not fatal to a finding of likelihood of confusion because even weak marks are entitled to protection against confusion.” *Made in Nature*, 2022 USPQ2d 557, at *36. None of the third-party EVER-formative marks registered in Class 14 or the FOREVER-formative marks registered in Class 25 is as similar to either the cited FOREVER BLACK mark or to Applicant’s EVERBLAK mark as those two marks are to one another.⁵⁰

The marks FOREVER BLACK and EVERBLAK are quite similar in sound and meaning, and only somewhat dissimilar in appearance. Under the circumstances, we find that the marks’ strong similarities in sound and meaning outweigh their modest differences in appearance. The first *DuPont* factor supports a finding of a likelihood of confusion.

⁴⁹ November 17, 2021 Request for Reconsideration at TSDR 6-7, 8-9, 10-11, 14-15, 16-17, 20-21, 24-25, 26-27, 28-29, 32-33, 36-37, 40-42, 43-44, 45-46, 51-52, 53-54, 55-56, 57-58, 59-60, 61-62, 63-64, 65-67, 68-69, 74-75, 76-77, 78-80, 81-82, 85-86, 87-88, 89-90, 91-92, 97-98, 99-100, 101-02, 103-04, 115. As discussed above, Applicant also points specifically to the coexistence of the mark FOREVER PUR for jewelry and rings, *id.* at TSDR 1178-79, with the mark EVRPUR for shirts, *id.* at TSDR 1180-81, and the coexistence of the mark FOREVER BELT for belts, *id.* at TSDR 1182-83, with the mark EVERBELT for belts. *Id.* at 1184-85. “It is axiomatic that we must decide each case on its own merits,” and the “bare fact that the USPTO has allowed the marks in the referenced third-party registrations to register is of little persuasive value and does not dictate the result in this case or rebut our finding” below that the FOREVER BLACK and EVERBLAK marks before us are similar. *In re United Trademark Holdings, Inc.*, 122 USPQ2d 1796, 1800 (TTAB 2017).

⁵⁰ The same is true with respect to the FOREVER-formative marks registered in Class 14, November 17, 2021 Request for Reconsideration at TSDR 117-365, and the EVER-formative marks registered in Class 25. *Id.* at TSDR 367-700.

B. Similarity or Dissimilarity of the Goods

The second *DuPont* factor “considers [t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration’” *Embiid*, 2021 USPQ2d 577, at *29 (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d, 1047, 1051 (Fed. Cir. 2018)). The goods identified in the cited registration are “clothing, namely, pants, jeans, skirts, shorts, dresses, jackets, coats and t-shirts,” while the goods identified in the application, as amended, are “jewelry, namely, wedding rings and wedding bands.”

“The goods need not be identical, but ‘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 they emanate from the same source.’” *Id.* (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012)).

Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant’s goods and the goods listed in the cited registration.

Id., at *22-23 (quoting *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *5 (TTAB 2020)).

“The Examining Attorney need not prove, and we need not find, similarity as to each product listed in the description[s] of goods. ‘It is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the

identification of goods within a particular class in the application.” *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at *3-4 (TTAB 2020) (quoting *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015)).

Applicant argues that “the goods offered under the Applied-for Mark are not sufficiently related to the goods offered under the registered mark to support of [sic] finding of likelihood of confusion” and that “the similarity of the goods fails to reach a level of relation that would create a mistaken belief in the consumer’s mind that the goods emanate from the same source.” 9 TTABVUE 14. According to Applicant, “consumers do not expect that they will purchase their wedding ring or wedding band from the same source where they obtain their jeans and t-shirts.” *Id.* at 15.

Applicant notes that “the goods recited in the application are not simply jewelry, but the more specific, jewelry items wedding rings and wedding bands.” *Id.* Applicant rejects the Examining Attorney’s Internet evidence from three websites regarding the sale of wedding rings and clothing under the same mark because he claims that two of the sites do not actually offer wedding rings, and the third site offers wedding rings that “differ significantly from the traditional wedding rings and wedding bands recited in the Application.” *Id.* Applicant does not address the Examining Attorney’s third-party registration evidence.

The Examining Attorney argues that “the goods of both parties are wearable consumer items” and that “[j]ewelry and clothing are often components of fashion lines and these goods are often marketed in the same channels of trade to the same class of consumers, and as such are closely related.” 11 TTABVUE 6. She further

argues that the “evidence of record serves as a representative sampling of the real world marketplace showing fashion lines that include jewelry and clothing under the same mark or very similar marks produced by a single source.” *Id.* She points specifically to webpages showing the sale of clothing and jewelry under the same mark, including webpages made of record in response to the amendment of the identified goods on Applicant’s request for reconsideration, which she argues “feature[] goods such as dresses, jackets and jewelry rings” and “demonstrate[] that these goods tend to travel through the same channels of trade and target the same class of purchasers.” *Id.* The Examining Attorney also does not address the third-party registration evidence.

We begin with the third-party registration evidence in the record. Prior to Applicant’s amendment to his identification of goods, the Examining Attorney made of record two third-party use-based registrations that cover both “jewelry” and one or more of the clothing identified in the cited registration.⁵¹ As part of his own third-party registration evidence discussed above, Applicant made of record eight use-based registrations that cover both “jewelry” generally, or some form of “rings” specifically, and one or more of the clothing items identified in the cited registration.⁵² Although Applicant’s amended identification of goods is limited to “wedding rings and wedding bands,” the 10 registrations in the record that cover goods broadly identified

⁵¹ October 15, 2020 Office Action at TSDR 24-26, 33-36.

⁵² November 17, 2021 Request for Reconsideration at TSDR 40-42, 57-58, 119-20, 167-69, 174-77, 209-10, 680-82, 1,162. The existence of these eight third-party registrations is particularly significant given that Applicant’s search criteria apparently limited the search to marks containing the words “Forever” and “Ever.”

as “jewelry” or “rings” as well as clothing are probative of the relatedness of wedding rings and wedding bands to the goods identified in the cited registration. “Just as we must consider the full scope of the goods . . . as set forth in the application and registration under consideration, we must consider the full scope of the goods . . . described in a third-party registration,” *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *9 (TTAB 2019), and we thus must deem “jewelry” and “rings” in the third-party registrations to encompass “wedding rings and wedding bands.”

“As a general proposition, third-party registrations that cover goods . . . from both the cited registration and an Applicant’s application are relevant to show that the goods . . . are of a type that may emanate from a single source under one mark.” *Id.*, at *8 (finding that 10 third-party use-based registrations covering the involved goods and services bolstered the Board’s determination of relatedness) (citing *Detroit Athletic Co.*, 128 USPQ2d at 1051). *See also In re I-Coat Co.*, 126 USPQ2d 1730, 1738-39 (TTAB 2018) (finding that 11 third-party registrations covering the involved goods were probative of the relatedness of the goods). We find that the third-party registrations in the record support a finding of relatedness of wedding rings and wedding bands to one or more of the clothing items identified in the cited registration.

We turn next to the third-party use evidence. Much of it was directed by the Examining Attorney to the relatedness of jewelry, including goods other than rings, and clothing generally. Prior to the amendment of the identification of goods in the application from “Jewelry; Watches” to “Jewelry, namely, wedding rings and wedding bands” on Applicant’s request for reconsideration, the Examining Attorney made of

record pages from the Ralph Lauren website offering clothing and watches;⁵³ pages from the Donna Karan New York website offering clothing and watches;⁵⁴ pages from the Chico's website containing links to "Clothing" and "Jewelry and Accessories;"⁵⁵ pages from the Kate Spade website containing links to "Jewelry" and "Clothing;"⁵⁶ pages from the Philosophy website containing links to "Jewelry" and "Fashion," and displaying both sets of goods;⁵⁷ pages from the Francesca's website containing links to "Jewelry" and various types of clothing;⁵⁸ a page from the Tommy Hilfiger website containing links to "Clothing" and "Watches and Jewelry" and displaying watches;⁵⁹ and a page from the Michael Kors website containing links to various categories of goods including "Clothing" and "Jewelry" (with sub-links to various forms of jewelry including "Rings") and displaying necklaces.⁶⁰

Following Applicant's amendment of its identification of goods to "jewelry, namely, wedding rings and wedding bands," the Examining Attorney made of record Internet evidence regarding the amended goods specifically. She made of record (1) a page from the Ralph Lauren website displaying clothing together with blog posts captioned

⁵³ October 15, 2020 Office Action at TSDR 13-17.

⁵⁴ *Id.* at TSDR 18-20.

⁵⁵ *Id.* at TSDR 21-22; May 17, 2021 Final Office Action at TSDR 10-15.

⁵⁶ October 15, 2020 Office Action at TSDR 23; May 17, 2021 Final Office Action at TSDR 16.

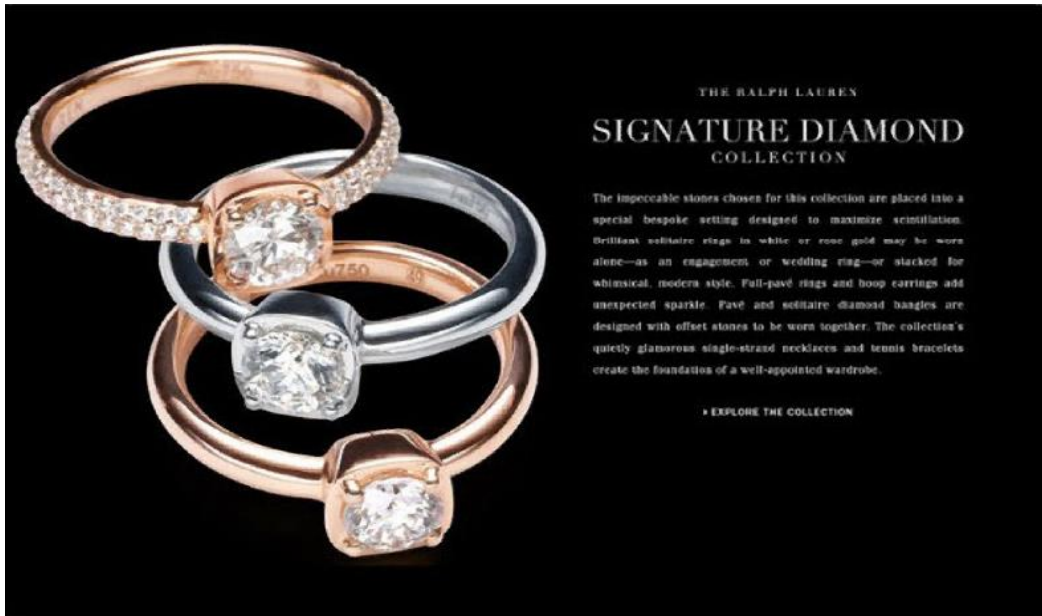
⁵⁷ May 17, 2021 Final Office Action at TSDR 2-5.

⁵⁸ *Id.* at TSDR 6-9.

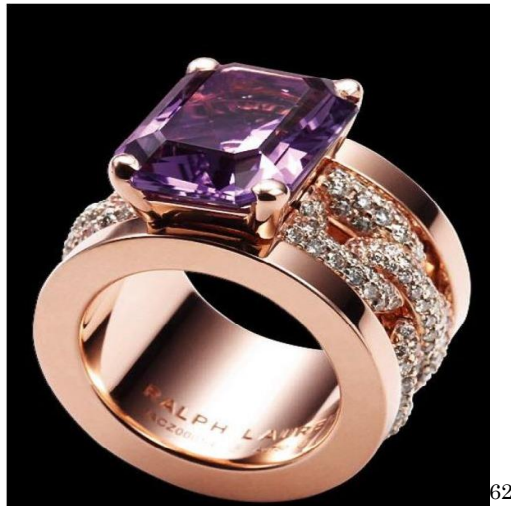
⁵⁹ *Id.* at TSDR 17.

⁶⁰ *Id.* at TSDR 18.

“Ralph Lauren wedding rings,” which display wedding rings in “The Ralph Lauren Signature Diamond Collection:”



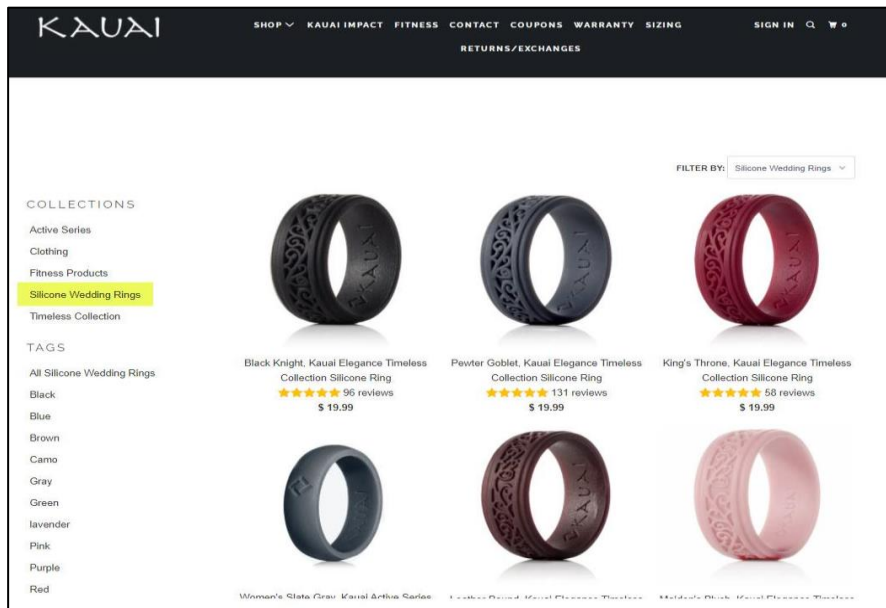
and another band ring bearing the RALPH LAUREN mark:



⁶¹ January 5, 2022 Denial of Request for Reconsideration at TSDR 2-8.

⁶² *Id.* at TSDR 6.

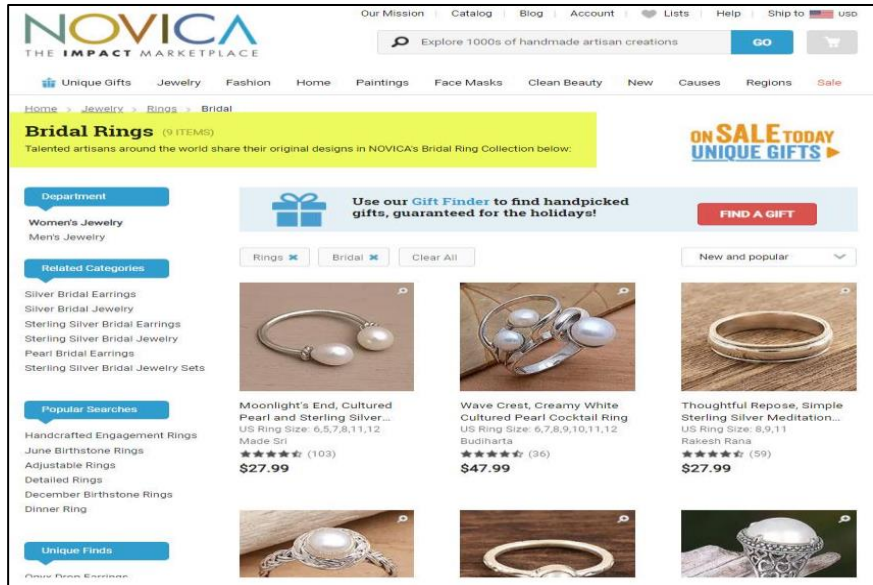
(2) pages from the Anthropologie website displaying clothing items and a page displaying an “Infinite Love Engagement Ring,” the latter of which appears to have been reached through a link captioned “Weddings;”⁶³ (3) pages from the website of Kauai Innovations, which display clothing and “Silicone Wedding Rings,” one page of which is shown below:



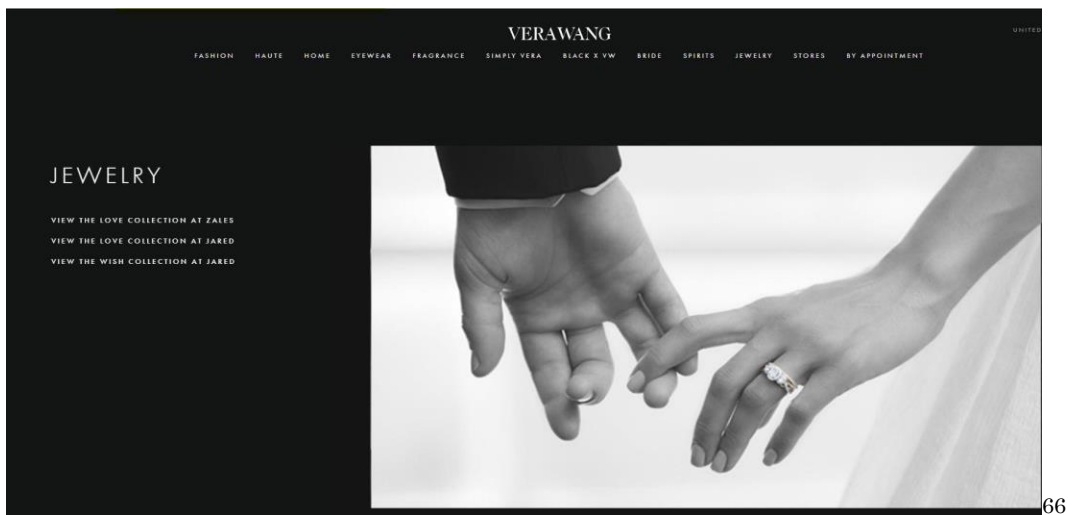
(4) pages from the Novica website displaying both various women’s clothing items and “Bridal Rings,” including a wedding band, one page of which is shown below:

⁶³ *Id.* at TSDR 9-16.

⁶⁴ *Id.* at TSDR 17-20.



and (5) pages from the Vera Wang website displaying women’s fashion items and a page captioned “Jewelry,” which shows what appears to be a wedding ring on the bride’s ring finger as she and the groom touch hands:



Applicant quibbles with the probative value of some of this evidence. He argues that the Ralph Lauren “wedding rings” pages do “not depict sales of the rings through

⁶⁵ *Id.* at TSDR 21-33.

⁶⁶ *Id.* at TSDR 33-34.

Ralph Lauren, but reflect[] a blog post from a third party,” that a “search of the anthropologie.com site by applicant’s counsel for ‘wedding bands’ during the preparation of this Appeal Brief failed to identify any wedding rings” and that the “wedding ring identified by the Examining Attorney was located within a separate bridal site: BHLDN.com,” and that the “silicone bands depicted on the Kauai Innovations website “differ significantly from the traditional jewelry wedding rings and wedding bands recited in the Application.” 9 TTABVUE 15.

We agree with Applicant that the anthropologie.com webpage has little probative value because it only refers to engagement rings, but his other critiques are meritless. It is true that the RALPH LAUREN rings appear on a blog site, but he does not dispute that the rings that are shown on the site are wedding rings sold under the RALPH LAUREN mark. His argument that the “Silicone Wedding Rings” shown on the Kauai Innovations website are not “traditional jewelry wedding rings” fails because the goods identified in his application as “wedding rings” are not limited to “traditional jewelry wedding rings” (which he does not define), and thus encompass silicone wedding rings.

We find that the third-party registration and use evidence in the record collectively “provide[s] a reasonable predicate supporting the Examining Attorney’s position on relatedness and shift[s] the burden to Applicant to rebut the evidence with competent evidence of [his] own,” *Country Oven*, 2019 USPQ2d 443903, at *10, which he did not do. The record as a whole suffices to show that companies that sell one or more of the clothing items identified in the cited registration frequently also

sell wedding rings and wedding bands of various sorts. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203-04 (TTAB 2009). The second *DuPont* factor supports a finding of a likelihood of confusion.

C. Sophistication of the Purchasers

The fourth *DuPont* factor “considers [t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse vs. careful, sophisticated purchasing.’” *Embiid*, 2021 USPQ2d 577, at *31 (quoting *DuPont*, 177 USPQ at 567). Applicant notes that his amended application covers “wedding rings and wedding bands,” and argues that “courts have recognized that purchasers of these goods are discriminating purchasers.” 9 TTABVUE 16. Applicant argues that “the purchaser of a diamond ring, particularly of a wedding or engagement ring, will be discriminating in his purchase, and make it carefully and deliberately.” *Id.* (quoting *Tiffany & Co. v. Costco Wholesale Corp.*, 971 F.3d 74, 2020 USPQ2d 10942, at *12 (2d Cir. 2020) (quoting *J.R. Wood & Sons, Inc. v. Reese Jewelry Corp.*, 278 F.2d 157, 125 USPQ 367, 369 (2d Cir. 1960)).

We have given the quoted Second Circuit decisions respectful consideration,⁶⁷ but they do not bind us, and they have little or no persuasive value in any event because they both involved diamond rings, and Applicant’s amended identification of goods, “wedding rings and wedding bands,” encompasses, but is not limited to, diamond

⁶⁷ In his reply brief, Applicant mistakenly describes the *Tiffany* decision as a Federal Circuit decision. 12 TTABUVE 10.

rings and bands. As shown above, “wedding rings” and “wedding bands” take many forms other than diamond rings and some are offered at prices as low as \$20.⁶⁸

We acknowledge that the purchase of a wedding ring or wedding band of any sort is made in connection with a major life milestone, and it is not implausible that, as Applicant puts it in his reply brief, “[t]hese goods represent some of the most emotionally important purchases consumers will ever make.” 12 TTABVUE 10.⁶⁹ At the same time, however, it is common knowledge that millions of ordinary consumers in the general public get married and buy wedding rings and wedding bands in the process, and, in the case of divorce and re-marriage, more than once. In the final analysis, we agree with the Examining Attorney that Applicant’s “assertion that the consumers are sophisticated is mere argument and is not supported by any evidence of record,” 11 TTABVUE 8, and argument of counsel “is ‘no substitute for evidence.’” *Embiid*, 2021 USPQ2d 577, at *40 (quoting *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, at *46 (TTAB 2019) (quoting *Cai*, 127 USPQ2d at 1799)). We find that the fourth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

D. Summary and Conclusion

The first and second *DuPont* factors support a finding of a likelihood of confusion, and the fourth *DuPont* factor is neutral. Although the FOREVER BLACK mark is

⁶⁸ January 5, 2022 Denial of Request for Reconsideration at TSDR 17-33.

⁶⁹ In the reverse confusion scenario noted above, the relevant purchasers are purchasers of the clothing items identified in the cited registration. Applicant argues that purchases of those goods “represent some of the most routine, inconsequential purchases consumers make,” 12 TTABVUE 10, and some of those goods may be purchased on impulse. *See Embiid*, 2020 USPQ2d 577, at *32-33.

conceptually weak for clothing, it is more similar to the EVERBLAK mark than any of the third-party marks in the record. The record as a whole shows that wedding rings and wedding bands, and one or more of the clothing items identified in the cited registration, often originate from the same source. We find that confusion as to source or sponsorship is likely when those goods are sold under the similar FOREVER BLACK and EVERBLAK marks.

Decision: The refusal to register is affirmed.