

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: March 5, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Tiffany L. Henry

Serial No. 90446044

Ticora E. Davis of The Creator's Law Firm,
for Tiffany L. Henry.

Hector Grajeda, Trademark Examining Attorney, Law Office 123,
Susan Hayash, Managing Attorney.

Before Pologeorgis, Dunn, and Lebow,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Tiffany L. Henry ("Applicant") seeks registration on the Principal Register of the standard character mark **NOBODY CARES...THEY REALLY DON'T!** for the following goods in International Class 25:¹

Sweatpants; Sweatshirts; Baseball caps; Bathing suits; Fleece pullovers; Gym pants; Hats; Headwear; Hooded sweatshirts; Hooded pullovers; Hooded sweat shirts; Jackets; Jeans; Jogging pants; Jogging suits; Jumpers; Long sleeve pullovers; Men's socks; Outer jackets; Pajama bottoms; Pants; Robes; Short sets; Shorts; Socks; Sweat jackets;

¹ Application Serial No. 90446044, filed on January 3, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an allegation of a bona fide intention to use the mark in commerce.

Sweat pants; Sweat shirts; Sweat suits; Sweaters; Swim trunks; Swimsuits; T-shirts; Tank tops; Track jackets; Track pants; Track suits; Tracksuits; Undergarments; Underpants; Undershirts; Underwear; Wind resistant jackets.

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 standard character mark **NOBODYCARES** registered on the Principal Register for the following goods and services:

Backpacks; Fanny packs; Tote bags; Gym bags, in International Class 18;

Shirts, in International Class 25; and

On-line retail store services featuring apparel and accessories, in International Class 35.²

When the refusal was made final, Applicant appealed and requested reconsideration. When the request for reconsideration was denied, the appeal resumed. Both Applicant and the Examining Attorney filed briefs. For the reasons explained below, we affirm the refusal to register.³

I. Preliminary Matter - Evidentiary Objection

We initially turn to an evidentiary objection lodged by the Examining Attorney regarding evidence presented by Applicant with her Petition to Revoke dated October 11, 2022.⁴ Specifically, the Examining Attorney objects to Internet evidence submitted by Applicant with her Petition that is comprised solely of web addresses

² Registration No. 6075920 issued on June 9, 2020.

³ The TTABVue and Trademark Status and Document Retrieval ("TSDR") citations refer to the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .PDF version of the documents.

⁴ Examining Attorney's Appeal Brief, pp. 4-5; 8 TTABVue 4-5.

and hyperlinks.⁵

To properly introduce internet evidence into the record, a party must provide (1) an image file or printout of the downloaded webpage, (2) the date the evidence was downloaded or accessed, and (3) the complete URL address of the webpage. *See In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1733 (TTAB 2018); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1208.03 (2023); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 710.01(b) (Nov. 2023).

Here, Applicant argues the sophistication of relevant consumers weighs against a likelihood of confusion.⁶ In support, Applicant cites two hyperlinks to two studies that purportedly supports her argument that were first submitted with her Petition to Revive and reiterated in her brief. The Board has made clear that merely providing hyperlinks or webpage addresses to internet materials alone is insufficient to make such materials of record. *See, e.g., In re Olin Corp.*, 124 USPQ2d 1327, 1332 n.15 (TTAB 2017) (“Applicant did cite to an internet link, here and at several other places in its brief. This is improper. Because the information displayed at a link’s internet address can be changed or deleted, merely providing a link to a website is insufficient to make information from that site of record.”); *In re HSB Solomon Assocs., LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012) (“a reference to a website’s internet address is not sufficient to make the content of that website or any pages from that website of record.”); *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010)

⁵ Applicant’s October 11, 2022 Petition to Revive, TSDR p. 16.

⁶ Applicant’s Appeal Brief, p. 17, 6 TTABVUE 18.

(noting that because of the transitory nature of internet postings, websites referenced only by links may later be modified or deleted).

Insofar as Applicant only provided web addresses/hyperlinks to the evidence at issue and failed to provide (1) an image file or printout of the downloaded webpages, and (2) the date the evidence was downloaded or accessed, the evidence is not properly of record. Accordingly, the Examining Attorney's objection is sustained, and we give no consideration to this evidence.

II. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor that is relevant or for which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). 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) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Notwithstanding, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973) (internal citations removed).

A. Relatedness of the Goods

We first turn to the comparison of the goods and services, the second *DuPont* factor. In making our determination regarding the relatedness of the goods and services, we must look to the goods as identified in Applicant's application and the goods and services listed in the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. 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 In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011).

It is sufficient that the respective goods and services are related in some manner, or that the conditions and activities surrounding the marketing of the goods and services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (internal citation omitted); *Hilson Research, Inc. v. Soc'y for Human Res. Mgmt.*, 27 USPQ2d 1423, 1432 (TTAB 1993). The issue here is not whether consumers would confuse Applicant's goods with Registrant's goods and services, but rather whether there is a likelihood of confusion as to the source of these goods and services. *L'Oreal*

S.A. v. Marcon, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984). Moreover, registration must be refused if Applicant's mark for any of its identified goods is likely to cause confusion with the Registrant's mark for any of its identified goods or services. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application).

Here, the goods listed in the cited registration include "shirts" which is broad enough to encompass Applicant's "t-shirts" and "undershirts."⁷ Thus, Applicant's and Registrant's Class 25 goods are in part legally identical. *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1412-15 (TTAB 2018) (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein); *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d at 1025 (same); *In re Elbaum*, 211 USPQ 639; 640 (TTAB 1981) (same).

As for Registrant's Class 18 goods, the Examining Attorney submitted 10 third-

⁷ The term "shirt" is defined as "1. A garment for the upper part of the body, typically having a collar, sleeves, and a front opening; 2. **An undershirt.**" *See* American Heritage Dictionary (accessed February 20, 2024) (emphasis added). The term "T-shirt" is defined as "a short-sleeved, pullover **shirt** with no collar." (emphasis added). *Id.* "The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed form or regular fixed editions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006)." *See also M/S R.M. Dhariwal (HUF) 100% EOU v. Zarda King Ltd. and Global Tech. & Trade Marks Ltd.*, 2019 USPQ2d 149090, at *1 n.2 (TTAB 2019).

party registrations that identify both Applicant's Class 25 goods and Registrant's Class 18 goods under the same mark.⁸ Although third-party registrations are not evidence that the registered marks 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 or services listed in the registrations are of a kind that may emanate from a single source. *See, e.g., In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018) (citing *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001)); *In re Aquamar*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). Indeed, the cited registration features the same mark as the source indicator for the goods in both Classes 18 and 25.

The Examining Attorney also submitted screenshots from the websites of several online retailers of apparel and accessories like packs and bags, i.e., the Gap, Old Navy, Athleta, Nike and L.L. Bean, that demonstrate that these retailers sell both Registrant's Class 18 goods and Applicant's Class 25 goods under the same mark.⁹ Accordingly, we find that the evidence of record shows that Applicant's Class 25 goods and Registrant's Class 18 goods are related.

Finally, with regard to the relationship between Registrant's Class 35 retail apparel store services and Applicant's Class 25 clothing items, logic and precedent

⁸ November 6, 202213

Office Action, TSDR pp. 13-52.

⁹ *Id.*, TSDR pp. 53-775.

dictates that retail store services are related to products commonly sold in that particular retail store. Thus, we find that Applicant's Class 25 clothing items and Registrant's Class 35 retail store services featuring apparel are inherently related goods and services. *See, e.g., In re Detroit Athl. Club Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (sports apparel retail services are related to clothing); *Fortunoff Silver Sales, Inc. v. Norman Press, Inc.*, 225 USPQ 863, 866 (TTAB 1985) ("there is little question that jewelry store services and jewelry are highly related goods and services"); and *In re Jewelmasters, Inc.*, 221 USPQ 90 (TTAB 1983). *See also* J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION §24:25 (5th ed. Dec. 2023 Update) ("Where the services consist of retail sales services, likelihood of confusion is found when another mark is used on goods which are commonly sold through such a retail outlet.").

In sum, we find that Applicant's goods are legally identical in part or otherwise related to goods and services in each class of the cited registration. Accordingly, the second *DuPont* factor heavily favors a finding of likelihood of confusion.

B. Similarity of Trade Channels

Next we consider established, likely-to-continue channels of trade, the third *DuPont* factor. Because the Class 25 identifications of Applicant's and Registrant's goods have no restrictions as to channels of trade or classes of customers and are legally identical in part, we must presume that they travel through the same channels of trade and are offered to the same or overlapping classes of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *In*

re Yawata Iron & Steel Co., 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

As for Registrant's listed Class 18 goods and Class 35 services, we find that the third-party use Internet evidence submitted by the Examining Attorney shows that Applicant's Class 25 goods and Registrant's Class 18 goods and Class 35 retail services, at a minimum, travel in some of the same or overlapping channels of trade and are offered to overlapping consumers.

Thus, the third *DuPont* factor also weighs highly in favor of a finding of likelihood of confusion.

C. Strength of the Cited NOBODYCARES Mark

Before we make our comparison of the marks, we consider the strength, as well as any weakness, of the cited NOBODYCARES mark as used in connection with the goods and services listed in the cited registration. We do so because a determination of the strength or weakness of this mark helps inform us as to its scope of protection. *See In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1745 (TTAB 2016) (“[T]he strength of the cited mark is — as always — relevant to assessing the likelihood of confusion under the *du Pont* framework.”).

When evaluating the strength or weakness of a mark, we look at the mark's inherent strength based on the nature of the term itself and its commercial strength in the marketplace. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (measuring both conceptual and marketplace strength); *see also Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *17 (TTAB 2022)

(quoting *DuPont*, 177 USPQ at 567); *New Era Cap Co. v. Pro Era LLC*, 2020 USPQ2d 10596, at *10 (TTAB 2020) (“[T]he strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak.”) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)).

With regard to commercial strength, “[t]he proper standard is the mark’s ‘renown within a specific product market,’ ... and ‘is determined from the viewpoint of consumers of like products,’ ..., and not from the viewpoint of the general public.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734-35 (Fed. Cir. 2017).

1. Conceptual Strength of the Cited NOBODYCARES Mark

Conceptual strength is a measure of a mark’s distinctiveness and may be placed “in categories of generally increasing distinctiveness: . . . (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 23 USPQ2d 1081, 1084 (1992).

Because the cited mark NOBODYCARES issued on the Principal Register, without a claim of acquired distinctiveness, the mark is presumed to be inherently distinctive for the goods and services listed in the cited registration. Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006) (a “mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods”).

The Federal Circuit has held, however, that if there is evidence that a mark, or an element of a mark, is commonly adopted by many different registrants, that may indicate that the mark or common element has some non-source identifying significance that undermines its conceptual strength as an indicator of a single source. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ... that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that segment is relatively weak’”) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)).

Here, Applicant submitted a plain copy of a single third-party registration for the standard character mark NOBODY CARES ABOUT YOUR STUPID DIET for “T-shirts” in International Class 25.¹⁰ While there is no minimum number of third-party marks required to show weakness, a single third-party registration, coupled with no evidence of third-party use, is woefully insufficient compared to the number of such marks in cases that have found weakness based on those marks. *See, e.g., In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (2018) (four third-party registrations and no third-party uses were “a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant” in *Jack Wolfskin*

¹⁰ Applicant’s October 11, 2022 Petition to Revise, TSDR p. 28.

and *Juice Generation*); *Am. “76” Co. v. Nat’l Brewing Co.*, 158 USPQ 417, 420 (TTAB 1968) (single registration insufficient). *Cf. TPI Holdings, Inc. v. TrailerTrader.com, LLC*, 126 USPQ2d 1409, 1427-28 n.92 (TTAB 2018) (67 third-party registrations and numerous uses of TRADER-formative marks showed that the formative was weak and could not form the basis of petitioner’s claimed family of marks); *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (where the conflicting marks were identical, evidence of the coexistence of the cited registered mark with two third-party registrations of the same mark for the same or similar goods “falls short of the ‘ubiquitous’ or ‘considerable’ use of the mark components present in” *Jack Wolfskin* and *Juice Generation*).

In sum, because the evidence of record is insufficient to demonstrate that the cited NOBODYCARES mark for the goods and services listed in the cited registration is conceptually or inherently weak, we accord the cited NOBODYCARES mark the normal scope of protection due an inherently distinctive mark.

Commercial Strength of the Cited NOBODYCARES Mark

a. Fifth *DuPont* Factor

The fifth *DuPont* factor examines the extent to which the public perceives the mark as indicating a single source of origin, i.e., its fame or commercial strength. *DuPont*, 177 USPQ at 567. However, as is typical in an ex parte proceeding, the record in this case provides no basis for a finding that the cited mark is commercially strong when used in association with the Registrant’s goods and services. “[I]n an ex parte appeal the ‘fame of the mark’ factor is normally treated as neutral because the record

generally includes no evidence as to fame. *See In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006). Thus, the fifth *DuPont* factor is neutral.¹¹

b. Similar Marks on Similar Goods – 6th *DuPont* Factor

We next address the sixth *DuPont* factor, the number and nature of similar marks in use on similar goods and services. *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016). The Federal Circuit has held that evidence of extensive registration and use of a term by others for similar goods or services can be “powerful” evidence of the term’s weakness. *Jack Wolfskin*, 116 USPQ2d at 1136; *Juice Generation*, 115 USPQ2d at 1674. If the evidence establishes that the consuming public is exposed to widespread third-party use of similar marks for similar goods or services, it “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567).

As previously noted, Applicant has not submitted any evidence concerning third-party uses of marks identical or similar to the cited mark NOBODYCARES for goods or services identical or similar to those listed in the cited registration. Thus, the sixth *DuPont* factor is neutral.

In sum, the evidence of record neither demonstrates that the cited

¹¹ The owner of the cited registration is not a party to this proceeding and thus cannot introduce evidence regarding its use of the cited registered mark. *See In re Thomas*, 79 USPQ2d at 1027, n. 11 (“Because this is an *ex parte* proceeding, we would not expect the examining attorney to submit evidence of fame of the cited mark”).

NOBODYCARES mark is conceptually nor commercially weak for the goods or services listed in the cited registration. Rather, the record shows that the cited NOBODYCARES mark is inherently distinctive and, therefore, is entitled to the normal scope of protection afforded inherently distinctive marks.

D. Similarity of the Marks

We next consider the first *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imps.*, 73 USPQ2d at 1691 (quoting *DuPont*, 177 USPQ at 567). Similarity as to any one of these factors may be sufficient to support a finding that the marks are confusingly similar. *See Krim-Ko Corp. v. Coca-Cola 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.”); *In re Inn at St. John’s, LLC*, 126 USPQ2d at 1746 (“Similarity in any one of these elements may be sufficient to find the marks confusingly similar.”) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

“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.” *i.am.symbolic*, 123 USPQ2d at 1748 (quoting *Coach Servs.*, 101 USPQ2d at 1721 (internal quotation marks omitted). Furthermore, because Applicant’s Class 25 goods are legally identical in part to Registrant’s Class 25 goods, the degree of similarity between the marks that is required to support a finding of likelihood of confusion declines. *Century 21 Real Estate Corp. v. Century Life of*

America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Applicant's mark is **NOBODY CARES...THEY REALLY DON'T!** in standard characters. The cited mark is **NOBODYCARES** also in standard characters. When considered in their entirety, we find Applicant's mark and Registrant's mark to be very similar in connotation and commercial impression because the marks both include the term NOBODYCARES/NOBODY CARES. The fact that the cited mark has no space between the term NOBODY and CARES and Applicant's mark does is of little consequence. Indeed, the presence or absence of a space between two terms is usually an inconsequential difference that even if noticed by consumers would not serve to distinguish these marks. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016) ("the absence of a space in Applicant's mark MINIMELTS does not meaningfully distinguish it from Opposer's [MINI MELTS] mark"); *Mag Instrument Inc. v. Brinkman Corp.*, 96 USPQ2d 1701, 1714 (TTAB 2010) ("presence or absence of a space before STAR does very little, if anything, to distinguish the two marks [MAXSTAR versus MAG STAR]").

Applicant argues that her applied-for mark creates a commercial impression that differs from the registered mark due to providing consumers with "a punchy wake up call to pull themselves up by their Bootstraps."¹² Applicant argues that, unlike Applicant's mark, the cited registered mark will not have the emotional and motivational effect on its consumers that drives them to take their lives into their

¹² Applicant's Appeal Brief, p. 16; 6 TTABVUE 16.

own hands.¹³ However, Applicant acknowledges that the phrase by itself is, wholly dependent upon, and thus secondary to, the dominant feature of the mark, namely “NOBODY CARES.”¹⁴

In any event, Applicant has adopted the entirety of the cited mark as the initial portion of her mark. Adding a term(s) to a registered mark generally does not obviate the similarity between the compared marks, as in the present case, nor does it overcome a likelihood of confusion under Section 2(d). *See Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 557, 188 USPQ 105, 106 (CCPA 1975) (holding BENGAL and BENGAL LANCER and design confusingly similar); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1269 (TTAB 2009) (holding TITAN and VANTAGE TITAN confusingly similar); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (holding MACHO and MACHO COMBOS confusingly similar); TMEP §1207.01(b)(iii). In the present case, the marks are identical in part. Specifically, the applied-for mark merely adds the phrase “...THEY REALLY DON'T!” to the cited registered mark.

Additionally, because the phrase NOBODY CARES is the initial term in Applicant’s mark, we find that consumers of Applicant’s goods will focus on and remember the NOBODY CARES portion of Applicant’s mark as the dominant element. *Palm Bay Imps.*, 73 USPQ2d at 1692 (finding the same “first word in both parties’ marks renders the marks similar, especially in light of the largely laudatory

¹³ *Id.*

¹⁴ *Id.* at 17; 6 TTABVUE 17.

(and hence non-source identifying) significance” of the other word in applicant’s mark); *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered[.]”).

Applicant cites *Juice Generation* to support her contention that the Examining Attorney must consider the applied-for mark in its entirety because, as a whole, the applied-for mark has a different commercial impression than Registrant’s mark.¹⁵ However, Applicant overlooks the Court’s reasoning that the additional wording and design element in that case conveyed a distinct meaning and different connotation in consumers’ minds. *See id.* In contrast, Applicant here acknowledges that the additional wording in her mark, “THEY REALLY DON’T!,” serves to emphasize the dominant phrase, “NOBODY CARES”¹⁶. Thus, unlike *Juice Generation*, the additional wording in Applicant’s mark merely affirms the commercial impression of the dominant phrase NOBODY CARES.

Further, even if potential purchasers realize the apparent differences between the marks, they could still reasonably assume, due to the overall similarities in connotation and commercial impression, that Applicant’s goods sold under the proposed mark constitute a new or additional product line from the same source as the goods and services sold under the cited registered mark with which they are acquainted or familiar, and that Applicant’s mark is merely a variation of, or

¹⁵ *Id.* at pp. 13-14; 6 TTABVUE 13-14.

¹⁶ *Id.* at 17; 6 TTABVUE 13-14.

derivative of, Registrant's mark. *See, e.g., In re Comexa Ltda.*, 60 USPQ2d 1118 (TTAB 2001) (applicant's use of term "AMAZON" and parrot design for chili sauce and pepper sauce is likely to cause confusion with registrant's "AMAZON" mark for restaurant services); *SMS, Inc. v. Byn-Mar Inc.* 228 USPQ 219, 220 (TTAB 1985) (applicant's marks ALSO ANDREA and ANDREA SPORT were "likely to evoke an association by consumers with opposer's preexisting mark [ANDREA SIMONE] for its established line of clothing."); *In re Collegian Sportswear, Inc.*, 224 USPQ 174 (TTAB 1984).

Lastly, there is no evidence that the cited mark NOBODYCARES or the initial phrase NOBODY CARES in Applicant's mark have any meaning or significance when applied to the parties' respective goods or services. In other words, both virtually identical terms are arbitrary when used in connection with Registrant's and Applicant's goods and services. And as noted above, there is no evidence of use by third parties of similar marks on similar goods and services that might dilute the source-identifying capacity of the cited mark NOBODYCARES for those goods and services

In sum, while there are some specific differences between Applicant's and Registrant's marks, i.e., the inclusion of the additional wording "...REALLY THEY DON'T!" in Applicant's mark, we nonetheless find that, in their entireties, the marks are more similar than dissimilar in appearance, sound, connotation, and overall commercial impression due to the common presence of the virtually identical and

dominant term NOBODYCARES. The first *DuPont* factor thus favors a finding of likelihood of confusion.

E. Sophistication of Consumers

The fourth *DuPont* factor concerns the “conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Applicant argues, without any evidence,¹⁷ that the parties’ respective goods and services are generally not the type of goods and services to be purchased or selected on impulse or without due care.¹⁸

Applicant’s arguments are unavailing. Mere argument regarding the sophistication of actual or potential consumers is not evidence. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)); *see also In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014) (finding that there was no proof to support the statements in the record by counsel).

Further, even assuming that some purchasers of Applicant’s and Registrant’s respective goods and services exercise care in purchasing these goods and services, “Board precedent requires the decision to be based ‘on the least sophisticated potential purchasers.’” *Stone Lion*, 110 USPQ2d at 1163. Here, there is no evidence

¹⁷ As previously noted, the hyperlinks submitted by Applicant to support her sophistication of consumer argument do not make the material purportedly located at the hyperlink properly of record and, therefore, we have given no consideration to the hyperlinks.

¹⁸ Applicant’s Appeal Brief, pp. 12-13, 4 TTABVUE 17-18.

that the least sophisticated purchasers in the general public will exercise anything other than ordinary care.

Moreover, even if actual or potential consumers of the parties' respective goods and services are sophisticated, they may not be sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *See In re Shell Oil Co.*, 26 USPQ2d at 1690 (indicating that "even sophisticated purchasers can be confused by very similar marks"); *Top Tobacco, LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011); TMEP § 1207.01(d)(vii). Where, as here, the marks at issue are similar and the goods and services are in part legally identical or otherwise related, confusion is often found likely despite customer sophistication and care. "That the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods [or services]. 'Human memories even of discriminating purchasers . . . are not infallible.'" *In re Rsch. & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (quoting *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)); *In re Wilson*, 57 USPQ2d 1863, 1865-66 (TTAB 2001) (where marks are very similar and goods or services related, confusion may be likely even among sophisticated purchasers). Finally, even if this factor weighs against a finding of likelihood of confusion, it is outweighed by the similarities between the marks at issue, the relatedness of the goods and services and the overlapping trade channels and classes of purchasers.

Overall, we find the *DuPont* consumer sophistication factor to be neutral.

III. Conclusion

We have considered all of the arguments and evidence of record and all relevant *DuPont* factors. We find that (1) the marks at issue are similar, (2) Applicant's goods and Registrant's goods and services are legally identical in part or otherwise related, (3) the legally identical in part goods are presumed to travel in identical trade channels and offered to identical classes of purchasers, and (4) the related goods and services, namely, Applicant's Class 25 goods and Registrant's Class 18 goods and Class 35 services, travel in overlapping channels of trade and are available to overlapping consumers. As such, we conclude that Applicant's NOBODY CARES...THEY REALLY DON'T! mark, as used in connection with the identified goods in Class 25, so resembles the cited mark NOBODY CARES for the listed goods in Classes 25 and 18 and the listed services in Class 35 as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.

Decision: The refusal to register Applicant's NOBODY CARES...THEY REALLY DON'T! mark under Section 2(d) of the Trademark Act is affirmed.