

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: April 4, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Pace 49, Inc.*

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Serial No. 90873297

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Bobby W. Braxton and Gregory Perrone of Braxton Perrone, PLLC, for Pace 49, Inc.

Kelly Neal, Trademark Examining Attorney, Law Office 105,  
Jennifer Williston, Managing Attorney.

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Before Heasley, English and Lebow,  
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Pace 49, Inc., seeks to register the standard-character mark PACE KLEENGROW on the Principal Register for “Algicides, fungicides, bactericides, disinfectants, and virucides for greenhouse structures and equipment and public areas surfaces; Pesticide for ornamental crops in greenhouses and in greenhouse recirculated irrigation systems” in International Class 5.<sup>1</sup>

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<sup>1</sup> Application Serial No. 90873297 (“the Application”) was filed on August 9, 2021, 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.

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used on or in connection with the identified goods, is likely to cause confusion with the standard-character mark CLEANGROW, on the Principal Register, for "Water treatment chemicals for use in greenhouse and hydroponic systems; chemical products for preventing scale; nutrients for hydroponic and soil medias; fertilizers, namely, hydroponic fertilizers, fertilizers for use in greenhouse and hydroponic systems, and multi-phase liquid-based fertilizers" in International Class 1.<sup>2</sup>

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal proceeded. We affirm the refusal to register.

### **I. Likelihood of Confusion**

Section 2(d) of the Trademark Act provides that a mark may be refused registration if it:

[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....

15 U.S.C. § 1052(d), *quoted in In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at \*2 (Fed. Cir. 2023).

To determine whether there is a likelihood of confusion between marks under Section 2(d), we analyze the evidence and arguments under the factors set forth in *In*

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<sup>2</sup> Registration No. 5020038, issued August 16, 2016.

*re E. I. duPont deNemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (the “*DuPont* factors”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019). “The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.” *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (internal punctuation omitted).

#### **A. Similarity of the Marks**

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant’s and Registrant’s marks in their entirety, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee 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), *aff’d*, 777 Fed. App’x 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

The test assesses not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Cai v. Diamond Hong*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Applicant's mark, again, is PACE KLEENGROW and Registrant's mark is CLEANGROW.

The Examining Attorney argues that the marks are "highly similar" because they share the phonetically equivalent terms KLEENGROW/CLEANGROW."<sup>3</sup> Although "applicant's mark has a different spelling, KLEEN," she asserts, "it is an intentional misspelling of CLEAN and is phonetically equivalent."<sup>4</sup> The marks thus "convey the same mental reaction, that of something growing free from contamination."<sup>5</sup> Furthermore, she asserts, "the addition of PACE at the beginning of applicant's mark does not affect the overall commercial impression and meaning of applicant's mark,"

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<sup>3</sup> 8 TTABVue 3 (Examining Attorney's Brief).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 3-4.

as “PACE appears to be applicant’s house mark as viewed on its website.”<sup>6</sup>

Applicant disagrees, urging that the word PACE in its mark does distinguish the marks: “In this case, the marks are most noticeably dissimilar in appearance in that the applied-for mark includes the word ‘PACE’ as the first element of the mark, while the Cited Registration does not include the word ‘PACE.’”<sup>7</sup> Moreover, Applicant asserts (quoting *Presto Prods. Inc. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1998)), “it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.”<sup>8</sup>

We are not persuaded. While the first term in a mark is often dominant, *id.* (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”), that is not always the case. “It has long been held that the addition of a trade name or house mark to a registered mark does not generally avoid confusion.” *In re Fiesta Palms, LLC*, 85 USPQ2d 1360, 1364 (TTAB 2007) (finding that “a consumer who has been told about the advantages of registrant’s MVP casino services is likely to believe that [applicant’s] CLUB PALMS MVP casino services is simply the now identified source of the previously anonymous MVP casino services.”).

Indeed, “such addition may actually be an aggravation of the likelihood of confusion as opposed to an aid in distinguishing the marks so as to avoid source

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<sup>6</sup> *Id.* at 4.

<sup>7</sup> 6 TTABVUE 5 (Applicant’s Brief).

<sup>8</sup> *Id.* at 5-6.

confusion.”. *In re Christian Dior, S.A.*, 225 USPQ 533, 534 (TTAB 1985) (addition of house mark in LE CACHET De DIOR does not avoid likelihood of confusion with registered CACHET mark). *See also Celanese Corp. of Am. v. E. I. Du Pont de Nemours & Co.*, 154 F.2d 143, 33 CCPA 857, 69 USPQ 69 (CCPA 1946) (addition of surname “Du Pont” to one of two otherwise confusingly similar trademarks was not of itself sufficient to avoid likelihood of confusion); *Hammermill Paper Co. v. Gulf States Paper Corp.*, 337 F.2d 662, 143 USPQ 237 (CCPA 1964) (“Hammermill E-Z Carry Pak” is so similar to “EZ Pak” and “E-Z Cari” that confusion is likely); *In re Dennison Mfg. Co.*, 229 USPQ 141, 144 (TTAB 1986) (holding use of “Glue Stic,” for general purpose adhesive in stick form, and “Uhu Glu Stic,” for adhesives for paper and stationery, is likely to cause confusion); *In re Riddle*, 225 USPQ 630 (TTAB 1985) (RICHARD PETTY’S ACCUTUNE and design for automotive service center confusingly similar to ACCUTUNE for automotive testing equipment). We find that to be the case here.

That Applicant uses a “K,” rather than a “C” in its intentional misspelling of the word CLEAN as KLEEN in KLEENGROW is not significant. An intentional misspelling that is the phonetic equivalent, and is easily recognized as the correctly spelled word, is the legal equivalent of the correctly spelled word. *In re Yardney Elec. Corp.*, 145 USPQ 404, 405 (TTAB 1965) (“NICEL’ is merely a misspelling and phonetic equivalent of ‘nickel’ and means the same thing.”). A finding of similarity is usually not avoided by a variant spelling, and it does not do so here. *Contour Chair-Lounge Co. v. Englander Co.*, 324 F.2d 186, 51 CCPA. 833, 139 USPQ 285, 288 (CCPA

1963) (“Contur’ [is] but a slight misspelling of ‘Contour,’ with identical pronunciation and meaning.”).

The first *DuPont* factor weighs in favor of finding a likelihood of confusion.

**B. Similarity of the Goods, Channels of Trade, and Classes of Customers**

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration...,” and the third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567. A proper comparison of the goods “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 Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)). It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods in a particular class. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981).

Once again, Applicant’s goods are:

Algicides, fungicides, bactericides, disinfectants, and virucides for greenhouse structures and equipment and public areas surfaces;  
Pesticide for ornamental crops in greenhouses and in greenhouse recirculated irrigation systems,

and Registrant’s goods are:

Water treatment chemicals for use in greenhouse and hydroponic systems; chemical products for preventing scale; nutrients for

hydroponic and soil medias; fertilizers, namely, hydroponic fertilizers, fertilizers for use in greenhouse and hydroponic systems, and multi-phase liquid-based fertilizers.

Applicant argues that the respective goods are dissimilar because “Registrant sells nutrients whereas Applicant sells algicides.”<sup>9</sup>

As the Examining Attorney notes, however, quoting *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000) and *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000), “the compared goods need not be identical or even competitive to find a likelihood of confusion.” Rather, the goods “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] emanate from the same source.’” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

To establish relatedness, the Examining Attorney introduced printouts from eight third-party websites to show that Applicant’s and Registrant’s identified goods “are commonly offered and sold by the same source, under the same mark, and in the same trade channels.”<sup>10</sup> Internet evidence may be probative of relatedness. *Made in Nature, LLC v. Pharmavite, LLC*, 2022 USPQ2d 557, at \*46 (TTAB 2022) (third-party websites promoting sale of both parties’ sorts of goods showed relatedness); *In re Embiid*, 2021 USPQ2d 577, at \*28-29 (TTAB 2021) (evidence of third-parties offering

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<sup>9</sup> 6 TTABVUE 9-10 (Applicant’s Brief).

<sup>10</sup> 8 TTABVUE 5 (Examining Attorney’s Brief).



goods of both applicant and registrant pertinent to relatedness of the goods); *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355-56 (TTAB 2015) (relatedness found where Internet evidence demonstrated goods commonly emanated from the same source under a single mark). For example:

- Brandt (brandt.co) sells herbicides and pesticides, like Applicant, as well as water treatment chemicals and fertilizers, like Registrant;<sup>11</sup>
- Ferti-lome (fertilome.com) sells fungicides, herbicides, and pesticides, like Applicant, as well as fertilizers, like Registrant, under the same mark:<sup>12</sup>



Come and Get It Fire Ant Killer (1 lb) Lawn Food Plus Iron 28-4-4 (20 lbs) 13

- Gardens Alive (gardensalive.com) sells pesticides like Applicant, and fertilizers like Registrant, under the same mark;<sup>14</sup>

<sup>11</sup> May 18, 2022 Office Action, TSDR 8-16.

<sup>12</sup> *Id.* at 17-45.

<sup>13</sup> *Id.* at 18.

<sup>14</sup> *Id.* at 46-52.

Household Pest Control



SHOP HOUSEHOLD PEST CONTROL

Soil & Amendments



SHOP GARDEN SOIL & AMENDMENTS

15

• Solutions Pest & Lawn Stores (solutionstores.com) sells algicides, fungicides, bactericides, disinfectants, and virucides, like Applicant, as well as fertilizers, like Registrant, though not necessarily under the same mark;<sup>16</sup>

• Fox Farm Soil and Fertilizer Company (foxfarm.com) sells insecticides, like Applicant, and fertilizer, like Registrant;<sup>17</sup>



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<sup>15</sup> *Id.* at 47.

<sup>16</sup> January 13, 2023 Final Office Action, TSDR 7-21.

<sup>17</sup> July 22, 2023 Reconsideration Letter, TSDR 10-16.

<sup>18</sup> *Id.* at 10, 15.

- General Hydroponics (generalhydroponics.com) sells insecticides, fungicides, and bactericides, like Applicant, as well as fertilizers, like Registrant, under the same mark;<sup>19</sup>



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- Sierra Natural Science (sierranaturalscience.com) sells pesticides, insecticides and fungicides, like Applicant, as well as fertilizers, like Registrant, under the same mark;<sup>21</sup>



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<sup>19</sup> *Id.* at 19-67.

<sup>20</sup> *Id.* at 26, 29.

<sup>21</sup> *Id.* at 68-83.

<sup>22</sup> *Id.* at 68, 76.

- Wilbur Ellis (wilburellisagribusiness.com) sells herbicides, like Applicant, and fertilizers, like Registrant.

The foregoing evidence provided by the Examining Attorney is sufficient to show that the goods of both Applicant and Registrant are often offered under the same mark and/or by the same purveyors and thus are related. *See In re Detroit Athl. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir 2018) (crediting relatedness evidence that third parties use the same mark for the goods at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard*, 62 USPQ2d at 1004 (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

Turning to the third *DuPont* factor, the channels of trade, we find that the same evidence from Brandt, Ferti-lome, Gardens Alive, Solutions Pest & Lawn Stores, Fox Farm Soil and Fertilizer Company, General Hydroponics, Sierra Natural Science, and Wilbur Ellis, establishes the similarity of Applicant’s and Registrant’s channels of trade. This evidence supports a finding that both Applicant’s and Registrant’s goods are offered and marketed in at least one common channel of trade, that is, websites operated by third-party gardening and pest control retailers, often on the same page.

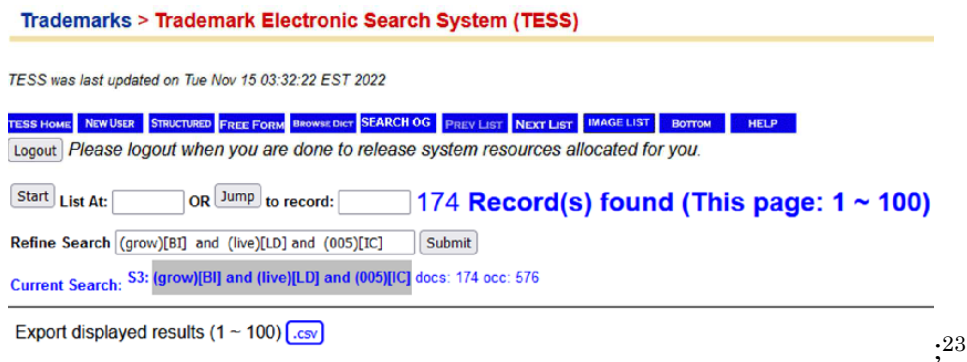
The second and third *DuPont* factors weigh in favor of finding a likelihood of confusion.

### **C. Strength of the Cited Mark**

Under the sixth *DuPont* factor, we consider the strength of the cited registered mark, and the extent to which that strength may be attenuated by “[t]he number and

nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567. The mark’s strength may vary along a spectrum from very strong to very weak, *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017), measured in terms of its conceptual and commercial strength. *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 2023 USPQ2d 737, at \*4 (Fed. Cir. 2023) (“There are two prongs of analysis for a mark’s strength under the sixth factor: conceptual strength and commercial strength.”). Applicant seeks to contract the cited mark’s scope of protection by presenting evidence from the USPTO’s Trademark Electronic Search System (TESS) database which purportedly shows that the field of marks containing the term “GROW” or “CLEAN” is crowded. According to Applicant:

- “There are 174 marks using the term ‘GROW’ for international class 005, and which are alive,” as supported by the following image embedded within its brief:



- “[T]here are 385 alive marks using ‘GROW’” in Class 1, as supported by the following image embedded within Applicant’s brief:

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<sup>23</sup> 6 TTABVUE 7 (Applicant’s Brief).

TESS was last updated on Tue Nov 15 03:32:22 EST 2022

TESS HOME NEW USER STRUCTURED FREE FORM Browse Dict SEARCH OG PREVIOUS LIST NEXT LIST IMAGE LIST BOTTOM HELP

Logout Please logout when you are done to release system resources allocated for you.

Start List At:  OR Jump to record:  **385 Record(s) found (This page: 1 ~ 100)**

Refine Search (grow)[BI] and (live)[LD] and (001)[IC] Submit

Current Search: S4: (grow)[BI] and (live)[LD] and (001)[IC] docs: 385 occ: 1276

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- “The below search shows 347, alive, marks using the term ‘clean’ in Class 001”:

TESS was last updated on Tue Nov 15 03:32:22 EST 2022

TESS HOME NEW USER STRUCTURED FREE FORM Browse Dict SEARCH OG PREVIOUS LIST NEXT LIST IMAGE LIST BOTTOM HELP

Logout Please logout when you are done to release system resources allocated for you.

Start List At:  OR Jump to record:  **347 Record(s) found (This page: 1 ~ 100)**

Refine Search (clean)[BI] and (live)[LD] and (001)[IC] Submit

Current Search: S5: (clean)[BI] and (live)[LD] and (001)[IC] docs: 347 occ: 1136

;<sup>25</sup> and

- “The below search shows 636 alive marks which use the term ‘clean’” in International Class 1:

TESS was last updated on Tue Nov 15 03:32:22 EST 2022

TESS HOME NEW USER STRUCTURED FREE FORM Browse Dict SEARCH OG PREVIOUS LIST NEXT LIST IMAGE LIST BOTTOM HELP

Logout Please logout when you are done to release system resources allocated for you.

Start List At:  OR Jump to record:  **636 Record(s) found (This page: 1 ~ 100)**

Refine Search (clean)[BI] and (live)[LD] and (005)[IC] Submit

Current Search: S6: (clean)[BI] and (live)[LD] and (005)[IC] docs: 636 occ: 2179

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“However, it is sliced,” asserts Applicant, “the term ‘clean’ and ‘grow’ are used repeatedly throughout the relevant classes.”<sup>27</sup> According to Applicant, this evidence demonstrates that the public has learned to distinguish between the numerous marks

<sup>24</sup> *Id.* at 8.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

used for various related goods using the term ‘CLEAN’ or ‘GROW’” and “indicates that the Patent and Trademark Office has recognized the public awareness, allowing the marks because it recognizes that there would be no likelihood of confusion resulting from the use of the Cited Marks or the registration of Applicant’s Mark.”<sup>28</sup>

As the Examining Attorney notes, however, “the embedded images [from TESS] do nothing more than show how many times the individual terms CLEAN and GROW appear in [marks] in Classes 1 and 5.”<sup>29</sup> “Specifically,” she asserts, “applicant’s evidence does not establish that consumers are accustomed to seeing CLEAN or phonetic equivalents of the term CLEAN such as KLEEN commonly paired with the word GROW in Classes 1 and 5. As such, applicant has not submitted relevant evidence that the combined wording CLEANGROW/KLEENGROW is commercially weak and entitled to a narrow scope of protection.”<sup>30</sup>

We agree with the Examining Attorney that the embedded images of search results have no probative value. As emphasized in *DuPont*, it is “[t]he number and nature of **similar marks** in use on **similar goods**” that is important. *DuPont* at 567 (emphasis added). Here, we have no idea what the actual marks in the search are,

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<sup>28</sup> *Id.* at 8-9.

<sup>29</sup> 8 TTABVUE 6 (Examining Attorney’s Brief).

<sup>30</sup> *Id.* The Examining Attorney also objects to Applicant’s TESS search results embedded within Applicant’s brief, asserting that they have not been properly made of record, and that to make third-party registrations or applications part of the record, an applicant must submit copies of the registration. *Id.* We agree with the Examining Attorney that no third-party registrations or applications were made of record via this evidence. Nevertheless, because the same embedded TESS images were provided with Applicant’s written response to the November 18, 2022 Office action, they are of record for whatever probative value they have, which is not much.

other than the fact that they include either “CLEAN” or “GROW,” and we have no knowledge of the goods covered by those marks. In addition, we do not know whether the marks are registered or merely subject to pending applications, nor do we know the filing bases. *Made in Nature, v. Pharmavite*, 2022 USPQ2d 557, at \*11 (disregarding third-party applications because they are evidence only of the fact that they have been filed and have no other probative value; explaining that third-party registrations issued under Sections 44(e) or 66(a) of the Trademark Act are probative only if they have been registered for more than five years). Simply put, the evidence has no effect on the strength of the cited mark.<sup>31</sup> The sixth *DuPont* factor is neutral.

#### **D. Purchasing Conditions**

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.

Applicant argues that “the relevant purchasers of Applicant’s goods are distributors and consumers of large volumes of product”; that “Applicant does not sell small packages which would be purchased in an impulse,” and instead “sells commercial and bulk sized product”; and that “[t]he end users are selective and

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<sup>31</sup> Even if Applicant had introduced probative evidence of use-based registrations for marks incorporating the words “grow” and/or “clean” for relevant goods, such evidence would be pertinent only to the conceptual strength of the cited mark, not its commercial strength. *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) (“Applicant’s citation of third-party registrations as evidence of market weakness is unavailing because third-party registrations standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences.”).



careful in the selection because they will be used on large scale products.”<sup>32</sup>

Applicant’s argument is unavailing because there is no evidence in the record indicating that the purchasers of Applicant’s goods are distributors or that Applicant’s consumers generally purchase large product volumes. This is nothing more than attorney argument, which is no substitute for evidence. *Cai v. Diamond Hong, Inc.*, 127 USPQ2d at 1799, quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005) (“Attorney argument is no substitute for evidence.”).

Furthermore, as the Examining Attorney notes, even if the relevant consumers are sophisticated or knowledgeable, that “does not necessarily mean they are sophisticated or knowledgeable in the field of trademarks or are immune to source confusion.” See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993) (“even sophisticated purchasers can be confused by very similar marks”); *Top Tobacco, LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011) (“[W]e have often noted that even consumers who exercise a higher degree of care are not necessarily knowledgeable regarding the trademarks at issue, and therefore immune from source confusion.”) (citations omitted); see also *Stone Lion*, 110 USPQ2d at 1163-64 (substantial evidence supported finding that “ordinary consumers ‘will exercise care when making financial decisions,’ but ‘are not immune from source confusion where similar marks are used in connection with related services’”) (citation omitted). Thus, the standard of care for purchasing the goods here is that of the least

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<sup>32</sup> 6 TTABVUE 11 (Applicant’s Brief).

sophisticated potential purchaser. *In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) (citing *Stone Lion*, 110 USPQ2d at 1163). As a result, this *DuPont* factor is neutral.

### **E. Conclusion**

The first, second, and third *DuPont* factors weigh in favor of a finding of likelihood of confusion; the fourth and sixth *DuPont* factors are neutral; and no *DuPont* factors weigh against a likelihood of confusion. Accordingly, we find Applicant's mark PACE KLEENGROW for "Algicides, fungicides, bactericides, disinfectants, and virucides for greenhouse structures and equipment and public areas surfaces; Pesticide for ornamental crops in greenhouses and in greenhouse recirculated irrigation systems" is likely to cause confusion with the cited mark CLEAN GROW in Registration No. 5020038 for "Water treatment chemicals for use in greenhouse and hydroponic systems; chemical products for preventing scale; nutrients for hydroponic and soil medias; fertilizers, namely, hydroponic fertilizers, fertilizers for use in greenhouse and hydroponic systems, and multi-phase liquid-based fertilizers."

**Decision:** The refusal to register Application Serial No. 90873297 is affirmed under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).