

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing Date: March 26, 2015

Mailed: April 29, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Omega S.A. (Omega AG) (Omega Ltd.)

v.

Alliant Techsystems Inc.

Opposition Nos. 91173785 and 91174067
to Application Serial Nos. 78548473 and 78550543

Jess M. Collen, Thomas P. Gulick and Kristen A. Mogavero of Collen IP for Omega S.A. (Omega AG) (Omega Ltd.).

Stephen R. Baird, Bradley J. Walz and Timothy D. Sitzmann of Winthrop & Weinstine, PA for Alliant Techsystems Inc.

Before Richey, Deputy Chief Administrative Trademark Judge and Wellington and Adlin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Alliant Techsystems Inc. (“Applicant”) seeks registration of the marks shown below

Ωmega

¹ and

Ωmega Elite

²

for

Tactical gear and tactical equipment for military, law enforcement and defense applications, namely, protective clothing; tactical vests, modular tactical vests, rapid entry vests, mesh vests, armor bearing vests, rescue vests, medical and paramedic vests, combination ballistic/flotation vests, load-bearing vests; harnesses and slings used for keeping clothing and tactical equipment in place; bags for tactical gear and tactical equipment.

In its amended notices of opposition, Omega S.A. (“Opposer”) alleges prior use of OMEGA and the Greek letter “Ω” for “clothing, watches, timing equipment, sports accessories” as well as prior registration of OMEGA and variations thereof for watches and timing equipment.³ As grounds for opposition, Opposer alleges that use of Applicant’s marks would be likely to cause confusion with Opposer’s marks, that Applicant was not using its marks for all of the goods originally identified in its applications as of the filing date thereof, that Applicant abandoned use of its marks for “some or all” of the goods identified in the applications, and fraud, in that Applicant intended to deceive the Office when it falsely stated that it was using its marks for all the goods originally identified in the applications, when it was not. In

¹ Application Serial No. 78550543, the subject of Opposition No. 91174067, filed January 20, 2005 based on alleged first use dates of October 1995.

² Application Serial No. 78548473, the subject of Opposition No. 91173785, filed January 17, 2005, based on alleged first use dates of January 11, 2005.

³ Registration Nos. 25036, 566370, 577415, 578041, 660541, 1290661 and 3146117, all for watches and related products and services, and all more than five years old. Registration No. 25036 is more than 120 years old.

Opposition Nos. 91173785 and 91174067

its answers, Applicant admits that it has not used its marks on some of the goods originally identified in the applications, but otherwise denies the salient allegations in the notices of opposition. Applicant also asserts the affirmative defenses of “estoppel,” “waiver” and “unclean hands,” which it failed to explain, pursue or prove at trial, and which are accordingly waived.⁴ *Miller v. Miller*, 105 USPQ2d 1615, 1616 n.3 (TTAB 2013); *Baroness Small Estates Inc. v. American Wine Trade Inc.*, 104 USPQ2d 1224, 1225 n.2 (TTAB 2012).

The Record and Evidentiary Objections

The record consists of the pleadings, the files of the involved applications, and the following:

Opposer’s first Notice of Reliance (“Opposer’s NOR No. 1,” TTAB Dkt. No. 74) on: its pleaded registrations; Applicant’s responses to some of Opposer’s written discovery requests; portions of Opposer’s discovery deposition of Anthony Michael, Applicant’s “technical services representative,” and “senior guy” who “wears many hats,” and the exhibits thereto (“Michael Tr.”); a variety of articles from newspapers, magazines and other printed publications; and website printouts.

Applicant’s Notice of Reliance (“Applicant’s NOR,” TTAB Dkt. No. 79) on third-party registrations; website printouts; and Opposer’s responses to some of Applicant’s written discovery requests.⁵

⁴ Under the heading “Affirmative Defenses,” Applicant also alleged that Opposer failed to state claims upon which relief may be granted, but we need not consider this “defense” at this stage because it was not the subject of a timely motion. *See Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 n.6 (TTAB 2013), *aff’d* 565 Fed. Appx. 900 (Fed. Cir. 2014) (mem.). Applicant’s remaining “Affirmative Defenses” are in fact merely amplifications of Applicant’s denials.

⁵ Applicant’s NOR also included as Exhibits 813-832 copies of Applicant’s catalogs, submitted as “printed publications.” However, in its June 13, 2014 order, the Board granted Opposer’s motion to strike these materials as inadmissible under notice of reliance, and they have not been considered.

Opposer's second notice of reliance ("Opposer's NOR No. 2," TTAB Dkt. No. 85) on: printouts from Office records regarding third-party registrations; and Internet printouts.

The Declaration of Peter Mulhern, a paralegal with Opposer's law firm and the exhibits thereto ("Mulhern Dec.," TTABVue Dkt. No. 86), submitted pursuant to the parties' stipulation filed January 31, 2014.

Opposer's testimonial deposition of Gregory Swift, Swatch Group U.S.'s Omega brand president for the United States, and the exhibits thereto ("Swift Tr.," TTABVue Dkt. No. 89). According to Mr. Swift, "Swatch Group U.S. manages [Opposer's] warehousing and sort of back office functions." Swift Tr. at 11.

The Board's June 13, 2014 order, which granted Opposer's motion to strike Applicant's Exhibits 813-832, also denied Opposer's motion to strike Applicant's Exhibits 722 and 723, but deferred consideration of the parties' remaining evidentiary objections, which we must now address.

Opposer "objects," not to the admissibility of Applicant's Exhibits 650-811 and 836-854, comprising Internet printouts, but instead to any reliance on those materials to prove the truth of the matters asserted therein, because the printouts are not supported by testimony or any other evidence. Similarly, Applicant "objects" to Opposer's NOR No. 1 Exhibits 12-75, comprised of printed publications and Internet printouts the vast majority of which are unsupported by any substantive testimony or other evidence, to the extent they are used to establish the truth of the

matters asserted therein.⁶ In response to each other's "objections," both parties indicate that they are not relying on the Internet printouts to establish the truth of the matters asserted therein. Applicant's Response to Opposer's Objections to Applicant's Evidence and Applicant's Objections to Opposer's Evidence at 2; Opposer's Reply in Support of its Objections and Response to Applicant's Objections at 5. As there is therefore no dispute with respect to whether these exhibits may be used to prove the truth of the matters asserted therein, the parties' Internet printouts will be considered only for what they show on their face. *See also, Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2007) (Internet printouts admissible "for the limited purpose of demonstrating what the documents show on their face").

However, the parties' positions about what, exactly, the Internet printouts show on their face are inconsistent and self-serving. For example, Opposer argues that Applicant's website printouts cannot establish trademark use absent accompanying testimony. Opposer's Objections to Applicant's Evidence at 3-4. At the same time, however, Opposer argues that its website printouts and printed publications can establish "the strength and notoriety of Opposer's OMEGA Marks among the relevant consuming public and trade," even where these printouts and publications are unsupported by any testimony. Opposer's Reply in Support of its Objections and Response to Applicant's Objections at 5. For its part, Applicant

⁶ To the extent Opposer suggests that Exhibits 12-75 to its NOR No. 1 are supported by Mr. Swift's testimony, Opposer is for the most part incorrect. Mr. Swift only testified about a few of these exhibits, the articles from *International Watch*, *InSync* and *Golf Digest*.

argues that its website printouts, which are unsupported by testimony, may “show that purchasers have been conditioned to expect different sources for specifically different goods” offered under OMEGA and similar marks, while at the same time arguing that Opposer’s website printouts and printed publications unsupported by testimony do not establish the strength, fame or use of Opposer’s marks. Applicant’s Response to Opposer’s Objections to Applicant’s Evidence and Applicant’s Objections to Opposer’s Evidence at 2, 5.

There is no basis upon which to treat one party’s unsupported website printouts and printed publications differently than the other’s, when both parties offer qualitatively similar evidence for essentially the same purposes. In fact, Opposer’s claim that its evidence establishes the “strength and notoriety” of its marks is necessarily based on the assumption that the evidence establishes either Opposer’s trademark use, or media or public recognition of Opposer’s trademark use. Applicant’s claim that its evidence establishes purchaser recognition of third-party uses of OMEGA marks is necessarily based on the assumption that the evidence establishes third-party trademark use or public recognition thereof. We find that these unsupported materials, regardless of which party introduced or relies on them, are entitled to some evidentiary weight, as explained in more detail below, but that these materials have inherent limitations which preclude them from establishing all of the facts for which they were proffered.

Opposer objects to Applicant’s Exhibits 836-852 on another ground -- that they consist of printouts from the Internet Archive’s (“archive.org”) “Wayback

Machine,” which purportedly display how certain pages from Applicant’s website appeared on certain dates. While these exhibits are compliant with *Safer*, and thus admissible, Opposer’s point is well-taken. These printouts do not, as Applicant contends in its notice of reliance, “demonstrate Applicant’s use in commerce of its marks” at any particular time. Rather, they only show the results of a Wayback Machine search, presumably conducted at Applicant’s direction. The reliability of the search and the search’s results are among the many questions raised by this evidence, which has additional limitations beyond those inherent in the other unsupported website printouts and printed publications upon which the parties rely.

Finally, Applicant objects to Exhibits 8-29, 33 and 59-63 to the Swift deposition as hearsay. The objections to the admissibility of this evidence are overruled, because these exhibits are comprised of printouts from Opposer’s own websites, Opposer’s advertisements and articles which Opposer’s “PR agency” provided to Opposer,⁷ and Mr. Swift sufficiently authenticated all of them. However, to the extent that Opposer relies on these materials to establish any facts about which Mr. Swift did not specifically testify based on his personal knowledge, this evidence is entitled to no more weight than the parties’ other Internet printouts and printed publications which are unsupported by testimony. *See*, Opposer’s Reply

⁷ Many of the articles and advertisements which Opposer introduced bear an added label or sticker which indicates, among other things, the publication and date, product/subject and “circulation.” At the oral hearing, Opposer represented that its public relations agency added this information, but there is no testimony or other evidence of record indicating who added this information or where it came from, much less supporting the accuracy of the circulation figures included on the labels/stickers. Accordingly, the information added to the articles and advertisements by way of label or sticker has been given no consideration.

Opposition Nos. 91173785 and 91174067

in Support of its Objections and Response to Applicant's Objections at 5 (*To the extent that* Opposer's witness, Gregory Swift testified regarding the contents of such documents and other related matters, such testimony is admissible for the truth of the matter asserted.") (emphasis added).

Standing and Priority

Opposer's pleaded registrations, made of record through Opposer's NOR No. 1, establish its standing, as Opposer alleges likelihood of confusion. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). And because Applicant has not counterclaimed for cancellation of any of the registrations, priority is not at issue in this proceeding with respect to the goods identified in Opposer's pleaded registrations, specifically watches and parts thereof, watch-movements, watchcases, wrist watch bracelets, bands and straps, clocks, chronometers and chronographs and parts thereof, "automatic recording machines and apparatus for use in determining the results of sporting events" and retail store services featuring watches and other timekeeping products and accessories. *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974); Opposer's NOR No. 1 Exs. 1-7. Priority is at issue, however, with respect to products not covered by Opposer's pleaded registrations, as indicated below in our discussion of the relationship between the parties' goods.

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set

forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham*, 222 F.3d at 943, 55 USPQ2d at 1848. We consider the likelihood of confusion factors about which the parties introduced evidence, and treat the remaining factors as neutral.

Fame

When an opposer's mark is famous, that fact "plays a 'dominant role in the process of balancing the *DuPont* factors,' ... and '[f]amous marks thus enjoy a wide latitude of legal protection.'" *Bose Corp. v. QSC Audio Products, Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) (quoting *Recot, Inc. v. Benton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000)). It is settled that a strong mark "casts a long shadow which competitors must avoid." *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

In the absence of direct evidence of fame, "fame of a mark may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident." *Bose*, 293 F.3d at 1367, 63 USPQ2d at 1305. Other relevant factors include "length of use of the mark, market share,

Opposition Nos. 91173785 and 91174067

brand awareness, licensing activities, and variety of goods bearing the mark.”
Coach Services, Inc. v. Triumph Learning LLC, 668 F.3d 1356, 101 USPQ2d 1713,
1720 (Fed. Cir. 2012).

Opposer has continuously used the “OMEGA marks” for more than 100 years.
Swift Tr. at 41-42. Its oldest registration, for the mark shown below



for “watch-movements and watchcases” (Registration No. 25036), is over 120 years
old. Opposer’s NOR No. 1 Ex. 1.

The dollar figures evidencing Opposer’s sales success and advertising
expenses in the United States are designated “confidential,” and therefore will not
be discussed specifically herein. Suffice it to say that from 1999 through 2009
Opposer’s sales of OMEGA-branded products, and its related advertising expenses
from 2000-2009, have been significant. Swift Tr. at 43-51 and Exs. 30-31, 34-36.⁸

Furthermore, Opposer has received unsolicited media attention from and
promoted its OMEGA watches in a number of well-known publications. For
example:

OMEGA-branded watches have appeared in *Allure*, *Elle*
Décor, *Men’s Vogue*, *Men’s Journal*, *New York Times Style*
Magazine, *Golf Digest*, *Men’s Fitness*, *Forbes Life*, *Esquire*,
OK! Weekly, *GQ*, *Ebony*, *Architectural Digest* and *O, The*

⁸ Mr. Swift also testified about Opposer’s sales and advertising figures from 2010-2012,
which are as or more impressive than the figures from 1999-2009 for which there is
documentary support. Swift Tr. at 45, 51.

Oprah Magazine. Opposer's NOR No. 1 Exs. 12-16, 21, 23, 26, 27, 30, 40, 52, 58, 62, 69 and 70; Swift Tr. Ex. 63.

Opposer's Olympic and other sponsorships have resulted in its OMEGA mark being displayed in major publications, including *USA Today*, *Sports Illustrated*, *Financial Times* (U.S. edition) and *The New York Times* Opposer's NOR No. 1 Exs. 49, 53, 55; Swift Tr. Ex. 50.

A 2008 New York Times article, "The Timekeeper and the Gold Medalist," by Jeré Longman, discusses a controversy surrounding Opposer's simultaneous role as "official timekeeper" of the Beijing Olympic Games and one of swimmer Michael Phelps' sponsors. Opposer's NOR No. 1 Ex. 56.

A February 26, 2010 *Wired* article, "How to Clock an Olympian," concerns Opposer's heavy involvement in timing sports events. *Id.* Ex. 72.

A July 9, 2008 Reuters article, "No time for mistakes for Omega at Olympics," addresses the increasing complexity of Opposer's Olympic Games timekeeping services, from 1932 through 2008. Swift Tr. Ex. 11.

Opposer is PGA America's official timekeeper. *Id.* at 77.

Opposer's "ambassadors," who "are appointed to represent the image of the brand and its values," and appear in Opposer's advertising, include George Clooney, Nicole Kidman, Cindy Crawford, Daniel Craig, Buzz Aldrin, Michael Phelps and Greg Norman. *Id.* at 78-79 and Ex. 62.

As a result of "product placement" relationships, Opposer's watches have been featured in James Bond films and, in part because an OMEGA watch "was a critical component in getting Apollo 13 safely back to earth," the movie "Apollo 13." *Id.* at 60-63 and Exs. 43 and 44.

We recognize there are some deficiencies in Opposer's evidence of fame. For example, "[w]e have no context for opposer's advertising and sales figures, such as

how the figures for the [OMEGA watches] compare with ... other brands of watches. *Lebanon Seaboard Corp. v. R&R Turf Supply Inc.*, 101 USPQ2d 1826, 1831 (TTAB 2012); *see also, Bose*, 63 USPQ2d at 1309 (“some context in which to place raw statistics is reasonable”). Similarly, there is no admissible evidence of the circulation figures for the various publications cited, or attendance/viewing figures for the movies in which Opposer’s products have appeared.

Furthermore, Applicant points out that the “Sports Timing” section of the Omega Museum website (“omegamuseum.com”) calls into question whether Opposer’s association with the Olympics is reliable evidence of fame. Indeed, the website states:

Many of the Museum’s guests, though, are surprised to see a broad selection of the equipment used to time some of the world’s leading sporting events including, notably, the Olympic Games. They tell us that while they have noticed the discreet red OMEGA logo next to the competitors’ times on their television screens, they haven’t associated the unparalleled leader in international sport timekeeping with one of the world’s leading watch brands.

Opposer’s NOR No. 1 Ex. 71. While we agree that the Museum guests referenced in this passage may not associate Opposer or its marks with the Olympics, the fact remains that many consumers have been exposed to Opposer’s marks as a result of its Olympics relationship, and nothing about this passage from the website, standing alone, detracts from Opposer’s other evidence of fame.

Notwithstanding the deficiencies in Opposer's fame evidence,⁹ we do not require evidence to recognize that *The New York Times*, *USA Today*, *Sports Illustrated*, James Bond films, "Apollo 13" and Opposer's celebrity endorsers are well-known and popular. Considering the totality of Opposer's fame evidence, we find based on Opposer's century-long use of OMEGA for watches, significant sales success, intensive advertising, widespread unsolicited media attention and association with prominent sports events and celebrities, that Opposer's OMEGA mark is famous, but only for watches. *See, Inter Ikea Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014) (recognizing similar deficiencies in the opposer's evidence of fame, but nonetheless finding fame for the opposer's primary service, acknowledging that context and "comparative information may be difficult, if not impossible to obtain, because companies may view such information as proprietary and not disclose it publicly").




The Marks




We must compare the parties' marks "in their entirety as to appearance, sound, connotation and commercial impression." *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). That is, we may not dissect the marks into their various components. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*,

⁹ The deficiencies compel us to advise parties attempting to prove fame to where possible provide circulation/attendance/viewership figures in admissible format, as well as context for sales and advertising figures and any other evidence necessary to support their claims.

667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981). However, one feature of a mark may be more significant than another, and it is not improper to give more weight to the dominant feature of a mark in determining its commercial impression. *In re Nat'l. Data Corp.*, 224 USPQ at 751 (“There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.”).

Here, Opposer relies on its registrations of OMEGA marks in various formats, including the following:

<u>Mark</u>	<u>Reg. No.</u>	<u>Goods/Services</u>
	25036	Watch movements and watch cases
	566370	Watches and parts thereof
	577415	Wrist watch bracelets, bands and straps;

	<p>578041</p>	<p>watches (including pocket watches, wrist watches with or without straps, bands or bracelets, pendant watches, calendar watches, and stopwatches) either stem-wind or automatic; clocks; chronometers, chronographs, and parts for all of the foregoing;</p>
	<p>660541</p>	<p>automatic recording machines and apparatus for use in determining the results of sporting events—namely, electrical or mechanical equipment for determining elapsed times in games or sporting events comprising a plurality of instruments for placement at the starting and finishing lines of a racing course, the same being electrically operated and connected to and actuated by the starting gun or other signal so as to automatically provide a permanent visible record of the order in which one or more contestants finish the race and of the corresponding elapsed times</p>
	<p>1290661 and 3146117</p>	<p>Watch cases; retail store services featuring watches, clocks, horological and chronometric instruments and their accessories,</p>

		jewelry
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Like Opposer's pleaded marks, Applicant's marks also include the word "omega" and the Greek letter "Ω," with the "O" in OMEGA being formed by the Greek letter:

Ωmega Ωmega Elite

Applicant's **Ωmega** mark is obviously quite similar to Opposer's marks, especially the mark in Registration No. 577415, in which the Greek letter is also the first character in the mark when read from left to right. It is of little significance that Applicant's marks are in lower case while Opposer's are in upper case letters, or that the "O" in Applicant's mark is comprised of the Greek letter, which Applicant's and Opposer's marks share. *See Sigma Instruments, Inc. v. Sigma Industries, Inc.*, 165 USPQ 654 (TTAB 1970), *aff'd*, 470 F.2d 1055, 176 USPQ 312 (CCPA 1973). And even if consumers do not perceive the Greek letter as an "O" in Applicant's marks, Applicant's use of that Greek letter with "mega" results in Applicant's marks looking and sounding similar to Opposer's mark.

While there is less similarity between Applicant's **Ωmega Elite** mark and Opposer's marks, this mark is still more similar than dissimilar to Opposer's marks. Indeed, it begins with the Greek letter, and its first word may be perceived as OMEGA or another word that looks and sounds similar to OMEGA. Consumers are likely to focus on the first part of the parties' marks. *See Presto Products Inc. v.*

Nice-Pak Products, 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”). Furthermore, the word ELITE is laudatorily descriptive, and thus entitled to less weight in our analysis, especially because it may be perceived as another, perhaps higher quality, version of Opposer’s products.



In short, both of Applicant’s marks look and sound similar to Opposer’s marks, and there is no basis upon which to distinguish the meaning of the parties’ marks.¹⁰ This factor weighs in favor of finding a likelihood of confusion.



The Number and Nature of Similar Marks in Use on Similar Goods

Applicant relies on a large number of third-party registrations for, and Internet printouts allegedly establishing use of, OMEGA and similar marks for a wide variety of goods and services. These include the third-party registrations summarized in the following table, with those registrations for which Applicant provides Internet evidence of actual use appearing in bold type:



<u>Mark</u>	<u>Reg. No. (goods/services)</u>	<u>Owner/ Evidence of Internet Use</u>
OMEGA	4146781 (beverage glassware)	Libbey Glass/Yes (Applicant’s NOR Ex. 650)
OMEGA II	4031448 (fill for sleeping bags ...)	American Recreation Products, Inc./Yes (Applicant’s

¹⁰ Applicant’s claim that consumers perceive the Greek letter Ω in Applicant’s marks as meaning “the end” is unsupported by any evidence, and the evidence that Applicant at least intended this meaning is thin at best.

		NOR Ex. 653)
Omega	4089572 (building materials for use only with photovoltaic and thermal solar plants ...)	Mounting Systems GmbH/No
OMEGA	3187397 (bicycles and parts ...)	Tien Hsin Industries Co., Ltd./No
OMEGA	3759440 (orthopedic joint implants, orthopedic instruments ...)	Howmedica Osteonics Corp./No
OMEGA	3376036 (computer programs for processing recorded seismic data)	WesternGeco LLC/Yes (Id. Ex. 656)
	3317454 (olive oil and processed green pigeon peas)	Omega Imports, Inc./No
OMEGA	3550259 (scientific and laboratory equipment, namely pipetors)	Argos Technologies, Inc./Yes (Id. Ex. 658)
OMEGA	2984895 (plastic travel mugs)	Williams Industries, Inc./No
OMEGA	3004028 (computer software and hardware used for fitting and manufacturing prosthetic devices; making of prosthetic devices to order)	The Ohio Willow Wood Company/Yes (Id. Ex. 664)
OMEGA	3922050 (educational services, namely, conducting conferences, workshops, professional trainings and retreats in the fields of holistic health, psychological development, spiritual practice and related yoga practice)	Omega Institute for Holistic Studies, Inc./Yes (Id. Ex. 668)
	3835002 (healthcare)	Omega Wellness Group/Yes (Id. Ex. 670)
OMEGA	3760945 (orthodontic pliers and	American

	instruments)	Orthodontics Corporation/Yes (Id. Ex. 671)
OMEGA	3823793 (commercial furniture for the restaurant, hotel, hospitality and food services industries)	Michigan Tube Swagers and Fabricators, Inc./No
OMEGA	3671932 (welding rods primarily of metal for welding and brazing; welding electrodes for welding and brazing)	CHF Associates, LLC/No
OMEGA CELLARS (“cellars” disclaimed)	3583276 (wines)	Omega Winery Inc./Yes (Id. Ex. 675)
OMEGA MIX (“mix” disclaimed)	3566210 (snack mix consisting primarily of processed fruits and nuts)	Fruit Essentials, Inc./Yes (Id. Ex. 676)
	3580143 (packaging machines for use in manufacturing and packaging industries)	Omega Design Corporation/Yes (Id. Ex. 677)
OMEGA MUNCHIES (“munchies” disclaimed)	3674188 (processed nuts)	Waymouth Farms, Inc./Yes (Id. Ex. 678)
OMEGA	3515964 (cigars)	Tabacalera Brands, Inc./No
OMEGA CHILL	3873632 (beverages, namely, water, namely, fruit flavored water)	Dreamspan Product Innovation, L.L.C./No
	2964867 (Metal gates and fencing ...)	Fertek Inc./3313045 No
OMEGA	3313045 (electric hair trimmers)	Wahl Clipper Corporation/No
OMEGA	2629324 (fishing reels)	W.C. Bradley/Zebco Holdings, Inc./Yes (Id. Ex. 690)


OMEGA II	2423638 (protective head gear)	Erb Industries/Yes (Id. Ex. 693)
OMEGA	2435579 (canned asparagus, canned hearts of palm, canned fish and canned seafood)	Omega Imports Inc./No
OMEGA	2150239 (repair and maintenance services of machines, equipment and instruments in the fields of measuring, controlling and/or regulating temperature, humidity, pressure ... Manufacturing machines, equipment and instruments to the order and specification of others in the fields of measuring, controlling, and/or regulating temperature, humidity, pressure ...)	Omega Engineering, Inc./Yes (Id. Ex. 694)
OMEGA.COM	2412722 (temperature sensitive paints and lacquers in the nature of a coating ... Crumpers, mechanically operated hand-held punches ... PH instruments, namely, hand-held controllers and panel meters, mechanically operated current probes ... Hand-held mechanically operated heat guns ... Catalogs, handbooks and technical reference textbooks in the fields of measuring, controlling and/or regulating temperature, humidity, pressure ... Online publications, catalogs and technical and scientific handbooks, textbooks ... for measuring, controlling and/or regulating temperature, humidity, pressure ...)	Omega Engineering Inc./Yes (Id. Ex. 694)


	1932059 (surgical instruments, namely, burs, drills and saws)	Omega Surgical Instruments, Inc./Yes (<i>Id. Ex. 699</i>)
OMEGA	1992580 (printed matter, namely handbooks and catalogs concerning scientific and laboratory instrumentation that control, measure and sense variable parameters)	Omega Engineering, Inc./Yes (<i>Id. Ex. 691</i>)
OMEGA	1844118 (electric juice extractors)	Omega Products, Inc./Yes (<i>Id. Ex. 707</i>)
OMEGA	1680084 (hand tools, namely, screwdrivers, pliers, wire cutters, knives, wrenches ... Scientific surveying, and measuring instruments, namely, calipers, deal calipers, inspection mirrors ...)	Omega Products Corp./No
OMEGA	1558052 (burial caskets)	Batesville Casket Company, Inc./Yes (<i>Id. Ex. 709</i>)
OMEGA WORLD TRAVEL (“world travel” disclaimed)	1503320 (travel agency services)	Omega World Travel, Inc./Yes (<i>Id. Ex. 714</i>)
OMEGA II	1525486 (prefabricated fuel-fired radiant tube heating units)	Combustion Research Corporation/Yes (<i>Id. Ex. 716</i>)
OMEGA SUPREME	1389234 (toy robots convertible into other visual forms)	Hasbro, Inc./Yes (<i>Id. Ex. 719</i>)
OMEGA	1385256 (threads for sewing, knitting, mending and embroidering)	Hilos Omega, S.A./No
	1350756 (athletic shoes)	Polo International Incorporated/No
OMEGA	1265238 (distilled spirits,	ABC Liquors,

	specifically gin)	Inc./Yes (Id. Ex. 723)
OMEGA	1191661 (flutes)	The Selmer Company, Inc./No
OMEGA	1133141 (mattresses)	Mattress Development Company of Delaware, LLC/No
OMEGA	794782 (photographic equipment of all kinds ...)	Omega Acquisition Corp./No
OMEGA	658744 (electric lighting fixtures)	Genlyte Thomas Group LLC/No

Applicant’s NOR Exs. 500, 504, 509, 510, 512, 513, 516, 518, 526, 529, 535, 537, 541, 542, 544, 545, 546, 547, 548, 555, 563, 566, 567, 573, 579, 581, 586, 589, 593, 600, 607, 614, 619, 624, 627, 630, 632, 633, 636, 637, 639, 643 and 645.

In addition, Applicant has introduced Internet printouts which on their face display the following marks in connection with the offering for sale or promotion by

different companies of the following goods and services:  for mixed

martial arts clothing and gear;  for funeral services; OMEGA SPORTS

for retail sporting good store services; OMEGA EXPRESS for bus charter and rental services; OMEGA PACIFIC for climbing and rescue gear; OMEGA TACTICAL for

assault rifles; OMEGA RAIL for rail systems for guns; and OMEGA for, *inter alia*, massage chairs; model engine fuel; lighting products; cabinetry; car alarms;

recording studios; airport shuttle services; loudspeakers; termite and pest control services; construction; remodeling and restoration services; internal gunlocks; and

tactical boots. *Id.* Ex. 654, 663, 686, 688, 728, 735, 737, 742, 744, 748, 751, 760, 781, 784, 786, 787, 802, 806 and 809.

The vast majority of the third-party OMEGA-branded goods and services shown on the face of Applicant’s website printouts are unrelated to either Opposer’s goods or Applicant’s. However, several of them are similar or at least related to Applicant’s goods. These include: (1) Erb Industries’ OMEGA II protective headgear (Reg. No. 2423638, Applicant’s NOR Exs. 579 and 693), similar to Applicant’s “protective clothing;”¹¹ (2) Omega Pacific’s OMEGA PACIFIC “rescue/industrial” and “tactical”¹² climbing and rescue gear (Applicant’s NOR Ex 744), similar to Applicant’s “tactical gear and tactical equipment for military, law enforcement ... applications,” including “rescue vests;” (3) Omega Safety Systems’ OMEGA internal gun locks (Applicant’s NOR Ex. 786), similar or related to Applicant’s “tactical gear and tactical equipment for military, law enforcement ... applications,” including “armor bearing vests;” (4) Omega Tactical’s assault rifles (Applicant’s NOR Ex. 802), similar or related to Applicant’s “tactical gear and tactical equipment for military, law enforcement ... applications,” including “armor bearing vests;” (5) ATS Tactical Gear’s OMEGA RAIL rail systems for guns (Applicant’s NOR Ex. 809), similar or related to Applicant’s “tactical gear and tactical equipment for military,

¹¹ Opposer claims that it filed a notice of opposition to registration of OMEGA II for protective headgear. Opposer’s Trial Reply Brief at 11; Mulhern Dec. ¶ 19 and Ex. 85. However, the record reveals that the opposition was unsuccessful, because the registration issued. Applicant’s NOR Ex. 579.

¹² We take judicial notice that “tactical” means “of or relating to combat tactics, especially military or naval tactics.” Dictionary.com (<http://dictionary.reference.com/browse/tactical>).

law enforcement ... applications,” including “armor bearing vests;”¹³ and (6) Thorogood’s OMEGA “tactical boot” (Applicant’s NOR Ex. 806), which is similar to Applicant’s “tactical gear and tactical equipment for military, law enforcement ... applications,” including “protective clothing.”

While this evidence is not overwhelming, and Opposer is correct that there is no evidence regarding how many consumers have been exposed to these third-party trademark uses, it is sufficient, despite its inherent limitations, to satisfy us that the public may have been exposed to offers for sale of or advertisements for OMEGA-branded goods which are similar or at least related to Applicant’s.¹⁴ *See, Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1072 (TTAB 2011) (Internet printouts “on their face, show that the public may have been exposed to those internet websites and therefore may be aware of the advertisements contained therein”).¹⁵ Given the limitations in Applicant’s evidence, however, this factor weighs only slightly against a finding of likelihood of confusion.

¹³ Opposer relies on an Internet printout from the “atstacticalgear.com” website, showing no substantive content, presumably to suggest that this website is no longer “live.” Opposer’s NOR No. 2 Ex. 90. However, Opposer’s printout is a blank page with this notation at the top: “This web store is not licensed to operate on this web server.” The notation suggests not that the website is no longer “live,” but instead that there may be an active ATS Tactical Gear “web store” accessible on or through another web server.

¹⁴ Mr. Swift was unaware of any efforts by Opposer to enforce its marks against these third-party uses. *See Swift Tr.* at 95-97, 110.

¹⁵ We recognize that Applicant has introduced evidence of many more third-party registrations and uses of OMEGA marks, but we have only listed a subset here because the use or registration of OMEGA marks for unrelated goods is generally not relevant to this *du Pont* factor. At the same time, however, in this case it may not be appropriate to completely ignore the large volume of those third-party uses as we turn to consideration of the parties’ goods and channels of trade. *See National Cable Television Ass’n Inc. v. American Cinema Editors Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991) (“Where a mark is commonly used on numerous types of goods and services by different

Goods, Channels of Trade and Classes of Purchasers

Turning to the parties' goods and channels of trade, it is settled that they need not be identical or even competitive in order to support a finding of likelihood of confusion. It is enough that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used, to a mistaken belief that Applicant's and Opposer's goods originate from or are in some way associated with the same source or that there is an association between the sources of the goods. *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423, 1432 (TTAB 1993); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *Schering Corp. v. Alza Corp.*, 207 USPQ 504, 507 (TTAB 1980); *Oxford Pendaflex Corp. v. Anixter Bros. Inc.*, 201 USPQ 851, 854 (TTAB 1978); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). The issue is not whether purchasers would confuse

companies, a term such as PREMIUM, SUN, BLUE RIBBON, NATIONAL, GIANT or AMERICAN, it may be reasonable to infer in some situations that purchasers have been conditioned to expect different sources for specifically different goods or services even though such goods or services might be deemed sufficiently related to be attributable to a single source under an uncommonly used mark."); *see generally, Rocket Trademarks Pty*, 98 USPQ2d at 1077 ("[d]espite any limitations in the probative value of this evidence, there are so many usages that we cannot dismiss them as de minimis); *cf. Anthony's Pizza & Pasta International v. Anthony's Pizza Holding Co., Inc.*, 95 USPQ2d 1271, 1277-78 (TTAB 2009), *aff'd*, 415 Fed. Appx. 222 (Fed. Cir. 2010) (large volume of evidence of third-party uses for related goods considered despite inherent limitations) and *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1665 & n.16 (TTAB 1996) (same). Indeed, while Applicant's evidence regarding the connotation of OMEGA and the Greek letter Ω is limited and does not relate to how consumers perceive the mark, the large number of third-party registrations containing and uses of OMEGA or variations thereof at least suggests that OMEGA lends itself easily to being adopted as a mark.

Opposition Nos. 91173785 and 91174067

the goods, but rather whether there is a likelihood of confusion as to the source of the goods. *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984). It is settled that we must consider the goods as identified in Applicant's involved applications and the goods identified in Opposer's registrations, or for which it has established prior use. *See Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *Octocom Systems, Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

Here, although Opposer alleges in its amended notices of opposition, and introduces some evidence, that its OMEGA marks have appeared on "clothing," "sports accessories" and other goods besides watches, its evidence does not establish technical trademark use of any OMEGA marks for these goods, let alone any use *prior to* Applicant's January 2005 filing dates. *See e.g.* Swift Tr. at 13, 35, 38-39 (identifying goods other than watches sold under OMEGA but not the date of any first sales, or other indicia of trademark use). Nevertheless, Opposer argues that the parties' goods are related based on goods for which there is no evidence of sales or sales prior to Applicant's filing dates.

Specifically, Opposer relies on evidence that in connection with its sponsorship of a sailing event, sailor Ellen MacArthur and Opposer's celebrity ambassador Anna Kournikova wore "Omega-branded life preservers around their necks," which Opposer argues are related to Applicant's "tactical gear and tactical equipment for military, law enforcement and defense applications, namely

protective clothing; tactical vests ... combination ballistic/flotation vests.” Swift Tr. at 33-34 and Ex. 20. Opposer also claims that its pleaded Registration No. 660541 “includes starting guns,” Opposer’s Trial Brief at 20, and that these starting guns are related to bags, vests and pouches used to hold guns and ammunition which are offered in Applicant’s catalogs. Because we are only concerned here with the goods identified in the involved applications, however, we construe Opposer’s argument as relating to the “armor bearing vests” identified in the involved applications. Opposer also claims that its timekeeping services are related to Applicant’s goods because “[s]ome Olympic events for which [Opposer] provides timekeeping services involve guns, for example, the biathlon.” Finally, Opposer relies on evidence that at one time Applicant’s predecessor-in-interest sold third-party watches and tactical and clandestine assault watch bands. Opposer’s NOR Exs. 9 (*e.g.* documents Bates-labeled ATK000102, ATK000204, ATK000343, ATK000985) and 11 (Michael Tr. 43, 46-47).

We are not persuaded by Opposer’s evidence or arguments that the parties’ goods are related. With respect to the “Omega-branded [promotional] life preservers” and “starting guns,” there is no evidence that either qualify as “goods in trade,” that Opposer sold either product to anyone or that it did so or made any trademark use of OMEGA for life preservers or starting guns in the United States prior to Applicant’s filing dates. Furthermore, “starting guns” do not relate to and would not be used in connection with Applicant’s tactical equipment, armor bearing vests or other products, because starting guns are used to signal the beginning of a

race, not as weapons, and they do not use the type of ammunition in connection with which Applicant's goods are used.¹⁶

As for Opposer's timekeeping services, even where they are provided for events which involve guns, such as the biathlon, there is no relationship to Applicant's goods. Opposer does not introduce any evidence whatsoever, or even claim, that it sells guns, or that there is any connection between sports timekeeping services or sports timekeeping equipment on the one hand and "tactical gear and tactical equipment for military, law enforcement and defense applications, namely protective clothing," "armor bearing vests" or any of Applicant's other goods on the other.¹⁷ *See, Coach Services*, 101 USPQ2d at 1720 ("On appeal, CSI concedes that the parties' products are not the same, but contends that there is some overlap between their goods because it 'has used the mark in connection with books and

¹⁶ In any event, we disagree that Opposer's Registration No. 660541 covers starting guns in and of themselves. The registration's identification of goods is:

automatic recording machines and apparatus for use in determining the results of sporting events-namely, electrical or mechanical equipment for determining elapsed times in games or sporting events comprising a plurality of instruments for placement at the starting and finishing lines of a racing course, the same being electrically operated and connected to and actuated by the starting gun or other signal so as to automatically provide a permanent visible record of the order in which one or more contestants finish the race and of the corresponding elapsed times

In other words, the registration covers machines and apparatus that time sporting events, which may be but are not necessarily "connected to and actuated by the starting gun," as they may also be connected to and actuated by some "*other signal ...*" In fact, the registration does not cover starting guns in and of themselves, it at most covers machines and apparatus which may include starting guns, and the purpose of the starting guns is merely to enable the machines and apparatus to time events.

¹⁷ At least some visitors to Opposer's OMEGA Museum do not even associate Opposer's timekeeping services with Opposer's watches, and it seems unlikely that they would nevertheless associate Opposer's timekeeping services with Applicant's tactical equipment. Opposer's NOR No. 1 Ex. 71.

audio and videotapes and in connection with tote bags, caps and shirts' ... This alleged overlap does not help CSI's position, however, particularly since there is no evidence in the record regarding the sales or marketing of these items.”).

Finally, Opposer's claim that the goods are related because “Applicant sold watches,” Opposer's Trial Brief at 21, is simply irrelevant.

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 sales of the goods are directed.

Octocom Systems, 16 USPQ2d at 1787 (upon which Opposer relies); *see also Coach Services*, 101 USPQ2d at 1722 (“although CSI argues that the parties' products are related because Triumph uses its marks on shirts, caps, and tote bags, the Board correctly noted that Triumph's applications do not seek to register its COACH marks for those items, and likelihood of confusion must be based on the goods identified in the application”). In any event, Opposer's evidence that “Applicant” sold watches and accessories therefor is limited to 20 year old catalogs published by Applicant's predecessor-in-interest. Michael Tr. at 45-47 and Exs. 7, 17. There is no evidence that Applicant has ever sold watches or that its predecessor has done so since 1995, let alone under an OMEGA mark.

Opposer's arguments regarding channels of trade and classes of purchasers are similarly unsupported by the evidence. The “primary way” Applicant makes customers aware of its products is through its catalogs. Michael Tr. at 45-46. These

catalogs are clearly targeted to military, law enforcement and perhaps other customers searching for “tactical” gear, which is entirely consistent with Applicant’s identification of goods. Michael Tr. Exs. 4 (the Enhanced M-16 Drop Leg Pouch has “internal dividers to separate the mags,” the Flashbang Pouch holds “(2) 30 round .223 cal mags” as well as flashbangs, the Triple Pistol Mag Pouch has “slotted webbing for military A.L.I.C.E. clips” and the Shot Shell Pouch carries 10 shot shell rounds in each pouch) and 7 (the Tactical Vest-1 includes a Radio Pouch and Gas Mask Pouch as well as “webbing on back to attach gear with Alice (slide) clips, and other products include “Sniper Tactical Drag Bag,” “Military Parachute and Gear Bag, Spec-Ops Holster, Escape and Evasion Kit Pouch and Frag and Smoke Grenade pouches). By contrast, Opposer distributes its products through its own stores, as well as “authorized Omega dealers and boutiques,” with a focus on “heavily populated areas.” Swift Tr. at 38-40. It promotes its products, offered under the categories “Ladies’ Collection” and “Gents’ Collection,” through celebrity ambassadors including models, actors and golfers. *Id.* Exs. 53, 62. Its watches are promoted in prominent publications, which list prices of \$3,000 and more, up to \$80,000. *Id.* Exs. 12, 15, 18, 21, 35.

While Opposer is correct that the identifications of its goods and some of Applicant’s goods do not contain any limitations with respect to channels of trade,¹⁸

¹⁸ Applicant argues that its channels of trade are limited to “military, law enforcement and defense applications,” but as Opposer points out, there is a semicolon following that limitation on Applicant’s “tactical gear and tactical equipment,” meaning that the limitation does not apply to Applicant’s other goods appearing after the semicolon. *In re Midwest Gaming & Entertainment LLC*, 106 USPQ2d 1163, 1166 (TTAB 2013).

that simply means that “the goods are presumed to travel in all normal channels and to all prospective purchasers *for the relevant goods.*” *Coach Services*, 101 USPQ2d at 1722. Here, the evidence reveals that the channels of trade for Opposer’s watches and other goods for which priority is not at issue are much different than those for Applicant’s tactical goods. Military and law enforcement personnel and others searching for tactical gear in Applicant’s catalogs would not encounter Opposer’s luxury watches nor would Opposer’s watch customers shopping in Opposer’s stores or authorized dealers or boutiques encounter Applicant’s catalogs or goods. The mere fact that some consumers of Applicant’s tactical goods might at some point also purchase Opposer’s high-end watches, or *vice versa*, is not a basis upon which to find that the channels of trade or classes of consumers are the same. *Id.* at 1723; *Sports Authority Michigan Inc. v. PC Authority Inc.*, 63 USPQ2d 1782, 1794 (TTAB 2002) (“We think it a fit subject for judicial notice that purchasers of computer hardware and software also would be purchasers of, at least, footwear and apparel, and perhaps sporting goods and equipment. There is nothing in the record, however, to suggest that merely because the same consumer may purchase these items, such consumer would consider the goods as likely to emanate from the same source or have the same sponsorship.”). Opposer therefore misplaces its reliance on its President’s statement that “Everybody’s a potential client. Everybody has a wrist” in arguing that the channels of trade and classes of consumers are similar. *Swift Tr.* at 41 and Ex. 29. By that logic, the channels of trade and classes of consumers would always weigh in Opposer’s favor in any

likelihood of confusion dispute. The question we are faced with here is whether consumers “would consider the goods to emanate from the same source.” *Coach Services*, 101 USPQ2d at 1723; *7-Eleven, Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007). Here the evidence reveals they would not.

Opposer argues in its Trial Brief that it “has an extensive relationship with the armed forces both in the United States and around the world,” that it is “well known for having supplied watches over the years to the United States Army during the First World War and beyond” and that it currently “has an active division that sells OMEGA watches to the U.S. armed forces, particularly the Air Force squadron leaders who have the OMEGA watches engraved with their squadron logo.” Opposer’s Trial Brief at 23. The evidence, the totality of which is set forth below, does not support this argument:

Omega is well known for having supplied watches over the years for both U.S., the U.S. Army during the First World War and then the RAF, for example, which is the Royal Air Force in the Second World War. And even today we have an active division that sells Omega watches to our very own armed forces, particularly from the Air Force squadron leaders who have the opportunity to have our watches engraved, the Omega watch engraved with their squadron logo, and we’re very active in that even today.

Swift Tr. at 20-21. World War I was 100 years ago, and therefore any sales, channels of trade or classes of purchasers from that time have no relevance to the current marketplace, and the number of current consumers familiar with Opposer’s military sales during World War I is at most *de minimus*. Furthermore, we agree with Applicant that Mr. Swift’s testimony about an active but unidentified division

which “sells” Opposer’s watches to the U.S. armed forces is bare, vague and not persuasive. In fact, there is no evidence whatsoever of any actual sales of any OMEGA-branded watches to the “armed forces,” or even individual members of the armed forces. And to the extent Opposer is claiming to provide engraving services to members of the armed forces, there is no evidence that Opposer uses OMEGA or variations thereof for those services, much less that it did so prior to Applicant’s filing dates.

In short, given the utter lack of any evidence of a relationship between Opposer’s and Applicant’s goods, their channels of trade or the classes of purchasers, these factors weigh heavily against a finding of likelihood of confusion.

Sophistication of Purchasers

We accept Applicant’s argument that regardless of the prices for its goods, its customers will exercise heightened care because Applicant’s goods “are tactical gear for use in a close combat situation by law enforcement and military personnel,” and the goods “are used to protect these individuals’ lives.” Applicant’s Trial Brief at 31. This factor weighs slightly against a finding of likelihood of confusion.

Balancing the Factors

Despite the fame of Opposer’s OMEGA marks for watches, and the similarity of the parties’ marks, we find that confusion is unlikely. There is simply no evidence of any relationship between the goods, which are offered in distinct channels of trade to different classes of purchasers who would not be likely to believe that Applicant’s and Opposer’s goods emanate from the same source. While the fame of

Opposition Nos. 91173785 and 91174067

Opposer's marks plays a "dominant role" in our analysis, it "cannot overwhelm the other *DuPont* factors." *Coach Services*, 101 USPQ2d at 1720; *The University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 703 F.2d 1372, 217 USPQ 505, 507 (Fed. Cir. 1983) (likely to cause confusion "means more than the likelihood that the public will recall a famous mark on seeing the same mark used by another ... To hold otherwise would result in recognizing a right in gross, which is contrary to principles of trademark law and to concepts embodied in 15 USC § 1052(d).") Accordingly, Opposer's claim of likelihood of confusion is dismissed.

Nonuse and Abandonment

On August 7, 2013, Applicant filed a motion to amend its involved applications to delete many of the goods identified therein, and consented to entry of judgment against it on the ground of abandonment with respect to the deleted goods. On August 12, 2013, the Board entered an order amending the applications as requested and entering judgment against Applicant with respect to the deleted goods. Applicant's admitted nonuse on *some* of the goods identified in the applications is not grounds for finding the entire application void. *Grand Canyon West Ranch LLC v. Hualapai Tribe*, 78 USPQ2d 1696, 1697-98 (TTAB 2006).

Opposer argues, however, that Applicant has also not used its marks for "bags for tactical gear and tactical equipment" or "tactical gear and tactical equipment for military, law enforcement and defense applications, namely, protective clothing," which remain in the involved applications, as amended. We disagree. As Applicant points out, prior to its filing dates, Applicant used its marks

Opposition Nos. 91173785 and 91174067

for pouches for tactical gear, which are substantively no different than “bags for tactical gear and tactical equipment,” and for armor bearing vests, which are “protective clothing.” Michael Tr. at 45-46, 144 and Exs. 4, 5, 7.¹⁹ Accordingly, Opposer’s nonuse and abandonment claims are dismissed.

Fraud

There is no dispute that Applicant has not used its involved marks on many of the goods originally identified in its applications. Applicant has admitted as much throughout this litigation. Michael Tr. at 67-70; Opposer’s NOR No. 1 Ex. 10; Applicant’s Answer to Amended Notice of Opposition ¶¶ 16, 17, 21; Applicant’s Motion to Amend Applications and Stipulation to Accept the Entry of Judgment on Ground of Abandonment for Certain Goods. However, that is not enough to establish fraud.

Indeed, “[f]raud in procuring a trademark registration occurs when an applicant knowingly makes false, material representations of fact in connection with its application *with intent to deceive the USPTO.*” *Nationstar Mortgage LLC v. Ahmad*, 112 USPQ2d 1361, 1365 (TTAB 2014) (citing *In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009)) (emphasis added). Here, Opposer has not presented any evidence, direct, indirect or circumstantial, let alone the requisite “clear and convincing” evidence, *In re Bose*, 91 USPQ2d at 1939, that Applicant’s admittedly false statements were made with the requisite intent to deceive the

¹⁹ A “pouch” is defined as “a bag, sack, or similar receptacle, especially one for small articles or quantities.” Dictionary.com (<http://dictionary.reference.com/browse/pouch>). “Armor” is defined as “any covering worn as a defense against weapons.” Dictionary.com (<http://dictionary.reference.com/browse/armor>).

USPTO. And while the facts indicate that Applicant *should have known* that it was not using its marks on some of the goods identified in the applications, those facts, without more, do not reflect an intent to deceive much less prove such an intent “to the hilt” as required by *Bose*. 91 USPQ2d at 1939.

Opposer’s argument that Applicant’s “delay in rectifying its material misrepresentations” establishes its intent to deceive the Office, Opposer’s Trial Brief at 33-36, is not well-taken. Applicant admitted that it did not use its marks on some of the goods originally identified in the applications in discovery in June 2012 and in its Answer to the Amended Notice of Opposition filed September 25, 2012. Its motion for summary judgment filed November 26, 2012 is entirely consistent with its admissions, as the motion sought judgment because “Applicant has used the mark on at least some of the goods.” This case was suspended upon the filing of Applicant’s motion for summary judgment, and did not resume until July 8, 2013, when the Board allowed Applicant 30 days “to show cause why judgment should not be entered against” it in connection with the goods in connection with which it had not used its involved marks. Applicant complied with the show cause order when it timely filed its Motion to Amend Applications and Stipulation to Accept the Entry of Judgment on Ground of Abandonment for Certain Goods. These actions do not constitute evidence of an intent to deceive the Office.²⁰

²⁰ We note also that in its reply brief in support of its motion for summary judgment, filed January 22, 2013, Applicant requested “that the Board ‘modify the application or registration by limiting the goods or services therein’ to those goods where the marks have been used and continue to be used in accordance with 15 U.S.C. § 1068.” Applicant’s Reply Brief in Support of Motion for Summary Judgment at 10.

Opposition Nos. 91173785 and 91174067

In the absence of evidence of an intent to deceive, Opposer's fraud claim must fail, and is accordingly dismissed.

Conclusion

Opposer has not met its burden of establishing a likelihood of confusion, nonuse or abandonment with respect to the goods remaining in the applications, or fraud.

Decision: The opposition is dismissed.