

This Opinion is not a
Precedent of the TTAB

Mailed: June 2, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

RevZilla Motorsports, LLC

v.

Powersports Plus LLC

Opposition No. 91212858

Jacob C. Jones of Snell & Wilmer L.L.P.,
for RevZilla Motorsports, LLC.

Bassam N. Ibrahim of Buchanan Ingersoll & Rooney, PC,
for Powersports Plus LLC.

Before Bergsman, Wellington and Lynch,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Powersports Plus LLC (“Applicant”) seeks registration on the Principal Register
of the mark PARTZILLA (in standard characters) for the services set forth below:

Retail store services in the field of parts, aftermarket parts, accessories and related products for ATVs, motorcycles, scooters, watercrafts and snowmobiles accessible online and by telephone; retail store services in the field of tires, wheels and related products for ATVs and motorcycles accessible online and by telephone; retail store services in the field of tools and related products for ATVs, motorcycles and watercrafts accessible online and by telephone; retail store services in the field of apparel, eyewear, footwear,

helmets, leather jackets, leather pants, leather vests, protection gear, riding gear and related products accessible online and by telephone; retail store services in the field of DVDs and toys accessible online and by telephone, in Class 35.¹

RevZilla Motorsports, LLC (“Opposer”) opposed the registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles Opposer’s registered mark REVZILLA (standard characters) for “online retail store services featuring motorcycle apparel and accessories,” in Class 35, as to be likely to cause confusion.²

Applicant, in its Amended Answer, denied the salient allegations in the Notice of Opposition.³

In the June 2, 2015 order, the Board granted Opposer’s cross-motion for summary judgment on standing and priority.⁴

¹ Application Serial No. 85862009 was filed on February 27, 2013, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as January 8, 2013.

² Opposer’s Amended Notice of Opposition (17 TTABVUE). Also, Opposer alleged that Applicant’s mark PARTZILLA is merely descriptive of “the retail of a large variety of power sport vehicle parts and accessories.” Opposer’s Amended Notice of Opposition ¶¶59-66 (17 TTABVUE 22-23). In its brief, Opposer stated that “[t]his case presents one issue;” whether Applicant’s mark is likely to cause confusion with Opposer’s REVZILLA mark? Opposer’s Brief, p. 6 (78 TTABVUE 13). Because Opposer did not argue that Applicant’s mark is merely descriptive in its brief, that claim is deemed waived. *Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 n.6 (TTAB 2013).

³ 22 TTABVUE. Applicant interposed 3 affirmative defenses, all of which merely amplify its denials. Applicant’s assertion that “Opposer has failed to state a claim on which relief may be granted” is not an affirmative defense, it is boilerplate, and it is without any basis in fact or law.

⁴ 21 TTABVUE 3-4 and 10. The Board’s finding that Opposer has priority is limited to the priority of the mark REVZILLA in Opposer’s pleaded registration. The priority finding does not include whether Opposer established a family of marks prior to the filing date of the application. See the discussion below.

I. Preliminary Issues

A. Whether Opposer's assertion that it has a family of marks was tried by implied consent?

An opposer must plead a family of marks in its notice of opposition to rely on the marks as a family for sustaining the opposition at trial. *See Wise F&I, LLC v. Allstate Ins. Co.*, 120 USPQ2d 1103, 1107 (TTAB 2016); *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1927 (TTAB 2011). In its brief, Opposer, for the first time, raised the claim that it is the owner of a “family of marks.”⁵ Applicant, in its brief, did not object to Opposer's assertion that it has a family of marks; rather, Applicant argued that Opposer failed to prove that it has a family of marks.⁶

Because Applicant did not object to Opposer's contention that Opposer has a family of marks and addressed the issue in its brief, we find that Applicant impliedly consented to try the issue of whether Opposer has a family of marks. *Nextel Commc'n. Inc. v. Motorola, Inc.*, 91 USPQ2d 1393, 1399 (TTAB 2009) (because applicant did not object to opposer's assertion of issue preclusion in its brief and addressed it in its brief, the Board deemed the pleadings to have been amended); *Linville v. Rivard*, 41 USPQ2d 1731, 1735 n.9 (TTAB 1996) (certain abandonment issues while not pleaded

⁵ Opposer's Brief, p. 24 (78 TTABVUE 31). Opposer did not allege that it had a “family of marks” in its Amended Notice of Opposition. Opposer alleged that it “uses the marks TEAMZILLA, TEAMZILLA CASH, ZILLA CASH, and ZLA (collectively with Opposer's Registered Mark, “Opposer's Marks”) in connection with its rewards club program and retail services.” Amended Notice of Opposition ¶14 (17 TTABVUE 13). This paragraph is not sufficient to put Applicant on notice that Opposer is alleging a family of “Zilla” marks.

⁶ Applicant's Brief, p. 24 (93 TTABVUE 32).

were clearly tried by the parties and argued in their trial briefs), *aff'd*, 133 F.3d 1446, 45 USPQ2d 1374 (Fed. Cir. 1998). Accordingly, we deem the pleadings to be amended under Fed.R.Civ.P. 15(b) to include Opposer's claim that it has a family of marks.

B. Whether Opposer has a family of –zilla marks?

Opposer contends that it has a "Zilla" family of marks.⁷

Opposer uses other marks for related goods or services, including TEAMZILLA CASH, TEAMZILLA REWARDS CLUB, ZILLANTHROPY, and ZILLAPALOOZA. These marks, especially are used in an [sic] manner that the "public associates not only the individual marks, but also the common characteristic of the family."⁸

Apparently, Opposer is claiming the term "Zilla" wherever it appears (*i.e.*, as a prefix, suffix, or standalone term) as the common characteristic of its family.

In addition to the mark in Opposer's pleaded registration, REVZILLA, Opposer uses TeamZilla to identify its rewards program.⁹ Consumers get \$5 cash back for every \$100 spent.¹⁰ While customers purportedly see TeamZilla in their shopping cart when they check out online,¹¹ the only use of TeamZilla presented in this record is on Opposer's TeamZilla Rewards Club webpage.¹² An excerpt of that webpage is displayed below:

⁷ Applicant's Brief, p. 39 (78 TTABVUE 46).

⁸ Applicant's Brief, p. 39 (78 TTABVUE 46) (citation omitted).

⁹ Price Testimony Dep., p. 93 (53 TTABVUE 96); Roscoe Testimony Dep., p. 115 (55 TTABVUE 118); Kull Testimony Dep., p. 38 (57 TTABVUE 41); Armenante Testimony Dep., p. 23 (59 TTABVUE 26).

¹⁰ Armenante Testimony Dep., p. 23 (59 TTABVUE 26).

¹¹ Roscoe Testimony Dep., p. 115 (55 TTABVUE 118).

¹² Kull Testimony Dep., Exhibit 10 (57 TTABVUE 132).



Also, Opposer uses “Zilla” on its website in the menu option labelled “Earn Zilla Cash Back.”¹³ The following excerpt from one of Opposer’s webpage is illustrative.



David Price, Opposer’s Chief Financial Officer, testified that Opposer uses “Zilla” internally.¹⁴

We use [Zilla] for a lot of our internal culture and branding we have zillanthropy, which is our employees exploits of nonprofit, working with nonprofit to - - for philanthropy. We use it for our annual, we call it spirit week, zillapalooza.¹⁵

Mr. Price did not introduce any exhibits showing use of Zillanthropy or Zillapalooza, nor did he testify as to when Opposer started using any other Zilla-formative mark.

¹³ Price Testimony Dep., Exhibits 16, 18, 20, 22, 24, 27, 28, 30, 33 and 35 (53 TTABVUE 182, 186, 190, 194, 198, 205, 208, 213, 218 and 224).

¹⁴ Price Testimony Dep., p. 48 (53 TTABVUE 52).

¹⁵ Price Testimony Dep., p. 48 (53 TTABVUE 52).

Matthew Kull, Opposer's Chief Operating Officer, testified that Opposer has used TEAMZILLA to describe Opposer's staff since 2007¹⁶ and that the public is exposed to the term TEAMZILLA through Opposer's rewards program, "the TeamZilla Rewards Club."¹⁷ Mr. Kull did not testify as to when Opposer started the TeamZilla Rewards Club.

In its brief, Opposer did not address when it established its family of marks. In fact, there is no testimony or evidence as to when Opposer first used or advertised more than one ZILLA-formative mark together so as to show use as a family of marks.¹⁸ Thus, Opposer has not established that it had a family of marks prior to the filing date of the application at issue (*i.e.*, February 27, 2013).¹⁹ *Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001) ("this court examines the Board's treatment of [plaintiff's] marks as a family of marks,

¹⁶ Kull Testimony Dep., p. 38 (57 TTABVUE 41).

¹⁷ Kull Testimony Dep., p. 38 (57 TTABVUE 41).

¹⁸ Although Matthew Kull testified that Opposer has used TeamZilla since 2007, that was only to describe Opposer's staff. He also testified that the public is exposed to TeamZilla through the TeamZilla Rewards Club, but provided no date for such use. Thus, Mr. Kull's testimony regarding when Opposer may have established a family of Zilla marks to which the public is exposed is not sufficiently clear as to prove when Opposer established a family of Zilla marks. *Cf. Daniel J. Quirk, Inc. v. Village Car Co.*, 120 USPQ2d 1146, 1151 (TTAB 2016) ("Oral testimony, if sufficiently probative, is normally satisfactory to establish priority of use in a trademark proceeding.") (quoting *Powermatics, Inc. v. Globe Roofing Prods. Co.*, 341 F.2d 127, 144 USPQ 430, 432 (CCPA 1965)); *Bass Pro Trademarks, LLC v. Sportsman's Warehouse, Inc.*, 89 USPQ2d 1844, 1856 (TTAB 2008) (the testimony of a single witness with personal knowledge of the facts may be sufficient to prove first use if it is clear, convincing, consistent, uncontradicted, and sufficiently circumstantial to convince the Board of its probative value).

¹⁹ "Applicant is entitled to rely on the filing date of his involved application, or whatever date of first use is established by the evidence of record." *UMG Recordings Inc. v. O'Rourke*, 92 USPQ2d 1042, 1046 (TTAB 2009).

recognizing that the public perception of the relatedness of the TRES-family of marks may have arisen before the filing date of [applicant's] TREVIVE mark.”). In view thereof, our likelihood of confusion analysis is based solely on the mark in Opposer’s pleaded registration (*i.e.*, REVZILLA). *See Citigroup Inc. v. Capital City Bank Group Inc.*, 94 USPQ2d 1645, 1657 (TTAB 2010) (“[O]pposer has not established that it had a family of marks prior to applicant’s first use of its mark. Therefore, the likelihood of confusion analysis will be based solely on the use of the individual marks in opposer’s registrations.”), *aff’d*, 637 F.3d 1344, 98 USPQ2d 2011 (Fed. Cir. 2011).

C. Whether Opposer may introduce excerpts from the discovery depositions of Opposer’s officers?

On the last day of its testimony period, Opposer proffered excerpts from the Rule 30(b)(6) discovery depositions taken by Applicant of Opposer’s witnesses: Patrick Roscoe, Opposer’s Director of Customer Experience, Anthony Bucci, Opposer’s Chief Executive Officer, and Matthew Kull, Opposer’s Chief Operating Officer.²⁰ Applicant filed a motion to strike the excerpts from those discovery depositions on the ground that a discovery deposition of a party or an officer of a party may be offered into evidence only by an adverse party.²¹

Opposer contends that it is not proffering the deposition excerpts because of the testimony of the witnesses, but “because they contain multiple party-opponent

²⁰ Submitted by Opposer under notice of reliance. 41 TTABVUE 546-552, 554-560, and 562-566.

²¹ 42 TTABVUE.

statements by Applicant's counsel."²² Apparently, Applicant's counsel misspoke and, during the depositions, transposed the marks REVZILLA and PARTZILLA.²³ In other words, Applicant's counsel said REVZILLA when he meant PARTZILLA and vice versa.

Trademark Rule 2.120(k)(1), 37 C.F.R. § 2.120(k)(1), reads as follows:

The discovery deposition of a party or anyone who at the time of taking the deposition was an officer, director or managing agent of a party, or a person designated by a party pursuant to Rule 30(b)(6) or Rule 31(a) of the Federal Rules of Civil Procedure, may be offered in evidence by an adverse party.

The Rules provide exceptions to the general rule noted above such as,

- There is a stipulation by the parties;²⁴
- There is a showing that exceptional circumstances exist as to make it desirable, in the interests of justice, to allow the deposition to be used;²⁵ or
- Part of the deposition should in fairness be considered so as to make not misleading what was offered by the submitting party.²⁶

²² Opposer's response to Applicant's motion to strike, p. 1 (46 TTABVUE 2). During its rebuttal testimony, Opposer reintroduced the excerpts from the discovery depositions of Patrick Roscoe, Anthony Bucci, and Matthew Kull (74 TTABVUE 12-18, 20-26, and 28-32) with a motion styled "Opposer's *Conditional* Motion For Finding of 'Exceptional Circumstances,' To Offer Party-Opponent Statements Made During Discovery Depositions of Opposer's Witnesses." (73 TTABVUE). Opposer's motion is, in essence, a surreply brief. Trademark Rule 2.127(a), 37 C.F.R. § 2.127(a) prohibits surreply briefs. *See Pioneer Kabushiki Kaisha v. Hitachi High Tech.*, 74 USPQ2d 1672, 1677 (TTAB 2005); *No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1553 (TTAB 2000). Therefore, we do not consider Opposer's "conditional motion."

²³ *Id.* at page 2 (46 TTABVUE 3).

²⁴ Trademark Rule 2.120(k)(2), 37 C.F.R. § 2.120(k)(2).

²⁵ *Id.*

²⁶ Trademark Rule 2.120(k)(4), 37 C.F.R. § 2.120(k)(4).

The Trademark Rules are clear about how a party may use the discovery depositions of its own witnesses. Opposer's explanation for introducing excerpts from the discovery depositions of its officers does not fall within one of the exceptions to the general rule.

With respect to the interests of justice exception, the misstatements by Applicant's counsel have little, if any, probative value because counsel's misstatements occurred in the context of the courtroom rather than in the marketplace. Counsel substituted one mark for the other; he did not confuse the source of the services because of the purported similarity of the marks. Thus, counsel's misstatements are not indicative of consumer perception. *See Marshall Field & Co. v. Mrs. Field's Cookies*, 25 USPQ2d 1321, 1334 (TTAB 1992); *VMC Corporation v. Distributor's Marketing Service*, 192 USPQ 227, 230 n.4 (TTAB 1976) (witness's inadvertent substitution of one mark for another is not necessarily probative of confusion because "[t]his slip of the tongue under the tension of being subjected to interrogation by opposing counsel is not indicative of a marketing environment.").

Applicant's motion to strike the excerpts from the discovery depositions of Opposer's officers proffered by Opposer is granted.

D. Applicant's third-party "zilla" trademark registrations and websites.²⁷

Applicant introduced through a notice of reliance copies of third-party registrations and excerpts from third-party websites to show the weakness of the – zilla suffix when used as a part of a trademark. Also, Applicant introduced the

²⁷ 69 TTABVUE 70-231 and 70-72 TTABVUE.

third-party registrations and websites as exhibits to the testimony deposition of Kathleen McCann Hemmerdinger, the paralegal of Applicant's counsel.²⁸ Opposer objected to the evidence on the grounds that "they were untimely, were created and produced either the day before or on the morning of the testimonial deposition ... which occurred on August 12, 2016. Thus, the documents were not disclosed until seven months after the close of discovery."²⁹

Opposer's objection is overruled. First, Opposer did not include a copy of the relevant discovery requests that would permit us to determine whether the documents were responsive to an outstanding request. Second, while information regarding a party's awareness of third-party use or registration of the same or similar marks for the same or related goods or services as a mark at issue is discoverable, the responding party does not have an obligation or duty to conduct an investigation to respond to the discovery request. *See Sheetz of Delaware, Inc. v. Doctor's Assoc. Inc.*, 108 USPQ2d 1341, 1348 (TTAB 2013) (a party need not investigate third-party use to respond to discovery requests); *Rocket Trademarks Pty. Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1071-72 (TTAB 2011) (a party has no duty to conduct an investigation of third-party uses in response to discovery requests).

²⁸ The deposition transcript is posted at 87 TTABVUE and the exhibits are posted at 85-86 and 87-90 TTABVUE. The probative value of the evidence does not increase with the number of times the evidence is introduced into the record; once is enough.

²⁹ 78 TTABVUE 51.

Ms. Hemmerdinger testified that she printed the documents on August 11, 2016, the day before her testimony deposition.³⁰ It is clear that Applicant printed the third-party registrations and websites in anticipation of showing the weakness of the –zilla suffix. Moreover, Opposer was not put at a disadvantage because it is common practice for parties to introduce evidence of third-party registrations and use to demonstrate that a mark or a portion of a mark is weak, and the evidence introduced by Applicant was publicly available via the Internet. *See Sheetz of Delaware, Inc. v. Doctor's Assoc. Inc.*, 108 USPQ2d at 1348.

E. Testimony declaration of Scott E. Bain.

On September 23, 2016, Applicant, during its testimony period, proffered the declaration of Scott E. Bain purportedly “to provide an expert opinion” as to whether Applicant’s evidence comprising excerpts from third-party websites “reflect the commercial use of particular trademarks and service marks containing the term ZILLA.”³¹ Mr. Bain’s testimony is based on his “professional experience including but not limited to six years as Litigation Counsel at the Software Information Industry Association” where he “learned to recognize images on the Internet which may appear to reflect, but do not reflect, the actual offer of sale of a good or services on the

³⁰ Hemmerdinger Testimony Dep., pp. 20, 22 (87 TTABVUE 21, 23); *see also* the dates printed on the exhibits.

³¹ 72 TTABVUE 202. “Mr. Bain was an attorney in private practice when he prepared the declaration and was intending to testify as an expert in this proceeding; however, he was subsequently hired by the USPTO as an Administrative Patent Judge.” Applicant’s Brief, p. 6 n.4 (93 TTABVUE 14). The USPTO’s General Counsel denied Applicant’s request to have Mr. Bain testify in this case. (78 TTABVUE 54).

Internet.”³² Opposer objected to the declaration of Scott E. Bain on the ground that the statements in the declaration are hearsay and that the declaration violates the Board rule forbidding an unstipulated declaration of in lieu of a testimony deposition.³³

At the time Applicant proffered the declaration of Scott E. Bain, Trademark Rule 2.123(b), 37 C.F.R. § 2.123(b), provided that upon written agreement of the parties, the testimony of a witness may be submitted in the form of an affidavit or declaration. Effective January 14, 2017, the Trademark Rules were amended to permit the testimony of a witness to be submitted in the form of an affidavit or declaration “subject to the right or any adverse party to elect to take and bear the expense of oral cross-examination of that witness.” Trademark Rule 2.123(a)(1), 37 C.F.R. § 2.123(a)(1).

Applicant submitted the Declaration of Scott E. Bain without a written stipulation from Opposer. Thus, under the old rule, Opposer’s objection is well taken. Because Opposer never had the opportunity to cross-examine Mr. Bain, Opposer’s objection is well taken under the amended rule. Accordingly, Opposer’s objection to the testimony declaration of Scott E. Bain is sustained and the declaration will not be considered.³⁴

³² Bain Declaration (72 TTABVUE 208).

³³ 78 TTABVUE 51.

³⁴ Even if Applicant had properly introduced Mr. Bain’s declaration or testimony, we would have given it little or no evidentiary weight because the third-party websites are admissible only to show what has been printed, not the truth of what has been printed. *See Safer v. OMS Inv. Inc.*, 94 USPQ2d 1031, 1040 (TTAB 2010).

F. Opposer's spreadsheet survey of its customer service representatives regarding instances of confusion.

Opposer sought to introduce "[A] Google survey response form of all the responses captured from a global survey that was sent out, with the questions noted on the header bar of this table."³⁵ The header bar of the Google survey is displayed below:

Timestamp	At any point during your time as a Gear Geek have you ever come across an instance where the customer confused use with "Partzilla.com", which is another company?	If you answered "Yes", can you remember as to when this phone call/live chat approximately occurred?	Username
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The purpose of the Google survey was to document instances of confusion between Opposer's mark REVZILLA and Applicant's mark PARTZILLA.³⁶ Opposer's customer service representatives responded to the survey in August and September 2015.³⁷ Opposer is "now using this for any future instances when we find any sort of confusion that comes through,"³⁸ although Opposer did not introduce a copy of the current Google survey form.

³⁵ Roscoe Testimony Dep., pp. 22-23 and Exhibit 1 (55 TTABVUE 25-26 and 147-148); Armenante Testimony Dep., p. 15 and Exhibit 1 (59 TTABVUE 18 and 55-56); Wise Testimony Dep., p. 16 and Exhibit 1 (61 TTABVUE 16 and 53-53).

³⁶ Roscoe Testimony Dep., p. 23 (55 TTABVUE 26); Armenante Testimony Dep., p. 15 (59 TTABVUE 18) ("There was a survey where we were to document instances of Partzilla being mentioned."); Wise Testimony Dep., p. 13 (61 TTABVUE 16) ("survey related to potential confusion between RevZilla and Partzilla.").

³⁷ Armenante Testimony Dep., p. 16 (59 TTABVUE 19); Wise Testimony Dep., pp. 13-14 (61 TTABVUE 16-17).

³⁸ Roscoe Testimony Dep., p. 25 (55 TTABVUE 28).

Applicant objected to the admissibility of the Google survey as hearsay³⁹ and renewed its objection in an appendix to its brief.⁴⁰ Opposer contends that the Google survey falls within the “business records” exception to the hearsay rule and that the survey results are not hearsay because they are not being used to prove the truth of the matters asserted.⁴¹

The survey results are hearsay because they are purported statements of Opposer’s customer service representatives, made outside of this proceeding, asserting that Opposer’s customer service representatives have encountered an “instance where the customer confused use with ‘Partzilla.com’.” Contrary to Opposer’s contention, the survey results are being relied on for the truth of the matters asserted, to establish actual confusion. Opposer has not advanced any reason the survey results otherwise would be relevant.

The Federal Rules of Evidence define the “Records of a Regularly Conducted Activity” exception to the hearsay rule as follows:

A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

³⁹ Roscoe Testimony Dep., p. 22 (55 TTABVUE 25); Armenante Testimony Dep., p. 15 (59 TTABVUE 18); Wise Testimony Dep., p. 13 (61 TTABVUE 16).

⁴⁰ Applicant’s Brief, Appendix A: Objections to Opposer’s Evidence, p. 5 (93 TTABVUE 63).

⁴¹ Opposer’s Reply Brief, p. 22 (95 TTABVUE 24). Opposer also asserts that “Applicant admits that the consumer statements therein are admissible under the ‘state of mind’ exception.” *Id.* However, Opposer did not cite to where in the record Applicant supposedly made such an admission and, therefore, we give that argument no further consideration.

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.⁴²

The survey results are not a record of a regularly conducted activity and, therefore, they do not fall within that exception of the above-noted exception to the hearsay rule. First, the survey results were not made at or near the time the customer survey representatives spoke with the customers. The survey questionnaire is not limited to contemporaneous events: “*at any point during your time as a Gear Geek have you ever come across an instance where the customer confused use with ‘Partzilla.com.’*” (Emphasis added). Thus, the survey results are not limited to “at or near the time” the incident occurred.

Second, at the time the Google survey was conducted, Opposer was not keeping track of reported instances of confusion in the course of a regularly conducted business activity, and the survey results were not recorded as a regular practice of any such activity. Opposer filed the notice of opposition on October 7, 2013 and conducted the Google survey in August/September 2015. There is no testimony that

⁴² Fed.R.Evid. 803(6).

Opposer's customer service representatives kept track of reported instances of confusion while speaking with customers or that the customer service representatives were instructed that from some date certain they were to keep track of instances of confusion. The survey was conducted specifically for purposes of this opposition proceeding to see if Opposer's customer service representatives recalled any instances of customer confusion between REVZILLA and PARTZILLA. Thus, the survey results sought to capture the recollections of the customer service representatives rather than contemporaneous events.

Finally, if Opposer were keeping track of reported instances of confusion as a regular business practice at the time the Google survey was conducted as opposed to compiling evidence for this proceeding, it should have been keeping track of instances of confusion with any mark containing a -zilla suffix. *See* the discussion below regarding third-party use of the -zilla suffix.

Applicant's objection to the Google survey results is sustained and the survey results will be given no consideration.⁴³

G. Opposer's objection to Applicant's other PARTZILLA registrations.

As noted below in the "Record" section, Applicant introduced, through a notice of reliance, three additional PARTZILLA registrations that it owns, to which Opposer did not oppose or seek to cancel. Those registrations include:

- Registration No 4470663 for the mark PARTZILLA (standard characters);

⁴³ We apply Applicant's objection to Roscoe Testimony Deposition Exhibits 9, 10, and 11 (55 TTABVue 168, 170 and 172) that are documents related to the Google survey.

- Registration No. 4888288 for the mark PZ PARTZILLA and design; and
- Registration No. 5026081 for the mark PZ PARTZILLA and design.

The descriptions of services include, *inter alia*, retail and wholesale store services accessible online and by telephone in the field of parts, aftermarket parts, accessories, tires, wheels, tools, apparel, eyewear, footwear, helmets, leather jackets, leather pants, leather vests, protection gear, riding gear, and related products for motorcycles.⁴⁴

Opposer objected to the admissibility of Applicant's other PARTZILLA registrations on the ground that they are irrelevant.⁴⁵ Opposer offered no explanation as to why Applicant's ownership of three unchallenged PARTZILLA registrations for services that are in closely related to the services in Opposer's pleaded registration (*i.e.*, wholesale vs. retail sales) would be irrelevant.⁴⁶

Applicant's three other PARTZILLA registrations are relevant. They are probative of the strength or weakness of the –zilla suffix in the field of motorcycles, including the inherent strength of the –zilla suffix and the number of other marks that include the –zilla suffix, as well the market interface between the parties.

Opposer's objection to Applicant's other PARTZILLA registrations is overruled.

⁴⁴ Registration No. 4470663 for the mark PARTZILLA (standard characters) does not include "retail store services."

⁴⁵ Opposer's Appendix A – Objections to Applicant's Evidence, p. 3 (78 TTABVUE 52).

⁴⁶ Since the objection does not appear to be warranted by existing law or by a nonfrivolous argument, the objection was raised in violation of Rule 11(b) of the Federal Rules of Civil Procedure.

H. Other objections.

The parties lodged numerous other objections.⁴⁷ None of the evidence sought to be excluded is outcome determinative. Moreover, the Board is capable of weighing the relevance and strength or weakness of the objected-to testimony and evidence, including any inherent limitations. As necessary and appropriate, we will point out any limitations in the evidence or otherwise note that the evidence cannot be relied upon in the manner sought. We have considered all of the testimony and evidence introduced into the record. In doing so, we have kept in mind the various objections and we have accorded whatever probative value the subject testimony and evidence merit. *See, e.g., Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1104 (TTAB 2007).

II. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Applicant's application file.⁴⁸ The record also includes the testimony and evidence listed below.

A. Opposer's testimony and evidence.

1. Opposer's notice of reliance on the discovery deposition of Tom D'Azevedo, Applicant's co-owner and Chairman, with attached exhibits;⁴⁹

⁴⁷ 78 TTABVUE 50-57; 93 TTABVUE 59-75.

⁴⁸ It was not necessary for Applicant to introduce a copy of its application.

⁴⁹ 41 TTABVUE 8-306. Because most of the testimony in the discovery deposition is irrelevant to Opposer's likelihood of confusion claim, Opposer was not required to introduce the entire deposition. Trademark Rule 2.120(k)(3)(i), 37 C.F.R. § 2.120(k)(3)(i), provides that a discovery deposition "may be made of record in the case by filing the deposition or any part thereof with an exhibit to the part that is filed." It is the better practice for a party to limit the introduction

2. Opposer's notice of reliance on the discovery deposition of Martin Polo, Applicant's Chief Executive Officer, with attached exhibits;⁵⁰
3. Testimony deposition of David Price, Opposer's Chief Financial Officer, with attached exhibits;⁵¹
4. Testimony deposition of Patrick Roscoe, Opposer's Director of Customer Experience, with attached exhibits;⁵²
5. Testimony deposition of Matthew Kull, Opposer's Chief Operating Officer, with attached exhibits;⁵³
6. Testimony deposition of George Armenante, one of Opposer's Metric Catalog associates, with attached exhibits;⁵⁴
7. Testimony deposition of Brandon Wise, one of Opposer's Gear Geeks, with attached exhibits;⁵⁵

of testimony elicited during a discovery deposition to testimony that is relevant to facts proving the elements of the claim. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

⁵⁰ 41 TTABVUE 320-544. As noted above, Opposer introduced the entire discovery deposition when it would have been more persuasive to limit the proffer to relevant testimony.

⁵¹ 53 TTABVUE. The portions of the Price deposition that are designated confidential are posted at 52 TTABVUE.

⁵² 55 TTABVUE. The portions of the Roscoe deposition that are designated confidential are posted at 54 TTABVUE.

⁵³ 57 TTABVUE. Portions of the Kull deposition that are designated confidential are posted at 56 TTABVUE.

⁵⁴ 59 TTABVUE. Portions of the Armenante deposition that are designated confidential are posted at 58 TTABVUE.

⁵⁵ 61 TTABVUE. The portions of the Wise deposition that are designated confidential are posted at 60 TTABVUE. As a Gear Geek, Mr. Wise works with customers to help them find motorsport parts and accessories. Wise Dep., p. 6 (61 TTABVUE 9).

8. Testimony deposition of Jordan Demidow, a third party, who has purchased products from both parties;⁵⁶
9. Testimony deposition of Rod Depperschmidt, a third party, who has purchased products from both parties;⁵⁷
10. Testimony deposition of Wayne Buzzell, a third party, who has purchased products from both parties;⁵⁸
11. Testimony deposition of Kevin Graham, a third party, who has purchased products from both parties, with attached exhibits;⁵⁹
12. Notice of reliance on Applicant's responses to Opposer's first set of interrogatories.⁶⁰

B. Applicant's testimony and evidence.

1. Notice of reliance on the following items:
 - a. A copy of the prosecution history file for Registration No. 4888289 for the mark PZ and design;⁶¹
 - b. A copy of the prosecution history file Registration No 4470663 for the mark PARTZILLA (standard characters), owned by Applicant, for the services listed below:

⁵⁶ 62 TTABVUE.

⁵⁷ 63 TTABVUE.

⁵⁸ 64 TTABVUE.

⁵⁹ 65 TTABVUE.

⁶⁰ 74 TTABVUE 5-13.

⁶¹ 68 TTABVUE 57-104.

Retail store services accessible online or by telephone in the field of parts, aftermarket parts, accessories and related products for marine and lawn and garden equipment; wholesale store services accessible online and by telephone in the field of parts, aftermarket parts, accessories and related products for ATVs, motorcycles, scooters, watercrafts, snowmobiles, marine and lawn and garden equipment; wholesale store services accessible online and by telephone in the field of tires, wheels and related products for ATVs, motorcycles and lawn equipment; wholesale store services accessible online and by telephone in the field of tools and related products for ATVs, motorcycles, watercrafts, marine and lawn and garden equipment; wholesale store services accessible online and by telephone in the field of apparel, eyewear, footwear, helmets, leather jackets, leather pants, leather vests, protection gear, riding gear and related products; wholesale store services accessible online and by telephone in the field of DVDs and toys, in Class 35;⁶²

- c. A copy of the prosecution history file for Registration No. 4888288 for the mark PZ PARTZILLA and design, shown below,



owned by Applicant, for the services listed below:

Retail and wholesale store services accessible online or by telephone in the field of parts, aftermarket parts, accessories and related products for automobiles, marine and lawn and garden equipment; retail and wholesale store services accessible online and by telephone in the field of parts, aftermarket parts, accessories and related products for ATVs, motorcycles, scooters, watercrafts, snowmobiles,

⁶² 68 TTABVUE 105-150. The registration issued January 21, 2014 based on an application filed June 18, 2013.

automobiles, marine and lawn and garden equipment; retail and wholesale store services accessible online and by telephone in the field of tires, wheels and related products for ATVs, motorcycles, marine and lawn equipment; retail and wholesale store services accessible online and by telephone in the field of tools and related products for ATVs, motorcycles, watercrafts, marine and lawn and garden equipment; retail and wholesale store services accessible online and by telephone in the field of apparel, eyewear, footwear, helmets, leather jackets, leather pants, leather vests, protection gear, riding gear and related products; retail and wholesale store services accessible online and by telephone in the field of DVDs and toys, in Class 35;⁶³

- d. A copy of the prosecution history file for Registration No. 5026081 for the mark PZ PARTZILLA and design, shown below,



owned by Applicant for the services listed below:

Retail and wholesale store services accessible online or by telephone in the field of parts, aftermarket parts, accessories and related products for marine and lawn and garden equipment; retail and wholesale store services accessible online and by telephone in the field of parts, aftermarket parts, accessories and related products for ATVs, motorcycles, scooters, watercrafts, snowmobiles, marine and lawn and garden equipment; retail and wholesale store services accessible online and by telephone in the field of tires, wheels and related products for ATVs, motorcycles, and lawn equipment; retail and wholesale store services accessible online and by telephone in the field of tools and related products for ATVs, motorcycles,

⁶³ 68 TTABVue 152-210. The registration issued January 19, 2016 based on an application filed April 8, 2015.

watercrafts, marine and lawn and garden equipment; retail and wholesale store services accessible online and by telephone in the field of apparel, eyewear, footwear, helmets, leather jackets, leather pants, leather vests, protection gear, riding gear and related products; retail and wholesale store services accessible online and by telephone in the field of DVDs and toys, in Class 35;⁶⁴

- e. A copy of the prosecution history file for application Serial No. 86866086 for the mark PZ PARTZILLA (standard characters);⁶⁵
- f. Wikipedia (wikipedia.com) entry for “-zilla”;⁶⁶
- g. Definition of “zilla” in the *Urban Dictionary* (urbandictionary.com);⁶⁷
- h. Definition of “zilla” in *Wiktionary* (wiktionary.org);⁶⁸
- i. Definition of “zilla” in *Definitions & Translations* (definitions.net);⁶⁹
- j. Definition of “zilla” in Books.Google.com;⁷⁰
- k. Definition of “zilla” in *Words You Should Know: 2013*;⁷¹
- l. The derivation of “zilla” in Paul McFedries, *The Word Lover’s Guide to Modern Culture*;⁷²

⁶⁴ 68 TTABVUE 212-239. The registration issued August 23, 2017 based on an application filed January 5, 2016.

⁶⁵ 69 TTABVUE 3-24.

⁶⁶ 69 TTABVUE 26-28.

⁶⁷ 69 TTABVUE 30-35.

⁶⁸ 69 TTABVUE 37.

⁶⁹ 69 TTABVUE 39.

⁷⁰ 69 TTABVUE 41 and 46.

⁷¹ 69 TTABVUE 43-44.

⁷² 69 TTABVUE 48-50.

- m. The derivation of “zilla” in Neal Whitman, *A linguistic tour of the best libfixes, from -ana to -zilla*; ⁷³
- n. A profile of trademark suffixes, including “zilla” by Steve Baird, “What Does the Suffix Say” (duetsblog.com); ⁷⁴
- o. “Word-zilla,” “Evolving English II” (evolvingenglish.blogspot.com); ⁷⁵
- p. Third-party “zilla” trademark registrations and websites; ⁷⁶
- q. Confidential excerpts from the discovery deposition of David Price, Opposer’s Chief Financial Officer, with attached exhibits; ⁷⁷
- r. Confidential excerpts from the discovery deposition of Matthew Kull, Opposer’s Chief Operating Officer, with attached exhibits; ⁷⁸
- s. Confidential excerpts from the discovery deposition of Anthony Bucci, with attached exhibits; ⁷⁹
- t. Confidential excerpts from the discovery deposition of Patrick Roscoe, Opposer’s Director of Customer Experience; ⁸⁰

⁷³ 69 TTABVUE 52-60.

⁷⁴ 69 TTABVUE 61-64.

⁷⁵ 69 TTABVUE 66-69.

⁷⁶ 69 TTABVUE 70-231 and 70-72 TTABVUE.

⁷⁷ 66 TTABVUE 6-61.

⁷⁸ 66 TTABVUE 62-108.

⁷⁹ 66 TTABVUE 110-142.

⁸⁰ 66 TTABVUE 144-171.

- u. Confidential excerpts from Opposer's amended response to Applicant's interrogatory No. 26;⁸¹
- 2. Testimony deposition of Thomas D'Azevedo, Applicant's Chairman, with attached exhibits;⁸²
- 3. Testimony deposition of Martin Polo, Applicant's Chief Executive Officer, with attached exhibits;⁸³ and
- 4. Testimony deposition of Kathleen McCann Hemmerdinger, paralegal at Opposer's counsel's law firm, with attached exhibits.⁸⁴

III. Likelihood of confusion

Our determination under Section 2(d) is based on an analysis of all of the 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) ("*du Pont*") (cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015)); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *du Pont* factor that is relevant and for which there is evidence of record. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944,

⁸¹ 66 TTABVUE 173-179.

⁸² 80 TTABVUE. The portions of the D'Azevedo deposition designated as confidential are posted at 81 TTABVUE.

⁸³ 82 TTABVUE. The portions of the Polo deposition designated as confidential are posted at 83 TTABVUE.

⁸⁴ The deposition transcript is posted at 87 TTABVUE and the exhibits are posted at 85-86 and 87-90 TTABVUE.

1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *appeal docketed*, No. 16-1507 (Fed. Cir. Jan. 21, 2016).

A. The similarity or dissimilarity and nature of the services.

As noted above, Applicant is seeking to register its mark for, *inter alia*, retail store services, online sales services, and telephone sales services in the field of accessories for ATVs, motorcycles, scooters, watercrafts and snowmobiles and “apparel, eyewear, footwear, helmets, leather jackets, leather pants, leather vests, protection gear, riding gear and related products accessible.”

Opposer’s REVZILLA mark is registered for “online retail store services featuring motorcycle apparel and accessories.”

Both parties sell motorcycle accessories and Applicant’s sales of apparel, footwear, helmets, leather jackets, pants, and vests, protection gear, and riding gear encompasses Opposer’s sales of motorcycle apparel. *See In re Hughes Furniture*

Indus., Inc., 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”). Accordingly, the services are in part identical.

Under this *du Pont* factor, we need not find similarity as to each and every activity listed in the description of services. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any activity encompassed by the identification of services in a particular class in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d at 1409; *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014).

B. Established, likely-to-continue channels of trade.

Because the parties’ descriptions of services are identical, at least in part, we must presume that the channels of trade and classes of purchasers are the same for the identical services. *See In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *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); *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011).

C. The strength of Opposer's mark, including the number and nature of similar marks in use in connection with similar goods or services.

In determining the strength of a mark, we consider both its inherent strength based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength."); *Top Tobacco, L.P. v. North Atlantic Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (same); *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006); *McCarthy on Trademarks and Unfair Competition* § 11:83 (4th ed. 2017) ("The first enquiry focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another's use."). Market strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d at 1899.

1. The commercial strength of Opposer's mark.

Opposer's advertising expenditures have increased significantly from 2007 through 2016 to the point where they are substantial.⁸⁵ Opposer spends "over a million dollars a year at least at the bare minimum . . . on efforts designed to improve

⁸⁵ Price Testimony Dep., pp. 37-39 (52 TTABVUE 41-43) (confidential). Because Opposer's revenues and marketing expenditures have been designated as confidential, we may refer to them only in general terms.

brand recognition of the REVZILLA mark among consumers.”⁸⁶ Opposer, at one unidentified time, was ranked 586 in the Inc. 5000, in a nationwide comparison of all companies based upon growth rates.⁸⁷ Suffice it to say, Opposer is a successful enterprise.

Through these efforts REVZILLA has become a strong mark.

I think the mark is very strong at this point. I think it’s certainly well-known within the motorcycle consumer market. I think it’s - - over the years we’ve, again, developed a tremendous reputation, a very strong connotation of premium hand a high level of service.

When consumers think of the RevZilla mark, they know they’re going to get the best service and they’re going to have a high level of comfort purchasing from that retailer.⁸⁸

Because competitors in the field of online sales of motorcycle parts, accessories, and apparel often sell the same items at the same prices, one of the main areas of competition between Opposer and its competitors is customer service.⁸⁹ In that regard, Stella Service, a third-party rating service, gave Opposer its highest customer service rating.⁹⁰ In fact, Opposer was ranked number one amongst all the retailers

⁸⁶ Kull Testimony Dep., p. 24 (57 TTABVUE 27).

⁸⁷ Kull Testimony Dep., p. 43 (57 TTABVUE 46).

⁸⁸ Kull Testimony Dep., pp. 15-16 (57 TTABVUE 18-19); *see also* Armenante Testimony Dep., pp. 11-14 (59 TTABVUE 14-17) (REVZILLA is an extremely strong and widely recognized mark and at motorcycle events “it’s very common to see people wearing RevZilla T-shirts” or “to see RevZilla stickers on cars, bikes.”); Wise Testimony Dep., p. 10 (61 TTABVUE 13) (REVZILLA is a very strong mark).

⁸⁹ Price Testimony Dep., p. 40 (53 TTABVUE 45).

⁹⁰ Kull Testimony Dep., p. 40 (57 TTABVUE 43).

surveyed by Stella Services, including companies such as L.L. Bean, Zappos, Amazon, Target, Lululemon, and others.⁹¹

Opposer primarily promotes its REVZILLA mark through paid search engine advertising, search engine optimization, paid searches, e-mail marketing, online radio, blogging, content marketing, magazines, trade shows, and a YouTube video channel with over 50 million views, increasing at over a million views each month.⁹²

We find that Opposer has enjoyed a high degree of commercial success and that its REVILLA mark is distinctive and strong.

2. The inherent strength of the –zilla suffix.

There is no third-party evidence showing use of Opposer's mark REVZILLA or any other mark containing the term "Rev." However, a key issue in this case is the strength of the –zilla suffix. Accordingly, we focus our analysis on the –zilla suffix because that is the common portion of the parties' marks.

“**-zilla** is an English slang suffix, a back-formation derived from the English name of the Japanese movie monster Godzilla. ... It is also found often in popular culture

⁹¹ Kull Testimony Dep., p. 41 (57 TTABVUE 44).

⁹² Price Testimony Dep., p. 32 (53 TTABVUE 36).

to imply some sort of excess, denoting the monster-like qualities of Godzilla.”⁹³ It is a suffix “used to make a word more intense.”⁹⁴

One author defined the “zilla” suffix as follows:

-zilla (ZIHL-uh), suffix

When tacked to the end of a noun, the suffix “zilla” transforms its root to mean something overbearing, over the top, and unrelenting. It is someone whose behavior has intensified, whose actions have been taken to extremes. As such, “zilla” can be added to almost any noun to convey this meaning.⁹⁵

The definition is corroborated by other authors. For example,

The suffix *-zilla* is another one of those morphemes that falls out of reparsing an existing word. The meaning seems to be “monster.” So *Hogzilla* is a monster hog. ...

* * *

The suffix *-zilla* is handy, because as far as I know, we don’t have a particle in English that we can add to a word to create a “big version of.” We have diminutives - - *dog*, *doggy* -- but no, uh what? Increasative. (Actually, it’s called an augmentative). In Spanish, there are a handful of augmentatives, such as *-on* and *-ota*, to name two. *Una caja* is a box; *un cajón* is a big box, etc. ... Of course, *-zilla*

⁹³ Wikipedia (69 TTABVUE 26). *Godzilla* is a Japanese horror film released in 1954. Godzilla, a giant monster spawned from the waste of nuclear tests, rises from the ocean to threaten Japan. Godzilla, *Encyclopaedia Britannica* (2016). The Board may take judicial notice of information from encyclopedias. *B.V.D. Licensing Corp. v. Body Action Design Inc.*, 846 F.2d 727, 6 USPQ2d 1719, 1721 (Fed. Cir. 1988) (“dictionaries and encyclopedias may be consulted”); *Productos Lacteos Tocumbo S.A. de C.V. v. Paleteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 n.61 (TTAB 2011); *In re Broyhill Furniture Indus. Inc.*, 60 USPQ2d 1511, 1514 n.4 (TTAB 2001) (dictionary entries and other standard reference works). See also Urban Dictionary (urbandictionary.com) (69 TTABVUE 31 (“Suffix added to any noun to describe the biggest/baddest/meanest/nastiest of its type.”); Wiktionary (wiktionary.org) (69 TTABVUE 37 (“Forms nouns and names suggesting monster or a thing of extremely large size or great destructiveness, or other characteristics of the fictional Godzilla.”)).

⁹⁴ *Urban Dictionary* (urbandictionary.com) (69 TTABVUE 33).

⁹⁵ Nicole Cammorata, *Words You Should Know: 2013* (69 TTABVUE 44).

isn't just "big version of" its "unprecedentedly enormous version of": the monster version.⁹⁶

When a trademark owner adopts a mark with a –zilla suffix, the trademark owner is attempting to engender the commercial impression of something big, intense, or special. David Price, Opposer's Chief Financial Officer, testified that "zilla itself conveys a large amount or big."⁹⁷ Likewise, Thomas D'Azevedo, Applicant's Chairman, testified that he adopted the –zilla suffix in the mark PARTZILLA to create a mark that is very powerful because –zilla means "powerful, large, voluminous, big."⁹⁸ In this regard, Applicant's website includes the phrase "The largest selection of parts in stock."⁹⁹

That the –zilla suffix engenders the commercial impression of something large, intense, or special is evidenced by other registrations incorporating the –zilla suffix. As noted above, Applicant owns Registration No. 4470663 for the mark PARTZILLA (standard characters), Registration No. 488288 for the mark PZ PARTZILLA and design, and Registration No. 5026081 for the mark PZ PARTZILLA and design

⁹⁶ Evolving English II (evolvingenglish.blogspot.com) (69 TTABVUE 66). The word "morpheme" is defined as "any of the minimal grammatical units of a language, each constituting a word or meaningful part of a word, that cannot be divided into smaller independent grammatical parts." Dictionary.com based on the *Random House Dictionary* (2017). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

⁹⁷ Price Testimony Dep., p. 47 (53 TTABVUE 51).

⁹⁸ D'Azevedo Discovery Dep., pp. 43, 45, 50, 133-136 (41 TTABVUE 52, 54, 59, 142-145).

⁹⁹ D'Azevedo Discovery Dep., pp. 54-55 and Exhibit 2 (41 TTABVUE 63-64 and 212).

registered for, *inter alia*, the same services at issue in this proceeding. Opposer has not challenged these registrations.

In addition, Applicant introduced copies of third-party registrations and websites incorporating the –zilla suffix. The examples set forth below show the –zilla suffix in the field of automobiles, motorcycles and other land vehicles:

- Registration No. 3119435 for the mark SHOPZILLA for, *inter alia*, “promoting the sale of goods and services of others by providing hypertext links to the websites of others, and through on-line ordering and cataloguing of those goods and services.”¹⁰⁰ Applicant introduced excerpts from the SHOPZILLA website (shopzilla.com) showing that the mark is in use,¹⁰¹ including advertising the sale of motorcycle accessories manufactured by others, the same services rendered by the parties.¹⁰²

- Registration No. 3626246 for the mark SYNZILLA for, *inter alia*, on-line retail store services in the field of automotive fluids, oils, greases, and additives, motorcycle polish and wax.¹⁰³ Applicant introduced an excerpt from registrant’s FACEBOOK page showing the use of the mark in connection with advertising the sale of motorcycle oil.¹⁰⁴

¹⁰⁰ 69 TTABVUE 70.

¹⁰¹ 69 TTABVUE 80

¹⁰² 69 TTABVUE 85.

¹⁰³ 69 TTABVUE 94.

¹⁰⁴ 69 TTABVUE 102. At the SYNZILLA.com website Synzilla.com LLC advertises itself as a “nationwide dealer of AMSOIL Synthetic Lubricants,” including motorcycle oils, offering “AMSOIL products at wholesale prices” providing a toll-free telephone number and a link to the AMSOIL online store. 69 TTABVUE 117.

- Registration No. 4999432 for the mark APEZILLA for “online auction services featuring powersport vehicles, cars, trucks, vans and other transportation related items.”¹⁰⁵ Applicant introduced excerpts from registrant’s website showing that the mark is in use.¹⁰⁶

- An excerpt from eBay featuring “AutoPartsZilla” specializing in discount auto parts, including motorcycle parts.¹⁰⁷

- Excerpts from the GODZILLA PARTS website (godzillaparts.com) advertising the online sale of automobile parts.¹⁰⁸

- Excerpts from the GODZILLA MOTORSPORT website (godzillamotorsport.com) advertising the online sale of automobile parts.¹⁰⁹

- An excerpt from the TRUCKZILLA website (truckzilla.com) showing the use of the mark in connection with a retail truck dealership.¹¹⁰

- An excerpt from the CARZILLA.com website advertising the online sale of automobiles.¹¹¹

- An excerpt from the TIREZILLA FACEBOOK page advertising the retail sale of tires.¹¹²

¹⁰⁵ 69 TTABVUE 133.

¹⁰⁶ 69 TTABVUE 136; *see also* 69 TTABVUE 143-160 displaying the mark used to identify the sale of powersport vehicles including motorcycles.

¹⁰⁷ 71 TTABVUE 167. *See also* the AutoPartsZilla FACEBOOK page (71 TTABVUE 234).

¹⁰⁸ 72 TTABVUE 56.

¹⁰⁹ 72 TTABVUE 64.

¹¹⁰ 70 TTABVUE 10.

¹¹¹ 71 TTABVUE 212.

¹¹² 71 TTABVUE 226.

- Registration No. 4891492 for the mark QUADZILLA for electronic components for engine and transmissions.¹¹³ Applicant introduced excerpts from registrant’s website to show that the mark is in use.¹¹⁴

- Registration No. 3638983 for the mark VANILLAZILLA for “aero-dynamic fairings for vehicles.”¹¹⁵ Applicant introduced excerpts from Amazon.com showing the use of registrant’s mark in connection with motorcycle fairings.¹¹⁶

- Registration No. 3638985 for the mark SPORTZILLA for “aero-dynamic fairings for vehicles.”¹¹⁷ Applicant introduced excerpts from registrant’s website showing the use of the mark in connection with motorcycle fairings.¹¹⁸

- Registration No. 4542856 for the mark CLAYZILLA for, inter alia, “preparations for cleaning, polishing, and restoring vehicle surfaces.”¹¹⁹ Applicant introduced an excerpt from a website showing the use of registrant’s mark.¹²⁰

- Registration No. 3675433 for the mark RACKZILLA for “steering gear mechanisms for land vehicles, namely, rack and pinion systems and inner and outer

¹¹³ 69 TTABVUE 171.

¹¹⁴ 69 TTABVUE 174.

¹¹⁵ 70 TTABVUE 33.

¹¹⁶ 70 TTABVUE 36.

¹¹⁷ 71 TTABVUE 37.

¹¹⁸ 71 TTABVUE 40. This third-party user also sells a RODZILLA motorcycle fairing. (71 TTABVUE 203).

¹¹⁹ 70 TTABVUE 69.

¹²⁰ 70 TTABVUE 72.

tie rods and mounting components therefor.”¹²¹ Applicant introduced an excerpt from a website showing the use of registrant’s mark.¹²²

- Registration No. 4691417 for the mark ZILLA WRAPS for “custom manufacture of vinyl wraps for use on vehicles and watercrafts.”¹²³ Applicant introduced an excerpt from registrant’s website showing the mark used in connection with motorcycle wraps.¹²⁴

- Registration No. 4651767 for the mark STANGZILLA for “automobile chassis.”¹²⁵ Applicant introduced excerpts from Amazon.com showing the use of registrant’s mark.¹²⁶

- An excerpt from the GRANDZILLA website (grandzilla.com) showing use of the mark GRANDZILLA in connection with modifying or customizing production vehicles.¹²⁷

- An excerpt from the Maxxis website (maxxis.com) showing use of the marks MUDZILLA and ZILLA for ATV tires.¹²⁸

¹²¹ 70 TTABVUE 157.

¹²² 70 TTABVUE 163.

¹²³ 70 TTABVUE 199.

¹²⁴ 70 TTABVUE 210, 213.

¹²⁵ 70 TTABVUE 224.

¹²⁶ 71 TTABVUE 3.

¹²⁷ 71 TTABVUE 62.

¹²⁸ 71 TTABVUE 114 and 123.

- An excerpt from the MotoSport website (motosport.com) showing the use of the mark ZILLA for a motorcycle helmet.¹²⁹
- An excerpt for the D & D Exhaust website (danddexhaust.com) advertising the Harley-Davidson Boss Boarzilla header system.¹³⁰
- An excerpt from the Slide-Zilla.com website advertising the SLIDEZILLA truck bed slide to increase storage.¹³¹
- Excerpts from the KARZILLA.com website advertising classic car restoration services.¹³²
- Excerpts from the GODZILLA Motor Machine Fabrication FACEBOOK page showing the company's work in connection with motorcycles.¹³³
- Excerpts from the SPEEDZILLA.com message board directed to motorcyclists.¹³⁴
- Excerpt from the Zilla Motorsports website (zillamotorsports.com), an online automobile enthusiast website.¹³⁵
- Excerpts from the AutoZilla website (autozilla.org), an online automobile enthusiast website.¹³⁶

¹²⁹ 71 TTABVUE 142.

¹³⁰ 71 TTABVUE 181. *See also* WelcomeBikers.com (72 TTABVUE 93).

¹³¹ 71 TTABVUE 197.

¹³² 71 TTABVUE 250.

¹³³ 72 TTABVUE 36.

¹³⁴ 72 TTABVUE 134.

¹³⁵ 72 TTABVUE 146.

¹³⁶ 72 TTABVUE 152.

We use the third-party registrations in the manner of a dictionary to show how a mark or, in this case, a portion of a mark is generally used. “Such third party registrations show the sense in which the word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services.” *Institut National Des Appellations D’Origine v. Vintners International Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) (third-party registrations found to be “persuasive evidence”); *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 153 (CCPA 1978) (“we find no error in the citation of nine third-party registrations ‘primarily to show the meaning of * * * [‘zing’] in the same way that dictionaries are used.”); *In re Toshiba Medical Systems Corp.*, 91 USPQ2d 1266, 1270 (TTAB 2009); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006) (“[T]hird-party registrations can be used in the manner of a dictionary definition to illustrate how a term is perceived in the trade or industry”). The registrations show that marks with a –zilla suffix have been adopted and registered at least 10 times in connection with identical or closely related services, not including Applicant’s three PARTZILLA registrations, presumably to mean something large, intense, or special (*e.g.*, SHOPZILLA for incredible shopping, SYNZILLA for amazingly high quality synthetic oil, AutoPartsZilla for a large selection of automotive parts, *etc.*).

Likewise, we use the third-party websites for the purpose of determining how others use the –zilla suffix. The third-party websites are probative that the websites exist, that the public may have been exposed to them, and that the public may be

aware of the advertisements contained therein. *Rocket Trademarks Pty Ltd., v. Phard S.p.A.*, 98 USPQ 2d 1066, 1072 (TTAB 2011). On the other hand, the third-party website evidence is not accompanied by any evidence of the extent of the use and promotion of the third-party marks or consumer awareness of them. Generally, without such evidence, we cannot assess whether the use has been so widespread as to have any impact on consumer perceptions. See *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1729 (TTAB 2007). However, the number of third-party users of the – zilla suffix is substantial, even allowing for the possibility that some of the entities are out of business, are small enterprises, or have reached only a few people. There is significant evidence of third-party use demonstrating that the –zilla suffix often is added to a noun to create a trademark that engenders the commercial impression of something large, intense or special. See *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1565 n.16 (TTAB 1996).

Opposer argues that the above-noted evidence of third-party use is irrelevant because none of the third-party use is in connection with online motorsports sales.¹³⁷ Despite Opposer's contention, SHOPZILLA, SYNZILLA, APEZILLA, and AutoPartsZilla are used in connection with the on-line sale of motorcycles and other motor sports and accessories. Although less probative, GODZILLA PARTS, GODZILLA MOTORSPORTS, TRUCKZILLA, CARZILLA, and TIREZILLA are used

¹³⁷ Opposer's Brief, p. 25, 39 (78 TTABVUE 32, 46); Opposer's Reply Brief, pp. 8-13 (95 TTABVUE 10-15).

in connection with the online sales of vehicles and vehicle parts.¹³⁸ Likewise, the other third-party registrations and websites display marks with a –zilla suffix used in connection with vehicle-related goods and services. Even considering the third-party registration and website evidence in a light most favorable to Opposer, we find that the third-party registrations and websites prove that the –zilla suffix tacked to the end of a noun means and engenders the commercial impression of something large, intense or special.

This finding of fact is consistent with what Steve Baird wrote in his DuetsBlog (duetsblog.com) about trademark suffixes, “What Does the Suffix Say?” (October 15th, 2013).¹³⁹

On the other hand, notwithstanding the early and likely famous GODZILLA brand dating back to the 1950s, nowadays when it comes to brands incorporating ZILLA as a suffix, even when inspired by the Godzilla name and/or character, the suffix appears to not say “exclusivity,” but instead it simply says, implies, or suggests some sort of excess in what precedes it.

* * *

A recent trip to Iowa City revealed that the GOLFZILLA brand appears to be going strong. In addition, federally-registered trademarks such as PRETZILLA for pretzels, BACONZILLA for hamburgers, HOGZILLA for barbecue sauce, SHRIMPZILLA for sandwiches, NOMZILLA for restaurant services, GLUZILLA for adhesives, PLUMBZILLA for online retail stores featuring plumbing supplies and fixtures, GUARDZILLA for athletic mouth guards, and BITZILLA for power operated drill bits, all

¹³⁸ Again, we note that Applicant has registered and uses PARTZILLA and design for the services at issue in this proceeding and presumably will continue to do so regardless of our decision.

¹³⁹ 69 TTABVUE 61.

appear to peacefully coexist with the GODZILLA brand and mark, opening the door to yet more who want their own piece of the ZILLA suffix action.¹⁴⁰

There is no third-party use of REVZILLA. However, the strongly suggestive nature of the –zilla suffix (*i.e.*, referring to large, intense, or special characteristics) means that Opposer’s mark REVZILLA cannot bar the registration of every mark ending in the –zilla suffix used in connection with the online sales of motorcycle parts and accessories (*e.g.*, PARTZILLA and design, SHOPZILLA, SYNZILLA, AutoPartsZilla, *etc.*). Marks incorporating the –zilla suffix, including Opposer’s mark REVZILLA, will bar the registration of marks “as to which the resemblance to [Opposer’s marks] is striking enough to cause one seeing it to assume that there is some connection, association or sponsorship between the two.” *Anthony’s Pizza & Pasta Int’l Inc. v. Anthony’s Pizza Holding Co.*, 95 USPQ2d 1271, 1278 (TTAB 2009), *aff’d*, 415 Fed. Appx. 222 (Fed. Cir. 2010) (quoting *Pizza Inn, Inc. v. Russo*, 221 USPQ 281, 283 (TTAB 1983)); *see also In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985) (“the public can be said to rely more on the non-descriptive portion of each mark.”).

D. The conditions under which and buyers to whom sales are made, *i.e.*, “impulse” vs. careful, sophisticated purchasing.

This *du Pont* factor requires us to consider the degree of care exercised by a reasonably prudent purchaser in selecting online retail sales services in the field of motorcycle apparel and accessories. *See 7-Eleven, Inc. v. Wechsler*, 83 USPQ2d 1715,

¹⁴⁰ 69 TTABVue 62-63.

1724-25 (TTAB 2007) (“As with the standard of the reasonable person in negligence cases, the discernment exercised by a reasonably prudent purchaser varies with the circumstances.”) (*quoting* Restatement Third, Unfair Competition § 20, comment h (1995) (“The reasonably prudent purchaser often invoked in determining likelihood of confusion is the ordinary purchaser of the goods or services buying with ordinary care.”)); *West Point-Pepperell, Inc. v. Borlan Indus. Inc.*, 191 USPQ 53, 56 (TTAB 1976) (the test is whether use of the marks “would be likely to cause confusion, mistake or deception of average reasonably prudent purchasers.”).

As set forth in the descriptions of services, both parties render online sales of motorcycle apparel and accessories. The problem with the evidentiary record and arguments in the briefs is that the parties focus on the degree of care that consumers exercise in purchasing the motorcycle apparel and accessories; they did not focus on the degree of care that consumers use in selecting online sales providers. For example, Opposer contends that Applicant admitted that consumers purchase products on impulse.

Applicant’s owner describes relevant consumers as “impulse” buyers. 41 TTABVUE 120:1-17 (“Yes, I would say that the aftermarket is impulse buy.” “They may go there for one thing and wind up buying other things on an impulse.”).¹⁴¹

¹⁴¹ Opposer’s Brief, p. 20 (78 TTABVUE 27); *see also* Opposer’s Brief, p. 36 (78 TTABVUE 43) (“Applicant has admitted that relevant purchasers are ‘impulse’ buyers.”).

However, in this case, we are concerned about the care consumers use to select their online retailer, not the degree of care they use to select the products they buy from those retailers.

As discussed below, consumers distinguish between original equipment manufacturer and aftermarket products and select their online retailer accordingly.¹⁴² Opposer specializes in “aftermarket” products that are manufactured by one other than the manufacturer of the original equipment as a substitute or replacement for the original equipment manufacturer’s part. The aftermarket product may not meet the manufacturer’s specifications for those parts.¹⁴³ Applicant on the other hand specializes in OEM (“original equipment manufacturer”) products made by the original manufacturer of the product.¹⁴⁴

OEM products typically are more expensive than aftermarket products.¹⁴⁵ Consumers who buy aftermarket products generally are more interested in price, while consumers who purchase OEM parts are more concerned about quality,

¹⁴² We do not include in our analysis consumers who select their online retailer solely on the price of the product they need because those consumers do not care about the source of the services; they care only about the price of the products.

¹⁴³ D’Azevedo Testimony Dep., p. 37-38, 51-52 (80 TTABVUE 42-43, 56-57); Polo Testimony Dep., p. 10 (82 TTABVUE 43); Price Testimony Dep., p. 23 (53 TTABVUE 27); Demidow Testimony Dep., pp. 16-18 (62 TTABVUE 19-21); Depperschmidt Testimony Dep., pp. 5, 10 (63 TTABVUE 8, 13).

¹⁴⁴ D’Azevedo Testimony Dep., p. 37, 51 (80 TTABVUE 42, 56); Polo Testimony Dep., p. 10 (82 TTABVUE 43); D’Azevedo Discovery Dep., p. 72 (41 TTABVUE 81); Price Testimony Dep., p. 23 (53 TTABVUE 27); Demidow Testimony Dep., pp. 16-18 (62 TTABVUE 19-21). Depperschmidt Testimony Dep., p. 5, 7, 10 (63 TTABVUE 8, 10, 13). However, Opposer also sells OEM parts, including “OEM apparel made by Triumph.” Price Testimony Dep., pp. 27-28 (53 TTABVUE 31-32).

¹⁴⁵ D’Azevedo Testimony Dep., p. 51 (80 TTABVUE 56); Price Testimony Dep., p. 25-26 (53 TTABVUE 29-30).

including the manufacturer's specifications. Consumers are aware of the difference between OEM and aftermarket parts and accessories.¹⁴⁶

The OEM buyer is one that's typically looking for a part or a component that meets the manufacturer's specs, that when they purchase it they know it's going to fit the unit that they're buying it for. And they, in general, know that it will last longer than a non-OEM or aftermarket part.

The aftermarket buyer is typically somebody that's looking for a cheaper part and is not as concerned, you know, about the performance.¹⁴⁷

Purchasers of OEM products are aware of the source of the OEM products.¹⁴⁸

[Purchasers of OEM products] are very particular about their replacement parts and they want to make sure they've got the exact match. They spend the time to go through the diagrams. Diagrams meaning the exploded view of the components of the unit.¹⁴⁹

* * *

On the OE side of the business, the customers that come there are coming there for a specific reason. They're looking for hard parts; they are looking for a site that - - where they can buy all of their parts to fix their problem.

And everything on the aftermarket side is pretty much an impulse buy. Our customers are not, per se, impulse buyers.¹⁵⁰

¹⁴⁶ D'Azevedo Testimony Dep., p. 55-56 (80 TTABVUE 60-61); Buzzell Testimony Dep., p. 26 (64 TTABVUE 29) ("Q: When you are looking at a product on a website, are you generally aware of whether the product is an OEM part or an aftermarket part? A. Yeah, yeah.").

¹⁴⁷ D'Azevedo Testimony Dep., p. 56 (80 TTABVUE 61).

¹⁴⁸ D'Azevedo Testimony Dep., p. 53 (80 TTABVUE 58). Wayne Buzzell testified that he thought PARTZILLA sells OEM parts and REVZILLA sells aftermarket parts. Buzzell Testimony Dep., p. 13, 19 (64 TTABVUE 16, 22).

¹⁴⁹ D'Azevedo Testimony Dep., p. 54 (80 TTABVUE 59). There are no diagrams or schematics for aftermarket products. *Id.*

¹⁵⁰ D'Azevedo Discovery Dep., p. 71-72 (41 TTABVUE 80-81).

* * *

Somebody that comes to [Applicant's website] generally knows what they want before they get to my site because they've got a repair issue, and they come there for specific parts. And aftermarket, that includes the apparel and accessories, it generally works just the opposite. They may go there for one thing and wind up buying other things on impulse.¹⁵¹

David Price, Opposer's Chief Financial Officer, agrees that consumers do research to determine whether to purchase an OEM or aftermarket product.

Q. And when in the purchasing process could you make the decision [to purchase an OEM or aftermarket part]?

A. Usually, when you're doing the research. When you've decided that you need to [buy] something and then you've decided to research it, you would research which is better. You would look at customer views and decide which one you would prefer.

Q. During the decision making process, though, you could switch between one or the other?

A. Generally, speaking, you usually go from OEM to aftermarket. You sometimes may go from aftermarket to OEM, if for some reason you aren't happy with the aftermarket products that are made to replace the OEM.¹⁵²

Testimony by consumers establishes that they research the products they need, determine whether they want an OEM or aftermarket product, and then select their online retailers.

Q. And how do you typically find the retailer that you ultimately purchase from?

¹⁵¹ D'Azevedo Discovery Dep., pp. 111-112 (41 TTABVUE 120-121).

¹⁵² Price Testimony Dep. p. 27 (53 TTABVUE 31).

- A. Usually, I use a search engine to type in what I am looking for. And usually it will display the list of manufacturers. The top three usually show up.
- Q. So you will search for the part that you are looking for?
- A. Correct. Or if I know a website usually carries whatever part, I will usually try them out first. If I don't find it, then I will search locally. Or however else I can find it.¹⁵³

Rod Depperschmidt “quite frequently” checks particular online motorcycle forums “for people that may have had with different online dealers, and at least then I’ve got a head start on finding a good vendor.”¹⁵⁴ That is how Mr. Depperschmidt found Applicant.¹⁵⁵ Also, Mr. Depperschmidt selects online retailers based on whether they specialize in OEM or aftermarket parts.¹⁵⁶

The record establishes the way consumers select their online retailers for motorcycle apparel and accessories. They tend to be knowledgeable consumers who enter the marketplace in search of specific products for a specific purpose; their search for OEM or aftermarket products leads them to different retailers. The selection of the retailer involves care, and only after reaching and “surfing” the website of an online retailer might the consumer make an impulse purchase. Furthermore, consumers of online retail sales of motorcycle apparel and accessories are enthusiasts who have a heightened interest and greater involvement in

¹⁵³ Demidow Testimony Dep., pp. 18-19 (62 TTABVUE 21-22).

¹⁵⁴ Depperschmidt Testimony Dep., pp. 8-9 (63 TTABVUE 11-12).

¹⁵⁵ Depperschmidt Testimony Dep., p. 14 (63 TTABVUE 17).

¹⁵⁶ Depperschmidt Testimony Dep., p. 11 (63 TTABVUE 14).

purchasing care. Under these conditions, purchasers will be aware of the source of the online retail sales services. We find that the degree of consumer care is a factor that weighs against finding a likelihood of confusion.

E. The similarity or dissimilarity of the marks.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *du Pont*, 177 USPQ at 567. In comparing the marks, we are mindful that “[t]he proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quoting *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007); see also *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). As indicated above, the average customer is a discriminating consumer.

Applicant is seeking to register PARTZILLA and Opposer has registered REVZILLA. The –zilla suffix is the common element of the marks. As discussed above, the –zilla suffix is a suggestive, if not descriptive, term that is added to a noun to engender the commercial impression of something large, intense or special. Where the common portion of the marks is weak, consumers may distinguish the marks based on otherwise minor differences in the remaining portions of the mark. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

A merely descriptive or highly suggestive term falls within the general category of weak marks, and the scope of protection extended to these marks has been so limited as to permit the subsequent use and/or registration of a substantially identical notation for different goods or of a composite mark comprising this term plus other matter, whether such matter be equally suggestive or even descriptive, for substantially similar goods. Thus the addition of other matter to a merely descriptive or highly suggestive designation may result in the creation of a mark which is distinguishably different therefrom so as to avoid confusion in trade.

Land-O-Nod Co. v. Paulison, 220 USPQ 61, 66 (TTAB 1983); *see also Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694 (CCPA 1976) (“It is obvious that the suffixes of the parties’ marks are highly suggestive. Because marks, including any suggestive portions thereof, must be considered in their entirety, the mere presence of a common, highly suggestive portion is usually insufficient to support a finding of likelihood of confusion.”); *Sure-Fit Prods. Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 117 USPQ 295, 297 (CCPA 1958) (“Where a party chooses a trademark which is inherently weak, he will not enjoy the wide latitude of protection afforded the owners of strong trademarks. Where a party uses a weak mark, his competitors

may come closer to his mark than would be the case with a strong mark without violating his rights. The essence of all we have said is that in the former case there is not the possibility of confusion that exists in the latter case.”); *In re Hartz Hotel Serv. Inc.*, 102 USPQ2d 1150, 1154 (TTAB 2012) (“Unlike a situation involving an arbitrary or fanciful mark, the addition of other matter to a laudatory or suggestive word may be enough to distinguish it from another mark.”).

The other portions of the two marks, REV and PART, are not similar. In view of the highly suggestive or descriptive nature of the –zilla suffix, we find that Applicant’s addition of the term “Part” to the –zilla suffix is sufficient to render the resulting mark PARTZILLA, considered in its entirety, distinguishable from Opposer’s mark REVZILLA.

F. The nature and extent of actual confusion.

Opposer presented the testimony and evidence listed below as purported instances of actual confusion. In analyzing these purported instances of actual confusion, we note that where Opposer has adopted a mark with a weak component such as the – zilla suffix, its “competitors may come closer to [its] mark than would be the case with a strong mark without violating [its] rights.” *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992) (quoting *Sure-Fit Products Company v. Saltzson Drapery Company*, 117 USPQ at 296 (“If any confusion results, that is a risk the plaintiff accepted when it decided to identify the product with a mark that uses a well-known descriptive phrase.”)); *see also KP Permanent v. Lasting Impression*, 543 U.S. 111, 72 USPQ 2d 1833, 1838 (2004);

Milwaukee Nut Co. v. Brewster Food Service, 277 F.2d 190, 125 USPQ 399, 401 (CCPA 1960) (“appellee, in adopting a word which is highly suggestive to the trade in which it was catering, ran the risk of having similar merchandise sold by others for the same purpose to the same trade offered to the witness when he requested ‘BEER NUTS.’”); *Bass Pro Trademarks, LLC v. Sportsman's Warehouse, Inc.*, 89 USPQ2d 1844, 1857 (TTAB 2008) (“when a business adopts a mark, or a portion of a mark incorporating a descriptive term, it assumes the risk that competitors may also use that descriptive term.”).

Also, in considering the opportunity for actual confusion and its weight in the analysis, we keep in mind that Opposer did not oppose, nor seek to cancel, Applicant’s other registered PARTZILLA and design marks for, *inter alia*, the same services at issue in this proceeding. These marks have coexisted with Opposer’s mark, and regardless of the outcome of this proceeding, Applicant’s other PARTZILLA registrations will continue to exist and presumably Applicant will continue to use those marks. *See also* the market interface analysis *infra*.

1. Kevin J. Graham

Kevin Graham is a motorcycle enthusiast familiar with both parties.¹⁵⁷ Mr. Graham received a letter from Martin Polo, on behalf of Applicant, dated September 11, 2013, advising Mr. Graham that “an incident on our websites (boats.net and partzilla.com) may have exposed your personal information to unauthorized

¹⁵⁷ Graham Testimony Dep., p. 5 (65 TTABVue 8).

persons.”¹⁵⁸ Mr. Graham was upset and posted the following messages on the Kawasaki Vulcan 750 (a motorcycle) website (VN750.com) on September 20, 2013:

I got a letter in the mail yesterday that my credit card information had been stolen from Revzilla.com and some other website (motorcycle related). JUST FYI. Now I need to get a new card. May have to start using a pre-paid card online.¹⁵⁹

* * *

I asked revzilla on their facebook page if they will be paying for life lock or something and why my card number was even stored on their website. They keep deleting my posts.¹⁶⁰

In response to those communications, Opposer sent Mr. Graham emails dated September 20, 2013 and September 25, 2013, following-up on Mr. Graham’s complaint regarding his credit card information.¹⁶¹ Mr. Graham sent the September 11, 2013 letter to Opposer and in an email dated September 26, 2013, Opposer explained to Mr. Graham that the September 11, 2013 letter had been “sent by Outdoor Network, LLC, who own[s] Partzilla.com.”¹⁶²

¹⁵⁸ Graham Testimony Dep., Exhibit 5 (65 TTABVUE 65).

¹⁵⁹ Graham Testimony Dep., Exhibit 1 (65 TTABVUE 53).

¹⁶⁰ Graham Testimony Dep., Exhibit 1 (65 TTABVUE 54).

¹⁶¹ Graham Testimony Dep., Exhibit 3 (65 TTABVUE 54-55) and Exhibit 4 (65 TTABVUE 60).

¹⁶² Graham Testimony Dep., Exhibit 4 (65 TTABVUE 60 at 62).

As to why Mr. Graham thought the letter reporting the credit card data breach came from Opposer rather than Applicant, Mr. Graham testified that he might have misread the letter because he focused on the –zilla suffix.¹⁶³

Q. Is it possible that you just confused -- you just misread this letter at the time it was received - -

A. Sure.

Q. - - and that you weren't - - when you were making those postings, you weren't necessarily thinking about Partzilla at all?

A. No. I was thinking about a "Zilla."

Q. About RevZilla?

A. About a company with "Zilla" in the name. Put it that way. I didn't distinguish between the two, because all's my brain was reading was "Zilla." It's like iPad, iPhone, that kind of thing.¹⁶⁴

* * *

Q. Do you have any personal belief, based on your experience, of what might have caused the confusion between RevZilla and Partzilla, in your mind?

A. Oh, just the "Zilla" part of the name.¹⁶⁵

On the other hand, Mr. Graham never confused the marks in a commercial setting.

Q. Did you ever make a purchase from Partzilla, thinking that you making a purchase from RevZilla?

¹⁶³ We question how carefully Mr. Graham read the letter as he complained that his "credit card information had been stolen from Revzilla and some other website (motorcycle related)." We fail to see how the boats.net website can be characterized as "motorcycle related."

¹⁶⁴ Graham Testimony Dep., p. 35 (65 TTABVUE 38).

¹⁶⁵ Graham Testimony Dep., p. 25 (65 TTABVUE 28).

- A. I would say no, because I was looking at a web page that had “Partzilla” written on the top of it.
- Q. Right. And conversely, did you ever make a purchase from RevZilla, thinking that you were making a purchase from Partzilla?
- A. Probably not. But I probably didn’t really care. I’m making a purchase from a parts company, you know. I’m not trying to sort of equate these two entities, in my mind, while I’m making this purchase. It’s just a purchase from a company named Partzilla with a “Zilla” in it and a RevZilla with a “Zilla” in it.
- Q. Right. And so the most important think when you’re making a purchase online is the availability of a product?
- A. Well, yeah. It’s the availability of the product. I mean, it’s also the website that I’m going to. I’m not just going to buy from a dot-ru site from Russia and give them my credit card information.¹⁶⁶

2. Wayne Buzzell

Wayne Buzzell is a motorcycle enthusiast familiar with both parties.¹⁶⁷ Mr. Buzzell testified that he thought “maybe the Partzilla was more like an OEM-type manufacturer to Part - - or RevZilla”¹⁶⁸ because “the two names being similar, I thought maybe one was aftermarket parts and the other one was OEM-type parts.”¹⁶⁹

- Q. And what specifically about the names “RevZilla” and “Partzilla” was it that lead you to your belief that there may be possibly an affiliation?
- A. The zilla at the end. I mean, it’s not a common name that you would really think of, you know ... When

¹⁶⁶ Graham Testimony Dep., pp. 39 (65 TTABVUE 42-43).

¹⁶⁷ Buzzell Testimony Dep., pp. 6-10 (64 TTABVUE 9-13).

¹⁶⁸ Buzzell Testimony Dep., p. 10 (64 TTABVUE 13).

¹⁶⁹ Buzzell Testimony Dep., pp. 10-11 (64 TTABVUE 13-14).

you see zilla at the end of two different names selling the [same] products, it kind of makes you wonder if they're both the same company.¹⁷⁰

However, Mr. Buzzell never confused the marks in a commercial setting by mistakenly ordering products from one of the parties thinking it was ordering products from the other party because of the similarity of the marks.

Q. Have you ever ordered from RevZilla thinking you were ordering from Partzilla or vice versa?

A. Nope.¹⁷¹

3. Rod Depperschmidt

Rod Depperschmidt is a motorcycle enthusiast familiar with both parties.¹⁷² During a telephone call with one of Opposer's customer representatives, Mr. Depperschmidt inquired whether REVZILLA and PARTZILLA were affiliated.

Q. Do you remember anything about why you called in?

A. I was calling in reference to some of the parts that I had ordered from RevZilla, and in the course of the conversation I asked about Partzilla because of the - I guess the similarity in names, that it just made me wonder. And it was explained to me that they were not affiliated, and I let it drop at that. I was just curious because of the similarity in names.¹⁷³

Mr. Depperschmidt never confused the source of the online sales services by mistakenly purchasing products from the wrong party.

¹⁷⁰ Buzzell Testimony Dep., p. 14 (64 TTABVUE 17).

¹⁷¹ Buzzell Testimony Dep., p. 21 (64 TTABVUE 24).

¹⁷² Depperschmidt Testimony Dep., pp. 4-7 (63 TTABVUE 7-10).

¹⁷³ Depperschmidt Testimony Dep., pp. 7-8 (63 TTABVUE 10-11).

Q. Have you ever mistakenly called RevZilla to ask about something you ordered from Partzilla?

A. No.

Q. Have you ever mistakenly called Partzilla to ask about something you had ordered from RevZilla?

A. No.

Q. Have you ever ordered from RevZilla thinking you were ordering from Partzilla?

A. No, I have not.

Q. Why did you think the companies might have been related?

A. Because of the Zilla in the name, and they both deal with motorcycle parts in one sense of another.¹⁷⁴

An inquiry regarding whether there is a relationship between the parties, as we have here, is not evidence of confusion. *See Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1479 (TTAB 2014) (inquiry is not evidence of confusion because the inquiry indicates that the prospective customer had a reason to suspect that there were two different companies); *Marshall Field & Co. v. Mrs. Field's Cookies*, 25 USPQ2d at 1334 (inquiries indicate that the declarants were aware that there may be two different entities); *Elec. Water Conditioners, Inc. v. Turbomag Corp.*, 221 USPQ 162, 164 (TTAB 1984) ("That questions have been raised as the relationship between firms is not evidence of actual confusion of their trademarks."); *Toys "R" Us, Inc. v. Lamps R Us*, 219 USPQ 340, 346 (TTAB 1983)

¹⁷⁴ Depperschmidt Testimony Dep., pp. 15-16 (63 TTABVUE 18-19).

(“The fact that questions have been raised as the possible relationship between firms is not by itself evidence of actual confusion of their marks.”).

4. Jordan Demidow

Jordan Demidow is a motorcycle enthusiast who is familiar with both parties.¹⁷⁵ Mr. Demidow testified that in a September 2015 telephone conference with one of Opposer’s customer service representatives, Mr. Demidow told Opposer’s service representative that he previously had ordered from REVZILLA, but Opposer’s service representative could not find any record of Mr. Demidow’s order.¹⁷⁶ That is when Mr. Demidow realized that he must have placed the previous order through PARTZILLA.¹⁷⁷

A. When he said my account didn’t show up, that’s when I said that I had ordered some OEM parts. It was probably four months before that, for a previous motorcycle. He said, we don’t sell OEM parts. I told him, it was PartZilla, I guess. I had asked him, are you guys affiliated? Are you the same company? He said, no.¹⁷⁸

Q. So you asked if there was a possibility of [sic] they were affiliated?

A. Yes.

Q. But you weren’t sure, at that time?

A. Correct.

¹⁷⁵ Demidow Testimony Dep., pp. 6-8 (62 TTABVUE 9-11).

¹⁷⁶ Demidow Testimony Dep., pp. 8-10 (62 TTABVUE 11-13).

¹⁷⁷ Demidow Testimony Dep., p. 10 (62 TTABVUE 13).

¹⁷⁸ Demidow Testimony Dep., p. 14 (62 TTABVUE 17).

Q. And at the time you completed the purchase, did you understand that RevZilla and PartZilla were two different companies?

A. Yes. He made it clear that they were not the same company.¹⁷⁹

Mr. Demidow inquired about a potential affiliation between the parties because they share the –zilla suffix.

Q. And do you know what caused you to think that there might be an association between RevZilla and PartZilla?

A. They both have Zilla in the name.¹⁸⁰

However, as noted above, an inquiry regarding whether there is a relationship between the parties, as we have here, is not evidence of confusion because the Mr. Demidow may have suspected that they were different entities despite sharing the – zilla suffix. *See Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d at 1479; *Marshall Field & Co. v. Mrs. Field's Cookies*, 25 USPQ2d at 1334; *Elec. Water Conditioners, Inc. v. Turbomag Corp.*, 221 USPQ at 164; *Toys "R" Us, Inc. v. Lamps R Us*, 219 USPQ at 346.

5. Business records introduced by Opposer.

Through the testimony deposition of Patrick Roscoe, Opposer's Director of Customer Experience, and David Price, Opposer's Chief Financial Officer, and Matthew Kull, Opposer's Chief Operating Officer, Opposer introduced documents

¹⁷⁹ Demidow Testimony Dep., pp. 14 -15 (62 TTABVUE 17-18).

¹⁸⁰ Demidow Testimony Dep., p. 11 (62 TTABVUE 14).

purporting to show instances of actual confusion. Applicant objected to the documents and accompanying testimony on the ground that the documents are hearsay.¹⁸¹

The documents at issue fall within the “Records of a Regularly Conducted Activity” exception to the hearsay rule discussed above. Mr. Roscoe testified that “[w]e store all customer service interactions, just normal operating procedure, and we attach those interactions to a customer account or a customer record within our CRM [‘customer relationship management’].”¹⁸²

[W]e use our customer interactions, ticketing system, tracks, and then we have those records stored for all different investigative purposes to basically solve any customer issues that come through. We look back quite often on, you know, records or chat records to make sure we provided the best experience through QC. We confirm customer’s accounts, customer records, things like that through interactions.¹⁸³

* * *

Any customer issue that gets bubbled up through any customer channel needs a response and needs to get handled to make sure we are providing the best experience that we can.¹⁸⁴

The documents comprise a record made at the time the information was transmitted by one of Opposer’s customers, made in the course of a regularly conducted activity, and making and retaining the documents were a regular practice of Opposer.

¹⁸¹ Roscoe Testimony Dep., pp. 27-28 (55 TTABVUE 30-31). Applicant renewed the objection in its Appendix A to its brief, Objections to Opposer’s Evidence, p. 9 (93 TTABVUE 67).

¹⁸² Roscoe Testimony Dep., p. 29, 32 (55 TTABVUE 32, 35).

¹⁸³ Roscoe Testimony Dep., pp. 25-26 (55 TTABVUE 28-29).

¹⁸⁴ Roscoe Testimony Dep., p 24 (55 TTABVUE 27).

Applicant's objection is overruled. Nevertheless, we consider only what the documents say on their face (*i.e.*, that the statements were made). We do not give any consideration to witness testimony or statements in the document by a person regarding the confusion of others. *See American Rice, Inc. v. H.I.T. Corp.*, 231 USPQ 793, 796 (TTAB 1986) (the opinion of opposer's agent as to the confusion of others does not prove that there was actual confusion). Moreover, in analyzing the documents, we will not speculate as to why the declarants made their statements. *See Toys "R" Us, Inc. v. Lamps R Us*, 219 USPQ at 346.

In the table below, we identify and discuss the purported instances of confusion proffered through the Roscoe deposition.¹⁸⁵

Exhibit No.	Document	Probative Value
2 ¹⁸⁶	Email exchange with a customer regarding how Paypal misapplied a charge to REVZILLA that should have gone to PARTZILLA.	This is essentially a bookkeeping mistake by a person that is not a customer or potential customer of either party. This is not evidence of actual confusion because, <i>inter alia</i> , there is no nexus to a customer.

¹⁸⁵ Roscoe Testimony Dep., Exhibits 9-11 refer to the Google survey discussed above.

¹⁸⁶ 55 TTABVue 149.

Exhibit No.	Document	Probative Value
3 ¹⁸⁷	<p>Customer chat transcript – customer and Opposer’s service representative could not complete a transaction without Opposer’s system automatically applying Opposer’s TZ cash rewards.</p> <p>The customer wrote: “I tried to pay something over the phone the other day to partzilla actually kept getting rejected over the phone I guess i’ll just use the zilla cash”¹⁸⁸</p>	This document does not show trademark confusion. It does not show that the customer thought that the services of the parties emanated from the same source because of the similarity of the marks. In essence, the customer is saying he or she had a problem completing a transaction with PARTZILLA also.
4 ¹⁸⁹	Customer profile in Opposer’s database.	No apparent relevance
5 ¹⁹⁰	Chat history, including an inquiry “Are you affiliated with Partzilla?” ¹⁹¹	An inquiry regarding whether there is a relationship between the parties is not evidence of confusion. <i>See Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC</i> , 110 USPQ2d at 1479; <i>Marshall Field & Co. v. Mrs. Field’s Cookies</i> , 25 USPQ2d at 1334; <i>Elec. Water Conditioners, Inc. v. Turbomag Corp.</i> , 221 USPQ at 164; <i>Toys “R” Us, Inc. v. Lamps R Us</i> , 219 USPQ at 346.

¹⁸⁷ 55 TTABVUE 151. Exhibit 3 is the same as Exhibit 18 (55 TTABVUE 200).

¹⁸⁸ 55 TTABVUE 154.

¹⁸⁹ 55 TTABVUE 156.

¹⁹⁰ 55 TTABVUE 159.

¹⁹¹ 55 TTABVUE 160.

Exhibit No.	Document	Probative Value
6 ¹⁹²	An internal communication between Opposer's employees reporting that an unidentified customer "thought he ordered OEM parts from us (Partzilla)."	This document shows that the customer was confused about where he bought a product and not that he thought that the services of the parties emanated from the same source because of the similarity of the marks.
7 ¹⁹³	An illegible screen shot of a customer information card from Opposer's database ¹⁹⁴	No apparent relevance.
8 ¹⁹⁵	Internal communication between Opposer's employees inquiring where to report "Partzilla mix ups." Customer reportedly "called looking for an exhaust and after the end of the conversation .. he said it was partzilla that had helped him not us with the exhaust."	This is ambiguous. We do not know why the customer called REVZILLA looking for an exhaust. However, the customer appears to know the difference between REVZILLA and PARTZILLA having expressed that PARTZILLA had previously assisted him.

¹⁹² 55 TTABVUE 162. Exhibit 6 is the same as Exhibit 16 (55 TTABVUE 184).

¹⁹³ 55 TTABVUE 163.

¹⁹⁴ Roscoe Testimony Dep., p. 36 (55 TTABVUE 39). It is the responsibility of the party making submissions to the Board via the electronic database to ensure that the testimony or evidence has, in fact, been properly made of record. *See Weider Publ'ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1350-51 (TTAB 2014); *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc. dba Watermark Cruises*, 107 USPQ2d 170, 1758 n.16 (TTAB 2013) ("the onus is on the party making the submissions to ensure that, at a minimum, all materials are clearly readable by the adverse party and the Board"); *Hard Rock Café Licensing Corp. v. Elsea*, 48 USPQ2d 1400, 1404 (TTAB 1998) ("It is reasonable to assume that it is opposer's responsibility to review the documents it submits as evidence to ensure that such submissions meet certain basic requirements, such as that they are legible and identified as to source and date.").

¹⁹⁵ 55 TTABVUE 166. Exhibit 8 is the same as Exhibit 15 (55 TTABVUE 182).

Exhibit No.	Document	Probative Value
12 ¹⁹⁶	An internal email referring to a statement from someone who asked “are you affiliated with Partzilla or are they just stealing your name.”	An inquiry regarding whether there is a relationship between the parties is not evidence of confusion. <i>See Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC</i> , 110 USPQ2d at 1479; <i>Marshall Field & Co. v. Mrs. Field’s Cookies</i> , 25 USPQ2d at 1334; <i>Elec. Water Conditioners, Inc. v. Turbomag Corp.</i> , 221 USPQ at 164; <i>Toys “R” Us, Inc. v. Lamps R Us</i> , 219 USPQ at 346.
13 ¹⁹⁷	A customer information card from Opposer’s database where Opposer’s service representative noted that customer said “oh snap, thought this was PartZilla.”	This is evidence that the customer mistakenly called Opposer rather than Applicant, not that the customer was confused as to the source.
14 ¹⁹⁸	A posting on Opposer’s FACEBOOK page stating “if these guys are associated with Partzilla stay away.” ¹⁹⁹	An inquiry regarding whether there is a relationship between the parties is not evidence of confusion. <i>See Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC</i> , 110 USPQ2d at 1479; <i>Marshall Field & Co. v. Mrs. Field’s Cookies</i> , 25 USPQ2d at 1334; <i>Elec. Water Conditioners, Inc. v. Turbomag Corp.</i> , 221 USPQ at 164; <i>Toys “R” Us, Inc. v. Lamps R Us</i> , 219 USPQ at 346.

¹⁹⁶ 55 TTABVUE 175.

¹⁹⁷ 55 TTABVUE 177.

¹⁹⁸ 55 TTABVUE 179.

¹⁹⁹ 55 TTABVUE 180.

Exhibit No.	Document	Probative Value
17 ²⁰⁰	Internal communication reporting a customer who was “Not sure if Partzilla and Revzilla are related” and recounted a recent bad experience with Partzilla.	An inquiry regarding whether there is a relationship between the parties is not evidence of confusion. <i>See Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC</i> , 110 USPQ2d at 1479; <i>Marshall Field & Co. v. Mrs. Field’s Cookies</i> , 25 USPQ2d at 1334; <i>Elec. Water Conditioners, Inc. v. Turbomag Corp.</i> , 221 USPQ at 164; <i>Toys “R” Us, Inc. v. Lamps R Us</i> , 219 USPQ at 346.
19 ²⁰¹	Customer service ticket including a statement from the customer commending Opposer for excellent service and writing “Contrast this with Partzilla (no relation to revzilla I hope).”	Not an instance of confusion because the customer distinguished the parties.
20 ²⁰²	Customer information profile from Opposer’s database.	No apparent relevance.
21 ²⁰³	Customer service ticket where the customer apologized for posting a bad online review and stating “had a real bad mix-up with another company I just recently made a purchase from (partzilla).” The document did not include the review.	We are not going to infer trademark confusion because the customer had a “bad mix-up” with Partzilla. It is incumbent upon Opposer to elicit testimony to show that the “bad mix up” was caused by the customer mistakenly believing that REVZILLA services and PARTZILLA services emanate from the same source because of the similarity of the marks.

²⁰⁰ 55 TTABVUE 185.

²⁰¹ 55 TTABVUE 205.

²⁰² 55 TTABVUE 206.

²⁰³ 55 TTABVUE 208. Exhibit 22 (55 TTABVUE 209) and Exhibit 31 (55 TTABVUE 230) appear to be the same as Exhibit 21 except in different forms. Also, Exhibit 31 is illegible.

Exhibit No.	Document	Probative Value
23 ²⁰⁴	Customer order history.	No apparent relevance.
24 ²⁰⁵	Bizarre voice alert ²⁰⁶ flagged for low rating.	No apparent relevance.
25 ²⁰⁷	An internal shipping quote with an inquiry “is revzilla same as partzilla at same warehouse.”	On its face, the inquiry does not evidence trademark confusion; it is merely a question as to whether REVZILLA and PARTZILLA ship from the same warehouse.
26 ²⁰⁸	Email interaction with a customer from outside of the United States who stated that he had opened an account with PARTZILLA but was having problems with REVZILLA.COM.	This does not show confusion by a relevant consumer. It is incumbent upon Opposer to elicit testimony to show that the customer mistakenly believes that REVZILLA services and PARTZILLA services emanate from the same source because of the similarity of the marks.
27 ²⁰⁹	Interaction with a customer outside the United States who inquired if Opposer had certain products in stock including products featuring a link to the PARTZILLA website.	This does not show confusion by a relevant consumer in the United States.

²⁰⁴ 55 TTABVUE 211.

²⁰⁵ 55 TTABVUE 212.

²⁰⁶ Roscoe Testimony Dep., p. 55 (55 TTABVUE 58).

²⁰⁷ 55 TTABVUE 214.

²⁰⁸ 55 TTABVUE 216.

²⁰⁹ 55 TTABVUE 219.

Exhibit No.	Document	Probative Value
28 ²¹⁰	Email exchange between Anthony Bucci, Opposer's Chief Executive Officer and someone from Bike Bandit, a competitor, reporting an inquiry as to whether PARTZILLA and REVZILLA are related. ²¹¹	An inquiry regarding whether there is a relationship between the parties is not evidence of confusion. <i>See Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC</i> , 110 USPQ2d at 1479; <i>Marshall Field & Co. v. Mrs. Field's Cookies</i> , 25 USPQ2d at 1334; <i>Elec. Water Conditioners, Inc. v. Turbomag Corp.</i> , 221 USPQ at 164; <i>Toys "R" Us, Inc. v. Lamps R Us</i> , 219 USPQ at 346.
29 ²¹²	A customer review tool.	No apparent relevance.
30 ²¹³	A shopper approved review from a follow-up from a bad review for REVZILLA where a customer had bought a part from PARTZILLA, had a bad shopping experience, and stated "I just figured it was the same company." ²¹⁴	This is evidence that the consumer believed that the services rendered by PARTZILLA and REVZILLA emanate from the same source.

In the table below, we identify and discuss the purported instances of confusion proffered through the Price deposition.

²¹⁰ 55 TTABVUE 220.

²¹¹ 55 TTABVUE 221.

²¹² 55 TTABVUE 222.

²¹³ 55 TTABVUE 223.

²¹⁴ 55 TTABVUE 226.

Exhibit No.	Document	Probative Value
39 ²¹⁵	A posting on Opposer's FACEBOOK page from a person inquiring "is revzilla going to pay for a credit card protection agency for the credit card numbers that were stolen?"	This is similar to the experience of Kevin Graham discussed above. The evidence presented by this posting does not evidence trademark confusion.
54 ²¹⁶	An internal email reporting an incident where the sponsor questioned Opposer's credentials to attend the event as a dealer or retailer. Eventually, "[s]he thought I was with PartZilla who is registered to exhibit at the show. She went on to say that it was the Zilla that threw her off – that it was just so similar."	This is evidence that a trade show representative confused REVZILLA and PARTZILLA because of the –zilla suffix.

In the table below, we identify and discuss the purported instances of confusion proffered through the Kull deposition.

Exhibit No.	Document	Probative Value
4 ²¹⁷	An email from one of Opposer's vendors displaying a link to Applicant's website and inquiring "Are they hoping some of your success will rub off?"	This is not evidence of confusion. The vendor could be noting similar business models.

²¹⁵ 53 TTABVUE 260.

²¹⁶ 53 TTABVUE 298.

²¹⁷ 57 TTABVUE 112

Exhibit No.	Document	Probative Value
5 ²¹⁸	An email from an executive of a “motorcycle gear and apparel brand” expressing his opinion as to the similarity of the marks.	This is not evidence of confusion. The executive clearly was not confused.
6 ²¹⁹	An email from an executive from a helmet manufacturer inquiring whether Opposer has “any connection with partzilla.com?”	An inquiry regarding whether there is a relationship between the parties is not evidence of confusion. <i>See Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC</i> , 110 USPQ2d at 1479; <i>Marshall Field & Co. v. Mrs. Field’s Cookies</i> , 25 USPQ2d at 1334; <i>Elec. Water Conditioners, Inc. v. Turbomag Corp.</i> , 221 USPQ at 164; <i>Toys “R” Us, Inc. v. Lamps R Us</i> , 219 USPQ at 346.
7 ²²⁰	An email from a vendor expressing her opinion that “I feel like [Partzilla] is ripping you guys off.”	This is not evidence of confusion. The vendor clearly was not confused. The vendor could be noting similar business models.

²¹⁸ 56 TTABVUE 113. The exhibit is designated confidential. It is an email from the head of a “motorcycle gear and apparel brand.” Kull Testimony Dep., p. 28 (57 TTABVUE 31). The email consists of four lines; only one of which is arguably confidential. We do not treat the remainder of the email as confidential. Trademark Rule 2.116(g), 37 C.F.R. § 2.116(g) (“The Board may treat as not confidential that material which cannot reasonably be considered confidential, notwithstanding a designation as such by a party.”).

²¹⁹ 57 TTABVUE 114.

²²⁰ 57 TTABVUE 117.

Exhibit No.	Document	Probative Value
8 ²²¹	An email from a customer inquiring “Is Partszilla [sic] part of your company?”	An inquiry regarding whether there is a relationship between the parties is not evidence of confusion. <i>See Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC</i> , 110 USPQ2d at 1479; <i>Marshall Field & Co. v. Mrs. Field’s Cookies</i> , 25 USPQ2d at 1334; <i>Elec. Water Conditioners, Inc. v. Turbomag Corp.</i> , 221 USPQ at 164; <i>Toys “R” Us, Inc. v. Lamps R Us</i> , 219 USPQ at 346.

6. Summarizing the confusion evidence.

There are only two instances of actual confusion: Roscoe Exhibit 30²²² and Price Exhibit 54.²²³ The rest are evidence that someone thinks that the marks are similar because they share the –zilla suffix, but actual confusion as to source did not result. In this regard, Opposer’s third-party witnesses testified that the marks were similar, but they did not purchase from REVZILLA thinking it was PARTZILLA or vice versa because of the similarity of the marks.

Nevertheless, the two instances of confusion and the other testimony and evidence are “illustrative of a situation showing how and why confusion is likely.” *Molenaar, Inc. v. Happy Toys, Inc.*, 188 USPQ 469, 471 (TTAB 1975) (quoting *Libbey-Owens-Ford Glass Co. v. Thermoproof Glass Co.*, 156 USPQ 510, 511 (CCPA 1968). In this case, consumers might believe that the marks were similar and they might be

²²¹ 57 TTABVUE 118.

²²² 55 TTABVUE 223.

²²³ 53 TTABVUE 298.

confused as to the source of the services because the marks share the –zilla suffix. However, as noted above, the suggestive nature of the –zilla suffix permits competitors to come closer to Opposer’s REVZILLA mark than would be the case with a mark featuring a stronger suffix. In other words, Opposer assumed the risk that competitors may use the –zilla suffix.

Nevertheless, the instances of actual confusion weigh in favor of finding a likelihood of confusion.

G. The market interface between applicant and the owner of a prior mark and any other established fact probative of the effect of use.

It is well settled that each case must be decided on the basis of all relevant factors, which include the marks and the services as well as the marketing environment in which a purchaser normally encounters them and the market interface between the owners and users of marks. *See In re R.C. Bigelow Inc.*, 199 USPQ 38, 40 (TTAB 1978).

But the question of confusion is related to the *nature* of the mark but its *effect* “when applied the goods of the applicant.” The only relevant application is made in the marketplace. The words “when applied” do not refer to a mental exercise, but to all known circumstances surrounding use of the mark.

du Pont, 177 USPQ at 567.²²⁴

²²⁴ The thirteenth *du Pont* factor, “any other established fact probative of the effect of use,” “accommodates the need for flexibility in assessing in each unique set of facts,” such as is the case in this opposition where Applicant owns two registrations incorporating the word “PARTZILLA” for the services at issue. *See, e.g., In re Strategic Partners Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012).

Applicant is the owner of Registration No. 4888288 for the mark PZ PARTZILLA and design, shown below,



and Registration No. 5026081 for the mark PZ PARTZILLA and design, shown below,



both for, *inter alia*, retail store services accessible online and by telephone in the field of parts, aftermarket parts, accessories, tires, wheels, tools, apparel, eyewear, footwear, helmets, leather jackets, leather pants, leather vests, protection gear, riding gear, and related products for motorcycles. The record also shows that Applicant uses the PARTZILLA and design marks.

Even if we were to sustain the opposition and refuse to register Applicant's PARTZILLA standard character mark for, *inter alia*, retail store services, online sales services, and telephone sales services in the field of accessories for ATVs, motorcycles, scooters, watercrafts and snowmobiles and "apparel, eyewear, footwear, helmets, leather jackets, leather pants, leather vests, protection gear, riding gear and related products accessible," Applicant still would retain two registrations for PARTZILLA and design for the services at issue in this proceeding which it is still rendering. Thus, the marketing environment in which purchasers encounter the marks at issue and

the market interface between the owners and users of marks will not change significantly.

We find these *du Pont* factors weigh against finding that there is a likelihood of confusion.²²⁵

H. Balancing the factors.

Because REVZILLA and PARTZILLA are not similar, we conclude that Applicant's mark PARTZILLA for *inter alia*, retail store services, online sales services, and telephone sales services in the field of accessories for ATVs, motorcycles, scooters, watercrafts and snowmobiles and "apparel, eyewear, footwear, helmets, leather jackets, leather pants, leather vests, protection gear, riding gear and related products accessible" is not likely to cause confusion with Opposer's REVZILLA mark for "online retail store services featuring motorcycle apparel and accessories."

While instances of actual confusion can be the best evidence of a likelihood of confusion, *Central Soya Co., Inc. v. North Am. Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981), we have relatively few instances in this record, particularly given the period of concurrent use and Applicant's prior registered marks for the same services. In addition, actual confusion is only one *du Pont* factor and it is not conclusive. *See*

²²⁵ While the Dissent ignores Applicant's other PARTZILLA registrations because Applicant did not plead those registrations as a prior registration or Morehouse affirmative defense, the fact remains that Applicant is the owner of two other PARTZILLA and design registrations for, *inter alia*, the services at issue in this proceeding which affect the market interface between the parties and cannot be ignored. *See Morehouse Mfg. Corp. v. J. Strickland and Co.*, 407 F.2d 881, 160 USPQ 715, 717 (CCPA 1960) ("the opposer cannot be damaged, within the meaning of section 13 of the statute, by the issuance to the applicant of a second registration where applicant already has an existing registration of the same mark for the same goods.").

Bandag, Inc. v. Al Bolser's Tire Stores, Inc., 750 F.2d 903, 223 USPQ 982, 990 (Fed. Cir. 1984) (“actual confusion is merely one factor to be considered by the Court when it makes its determination.”); *Hilson Research Inc. v. Soc’y for Human Resource Mgt.*, 27 USPQ2d 1423, 1435 (TTAB 1993) (“Actual confusion is but one factor.”); *see also Universal Money Centers, Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 30 USPQ2d 1930, 1937 (10th Cir. 1994) (“evidence of some actual confusion does not dictate a finding of likelihood of confusion.”); *Woodsmith Pub. Co. v. Meredith Corp.*, 904 F.2d 1244, 15 USPQ2d 1053, (8th Cir. 1990) (“[t]hough evidence of actual confusion may be the best evidence of likelihood of confusion, it is not conclusive of its existence.”); *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 589 F.2d 1225, 200 USPQ 421, 426 (3rd Cir. 1978) (“Ownership of a mark does not guarantee a total absence of confusion in the marketplace. Selection of a mark with a common surname [SCOTT in the household cleaning market] naturally entails a risk of some uncertainty and the law will not assure absolute protection.”).

“In determining the likelihood of confusion, however, a court must consider all of the evidence, including the countervailing circumstances which lessen the impact of asserted instances of confusion.” *Sun Banks of Florida, Inc. v. Sun Federal Sav. and Loan Ass’n*, 651 F.2d 311, 211 USPQ 844, 851 (5th Cir. 1981). If confusion is likely to occur from the activities of the parties under these marks, given the commercial strength of Opposer’s mark (discussed above) and the substantial exposure these marks have had in the same channels of trade, we would expect more instances of confusion.

As noted above, to the small extent that it occurred, the confusion was caused by the shared use of the highly suggestive – zilla suffix. Such is the risk that Opposer assumed when it adopted a mark featuring the –zilla suffix. The fact that there may be evidence of confusion due to the concurrent use of a highly suggestive term is insufficient to warrant finding that there is a legally recognizable likelihood of confusion where the marks as a whole are visually and aurally distinguishable. “This runs up against the well-settled principle that ‘a proprietary right cannot be acquired in a nonarbitrary term or a term that has been so commonly used in the trade that it cannot function as the distinguishing feature of any one party’s mark.’” *In re LC Trademarks, Inc.*, 121 USPQ2d 1197, 1205 (TTAB 2016) (quoting *Cambridge Filter Corporation v. Servodyne Corporation*, 189 USPQ 99, 103 (TTAB 1975)). In *Cambridge Filter Corp.*, opposer opposed the registration of UNI-CAP and UNI-FLO based on opposer’s prior use of marks comprising –cap and –flow suffixes. The Board held that “opposer has not acquired a proprietary right or secondary meaning in the suffix ‘CAP’ or ‘FLO’ in the air filter field and that the inclusion in each of the parties’ marks here involved of the ‘CAP’ and ‘FLO’ suffix cannot serve, per se, as a basis upon which to predicate a holding of conflict among the marks.” *Id.* at 103-104.

Even considering Opposer’s evidence of actual confusion in the most persuasive light, such evidence does not overcome the other factors weighing heavily against likely confusion (*i.e.*, the differences in the marks because the shared element is the commonly used –zilla suffix).

Based on the record as a whole and the relevant *du Pont* factors, consumer confusion is unlikely.

Decision: The opposition is dismissed.

Dissent by:

Wellington, Administrative Trademark Judge, dissenting:

I believe the opposition should be sustained on the likelihood of confusion ground, and therefore respectfully offer this brief dissent.

I agree with the majority's treatment of the evidentiary objections and have no issues with the description of the admissible evidence of record. Rather, my dissent stems from a disagreement with the majority over the persuasive value, or lack thereof, of certain evidence.

I agree with majority's findings that support a finding of a likelihood of confusion. Specifically, the parties' services are identical in part inasmuch as they include the retail sale of motorcycle accessories, including apparel, footwear, helmets, leather jackets, pants, vests, and protection gear. As the majority points out, we must therefore presume these services will be offered in the same channels of trade and to the same classes of consumers. I further agree with, and rely upon, the majority's findings with respect to Opposer's commercial success under the mark REVZILLA and the significant expenditures undertaken by Opposer in promoting its services.

As to the parties' marks, REVZILLA and PARTZILLA, I do not believe a likelihood of confusion is obviated based on the different suggestive or generic initial terms,

REV and PART, or by any weakness in the shared suffix, ZILLA. Rather, I find the evidence involving actual consumer confusion and consumer enquiry confusion is more persuasive for purposes of showing the marks are overall so similar that, when used in connection with identical services, confusion is likely. As acknowledged by the majority, the evidence shows there have already been two instances of actual confusion. Also, there have been several instances of consumers making enquiries about the status or relationship of the parties based on a perceived similarity between the marks.²²⁶ This evidence is not only highly probative for purposes of demonstrating a likelihood of confusion, but also directly rebuts any inference that consumers are so conditioned to overlook any similarity between the marks based on the common element ZILLA being suggestively or commercially weak.²²⁷ In other words, if consumers were already conditioned to overlook any similarity between marks based on them sharing the term ZILLA, there would be no need to make such an enquiry.

Finally, I realize a decision to sustain the opposition would result in the awkward situation whereby Applicant remains the owner of two registrations that contain, in

²²⁶ I fully recognized the distinction between evidence of actual confusion versus consumers making enquiries as to the parties' affiliation. See 4 *McCarthy on Trademarks and Unfair Competition* § 23:16 (4th ed. 2017). I also agree with Professor McCarthy's comment that "[t]he better view is that while enquiry evidence is admissible and relevant, standing alone with no other evidence it is insufficient proof of actual confusion." *Id.* Nevertheless, given that we have evidence of actual confusion in tandem with evidence of consumer enquiries, I find the evidence, as a whole, persuasive and helps show that consumers are likely to be confused as the source of the parties' services based on the involved marks.

²²⁷ Based on the record before us, I would not find the term ZILLA is commercially weak based on others using this term in their marks for the same or similar services – namely, retail sale of motorcycle accessories, including apparel, footwear, helmets, leather jackets, pants, vests, and protection gear. A review of the record reveals very little, if any, commercial use of the term ZILLA in third-party marks in connection with these actual services.

part, the mark being refused registration. In response, I note that a prior registration defense, also known as the Morehouse defense, is not before us and we are only concerned with whether Applicant's proposed mark, as it appears in the involved application, is likely to cause confusion with Opposer's previously-used mark.

For the aforementioned reasons, I would sustain the opposition.