

This Opinion is not a
Precedent of the TTAB

Mailed: March 11, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Nu Science Corporation

v.

Yuyao Deutrel Chemical Science and Technology Co., Ltd., d/b/a Evsfood Group

Consolidated Opposition Nos. 91225314 (Parent),
91225328 (Child)

Michael J. Saltz, Esq., Jacobson, Russell, Saltz, Nassim & De La Torre, LLP,
for Nu Science Corporation

Kevin J. Keener, Esq., Keener and Associates, P.C.,
for Yuyao Deutrel Chemical Science and Technology Co., Ltd., d/b/a Evsfood
Group

Before Cataldo, Wellington, and Casagrande,
Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:¹

¹ As part of an internal Board pilot program exploring the possibility of broadening or altering acceptable forms of legal citations in Board cases, the case citation form in this opinion varies from the citation forms recommended in Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 101.03 (June 2023). This decision cites precedential decisions of the Court of Appeals for the Federal Circuit and the Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). Precedential decisions of the Board and the Director will be cited only to WESTLAW (WL). Initial citations to Board decisions will include (1) a parenthetical indicating the decision's

In May 2015, Yuyao Deutrel Chemical Science and Technology Co., Ltd., d/b/a Evsfood Group (“Applicant”) filed two applications to register the mark EVSFOOD (in standard characters) on the Principal Register. Application Serial No. 86640204 (the “ ’204 Application”) identified the following goods in International Class 32: “Concentrates, syrups or powders used in the preparation of sports and energy drinks; Energy drinks; Fruit drinks and juices; Fruit juice concentrates; Herbal juices; Mineral water; Sports drinks containing electrolytes; Vegetable drinks; Vegetable-fruit juices.”² Application Serial No. 86639958 (the “ ’958 Application”) identified the following goods in International Class 30: “Apple cider vinegar; Beer vinegar; Beverages made of tea; Grain-based beverages; Grass-based food beverages; Herbal food beverages; Vinegar; Wine vinegar.”³

In December 2015, Nu Science Corporation (“Opposer”) filed Notices of Opposition against each application. Opposition No. 91225314 is directed to the ’204 Application. Opposition No. 91225328 is directed to the ’958 Application. In an order dated June 3, 2016, the Board consolidated the two oppositions, denominating Opposition No.

precedential status, and, where cited Board decisions are also available in the Board’s electronic docketing system (TTABVUE), (2) the proceeding or application number with (3) a hyperlink to the slip opinion in TTABVUE. This opinion will contain no citations to the United States Patents Quarterly (USPQ). Practitioners, however, should continue to adhere to the practice set forth in TBMP § 101.03 until further notice from the Board.

² Application Serial No. 86640204 was filed on May 24, 2015, based upon applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

³ Application Serial No. 86639958 was filed on May 23, 2015, based upon applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

91225314 the “parent” opposition.⁴ Later, Opposer filed Amended Notices of Opposition in each proceeding.⁵ These Amended Notices of Opposition constitute the operative pleadings in each case. Opposer’s Amended Notices of Opposition are essentially identical. Each alleges that Opposer owns the following four registrations on the Principal Register:

- Reg. No. 2083802 (renewed) for CELLFOOD in standard characters for goods identified as “mineral supplements for human consumption” in International Class 5 (claiming dates of first use and first use in commerce of Feb. 1, 1996);
- Reg. No. 2573852 (renewed) for EVERETT STOREY in standard characters for goods identified as “Dietary, nutritional, food, vitamin and mineral supplements for human consumption” in International Class 5 (claiming a date of first use anywhere of Jan. 1, 1982 and a date of first use in commerce of Feb. 1, 1996).
- Reg. No. 4624375 (Sections 8 and 15 combined declaration accepted and acknowledged, respectively) for CELLFOOD in standard characters for goods identified as “Cosmetics; Anti-wrinkle skin care preparations; Facial gels; Anti-wrinkle non-medicated skin serums; Moisturizing skin lotions; Skin care creams; Firming skin cream; Non-medicated serums for use on the skin; Skin care products, namely, lotions, facial skin cleansers, eye gels, face gels, face serums, face creams, face lotions, face oils, skin oils; Non-medicated skin care creams and lotions, face creams; Topical skin care preparation, namely, non-medicated preparation for the treatment of fine lines and wrinkles and skin surface irregularities” in International Class 3 (claiming dates of first use and first use in commerce of July 1, 1999); and
- Reg. No. 4793384 (Section 8 declaration accepted) for EVERETT STOREY in standard characters for goods currently identified as “Anti-wrinkle skin care preparations; Non-medicated skin care preparations, namely, facial skin gels; Non-medicated skin care products, namely, eye gels, face gels; Topical skin care preparation, namely, non-medicated preparation for the treatment of skin, namely, fine lines and wrinkles and skin surface irregularities, in International Class 3 (claiming dates of first use and first use in commerce of Jan. 1, 2000).

⁴ See 10 TTABVUE.

⁵ See 37 TTABVUE in Opp. No. 91225314; 13 TTABVUE in Opp. No. 91225328.

Opposer claims that registration should be refused on three grounds. One ground alleged is that Applicant's EVSFOOD marks are likely to cause confusion with Opposer's CELLFOOD and EVERETT STOREY marks, in contravention of Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). The Amended Notices of Opposition do not expressly allege that the EVSFOOD marks are likely to cause confusion in view of Opposer's CELLFOOD and EVERETT STOREY marks separately. Rather, they allege that "Applicant's 'EVSFOOD' mark is a clear combination of Opposer's two (2) Trademarks. 'EVS' is the initials of 'EVERETT STOREY' and 'FOOD' is the suffix of 'CELLFOOD.' Put together, the mark creates 'EVSFOOD.'"⁶ Both Amended Notices of Opposition also allege that "there exists a likelihood of confusion based on Opposer's use of two marks conjointly" (capitalization altered).⁷

Opposer also alleges that Applicant's marks consist of matter that falsely suggests a connection with Opposer in light of Opposer's EVERETT STOREY and CELLFOOD marks, in contravention of Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a).⁸

Opposer's third ground is that "Applicant does not have a bona fide intent to use the mark in commerce" (capitalization altered), which is required under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).⁹

⁶ 37 TTABVUE 10 in Opp. No. 91225314; 13 TTABVUE 10 in Opp. No. 91225328.

⁷ See 37 TTABVUE 17 and 13 TTABVUE 17 in the respective oppositions.

⁸ See 37 TTABVUE 15-17 and 13 TTABVUE 14-15 in the respective oppositions.

⁹ See 37 TTABVUE 16-17 and 13 TTABVUE 15-16 in the respective oppositions.

Applicant filed Answers in both oppositions denying the salient allegations in the Amended Notices of Opposition.¹⁰ The parties then engaged in discovery, as well as settlement discussions that ultimately were unsuccessful.

The parties filed trial briefs and Opposer filed a reply brief in the consolidated oppositions.¹¹ The case is now ready for decision. For the reasons set forth below, we dismiss the oppositions.

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the files of the two challenged applications. During the trial testimony period, Opposer introduced the declaration testimony of its president, Kevin Negrete.¹² The Negrete Declarations attached several exhibits, including:

- Opposer's asserted registrations;¹³
- Documents from a California federal court case Opposer brought in 2008 against Robert and Michael Henkel involving allegations of trade secret theft and trademark infringement;¹⁴

¹⁰ See 40 TTABVUE in Opp. No. 91225314; 14 TTABVUE in Opp. No. 91225328.

¹¹ See 91 TTABVUE (Opposer's trial brief); 92 TTABVUE (Applicants' trial brief); 93 TTABVUE (Opposer's reply).

¹² 88 TTABVUE 2-27.

¹³ See 89 TTABVUE 8-13. We note that Opposer provided only copies of the registrations themselves. Our rules, however, require that copies of registrations be accompanied by official documents showing the current status of and title to any registrations a party seeks to submit as evidence. See Trademark Rule 2.122(d)(2), 37 C.F.R. § 2.122(d)(2). Applicant, however, did not object to the copies alone. Accordingly, we deem Opposer's pleaded registrations to be of record. See *Shenzhen IVPS Tech. Co. v. Fancy Pants Prod., LLC*, [Opp. No. 91263919](#), 2022 WL 16646840, at *5-6 (TTAB 2022) (precedential).

¹⁴ See *id.* at 108-66, 589-614.

- A 2016 declaration of Mr. Junda Su in the 2008 California federal court case;¹⁵
- Several printouts of documents from the Georgia Secretary of State concerning various corporate entities in which Junda Su was involved;¹⁶
- Sample labels of product purportedly connected to Applicant, one bearing the mark CYTOFOOD and the other bearing the mark EVSFOOD;¹⁷
- A photo of a supplement bottle purportedly sold by Applicant in China bearing the mark EVSFOOD;¹⁸
- Documents, both in Chinese and translated into English, relating to Applicant's operations in China and court and administrative proceedings Opposer and Applicant have brought against each other in China;¹⁹
- Applications Serial Nos. 85809958 for the mark 艾瓦雷特·史多雷 and 85809962 for the mark 细胞食物, both for, inter alia, nutritional supplements, and both filed by Lifont Pharmaceuticals and signed by Junda Su as Lifont's president;²⁰
- Reg. No. 4393821 for EVSFOOD for, inter alia, nutritional supplements, owned by Evsfood, Inc., along with a 2017 Board order in Cancellation No. 92058422, brought by NU Science Corporation, cancelling that registration as a sanction for repeated discovery violations by Evsfood, Inc., and involving actions of Mr. Junda Su;²¹
- Assignment documents dated in 2014 assigning Reg. No. 4393821 for EVSFOOD to Applicant;²²
- The file for Appl. Ser. No. 86640155 for the mark EVERETT STOREY, filed by Applicant in 2015, for various beverages in class 30, including a 2015

¹⁵ See *id.* at 201-19.

¹⁶ See *id.* at 172-99, 271-79, 545.

¹⁷ See *id.* at 218-19.

¹⁸ See *id.* at 281.

¹⁹ See *id.* at 221-69, 285-543; 90 TTABVUE 228-337.

²⁰ See 89 TTABVUE at 547-69.

²¹ See *id.* at 571-81.

²² See 90 TTABVUE 3-6.

Office action refusing registration over the two registrations Opposer asserts in this case;²³ and

- A 2015 Office action refusing registration of another application filed by Applicant, for the mark EVERETT STOREY for various beverages in Class 32 (Appl. Ser. No. 86640183) based on the two registrations Opposer asserts in this case.²⁴

Opposer also offered a declaration from its retained expert, Mr. Bruce G. Silverman, purporting to evaluate Applicant's activities through the lens of the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973).²⁵

Applicant submitted no evidence during its testimony period.

II. Opposer is Entitled to Initiate a Statutory Opposition Proceeding.

In every inter partes case, the plaintiff must establish its entitlement to have invoked the statutory proceeding it filed. This requires the plaintiff to demonstrate: (i) an interest falling within the zone of interests protected by the statute and (ii) proximate causation. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 120-37 (2014)); *id.* at 1305 (applying *Lexmark* to inter partes TTAB cases). Demonstrating a real interest in opposing registration of a mark satisfies the zone-

²³ See *id.* at 22-63.

²⁴ See *id.* at 66-97.

²⁵ See 88 TTABVue 29-83. We note that, although Mr. Silverman expressly cites, and bases much of his declaration on, documents and websites, he does not attach any of the cited documents or website screenshots to his declaration. A few of these documents, such as documents concerning the prosecution of Applicant's various prior U.S. applications, appear to correspond to documents that are attached to Mr. Negrete's declaration. But the majority do not appear in the trial record and therefore we will consider neither these missing documents nor any testimony based on their contents.

of-interests requirement, and demonstrating a reasonable belief in damage by the registration of a mark demonstrates damage proximately caused by registration of the mark. *Id.* at 1305-06.

As noted earlier, *supra* n.13, Applicant's failure to object to the four pleaded registrations has resulted in them being of record, and Applicant further did not raise any argument at trial as to Opposer's ownership of these registrations or the registrations' validity. The operative pleading alleges that Applicant's mark creates a likelihood of consumer confusion as to source in view of these registered marks. Accordingly, Opposer has established that it is entitled to invoke the statute permitting the filing of an opposition proceeding. *See, e.g., Made in Nature, LLC v. Pharmavite LLC*, [Opp. No. 91223352](#), 2022 WL 2188890, at *9 (TTAB 2022) (precedential) (pleaded registrations demonstrated entitlement to oppose on basis of likelihood of confusion); *Primrose Ret. Communities, LLC v. Edward Rose Senior Living, LLC*, [Opp. No. 91217095](#), 2016 WL 7655551, at *2 (TTAB 2016) (precedential) (same).

Entitlement to bring an opposition due to an alleged likelihood of confusion in view of its prior registrations entitles Opposer to raise any other statutory bar(s) to registration that it deems applicable. *See, e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1377 (Fed. Cir. 2012). Therefore, we turn below to consideration of the multiple grounds asserted in the amended notices of opposition.

III. Analysis

Opposer has asserted three grounds which it believes require refusal of Applicant's applications: (1) priority and likelihood of confusion under Section 2(d) of the Trademark Act; (2) false suggestion of a connection to Opposer under Section 2(a) of the Act; and (3) lack of a bona fide intent to use the mark in commerce under Section 1(b) of the Act. We start with Opposer's claim under Section 1(b).

A. Lack of bona fide intent to use.

Trademark Act Section 1(b) provides that "a person who has a bona fide intention, under circumstances showing the good faith of such person, to use a trademark in commerce may request registration of its trademark" 15 U.S.C. § 1051(b). "Because a bona fide intent to use the mark in commerce is a statutory requirement of a valid intent-to-use trademark application under Section 1(b), the lack of such intent is a basis on which an opposer may challenge an applicant's mark." *M.Z. Berger & Co. v. Swatch AG*, 787 F.3d 1368, 1375 (Fed. Cir. 2015). "[W]hether an applicant has a bona fide intent to use a mark in commerce is an objective inquiry based on the totality of the circumstances." *Id.* at 1379.

Opposer bears the burden to prove lack of bona fide intent by a preponderance of the evidence. *See, e.g., Swatch AG v. M.Z. Berger & Co.*, [Opp. No. 91187092](#), 2013 WL 5655834, at *9 (TTAB 2013), *aff'd*, 787 F.3d 1368 (Fed. Cir. 2015). In discharging its ultimate burden of proof, an opposer asserting lack of bona fide intent to use bears an initial burden of pointing to some evidence supporting its claim, and "[o]ne way an opposer can establish its prima facie case of no bona fide intent is by proving that

applicant has no documentary evidence to support its allegation in the application of its claimed bona fide intent to use the mark in commerce as of the application filing date.” *Id.* (citation omitted). “If opposer satisfies its initial burden of showing the absence of documentary evidence regarding applicant’s bona fide intention to use the mark, the burden of production shifts to applicant to come forward with evidence adequately explaining or outweighing the failure to provide such documentary evidence.” *Id.* (citation omitted).

Here, Opposer invokes this means of making out its prima facie case, arguing:

Applicant has never produced in discovery or in these proceedings any documentary evidence that it maintained a good faith intent to use the mark in commerce in the United States. In fact, Applicant has chosen to barely participate in these proceedings and has elected to present no evidence of any kind whatsoever in defense of its application that is at issue here. This alone establishes that Applicant did not have a bona fide intent to use the EVSFOOD mark in the United States at the time the subject application was filed.²⁶

Applicant counters that “Opposer has not sustained its initial burden.”²⁷ We agree.

Opposer did not submit any document request(s) and response(s) to substantiate its

²⁶ See 91 TTABVUE 46; *see also* 93 TTABVUE 26.

²⁷ See 92 TTABVUE 19. Applicant also argues that it supplied documentary evidence of use, citing its response to a motion to compel that Applicant filed early on during the discovery period and its own motion for summary judgment. *See id.* at 18-19. We note that, had Opposer discharged its prima facie case, Applicant’s rebuttal would have been insufficient. To be admissible at trial, evidence must be submitted during that party’s trial testimony/evidence period. *See* Trademark Rule 2.121(a), 37 C.F.R. § 2.121(a). Indeed, the Board’s summary judgment ruling reminded the parties of this rule, stating that “evidence submitted in support of or in opposition to a motion for summary judgment is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced in evidence during the appropriate trial period.” 36 TTABVUE 9. Moreover, the documents that Applicant says it produced during discovery were not actually attached to the filings to which Applicant cited, so, even if we were to consider those earlier-

argument that there is no documentary evidence reflecting a bona fide intent to use the mark. The prima facie case may not require much, but it requires at least that. Nor does Opposer cite any other evidence in the trial record to substantiate its Section 1(b) claim. Because Opposer has failed to make out a prima facie case, its Section 1(b) claim is dismissed.

B. Likelihood of confusion

We turn next to Opposer's likelihood of confusion claim. Section 2(d) prohibits registration of a mark that "so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1052(d).

Under Section 2(d), an opposer must prove either ownership of a prior registration or priority of use. Where, as here, an opposer bases its opposition on its ownership of registered marks and has made the registrations of record, and the applicant has not counterclaimed to cancel them, Section 2(d) does not require proof of priority of use as to the marks and goods and services covered by the registrations. *See, e.g., Top Tobacco LP v. N. Atl. Op. Co.*, [Opp. No. 91157248](#), 2011 WL 6099691, at*6 (TTAB 2011) (precedential) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400 (CCPA 1974)); *see also Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 492

filed papers as part of the trial record, we still would not see what Applicant says it produced during discovery.

F.2d 1399, 1403 n.6 (CCPA 1974) (“prior use need not be shown by a plaintiff relying on a registered mark unless the defendant counterclaims for cancellation”); *Itel Corp. v. Ainslie*, 1988 WL 252407, at *2 (TTAB 1988) (precedential) (“because of the existence of opposer’s valid and subsisting registration, it need not prove prior use as to the services recited therein”). Here, Opposer relies on several pleaded registrations, copies of which it has made of record, that pre-date Applicant’s application. Thus, we find that proof of priority is unnecessary.

“In opposition proceedings, the opposer has the burden of proving a likelihood of confusion by a preponderance of the evidence.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 998 (Fed. Cir. 2020) (citation omitted). To determine whether likelihood of confusion has been proved, we evaluate the factors listed in *du Pont*, 476 F.2d at 1361. *See, e.g., Stratus Networks*, 955 F.3d at 998. The Board considers “each ... factor for which there is evidence and argument.” *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (quoting Bd. Decision); *In re Guild Mortg. Co.*, 912 F.3d 1376, 1380 (Fed. Cir. 2019). But we “may focus on dispositive factors, such as similarity of the marks and relatedness of the goods.” *Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 1379 (Fed. Cir. 2016) (cleaned up; citations omitted); *see also Coach Servs.*, 668 F.3d at 1366 (cleaned up; citations omitted). Here, Opposer presented argument on factors (1)–(6), (11), and (12).²⁸ Even though Applicant does not present counterarguments on all of these, we will examine each of them in turn. After doing so, we will weigh the findings we have made on

²⁸ See 91 TTABVUE 3, 29-45; 93 TTABVUE 3, 15-25.

these factors, not by mechanically tallying how many factors support each party, *see, e.g., Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 1356 (Fed. Cir. 2011), but rather by weighing them together with the understanding that, in any given case, one or more factors may be more consequential than others. *See, e.g., In re Charger Ventures LLC*, 64 F.4th 1375, 1381 (Fed. Cir. 2023) (“The weight given to each factor depends on the circumstances of each case.”) (citation omitted); *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1362 (Fed. Cir. 2022) (“Not all of the ... factors are necessarily relevant or of equal weight in a given case, and any one of the factors may control a particular case.”) (internal quotation marks and citation omitted).

1. Similarities/dissimilarities in the marks

The first *du Pont* factor concerns “[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” 476 F.2d at 1361. This is always one of the most important considerations. *See, e.g., Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed. Cir. 2002) (“the ‘similarity or dissimilarity of the marks in their entireties’ is a predominant inquiry”) (citation omitted). “Marks are compared along the axes of their ‘appearance, sound, connotation and commercial impression.’” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1340 (Fed. Cir. 2015) (citation omitted); *accord In re i.am.symbolic, llc*, 866 F.3d 1315, 1324 (Fed. Cir. 2017).

Before we compare the marks, we need to explain the way Opposer pleaded its likelihood of confusion claim. In the usual case, an opposer claims that an applicant’s

mark is likely to cause consumer confusion in view of one or more of its registered or previously-used marks. And that could require us to assess the similarities and dissimilarities between the applicant's mark and each of the asserted registered or previously-used marks. Here, consistent with the usual focus on individual marks, Applicant previously filed a summary judgment motion arguing that its mark was not confusingly similar to either the CELLFOOD or EVERETT STOREY marks separately. In denying summary judgment, however, the Board²⁹ noted that Opposer had alleged "that Applicant's mark EVSFOOD is a combination of Opposer's CELLFOOD and EVERETT STORY trademarks because "EVS" is the initials of 'EVERETT STOREY' and 'FOOD' is the suffix of 'CELLFOOD.' Put together, the mark[s] create 'EVSFOOD.'"³⁰ The Board further noted that Applicant had not appreciated that Opposer's claim was based, at least in part, on a combination of Opposer's two asserted marks. So the Board allowed Opposer to replead to clearly assert such a claim so that Applicant would be fully apprised of it and could defend the case accordingly.³¹ Opposer obliged and filed an Amended Notice of Opposition expressly alleging that Applicant's mark creates a likelihood of confusion in conjoint view of Opposer's EVERETT STOREY and CELLFOOD marks because the "EVS"

²⁹ Judge Bergsman was on the panel that issued the summary judgment order, but retired from federal service at the end of 2023. The author of this opinion has been substituted in as the third panelist.

³⁰ 36 TTABVUE 4.

³¹ *Id.* at 9-10.

portion of Applicant's mark comes from EVERETT STOREY and the "FOOD" portion comes from CELLFOOD.³²

Now that the operative pleading expressly alleges a "conjoint" confusion theory, we will address the merits of Opposer's likelihood of confusion claim under that theory, as well as by assessing the likelihood of confusion as to both of Opposer's registered marks individually.

To succeed on a likelihood of confusion claim under the theory that the junior user's mark is likely to create confusion in view of two of the senior user's marks viewed together or "conjointly," we require two threshold elements to be proved:

First, it must be established that the marks have been and are being used together on a single product or in marketing. [Second], it must be established that opposer's marks are used in such a fashion that it would be proper to combine them for purposes of comparison, that is, that they have been used and/or advertised conjointly in such a manner and to such an extent in connection with a single product that they have come to be associated together, in the mind of the purchasing public, as indications of origin for opposer's product.

Schering-Plough HealthCare Prods., Inc. v. Huang, [Opp. No. 91117558](#), 2007 WL 1751193, at *4 (TTAB 2007) (precedential) (citations omitted).

Here, the only evidence in the trial record that bears on the required element that the two marks are used together on a single product or in marketing is the declaration of Opposer's President, Kevin Negrete. Although he testifies that the two marks "have been and are being used together on a single product and in marketing in the

³² See 37 TTABVUE 17-19; see also 91 TTABVUE 32 (EVSFOOD is "an intentional combination of key elements of" EVERETT STOREY and CELLFOOD).

US,”³³ he cites to no exhibit or other documentation in the trial record showing the two marks being used on products or in marketing so that we can assess (1) whether the two marks are or have been, in fact, used together, (2) how they were used together, and (3) whether the manner and extent to which they are or were used together has caused the two marks to be “associated together, in the mind of the purchasing public, as indications of origin for opposer’s product.” *See Schering-Plough*, 2007 WL 1751193, at * 4.³⁴ Accordingly, Opposer’s “conjoint use” theory claim fails for this reason alone. Nevertheless, in the interest of completeness, we will compare Applicant’s mark to Opposers’ two marks “conjointly”—as though Opposer had successfully proved conjoint use—as well as separately.

Opposer argues that the public will see, understand, and pronounce Applicant’s mark as “Ev’s Food,” because they (1) will see and understand “EV” as short for “Everett Story,” (2) know “Everett Storey” either as the inventor of Opposer’s CELLFOOD supplement or as a trademark used by Opposer, and therefore (3) will view the mark EVSFOOD as a hybrid of EVERETT STOREY and CELLFOOD.

Here again, Opposer runs into a problem. It provides no admissible evidence that consumers will undertake this multi-step perceptive process. All that Opposer’s briefing cites for this proposition is a 2009 default judgment from a federal district

³³ *See* 88 TTABVUE 26.

³⁴ While a photograph of a bottle depicting the mark CELLFOOD appears in the record as Opposer’s “Exhibit 20” (*see* 89 TTABVUE 283; *see also* 88 TTABVUE 12 (referring to the bottle)), the bottle does not depict the mark EVERETT STOREY.

court in California that Opposer brought against three members of the Henkel family and a third-party entity.³⁵ We are not persuaded.

First, the district court made no finding about the mark at issue here, EVSFOOD. It simply enjoins the defaulting defendants in that case from using several words, including “Ev Storey” and “Uncle Ev” in advertising or labelling. It does not, however, spell out the circumstances, if any, that bore on why those injunctive provisions were ordered in that case such that we can determine whether such circumstances might similarly apply to a different party under different circumstances. For example, the default judgment lays out that the case against the Henkels concerned their sales of dietary supplements that competed with those of Opposer and made use of Opposer’s trade secret formula, but here, Applicant’s goods are not supplements. Second, it is well settled that there is no “correct” pronunciation of a trademark and that consumers may pronounce trademarks differently from what the mark owner intends. *See, e.g., In re Viterro Inc.*, 671 F.3d 1358, 1367 (Fed. Cir. 2012) (“It is also true, as the Board recognized, that there is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the brand owner.”) (citation omitted); *Crown Overall Mfg. Co. v. Edward Makransky Co.*, 187 F.2d 175, 176 (CCPA 1951) (“There is no such thing as a correct pronunciation for a trade-mark. It is pronounced in different ways by different people.”) (citation omitted). Putting aside the lack of evidence that U.S. consumers will understand “Ev” as short for “Everett Storey” and that they further know that Everett Storey is the

³⁵ *See* 93 TTABVUE 19 (citing 89 TTABVUE 107-19).

inventor of Opposer's CELLFOOD supplement, there is no evidence in the case that U.S. consumers who see Applicant's EVSFOOD mark on its beverage products would see and pronounce EVSFOOD as Ev's Food, as hypothesized by Opposer. *See, e.g., StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 1331-32 (Fed. Cir. 2014); *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336-37 (Fed. Cir. 2001). Without such evidence, we think that consumers are, if anything, just as likely, if not more likely, to pronounce EVSFOOD as though EVS were initials for something (i.e., "ee-vee-ess food").³⁶ Thus, even if Opposer had proved the threshold use-related elements of "conjoint use" theory, the evidence fails to support that EVSFOOD is similar enough to EVERETT STOREY and CELLFOOD conjointly to make confusion likely.

We now move on to compare EVSFOOD to the marks CELLFOOD and EVERETT STOREY separately. Opposer spends little ink analyzing the similarities and

³⁶ Opposer offers the declaration of Bruce Silverman as expert testimony on the ultimate issue of likelihood of confusion. Although neither Opposer's trial brief nor its reply brief cite anything Mr. Silverman says in Opposer's argument about the alleged similarity of the marks, we note that Mr. Silverman hypothesized that consumers likely would perceive EVSFOOD as a reference to the CELLFOOD-branded supplement invented by Everett Storey, citing Opposer's advertising. 88 TTABVUE 42-43 (referring to advertising discussed *id.* at 51-52). But when we look at the advertising he cites in support, we see no mention of Everett Storey. Thus, Mr. Silverman's opinion concerning how consumers will perceive EVSFOOD is unsupported. (So is his opinion that "EVSFOOD and CELLFOOD sound very similar when voiced." *See id.* at 41.) But even had he cited to advertising in the trial record mentioning Everett Storey, we still would not substitute our own assessment of the record with Mr. Silverman's opinion on likelihood of confusion, which is the ultimate issue in the case. We would be silently shirking our duty were we to do so. *See, e.g., Hanscomb Consulting, Inc. v. Hanscomb Ltd.*, [Conc. Use No. 94002720](#), 2020 WL 973180, at *3 (TTAB 2020) (precedential) ("To the extent HL's testimony submissions include the witnesses opining as to the ultimate issue of whether a likelihood of confusion exists, such opinions are accorded little or no value. ... The Board has long held that the opinions of witnesses, even those of experts, cannot serve as a substitute for our own judgment with regard to whether a likelihood of confusion exists.") (cleaned up; citations omitted).

dissimilarities of EVSFOOD, on the one hand, and CELLFOOD and EVERETT STOREY, on the other. Most of what it observes is incidental to and buried within its conjoint use discussion. Taking CELLFOOD first, we note that Opposer argues that “CELLFOOD and EVSFOOD sound similar when voiced aloud.”³⁷ That is true only insofar as the second component -FOOD. But the whether the first component of Applicant’s mark is pronounced “Ev’s, ee-veez,” or “ee-vee-ess,” it looks and sounds nothing like the first component CELL. Even with “-FOOD” added to them, it is a stretch to call them similar sounding or looking, because consumers typically see and absorb the first part of a mark more easily. *See, e.g., Edom Lab’s, Inc. v. Llichter, Opp. No. 91193427*, 2012 WL 1267961, at *7 (TTAB 2012) (precedential) (“The term CHIRO, as the first part of opposer’s mark, is most likely to be impressed upon the mind of a purchaser and remembered.”) (cleaned up, citation omitted); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 1988 WL 252340, at *3 (TTAB 1988) (precedential) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). Opposer argues that consumers will essentially understand EVSFOOD and CELLFOOD to be synonyms, because they will know that Everett Storey is the inventor of the supplement called CELLFOOD, and they will see the EVS-prefix as referring to him. But we look in vain for any evidence in the record supporting that argument. While there are conclusory statements from Opposer’s president supporting it, we see no corroboratory documentation that would allow us to understand the extent to which, if any, U.S. consumers are, in fact,

³⁷ 91 TTABVUE 32.

familiar with the story of Everett Storey and CELLFOOD supplements. Without such evidence, we therefore find EVSFOOD and CELLFOOD more dissimilar than similar.

As to EVSFOOD and EVERETT STOREY, Opposer’s argument is even less enthusiastic. It acknowledges that “EVERETT STOREY and EVSFOOD contain more differences than the comparison with CELLFOOD, but insists “there is nevertheless a visual similarity between the marks. ‘EV’ are the shared first letters of both marks, and the first term in Applicant’s mark ‘EVS’ are the initials of EVERETT STOREY.”³⁸ We disagree with the latter contention. The marks are much more different than similar, and we are constrained to point out the obvious that “EVS” are not the initials of Everett Storey—unless his middle name began with a “V,” and we don’t see anything in the record so indicating. We therefore find EVSFOOD and EVERETT STOREY much more dissimilar than similar.

In sum, we find EVSFOOD:

- more dissimilar than similar to EVERETT STOREY and CELLFOOD “conjointly”;
- more dissimilar than similar to CELLFOOD; and
- very dissimilar to EVERETT STOREY.

Any way we parse Opposer’s arguments, the evidence in this case—or, more precisely, the relative dearth of evidence—constrains us to find that the first *du Pont* factor weighs heavily against a conclusion that confusion is likely. *Cf. Kellogg Co. v. Pack’Em Enters. Inc.*, 1990 WL 354499, at *5 (TTAB 1990) (precedential) (FROOTEE

³⁸ 91 TTABVUE 32.

ICE and FROOT LOOPS are so different that, even were the goods, channels of trade, and customer classes the same, confusion would still be unlikely).

2. Similarity or dissimilarity and nature of the goods

The second *du Pont* factor concerns “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.” 476 F.2d at 1361. In most cases, the similarity of the goods is, along with the similarity of the marks, considered one of the relatively more important inquiries in the *du Pont* calculus. *See, e.g., Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (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.”); *CareFusion 2200, Inc. v. Entrotech Life Sciences, Inc.*, [Opp. No. 91206212](#), 2016 WL 4437726, at *7 (TTAB 2016) (precedential) (“In any likelihood of confusion analysis, two key considerations are the similarities between the goods and the similarities between the marks”) (citation omitted).

In the two EVSFOOD applications, the goods comprise various beverages and components for making beverages:

- Apple cider vinegar; Beer vinegar; Beverages made of tea; Grain-based beverages; Grass-based food beverages; Herbal food beverages; Vinegar; Wine vinegar; and
- Concentrates, syrups or powders used in the preparation of sports and energy drinks; Energy drinks; Fruit drinks and juices; Fruit juice concentrates; Herbal juices; Mineral water; Sports drinks containing electrolytes; Vegetable drinks; Vegetable-fruit juices.

Opposer asserts two registrations each for CELLFOOD and EVERETT STOREY.

Most relevant to the goods in the applications, one of the CELLFOOD registrations

(No. 2083802) lists “Mineral Supplements for human consumption,” and one of the EVERETT STOREY registrations (No. 2573852) identifies “Dietary, nutritional, food, vitamin and mineral supplements for human consumption.”³⁹

Opposer argues that “Applicant seeks to register its mark in the same classes as Opposer, and Applicant’s goods are identical to those of Opposer.” 91 TTABVUE 35. Obviously, the goods are not identical. But elsewhere Opposer makes the less facially-dismissible argument that the goods identified in its Class 5 CELLFOOD and EVERETT STOREY registrations and the beverage and beverage-component products in Applicant’s applications are “both nutrition-based and made for human consumption” and in that sense are “related.” 91 TTABVUE 36.⁴⁰

Usually we need more than just to find a general term that encompasses both parties’ goods or a broad category into which both parties’ goods could be said to fall.

³⁹ Opposer doesn’t even attempt to argue that the goods identified in the other CELLFOOD and EVERETT STOREY registrations—which comprise topically-applied products—are related to the beverages or beverage components identified in Applicant’s applications. We therefore find that Opposer has waived any such argument.

⁴⁰ Puzzlingly, Opposer’s trial brief cites to 1 TTABVUE 14 as evidence for this assertion. That page contains an allegation in Opposer’s original, now-superseded Notice of Opposition that the goods are related. Obviously, such an allegation is not evidence. But it refers to Exhibit 8 to that pleading, which is a nearly nine-year old print-out of a third-party registration for LIFEVANTAGE. We note, however, that where consumer-perception issues like likelihood of confusion are under consideration, the registrability of a mark is generally determined as of the date it is under consideration by the Board, which, in an inter partes case, means the testimony period. *See, e.g., Converse, Inc. v. Int’l Trade Comm’n Skechers U.S.A., Inc.*, 909 F.3d 1110, 1119 (Fed. Cir. 2018); *Oxford Pendaflex Corp. v. Rolodex Corp.*, 1979 WL 24884, at *1 n.3 (TTAB 1979) (precedential). This third-party registration predates that period by almost 9 years. As times goes by, our confidence in drawing inferences about current consumer perceptions from older evidence wanes. Registrations routinely go abandoned, are cancelled, or are amended to reflect deletion of identified goods or services. Moreover, Opposer did not tender this third-party registration during its trial period, as our rules require. *See* Trademark Rule 2.121(a), 37 C.F.R. § 2.121(a); 36 TTABVUE 9. We therefore do not consider either the allegation or the old copy.

See, e.g., Bose Corp. v. QSC Audio Prods., Inc., 293 F.3d 1367, 1376 (Fed. Cir. 2002) (“The Board is correct, as a general proposition, in discounting the relatedness of the WAVE product to the QSC amplifiers on the rationale that a broad general market category is not a generally reliable test of relatedness of products.”); *Elecs. Data Sys. Corp. v. EDSA Micro Corp.*, 1992 WL 184671, at *4 (TTAB 1992) (precedential) (“the issue of whether or not two products are related does not revolve around the question of whether a term can be used that describes them both, or whether both can be classified under the same general category”). Rather, we look for evidence that would show that they appeal to the same market, *see, e.g., Harvey Hubbell Inc. v. Tokyo Seimitsu Co.*, 1975 WL 20860, at *4 (TTAB 1975) (precedential); *In re Cotter and Co.*, 1973 WL 20021, at *1 (TTAB 1973) (precedential), or whether “that the use of the trademark in commercial transactions on the goods is likely to produce opportunities for purchasers or users of the goods to be misled about their source or sponsorship.” *Gen. Elec. Co. v. Graham Magnetics Inc.*, 1977 WL 22676, at *5 (TTAB 1977) (precedential). For example, evidence that other companies sell the goods of both parties under one mark, or that other companies have registered the same mark for both parties’ goods can show that the respective goods are related in this way. *See, e.g., Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 1117 (Fed. Cir. 2024); *In re Detroit Athletic Co.*, 903 F.3d 1297, 1306 (Fed. Cir. 2018).

Opposer’s briefs, however, cite no evidence of relatedness, leaving us only with the identifications of goods in the applications and registrations themselves.⁴¹ For its

⁴¹ By not arguing that there are any current third-party registrations or current instances of third-party use of the same mark for goods and services of both parties, Opposer has

part, Applicant simply points out that there is no evidence—presumably excepting the applications and registrations themselves—supporting that the goods overlap or are similar.⁴²

The sparsity of the record evidence in this case brings to mind the Board’s decision in *Inter IKEA Systems B.V. v. Akea, LLC*, [Opp. No. 91196527](#), 2014 WL 1827031 (TTAB 2014) (precedential). There, like here, the comparison was between one party’s supplements and another party’s food items, which included coffee, bread, biscuits, cakes, pastry, and candy. *Id.* at *1-2. There, as here, the opposer argued, without any evidence, that supplements are related to food and beverage products. *See id.* at *9. But the Board rejected the argument that the goods were related because “there [was] no testimony or evidence regarding the relationship between opposer’s goods ... and applicant’s nutritional, herbal, vitamin and mineral supplements.” *Id.*

Here, the goods are not identical, which is to say, they’re different. And the lack of probative evidence in this case constrains us, as in *IKEA Systems*, from finding that the goods are related. We’re not super-consumers with expertise in particular markets. We must rely on parties to submit the evidence we need to decide their

forfeited any such argument. To be sure, there are a few third-party registrations in the record, but they are attached to Office actions that were issued almost nine (9) years ago concerning applications for other marks, and Opposer does not cite them as evidence of relatedness. Further, we do not take judicial notice of registrations. *See, e.g., In re Seminole Tribe of Fla.*, [Ser. No. 87890892](#), 2023 WL 3751113, at *3 (TTAB 2023) (precedential). Therefore, even if Opposer had not forfeited the argument that third-party registrations support its relatedness argument, we would not, and do not, consider these old copies of registrations to be probative of current consumer perception.

⁴² See 92 TTABVue 16.

claims. On the evidence—or more precisely, the lack thereof—in this case, this factor weighs against a conclusion that confusion is likely.

3. Similarity or dissimilarity of trade channels

The third *du Pont* factor concerns “[t]he similarity or dissimilarity of established, likely-to-continue trade channels.” 476 F.2d at 1361. We focus on what the applications and registrations tell us about these channels. *See, e.g., Detroit Athletic*, 903 F.3d at 1308. Where, as here, there are no limitations or restrictions as to trade channels or classes of purchasers in the registrations and applications, we presume the goods are marketed in all normal trade channels, and to all normal classes of purchasers, of such goods. *See, e.g., Coach Servs.*, 668 F.3d at 1370. But what are the usual channels? Opposer’s President, Mr. Negrete, testified that Opposer sells its CELLFOOD supplements through channels that include online national retailers such as Amazon.com and Vitaminshoppe.com.⁴³ Applicant does not address this factor at all.

That’s not much for us to go on. Again, the decision in *Inter IKEA Systems B.V.*, 2014 WL 1827031, comes to mind. There, as here, the Board knew what the opposer’s trade channels were, but the applicant’s trade channels for its nutritional supplements—which were different goods from those asserted in the opposer’s registrations—were unrestricted. The Board explained:

When an application or registration fails to specify or limit the channels of trade of classes of customers, we must assume that the goods or services in question travel in all the normal channels of trade and to all prospective purchasers for the relevant goods

⁴³ See 88 TTABVue 7.

or services. Thus, when the dispute involves the comparison of different goods or services, this principle does not help the party asserting a likelihood of confusion unless there is further evidence that would permit a comparison of the normal trade channels for the parties' respective goods or services. That evidence is lacking here. Second, and more important, that applicant could conceivably sell its nutritional, herbal, vitamin and mineral supplements through [the trade channels used by the opposer] does not prove that opposer's goods and services and applicant's goods and services move through the same channels of trade and are sold to the same classes of consumers. For example, there is no evidence that any company rendering retail store services in the field of furniture, housewares and home furnishings, as well as restaurant and catering services, also sells nutritional, herbal, vitamin and mineral supplements. Under opposer's theory, any goods or services sold through [opposer's trade channels] move through the same channels of trade and, therefore, for all intents and purposes, all goods and services potentially move through the same channels of trade.

Id. at *10 (citation omitted; paragraphs combined). We base our decisions on evidence, not vibes. With this spotty an evidentiary record, we find ourselves unable to determine which way this factor tips. We therefore count it as neutral.

4. Who, and how sophisticated, are the purchasers?

du Pont also instruct us to look at evidence, "when of record," of "[t]he conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing." 476 F.2d at 1361. As with the comparison of the trade channels, there is little evidence of record on this factor. The lack of limitations in the goods identified in the respective registrations and application means all the "the normal customers." *See, e.g., Coach Servs.*, 668 F.3d at 1370.

Opposer's president, Mr. Negrete, testified a bit about consumers of his company's supplements, saying that they are "health-conscious consumers," and positing that

consumers of Applicant's products are the same.⁴⁴ Opposer's trial brief echoes the point, arguing that "[t]ypical consumers of CELLFOOD or other like products are those individuals who are particularly focused on their health and will tend to seek out products who (sic) will contribute or elevate their health."⁴⁵ While Opposer cites no evidence bearing on Applicant's classes of customers, it speculates that "if 'EVSFOOD' were to enter the marketplace, it would likely be marketed and advertised to the same audience as CELLFOOD."⁴⁶

But Opposer downplays the sophistication of the "health-conscious" consumers of the parties' respective goods, arguing that they do not exhibit "great sophistication or forethought" in making their purchasing decisions.⁴⁷ Here again, however, Opposer points to no evidence that "health-conscious" supplement shoppers do not exhibit any enhanced care in making purchasing decisions. *Cf. Inter IKEA Systems B.V.*, 2014 WL 1827031, at *12 ("We find that consumers who are potential purchasers of both opposer's goods and services and of applicant's products will exercise at least a moderate degree of consumer care when purchasing dietary supplements and, therefore, this *du Pont* factor weighs against finding that there is a likelihood of confusion."). Applicant does not address either the classes of customers it targets or their purchasing care.

⁴⁴ See 88 TTABVUE 23.

⁴⁵ See 91 TTABVUE 37.

⁴⁶ See *id.* at 38.

⁴⁷ See *id.* at 37.

While we credit Mr. Negrete's testimony that his company's targeted consumers are health conscious because this is information as to which he has personal knowledge, we see nothing in his declaration that would provide him with a basis to testify as to Applicant's classes of customers for its different goods. Moreover, we see no evidence bearing on whether Applicant's targeted customers would treat purchases of Applicant's products with less than ordinary care (e.g., in *du Pont*'s words, as an "impulse" purchase) or more than ordinary care (e.g., employing "careful, sophisticated purchasing" behavior).

Once again, the parties have provided us little upon which to base our finding. We are left to default to the identifications of goods in the applications and registrations themselves. Certainly purchasers of supplements also consume beverages. After all, all humans consume beverages. Opposer's customers therefore are necessarily a subset of Applicant's. And beverages such as the type identified in Applicant's applications are typically inexpensive, routine purchases. Without any evidence from Applicant indicating that this normal state of affairs does not apply in this particular case, we find this factor weighs somewhat in favor of a conclusion that confusion is likely.

5. The strength of opposer's marks

The fifth *du Pont* factor looks at the fame" of the prior mark. *du Pont*, 476 F.2d at 1361. This factor enables an Opposer an opportunity "to prove that its pleaded marks are entitled to an expanded scope of protection by adducing evidence of [its] fame" *Made in Nature, LLC v. Pharmavite LLC*, [Opp. No. 91223352](#), 2022 WL 2188890, at

*11 (TTAB 2022) (precedential). “Fame for purposes of likelihood of confusion is a matter of degree that varies along a spectrum from very strong to very weak.” *Coach Servs.*, 668 F.3d at 1367 (cleaned up; citations omitted). “A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength” *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (citations omitted). Marketplace strength evidence includes “sales, advertising, length of use of the mark, market share, brand awareness, licensing activities, and variety of goods bearing the mark.” *Coach Servs.*, 668 F.3d at 1367. The flip side of the fifth factor is the sixth factor: “the sixth *DuPont* factor allows Applicant to contract that scope of protection by adducing evidence of ‘the number and nature of similar marks in use on similar goods [or services].” *Monster Energy Co. v. Lo*, [Opp. No. 91225050](#), 2023 WL 417620, at *9 (TTAB 2023) (precedential) (quoting *Sock It to Me, Inc. v. Fan*, [Opp. No. 91230554](#), 2020 WL 3027605, at *11 (TTAB 2020) (precedential)).

Opposer argues that CELLFOOD and EVERETT STOREY are both “famous.”⁴⁸ But the only evidence we can glean from Opposer’s president’s testimony that could be probative are the statement that Opposer has been the exclusive U.S. supplier of CELLFOOD products (no mention of EVERETT STOREY products) since 1997, and that Opposer’s global (not U.S.) sales figures for **all** of Opposer’s products (not specifically CELLFOOD or EVERETT STOREY products) is \$350 million.⁴⁹ The only

⁴⁸ See 91 TTABVUE 38-41.

⁴⁹ See 88 TTABVUE 7, 24-25.

specific information comes from the declaration of Opposer's retained expert, Mr. Silverman, who avers that Opposer's U.S. wholesale distributor has spent more than \$2 million in the past three years to market CELLFOOD (no mention of EVERETT STOREY products) and "distributes more than \$38,000 worth of CELLFOOD product samples [no mention of EVERETT STOREY products] each year to its retail, health professional and spa and fitness center customers."⁵⁰ But we look through Mr. Silverman's declaration in vain for any personal knowledge that would form the foundation of these factual statements. He cites only a report allegedly issued in 2017 by "Lumina Health Products." This report, however, is not in the trial record. Mr. Silverman also reproduces two print ads, but they are mostly illegible and, from what little is legible, appear only to bear the CELLFOOD mark, not the EVERETT STOREY mark.⁵¹

This falls far short of proving that both the CELLFOOD and EVERETT STOREY marks are famous. First, statements as to global sales are not helpful. We are concerned only with the strength of Opposer's marks among U.S. consumers. *See KME Germany GmbH v. Zhejiang Hailiang Co.*, No. [91267675](#), 2023 WL 6366806, at *15 (TTAB 2023) (precedential); *cf. Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 1376 (Fed. Cir. 2005) (while Board should focus on whether a mark is famous among purchasers in the United States, global evidence can provide a "confirmatory context" for U.S.-specific evidence in the record). Second, what little

⁵⁰ *See id.* at 51-52.

⁵¹ *See* 88 TTABVue 51.

evidence Opposer provides is either too narrow, in that it concerns only CELLFOOD and not EVERETT STOREY products, or too broad, in that it talks in terms of sales of “all” of Opposers’ products, not just the products sold under the CELLFOOD and EVERETT STOREY marks.

Citing the sixth *du Pont* factor, Opposer also argues that the lack of evidence of any third-party registrations supports a conclusion that confusion is likely.⁵² As pointed out above, the sixth factor is a way for applicants to show that a mark cited against them is entitled to lesser protection than otherwise due, because of the fact that many other identical or similar marks exist. *See, e.g., Monster Energy Co. v. Lo*, 2023 WL 417620, at *9. But the converse is not true: the lack of evidence comprising third-party registrations does not affirmatively prove strength or fame beyond the strength we would normally accord marks registered on the Principal Register.

For these reasons, we find the fifth and sixth *du Pont* factors both to be neutral.

6. The extent of potential confusion

The twelfth *du Pont* factor is “[t]he extent of potential confusion, i. e., whether de minimis or substantial.” 477 F.2d at 1361. Opposer combines its discussion of this factor with that of the sixth *du Pont* factor,⁵³ which we just resolved. We don’t see the connection between the two factors. Decisions in which the Board examined the twelfth factor to determine the extent of potential confusion have looked at evidence, for example, of “whether the goods involved here are the type of goods that would be

⁵² See 91 TTABVUE 42-43; 93 TTABVUE 24.

⁵³ See 91 TTABVUE 41-43.

marketed to and purchased by significant numbers of purchasers.” See *In re Davey Prods. Pty Ltd.*, [Ser. No. 77029776](#), 2009 WL 2420527, at *9 (TTAB 2009) (precedential). In another decision, the Board looked at, inter alia, “the highly technical nature of applicant’s goods, and the limited number of potential purchasers.” See *Toro Co. v. Torohead Inc.*, 2001 WL 1734485, at *6 (TTAB 2001) (precedential). Here, we don’t have any similar evidence upon which to make a finding as to how extensive any potential confusion might be. As we explained above, Opposer’s evidence about its sales volume and market share does not pertain specifically to the supplement products under its asserted CELLFOOD and EVERETT STOREY marks or even to the United States. We therefore find this factor to be neutral in this case.

7. “The extent to which applicant has a right to exclude others from use of its mark on its goods.”

Opposer argues that the eleventh *du Pont* factor—“[t]he extent to which applicant has a right to exclude others from use of its mark on its goods,” see *du Pont*, 477 F.2d at 1361—“weighs heavily in its favor.”⁵⁴ Its argument consists mostly of asserting that it, not Applicant, is the senior user here. Applicant, for its part, makes no mention of the eleventh factor or any alleged right it may have to exclude others. In *Monster Energy Co. v. Lo*, 2023 WL 417620, the Board recently held that the eleventh factor “may be useful to determine how marketplace realities and consumer perception defined by **applicant’s** common law use and consequent right to exclude other users

⁵⁴ See 91 TTABVue 44; see also 93 TTABVue 25.

affects the likelihood of confusion.” *Id.* at *22 (emphasis added); *see also id.* at *20 n.80 (“On its face, the eleventh factor, ‘the extent to which applicant has a right to exclude others from use of its mark on its goods,’ involves an applicant’s, and not an opposer’s, right to exclude other users.”). Here, neither party has offered at trial any evidence concerning any common law rights Applicant may enjoy in the EVSFOOD mark in this country. Without any evidence pertinent to this factor, we deem it neutral in this case.

8. Weighing our findings on the relevant factors.

Our last step is to weigh the findings we have made on the individual likelihood-of-confusion factors together to determine whether confusion is likely or unlikely. *See, e.g., Charger Ventures*, 64 F.4th at 1384. In so doing, we are cognizant that this is not a simple task of mechanically tallying up how many factors support each party, but instead reflects how important the factors are relative to one another in this particular case, i.e., how heavily each factor weighs in one or the other party’s favor under the particular circumstances, as illuminated by the evidence of record. *See, e.g., Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 1356 (Fed. Cir. 2011) (“Citigroup’s approach of mechanically tallying the ... factors addressed is improper, as the factors have differing weights.”); *see also Charger Ventures*, 64 F.4th at 1381 (“In any given case, different ... factors may play a dominant role and some factors may not be relevant to the analysis.”) (citation omitted).

Here, we found EVSFOOD more dissimilar than similar to EVERETT STOREY and CELLFOOD “conjointly” and to CELLFOOD, and very dissimilar to EVERETT

STOREY. Also weighing against a conclusion that confusion is likely is that the goods are different and there was insufficient evidence to persuade us that they nevertheless are related. This factor, too, weighs against a conclusion that confusion is likely. And we note that these two factors ordinarily are weighty ones in the confusion calculus. *See, e.g., Federated Foods*, 544 F.2d at 1103 (“The means of distribution and sale, although certainly relevant, are areas of *peripheral* inquiry. 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.”) (emphases added); *In re Max Cap. Grp. Ltd.*, [Ser. No. 77186166](#), 2010 WL 22358, at *1 (TTAB 2010) (precedential) (“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services.”). We see no evidence or circumstances in this case why they shouldn’t have that gravity here.

Weighing a bit in favor of a conclusion that confusion is likely is the overlap in the customer class. But we think that this pales by comparison to the dissimilarities in the marks and goods.

We found the other factors on which Opposer relied to be neutral.

In sum, we think that it is quite clear that, on the evidence and arguments in this case, Opposer has failed to prove its Section 2(d) claim that EVSFOOD is likely to cause confusion.

C. False suggestion of a connection

Finally, we turn to Opposer's claim that the mark in Applicant's applications falsely suggests a connection with Opposer, in violation of Section 2(a), 15 U.S.C. § 1052(a). That provision provides for refusal of registration of any mark that "[c]onsists of or comprises ... matter which may ... falsely suggest a connection" with any "person."⁵⁵ Opposer, in asserting such a claim, must prove four essential elements:

1. EVSFOOD is the same as, or a close approximation of, the name or identity previously used by Opposer;
2. EVSFOOD would be recognized by consumers as such, in that it points uniquely and unmistakably to Opposer;
3. Opposer is not connected with the activities performed by Applicant under EVSFOOD; **and**
4. Opposer's fame or reputation is such that, when Applicant uses EVSFOOD in connection with Applicant's goods, consumers would presume a connection with Opposer.

U.S. Olympic Comm. v. Tempting Brands Netherlands B.V., [Opp. No. 91233138](#), 2021 WL 465324, at *9 (TTAB 2021) (precedential) (citation omitted; emphasis added); *Boston Athletic Ass'n v. Velocity, LLC*, [Opp. No. 91202562](#), 2015 WL 7273025, at *3 (TTAB 2015) (precedential); *see also Piano Factory Grp., Inc. v. Schiedmayer Celesta GmbH*, 11 F.4th 1363, 1377 (Fed. Cir. 2021).

Where one or more of these essential elements is found lacking, it is unnecessary to assess the remaining elements. *U.S. Olympic Comm.*, 2021 WL 465324, at *17; *see*

⁵⁵ In the Trademark Act, "person" includes corporate entities. *See* Section 45, 15 U.S.C. § 1127.

also Boston Athletic, 2015 WL 7273025, at *8 (“Given the lack of sufficient evidence showing that MARATHON MONDAY is perceived by the relevant public as a close approximation of the name or identity of Opposer, and given the frequent and various third-party uses of the term ‘Marathon Monday’ detailed above ... , which show that the term does not point uniquely and unmistakably to Opposer, there is no need for us to analyze the third and fourth prongs of the test.”). While intent to falsely suggest a connection is not a required element, evidence of intent could, to varying degrees depending on the nature of the evidence and other relevant circumstances, be persuasive that the public will make the intended false association. *Piano Factory*, 11 F.4th at 1380 (“A registrant’s intentions in using a mark are relevant to a false association claim.”); *see also Univ. of Notre Dame Du Lac v. J.C. Gourmet Food Imps. Co.*, 703 F.2d 1372, 1377 (Fed. Cir. 1983); *Bd. of Trustees of the Univ. of Ala. v. Pitts*, [Opp. No. 91187103](#), 2013 WL 4397047, at *27 (TTAB 2013) (precedential) (citations omitted), *vacated on other grounds by agreement sub nom. Bd. of Trustees of the Univ. of Ala. v. Houndstooth Mafia Enters. LLC*, 163 F. Supp. 3d 1150 (N.D. Ala. 2016).⁵⁶

⁵⁶ We note that, in other contexts, what the mark owner intends for the mark to convey to consumers is given little—and sometimes no—weight. *See, e.g., T.A.B. Sys. v. Pactel Teletrac*, 77 F.3d 1372, 1376 (Fed. Cir. 1996) (“[T]he Board in this case clearly misstated the law when it concluded that PacTel’s advertising, media and sales efforts were sufficient for analogous use as ‘intended to create an association in the mind of the relevant purchasing public between the mark, the services to be offered, and a single source.’ The user’s intent, no matter how clearly established, cannot suffice in lieu of proof of the necessary ‘prior public identification.’”); *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 568 F.2d 1342, 1345 (CCPA 1977) (“Seabrook contends that it ‘intentionally selected this mark because its distinctiveness would enable the design to distinguish its products from those of others.’ However, regardless of Seabrook’s intentions, it is the association, by the consumer, of the ‘oval’ design with Seabrook as the source that is determinative.”) (emphasis in original); *Plastilite Corp. v. Kassnar Imps.*, 508 F.2d 824, 827 (CCPA 1975) (“it is the association of the mark with a particular source by the ultimate consumers which is to be measured—not appellant’s intent”); *Hydra Mac, Inc. v. Mack Trucks, Inc.*, 507 F.2d 1399, 1400 (CCPA 1975) (“the

In this case, Opposer made Applicant's intent the centerpiece of its case. But not all of the intent-related evidence it submitted directly concerns Applicant or Applicant's intent as to what the EVSFOOD mark is designed to convey. The evidence that directly involves Applicant includes:

- Reg. No. 4393821 for EVSFOOD for, inter alia, nutritional supplements, owned by Evsfood, Inc.;⁵⁷
- Documents from 2014 assigning Reg. No. 4393821 from Evsfood, Inc., to Applicant Yuyao Deutrel Chemical Science and Technology Co., Ltd., with Junda Su signing on behalf of both assignor and assignee;⁵⁸
- A 2017 Board order in Cancellation No. 92058422, encaptioned *NU Science Corporation v. Yuyao Deutrel Chemical Science and Technology Co., Ltd. and Evsfood, Inc.*, cancelling Reg. No. 4393821 as a sanction for repeated discovery violations by Respondents involving its actions and those of Mr. Junda Su;⁵⁹
- The file for Appl. Ser. No. 86640155 for the mark EVERETT STOREY, filed by Applicant in May 2015, for various beverages, including a Sept. 2015 Office action refusing registration over the two EVERETT STOREY registrations Opposer asserts in this case;⁶⁰ and
- A Sept. 2015 Office action refusing registration of another application (Appl. Ser. No. 86640183) filed by Applicant, for the mark EVERETT

commercial impression **intended** by the user of a mark is entitled to very little consideration in resolving the issue of likelihood of confusion, etc., where, as the board here found, the **actual** impression created by the mark is different from the impression allegedly intended by the user") (emphasis in original); *Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 828-29 (CCPA 1970)) ("The mere fact that a combination of words or a slogan is adopted and used by a manufacturer with the intent Clairol has manifested here—that it identify its goods and distinguish them from those of others—does not necessarily mean that the slogan accomplishes that purpose in reality."). That, in the context of Section 2(a) false suggestion case, the mark owner's intent is credited and weighed against it suggests that intent might not strictly be used as a factor to measure consumer perception, but rather is akin to an equitable consideration used against a mark owner deemed to be operating in bad faith.

⁵⁷ See 89 TTABVUE 571-72.

⁵⁸ See 90 TTABVUE 3-6.

⁵⁹ See 89 TTABVUE 571-81.

⁶⁰ See 90 TTABVUE 22-63.

STOREY for various beverages overlapping with those in Applicant's current Class 32 application based on the two registrations Opposer asserts in this case.⁶¹

These documents show that in 2015, Applicant Yuyao had filed two applications for the mark EVERETT STOREY identifying beverage and beverage-related goods overlapping with those goods Applicant identifies in the two applications at issue here, which were also filed in 2015. While Appl. Ser. No. 86640183 is not in the trial record, Appl. Ser. No. 86640155 is, and the declaration on behalf of Applicant as to this application was executed by Junda Su as “manager.”⁶² Several years before Applicant filed these two applications, Mr. Su, in a long-pending federal court case involving Opposer's claims against the Henkels, executed a testimonial declaration in which he outlined his knowledge of Dr. Everett Storey and of the CELLFOOD supplement Dr. Storey allegedly invented, and in which he briefly recounted that he had requested of Opposer that he be designated a distributor of CELLFOOD products in China (a request that Opposer did not accept).⁶³ Mr. Su also recounted that he incorporated “Evsfood, Inc.”—i.e., a company whose name is identical to the applied-for marks—to be the platform for his ongoing research into “Mr. Storey's alleged technique” and to create a formula that would embody Storey's and Mr. Su's research.⁶⁴ While Mr. Su then goes on to testify that, once he learned of the Henkels' nefarious activities, he dissociated himself and his company from them, he goes on to

⁶¹ See *id.* at 66-97.

⁶² See *id.* at 24-25.

⁶³ See 89 TTABVUE 202-03.

⁶⁴ See *id.* at 204.

testify that he then has Evsfood, Inc., assign its trademark registration for EVSFOOD to Applicant.⁶⁵

This evidence shows not only that Applicant knew of Everett Storey (the person) and Opposer's CELLFOOD supplement products years before Applicant filed these two applications, but Mr. Su created Evsfood, Inc., to try to compete with Opposer. In connection with that goal, Evsfood, Inc., obtained a registration for EVSFOOD, which it then transferred to Applicant in 2014 via a transaction executed by Mr. Su on behalf of the assignor and the assignee. Applicant then, around the time it filed the two applications at issue here, filed two applications to register EVERETT STOREY for products in Classes 30 and 32. To us, this evidence collectively evinces Applicant's intent to create an association between EVSFOOD, on the one hand, and Dr. Everett Storey and CELLFOOD products, together, on the other hand.⁶⁶

But bad intent is not what Section 2(a) proscribes. Falsely suggesting to the consuming public a connection is the proscribed wrong. That question, like so many others in trademark law, is one of consumer perception. The weight we give to evidence of an applicant's ill intent depends how close the mark at issue is to "the

⁶⁵ See *id.* at 205.

⁶⁶ While Opposer has provided copious additional evidence of Applicant's, Mr. Su's, Mr. Su's various third-party corporate entities', and the Henkels,' activities, we do not consider any of that other evidence to bear on the issue of Applicant's intent at the time it filed the applications at issue. For example, most of the Chinese legal proceedings between Opposer and Applicant post-date the applications at issue. In addition, while there is further evidence of Mr. Su's allegedly questionable activities with respect to other corporate entities, Opposer does not provide evidence that would permit us to make a finding that these activities constituted activities on behalf of alter egos of Applicant. In any event, the evidence outlined in the body of this opinion sufficiently convinces us of Applicant's ill intent, making all this additional evidence merely cumulative.

name or identity previously used” by the opposer. Thus, in *Bd. of Trustees of the Univ. of Ala. v. Pitts*, 2013 WL 4397047, we found that the applicant’s admitted intent to create an association with opposer the University of Alabama’s football program was insufficient to result in a false suggestion of a connection because the opposer had never used the mark adopted by the applicant. *See id.* at *27. So, too, here. There is no evidence in this case that Opposer has ever used EVSFOOD in any way nor evidence that the consuming public associates EVSFOOD with Opposer.

We acknowledge Opposer’s argument that EVSFOOD takes the “EV” from “EVERETT” and the “S” from “STOREY” in Opposer’s EVERETT STOREY mark and combines those selected letters with the word “FOOD” from Opposer’s CELLFOOD mark. But as we explained in resolving Opposer’s claim under Section 2(d), there is no direct evidence supporting Opposer’s argument that consumers will understand that the “EVS” is a reference to Everett Storey. And the circumstantial evidence from which we could arrive at Opposer’s requested destination—e.g., evidence here showing that consumers have been exposed to Opposer’s EVERETT STOREY mark, which seems a prerequisite to any finding that they therefore would see “EVS” as a reference to it—is vanishingly thin. There’s not even one photo of a product displaying the EVERETT STOREY mark, and there is no evidence documenting any U.S. sales (either in revenue or unit volume) of EVERETT STOREY-branded products. Opposer did not even provide any U.S. advertising exemplars mentioning Everett Storey, let alone displaying or advertising the EVERETT STOREY mark, nor do we see any U.S. advertising expenditures for products under that mark. Thus, we find the evidence

in this case falls far short of supporting Opposer's claim that "Everett Storey" is a part of Opposer's name or identity such that, when U.S. consumers see EVSFOOD, they will associate it with Opposer.

Similar to the situation we confronted in *Bd. of Trustees of the Univ. of Ala. v. Pitts*, the evidence of Applicant's intent here, while clear, is insufficient to make up for the clear failure of Opposer's evidence to show the required elements that (1) EVSFOOD is the same as, or a close approximation of, the name or identity previously used by Opposer and that (2) EVSFOOD would be recognized by consumers as such, in that it points uniquely and unmistakably to Opposer.

Having found that Opposer has failed to carry its burden to prove the first two required elements of its Section 2(a) false suggestion of a connection claim, we do not reach the remaining two elements. We dismiss this claim as well.

IV. Conclusion

Decision: Because Opposer has failed to prove, by a preponderance of the evidence, each of its three claims (under Trademark Act Sections 1(b), 2(a), and 2(d)), we dismiss this opposition.