

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: August 18, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Frame La Brands, LLC

v.

*Sveba S.r.l., Vincenzo Salamone,
Ornella Sorrentino, and Florin-Dumitru Suceava*

—
Opposition No. 91245241
—

Rachael Santori and Catherine M.C. Farrelly of Frankfurt Kurnit Klein & Selz, P.C.
for Frame La Brands, LLC.

Aaron T. Borrowman of Kelly & Kelley, LLP
for Sveba S.r.l., Vincenzo Salamone, Ornella Sorrentino,
and Florin-Dumitru Suceava.

—
Before Bergsman, Greenbaum, Heasley,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Sveba S.r.l., Salamone Vincenzo, Sorrentino Ornella, and Florin-Dumitru Suceava (Applicant) seek registration on the Principal Register of the mark FRAME and design, reproduced below, for the goods listed below:¹

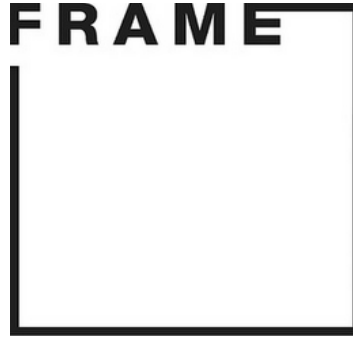
Eau de cologne; nail art stickers; adhesives for cosmetic purposes; adhesives for affixing false hair; aromatics; lipstick cases; cotton swabs for cosmetic purposes; false

¹ For ease of reference, we refer to the applicants collectively as “Applicant.”

eyelashes; make-up powder; cosmetics; cosmetic creams; eyebrow cosmetics; cosmetic preparations for eyelashes; skin whitening creams; dentifrices; cleansers for intimate personal hygiene purposes, non-medicated; ethereal essences; topical herbal extracts for cosmetic purposes; massage gels, other than for medical purposes; dental bleaching gels; henna dye for cosmetic purposes; incense; cleansing milk for toilet purposes; after-shave lotions; lotions for cosmetic purposes; lip glosses; mascara; beauty masks; cosmetic pencils; mint for perfumery; decorative transfers for cosmetic purposes; cosmetic kits comprised of Lipstick, lip gloss, Mascara, Eyeliners, Eye shadow, Eyes pencils, Make-up pencils, Blusher; oils for toilet purposes; oils for perfumes and scents; oils for cosmetic purposes; cotton wool for cosmetic purposes; hydrogen peroxide for cosmetic purposes; pomades for cosmetic purposes; fragrances, namely, potpourris; sun block preparations for cosmetic purposes; cosmetic preparations for baths; aloe vera preparations for cosmetic purposes; phytocosmetic preparations; collagen preparations for cosmetic purposes; toiletries, namely, douching preparations for personal sanitary or deodorant purposes; eye-washes, not for medical purposes; cosmetic sun-protecting preparations; cosmetic preparations for slimming purposes; cosmetic preparations for skin care; depilatory preparations; perfumery; make-up preparations; make-up removing preparations; perfumes; lipsticks; bath salts, not for medical purposes; shaving soap; body soap; nail varnish; nail varnish removers; furbishing preparations, namely, polishing preparations; talcum powder, for toilet use; terpenes being essential oils; cosmetic dyes, namely, hair dye; beard dyes; make-up; false nails, in International Class 3; and

Vitamin supplements; food supplements; mineral food supplements; glucose dietary supplements; propolis dietary supplements; yeast dietary supplements; casein dietary supplements; protein dietary supplements; alginate dietary supplements; pollen dietary supplements; enzyme dietary supplements; dietary supplements

consisting of vitamins; royal jelly dietary supplements; linseed dietary supplements, in International Class 5.²



Applicant describes its mark as follows:

The mark consists of the word “FRAME” with a line extending out of the top line of the letter “E” and continuing on to form a square which ends just below the “F”.

Color is not claimed as a feature of the mark.

Frame La Brands, LLC (Opposer) opposes registration of Applicant’s mark in International Class 3 only 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 FRAME marks as to be likely to cause confusion. Opposer pleads ownership of the registered marks listed below:

- FRAME (stylized), reproduced below, for the goods and services listed below:

Travelling bags; travel cases; holdalls; handbags; shoulder bags; cosmetic bags sold empty; rucksacks; backpacks; satchels; clutch bags; all-purpose carrying bags; tote bags; beach bags; overnight bags; duffel bags; leather and imitation leather bags; toiletry bags sold empty; leather

² Application Serial No. 79225452 was filed on July 14, 2017, under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a), seeking a request for extension of protection of International Registration No. 135800 registered July 14, 2017.

cases; leather shopping bags; wallets; purses, in International Class 18;³

Clothing, namely, jackets, shirts, dresses, trousers, jeans, sweaters, blouses, vests, blazers and skirts, in International Class 25;⁴ and

On-line retail store services featuring shoulder bags, tote bags, jeans, overalls, jackets, shirts, tank tops, t-shirts, skirts, shorts, dresses, jumpers, trousers, scarves, gloves, hats, belts, footwear, shoes, wraps, sweatshirts, sweatpants, sweaters, socks, rainwear, swimwear, sleepwear, beachwear, underwear, lingerie, blouses, vests, blazers, ponchos, jumpsuits, tights and play suits, in International Class 35.⁵

FRAME

Opposer describes its mark as follows:

The mark consists of the word “FRAME” in stylized lettering.

Color is not claimed as a feature of the mark.

● FRAME DENIM, in standard character form, for “retail store services featuring clothing and shoulder bags, all the foregoing featuring denim,” in International Class 35.⁶ Opposer disclaims the exclusive right to use the word “Denim.”

● FRAME LONDON – LOS ANGELES (stylized), reproduced below, for “jeans,” in International Class 25;⁷

³ Registration No. 5556035, registered September 4, 2018.

⁴ Registration No. 5270809, registered August 22, 2017.

⁵ Registration No. 5166888, registered March 21, 2017.

⁶ Registration No. 5176618, registered April 4, 2017.

⁷ Registration No. 5715687, registered April 2, 2019.

FRAME
LONDON - LOS ANGELES

Opposer describes its mark as follows:

The mark consists of the word “FRAME” in stylized lettering, below which is the wording “London-Los Angeles”.

Color is not claimed as a feature of the mark.

Opposer disclaims the exclusive right to use the names “London” and “Los Angeles.”

• FRAME ATELIER LONDON – LOS ANGELES (stylized), reproduced below, for “clothing, namely, jackets, trousers, sweaters, vests, blazers, ponchos, jumpsuits,” in International Class 25.⁸

FRAME
ATELIER
LONDON - LOS ANGELES

Opposer describes its mark as follows:

The mark consists of the word “FRAME” in stylized lettering, below which is the word “ATELIER” in stylized lettering, below which is the wording “LONDON-LOS ANGELES” in stylized lettering.

Color is not claimed as a feature of the mark.

Opposer disclaims the exclusive right to use the names “Atelier,” “London,” and “Los Angeles.”

⁸ Registration No. 5187477, registered April 18, 2017.

Opposer also alleges that it has common law rights in the FRAME marks for clothing, bags, candles, houseware, and retail sales of those products. However, we focus our likelihood of confusion analysis on Opposer's pleaded registrations.

Applicant denies the salient allegations in the Notice of Opposition. Applicant also raises purported affirmative defenses that are not true affirmative defenses; rather, they are merely amplifications of its denials. *DeVivo v. Ortiz*, 2020 USPQ2d 10153, *1 (TTAB 2020).

Citations to the record and briefs refer to the USPTO TTABVUE database.

I. Preliminary Issues

Before proceeding to the merits of the refusal, we address some preliminary matters.

A. The assignment of Applicant's application

On July 14, 2017, Carlo Mazzuca Mari, Vincenzo Mazzuca Mari, Vincenzo Salamone, Ornella Sorrentino, and Florin-Dumitru Suceava filed the application at issue. On April 14, 2020, the original applicants assigned the entire right title and interest in their mark and application to Sveba S.r.l., Vincenzo Salamone, Ornella Sorrentino and Florin-Dumitru Suceava. Applicant recorded the assignment on June 4, 2020, at reel 7608, frame 0258. Accordingly, Sveba S.r.l., Vincenzo Salamone, Ornella Sorrentino and Florin-Dumitru Suceava are substituted as Applicant in this proceeding.

B. Illegible documents

Opposer introduced documents that are only partially legible. For example, the copies of USPTO records showing the status of third-party marks Opposer has opposed are only partially legible,⁹ as are some of the webpages from third-party retailers.¹⁰ The parties are responsible for ensuring that the evidence they introduce is legible. *See Weider Publ'ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1351 (TTAB 2014) (onus is on party making submissions to ensure that, at a minimum, “all materials are clearly readable by the adverse party and the Board.”), *appeal dismissed per stipulation*, No. 14-1461 (Fed. Cir. 2014); *Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1758 n. 16 (TTAB 2013) (citing *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....”)). Accordingly, we will consider the evidence, or a portion of the evidence, only if it is clear and legible.

⁹ 32 TTABVUE 577-619 and 33 TTABVUE 2-14.

¹⁰ 30 TTABVUE 171-203.

C. Applicant's amendment to its description of goods

On March 11, 2021, Applicant filed a motion to amend its description of goods without the consent of Opposer.¹¹ The Board, in our July 7, 2021 order, deferred consideration of Applicant's motion until final hearing.¹²

Applicant seeks to amend its description of goods primarily by deleting many of the listed products and by prefacing that its products are "anti-aging preparations." We reproduce below Applicant's description of goods striking through the products it seeks to delete and bolding the addition:

Anti-aging preparations, namely, Eau de cologne; nail art stickers; adhesives for cosmetic purposes; adhesives for affixing false hair; aromatics; lipstick cases; cotton swabs for cosmetic purposes; false eyelashes; make up powder; cosmetics; cosmetic creams; eyebrow cosmetics; cosmetic preparations for eyelashes; skin whitening creams; dentifrices; cleansers for intimate personal hygiene purposes, non-medicated; ethereal essences; topical herbal extracts for cosmetic purposes; massage gels, other than for medical purposes; dental bleaching gels; henna dye for cosmetic purposes; incense; cleansing milk for toilet purposes; aftershave lotions; lotions for cosmetic purposes; lip glosses; mascara; beauty masks; cosmetic pencils; mint for perfumery; decorative transfers for cosmetic purposes; cosmetic kits comprised of Lipstick, lip gloss, Mascara, Eyeliners, Eye shadow, Eyes pencils, Make up pencils, Blusher; oils for toilet purposes; oils for perfumes and scents; oils for cosmetic purposes; cotton wool for cosmetic purposes; hydrogen peroxide for cosmetic purposes; pomades for cosmetic purposes; fragrances, namely, potpourris; sun block preparations for cosmetic purposes; cosmetic preparations for baths; aloe vera preparations for cosmetic purposes; phytocosmetic preparations; collagen preparations for cosmetic purposes; toiletries, namely, douching preparations for personal sanitary or deodorant

¹¹ 25 TTABVUE.

¹² 29 TTABVUE 2.

~~purposes; eye-washes, not for medical purposes; cosmetic sun-protecting preparations; cosmetic preparations for slimming purposes; cosmetic preparations for skin care; depilatory preparations; perfumery; make up preparations; make-up removing preparations; perfumes; lipsticks; bath salts, not for medical purposes; shaving soap; body soap; nail varnish; nail varnish removers; furbishing preparations, namely, polishing preparations; talcum powder, for toilet use; terpenes being essential oils; cosmetic dyes, namely, hair dye; beard dyes; make-up; false nails~~

Applicant argues that because its products are related to anti-aging preparations, it has inserted the qualifying and clarifying language “anti-aging preparations, namely,” before the list of products.¹³ However, Applicant did not properly qualify and clarify the description of goods because of its misuse of semicolons. As the Trademark Manual of Examining Procedure explains:

In general, commas should be used in the identification to separate items within a particular category of goods or services. When the items are preceded by the word “namely,” a comma should always be used before and after that term. For example, "clothing, namely, hats, sweaters, and jeans" is an acceptable identification of goods in Class 25 and shows proper use of commas. ...

Semicolons should generally be used to separate distinct categories of goods or services within a single class. For example, “cleaners, namely, glass cleaners, oven cleaners, and carpet cleaners; deodorants for pets” is an acceptable identification in Class 3. In this example, the word “cleaners” names the category covering “glass cleaners, oven cleaners, and carpet cleaners.” The semicolon prior to “deodorants for pets” indicates that the deodorants are a separate category of goods from the cleaners. *See In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1166 (TTAB 2013) (finding that, because a semicolon separated the two relevant clauses in registrant’s identification, its

¹³ 25 TTABVUE 5.

“restaurant and bar services” is a discrete category of services that stands alone and independently as a basis for likelihood-of-confusion analysis, and is not connected to nor dependent on the services set out on the other side of the semicolon).

TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1402.01(a) (2022).

Technically, “anti-aging preparations” are a stand-alone product because they are separated from the other products by a semicolon. “Anti-aging preparations” per se are an indefinite description of goods because they do not identify the specific products comprising the “anti-aging preparations” by their common commercial names. Nevertheless, we understand that Applicant meant to amend its description of goods so that all of the products listed in International Class 3 fall under the penumbra of “anti-aging products.”

In view of the foregoing and because Applicant otherwise deleted products from the original description of goods, we grant Applicant’s motion to amend its description of goods. Thus, the amended description of goods reads “Anti-aging preparations, namely,” and the remaining list of products is separated by commas, not semicolons.

In the analysis of the similarity or dissimilarity and nature of the goods and services, we discuss the meaning of the term “anti-aging preparations.”

II. The Record

The record includes the pleadings, and under Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Applicant’s application.¹⁴

¹⁴ Therefore, it was not necessary for Applicant to file a notice of reliance on a copy of Applicant’s application file. (36 TTABVUE 139-206).

Opposer's pleaded registrations are of record because Opposer attached copies of its pleaded registrations printed from the USPTO Trademark Status and Document Retrieval (TSDR) system showing the current status of and title to the registrations to its Notice of Opposition. Trademark Rule 2.122(b)(2), 37 C.F.R. § 2.122(b)(2).¹⁵

The parties submitted the testimony and evidence listed below:

A. Opposer's testimony and evidence.

1. Notice of reliance on a copy of Opposer's website (frame-store.com);¹⁶
2. Notice of reliance on excerpts from third-party websites for Bergdorf Goodman, Bloomingdales, Macy's, Neiman Marcus, Net-A-Porter, and Saks Fifth Avenue;¹⁷
3. Notice of reliance on media referring to Opposer or Opposer's FRAME products and services;¹⁸
4. Notice of reliance on excerpts from Opposer's Instagram page @FRAME;¹⁹

¹⁵ Therefore, it was not necessary for Opposer to file a notice of reliance on copies of Opposer's pleaded registrations. (33 TTABVUE 164-243).

¹⁶ 30 TTABVUE 8-169.

¹⁷ 30 TTABVUE 171-254.

¹⁸ 30 TTABVUE 256-305 and 31 TTABVUE 2-119. We do not consider the excerpt from the Who What Wear website (whowhatwear.co.uk) because it is United Kingdom website and Opposer did not introduce any evidence showing that consumers in the United States would access it. (31 TTABVUE 18-34).

¹⁹ 31 TTABVUE 120-122.

5. Notice of reliance on excerpts from third-party websites for Christian Louboutin, Jimmy Choo, H&M, Bottega Veneta, Calvin Klein, Carolina Herrera, Chanel, Chloé, Dior, Giorgio Armani, Givenchy, Gucci, Harrods, Hermès, Marc Jacobs, Prada, Ralph Lauren, Tom Ford, Tory Burch, Saint Laurent, Zara, and Burberry;²⁰
6. Notice of reliance on the “index of designers” listed in third-party websites for Neiman Marcus, Net-A-Porter, Saks Fifth Avenue, Shopbop, Bergdorf Goodman, Bloomingdales, and Moda Operandi;²¹
7. Notice of reliance on excerpts from the GOOGLE search engine results (hit list) for “frame denim” and “frame clothing”;²²
8. Notice of reliance on copies of USPTO records showing the status of third-party marks Opposer has opposed;²³
9. Notice of reliance on copies of third-party registrations covering the goods and services in both Applicant’s application and Opposer’s pleaded registrations;²⁴ and
10. Testimony declaration of Adrian Taylor, Opposer’s Chief Financial Officer.²⁵

²⁰ 31 TTABVUE 124-529 and 32 TTABVUE 2-350.

²¹ 32 TTABVUE 352-567.

Opposer referred to the “index of designers” as webpages from the third-party retailers “relevant to show that Opposer’s trademarks are unique, and have strong marketplace recognition, and therefore relevant to show the similarity of the parties’ marks.” (30 TTABVUE 3). However, FRAME is just one of many designers whose products the third-party retailers claim to carry. We fail to see how these lists have any probative value.

²² 32 TTABVUE 569-575.

²³ 32 TTABVUE 577-619 and 33 TTABVUE 2-14. These documents are only partially legible.

²⁴ 33 TTABVUE 16-162.

²⁵ 34 TTABVUE.

B. Applicant's testimony and evidence.

1. Testimony declaration of Florin-Dumitru Suceava, co-Applicant;²⁶ and
2. Notice of reliance on excerpts from Applicant's website (framecosmetics.com).²⁷

C. Opposer's rebuttal testimony and evidence.

The rebuttal testimony declaration of Adrian Taylor.²⁸

III. Entitlement to a statutory cause of action

Entitlement to a statutory cause of action, formerly referred to as "standing" by the Federal Circuit and the Board, is an element of the plaintiff's case in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (2021); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). To establish entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute and (ii) a reasonable belief in damage proximately caused by the registration of the mark. *Corcamore*, 2020 USPQ2d 11277 at *4. *See also Empresa Cubana*, 111 USPQ2d at 1062; *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina*

²⁶ 35 TTABVUE 5-126.

²⁷ 47 TTABVUE.

²⁸ 38 TTABVUE. The Board posted the portions of the Taylor rebuttal testimony declaration designated confidential at 37 TTABVUE.

Co., 670 F.2d 1024, 213 USPQ 185, 189 (TTAB 1982); *Spanishtown Enters.*, 2020 USPQ2d 11388, at *1.

Here, Opposer's use and registration of its FRAME marks establish that it is entitled to oppose the registration of Applicant's mark.²⁹ *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (pleaded registrations "suffice to establish ... direct commercial interest"; a belief in likely damage can be shown by establishing a direct commercial interest); *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *6 (TTAB 2020) (pleaded registrations establish statutory entitlement to bring opposition); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (testimony that plaintiff uses its mark "is sufficient to support [plaintiff's] allegations of a reasonable belief that it would be damaged").

Applicant, in its brief, does not contest Opposer's entitlement to a statutory cause of action.

IV. Priority

These same pleaded registrations, which Applicant has not counterclaimed to cancel, establish that priority is not an issue as to the marks and the goods and services covered by the registrations. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d. 1400, 182 USPQ 108, 110 (CCPA 1974)).

²⁹ Notice of Opposition Exh. A (1 TTABVUE 18-106); Taylor Testimony Decl, ¶ 7 (34 TTABVUE 2).

Applicant, in its brief, does not contest Opposer's prior use of its FRAME marks.

V. Likelihood of confusion

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). “In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET*

Commc'ns Inc., 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1533).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). “Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because 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.’” *In re Embiid*, 2021 USPQ2d 577, at *10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). *See also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004).

A. The strength of Opposer’s FRAME marks

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 marketplace recognition 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. N. Atl. Operating Co., Inc., 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006); 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. 2022 Update) (“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 or commercial strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d at 1899. The commercial strength of the mark also is affected by the number and nature of third-party uses of similar marks for similar goods. *DuPont*, 177 USPQ at 567; *In re FCA US LLC*, 126 USPQ2d 1214, 1224 (TTAB 2018) (“Evidence of third-party use may reflect commercial weakness.”).

For purposes of analysis of likelihood of confusion, a mark’s renown may “var[y] along a spectrum from very strong to very weak.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (internal quotations omitted). The proper standard is the mark’s “renown within a specific product market,” *id.*, and “is determined from the viewpoint of consumers of like products,” *id.* at 1735, and not from the viewpoint of the general public.

1. Inherent or conceptual strength

Opposer owns three registrations for FRAME (stylized), one registration for FRAME DENIM in standard character form, one registration for FRAME LONDON

– LOS ANGELES (stylized), and one registration for FRAME ATELIER LONDON – LOS ANGELES (stylized). For purposes of this determining the inherent or conceptual strength of Opposer’s marks, we focus our analysis on the inherent or conceptual strength of the term FRAME.

The MERRIAM WEBSTER DICTIONARY defines the word “Frame,” inter alia, as follows:³⁰

- “the physical makeup of an animal and especially a human body: PHYSIQUE, FIGURE”;
- “something composed of parts fitted together and united”;
- “the underlying constructional system or structure that give shape or strength (as to a building)”;
- “an enclosing border.”

As such, the word “Frame” has no suggestive or descriptive meaning when used in connection with Opposer’s bags in International Class 18, clothing in International Class 25, or retail and online store services in International Class 35. “Frame” is an arbitrary term when used in connection with products in those classes and, therefore, it forms inherently strong marks. *See Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (arbitrary terms are conceptually strong trademarks); *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004) (defining an arbitrary mark as a “known word used in an unexpected or uncommon

³⁰ Applicant’s Brief, Appendix A (45 TTABVue 45).

way” and observing that such marks are typically strong); *In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1479 (TTAB 2007) (completely unique and arbitrary, if not coined, nature of mark in relation to goods entitles the registered mark to a broad scope of protection, and significantly increases the likelihood that the marks, when used in connection with the identical goods would cause confusion).

2. Commercial strength

We now turn to the commercial strength of Opposer’s FRAME marks. Adrian Taylor, Opposer’s Chief Financial Officer, testified about Opposer’s use of its FRAME marks, Opposer’s geographic trading area, sales revenues, and advertising expenditures.

- “The initial FRAME products were a range of denim jeans, first sold in the United States in September of 2013.”;³¹
- “Currently, FRAME sells a full line of both women’s and men’s ready-to-wear clothing, including items such as tops, blouses, tank tops, tee-shirts, sweaters, pants, dresses, jumpsuits, skirts, shorts, jackets, and coats.”;³²
- Opposer opened an e-commerce FRAME online store in April 2016;³³
- Opposer opened its first FRAME brick and mortar store in April 2016;³⁴
- Opposer began selling FRAME handbags in March 2018;³⁵

³¹ Taylor Testimony Decl. ¶ 7 (34 TTABVUE 3).

³² Taylor Testimony Decl. ¶ 17 (34 TTABVUE 5).

³³ Taylor Testimony Decl. ¶ 19 (34 TTABVUE 5).

³⁴ Taylor Testimony Decl. ¶ 20 (34 TTABVUE 5).

³⁵ Taylor Testimony Decl. ¶ 22 (34 TTABVUE 5).

- Opposer also sells FRAME footwear and jewelry;³⁶
- Saks Fifth Avenue, Bloomingdale's, Bergdorf Goodman, and NET-A-PORTER.COM sell FRAME products;³⁷
- Opposer has FRAME retail stores in Boston, Austin, Dallas, Houston, San Francisco, Aspen, Greenwich, Manhasset, the Upper East Side, Meatpacking and SoHo districts of New York City, and the Grove, Pacific Palisades, and on Melrose Avenue in Los Angeles;³⁸
- Opposer spent approximately \$1.7 million in advertising and marketing in 2014, \$2.3 million in advertising and marketing in 2015, and \$2.5 million in advertising and marketing in 2016;³⁹
- Opposer spent those advertising and marketing expenses on its website (frame-store.com), social media, collaborations with celebrities such as actor Willem Dafoe, and models Lara Stone, Claudia Schiffer and Imaan Hammam, through print advertising, direct email advertising, and digital ads appearing on third-party websites and social media, billboard advertising, promotional events, and fashion shows;⁴⁰
- Opposer's FRAME Instagram account @FRAME has 445,000 followers;⁴¹

³⁶ Taylor Testimony Decl. ¶¶ 23 and 24 (34 TTABVUE 5).

³⁷ Taylor Testimony Decl. ¶ 31 (34 TTABVUE 6).

³⁸ Taylor Testimony Decl. ¶ 35 (34 TTABVUE 6).

³⁹ Taylor Testimony Decl. ¶¶ 46-48 (34 TTABVUE 8).

⁴⁰ Taylor Testimony Decl. ¶¶ 38-45 (34 TTABVUE 7-8).

⁴¹ Taylor Testimony Decl. ¶ 42 (34 TTABVUE 8).

- Opposer had sales of approximately \$110 million in 2015, \$175 million in 2016, and \$400 million in 2020;⁴² and

- Opposer has received favorable unsolicited media exposure.⁴³ For example,

- “Framed for Expansion: Denim Brand Eyes More Stores,” WWD (wwd.com)

(December 3, 2019)

The brand [FRAME] was made popular by “It” girls including Poppy Delevingne, Lily Aldridge, and Kate Bosworth, among others, with just one pair of blue jeans in 2012.

Though in just seven years, Frame has rapidly evolved from a favorite for off-duty models to a fashion house that releases four ready-to-wear collections a year.⁴⁴

And Frame has reached a vast audience outside of the fashion world too, finding a niche in “affordable luxury,” where the company said value is offered at a premium price.⁴⁵

- “Mejuri x Frame Launch Joint Collection,” Teen Vogue (teenvogue.com)

(October 26, 2020)

Internet favorite jewelry brand Mejuri is teaming up with celeb fave clothing line Frame for an exclusive collection of jewelry.⁴⁶

⁴² Taylor Testimony Decl. ¶¶ 47-49 (34 TTABVUE 8).

⁴³ 30 TTABVUE 256-305 and 31 TTABVUE 2-118. The media evidence is probative of what the authors have written and the readers have read, not for the truth of what has been written. We can infer from this evidence how the public perceives Opposer’s FRAME marks.

⁴⁴ 31 TTABVUE 106.

⁴⁵ 31 TTABVUE 108.

⁴⁶ 31 TTABVUE 87.

- “Laura Stone Teams Up With Frame for a Supermodel Denim Collection,”
Vogue (vogue.com) (November 14, 2016)

[Lara] Stone was a natural fit for Frame, a denim label known for its high-profile insider fashion collaborations.⁴⁷

Based on the foregoing, we find that the commercial strength of Opposer’s FRAME marks fall on the strong side of the spectrum from very strong to very weak. *Joseph Phelps Vineyards*, 122 USPQ2d at 1734.

Applicant takes a contrary position, arguing that “the term ‘frame’ is neither unique nor unusual.”⁴⁸ Relying on the testimony declaration of Florin-Dumitru Suceava, co-Applicant, Applicant proffers that it conducted an in-house Internet search for the term “Frame” and “found it to be used by a large number and variety of companies, from companies that create software systems to production houses, to international design magazines, to photography services, to conductive framing services for photographs and artwork and the like, along with hair products and even eyeglasses.”⁴⁹ Applicant found no use of the term “Frame” in connection with cosmetics.⁵⁰

Applicant’s search, such as it was, failed to find any third-party users of the term “Frame” in connection with Opposer’s bags in International Class 18, clothing in International Class 25, or retail and online store services in International Class 35,

⁴⁷ 31 TTABVUE 101.

⁴⁸ Applicant’s Brief, p. 34 (45 TTABVUE 39).

⁴⁹ Suceava Testimony Decl. ¶ 13 (35 TTABVUE 5).

⁵⁰ *Id.*

thereby corroborating our finding that the term “Frame” is a commercially strong term when used in connection with those goods and services.

In sum, because Opposer’s FRAME marks are both inherently and commercially strong, they are entitled to a broad scope of protection.

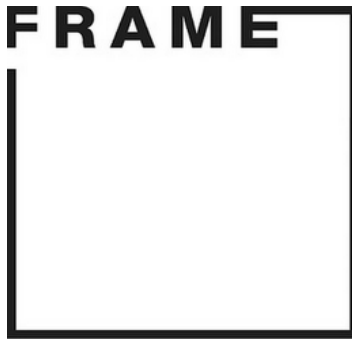
B. The similarity or dissimilarity of the marks

We turn now to the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

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.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)); *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012).

“Similarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)).

Applicant is seeking to register the mark FRAME and design:



As noted above, Opposer has three registrations for FRAME (stylized), one registration for FRAME DENIM in standard character form, one registration for FRAME LONDON – LOS ANGELES (stylized), and one registration for FRAME ATELIER LONDON – LOS ANGELES (stylized).

With respect to Applicant’s mark FRAME and design, we focus our analysis of the similarity or dissimilarity of the marks on the word “Frame.” “In the case of marks, ... consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods.” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)). That is because “[t]he word portion of a word and design mark ‘likely will appear alone when used in text and

will be spoken when requested by consumers.” *Aquitaine Wine USA*, 126 USPQ2d at 1184 (quoting *Viterra*, 101 USPQ2d at 1911).

In addition, the design element of Applicant’s mark engenders the commercial impression of a frame (i.e., “an enclosing border”) reinforcing the word “Frame.”

There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Viterra*, 101 USPQ2d at 1908; *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

Likewise, with respect to Opposer’s FRAME marks, we focus our attention on the word “Frame” because:

- Opposer’s stylization of the word “Frame” is basic and does not form a commercial impression separate and apart from the word “Frame.”
- The other wording that appears in Opposer’s marks is descriptive and Opposer has disclaimed the exclusive right to use them. It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations because consumers will tend to focus on the more distinctive parts of marks. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1305, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion

on the likelihood of confusion.”) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”).

Under these circumstances, we find that Applicant’s mark FRAME and design and Opposer’s FRAME marks are very similar in appearance and sound, and they possibly convey similar connotations and commercial impressions. See the discussion below.

Applicant contends that because its FRAME and design mark is different in appearance from Opposer’s FRAME marks because Applicant’s mark “consists of the term FRAME with a line extending from the top of the letter ‘E’ and continuing on to form a square which ends just below letter ‘F’” while none of Opposer’s FRAME marks have a square element.⁵¹ While the marks are not identical, the marks are similar because they all share the word “Frame” as their dominant element.

Applicant asserts that the marks have different connotations and engender different commercial impressions.

The logical definition and connotation of Applicants’ Logo, particularly with the square design element, is definition 4 [Merriam Webster Dictionary discussed above], relating to an enclosing border. On the other hand, in Opposer’s Marks, the term “frame” would bring to mind a completely different definition, namely, number 1, being the physical makeup of an animal and especially a human body; PHYSIQUE, FIGURE. This would be the logical definition

⁵¹ Applicant’s Brief, p. 25 (45 TTABVUE 30).

and connotation as the Opposer primarily offers clothing goods and goods which are placed on an individual's body.⁵²

We acknowledge that some consumers may perceive Applicant's mark as engendering the commercial impression of an enclosing border and Opposer's marks as engendering the commercial impression of a physique or figure. However, Opposer's clothing and bags may "frame" the figure of those who wear or carry its goods. Therefore, Opposer's FRAME marks may convey the same meaning and engender the same commercial impression as Applicant's mark.

In this regard, we must keep in mind that 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); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012). The parties' marks "must be considered ... in light of the fallibility of memory ..." *St. Helena Hosp.*, 113 USPQ2d at 1085 (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). "[M]ore frequently than not, such recollection is not enhanced with minute details or specific characteristics of the marks, but is determined by an overall or general impression of the many and various marks that exist in the marketplace." *In re Information Builders, Inc.*, 2020 USPQ2d 10444, at *6 (TTAB 2020).

⁵² Applicant's Brief, p. 26 (45 TTABVUE 31).

Because the dominant element of the marks is the word “Frame,” the general impression of the marks retained by many consumers is likely to lie in the word “Frame” per se and not the peripheral differences in the marks.

In addition, when Applicant’s mark FRAME and design is used in connection with anti-aging preparations, many consumers may associate the meaning and commercial impression of the mark with their physical makeup or physique, as well as an enclosed border.

Applicant argues that its contentions regarding the meaning and commercial impressions of the marks discussed above are consistent with the arguments Opposer made during the prosecution of its application Serial Nos. 85733323 and 85982535, asserting that the statements made during the prosecution of an application are admissions that may be considered by the Board.⁵³

First, Opposer’s argument during ex parte prosecution is neither an “admission” nor a substitute for the Board reaching its own ultimate conclusion as to likelihood of confusion in this case. Opposer’s prior argument is a fact “illuminative of shade and tone in the total picture confronting the decision maker.” *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978). As the Federal Circuit has explained, “[a] party’s prior arguments may be considered as ‘illuminative of shade and tone in the total picture,’ but do not alter the Board’s obligation to reach its own conclusion on the record.” *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014)

⁵³ Applicant’s Brief, p. 26 (45 TTABVue 31).

(discussing the impact of the opposer's statements during prosecution of the application that matured into its registration of LION CAPITAL, distinguishing its mark from the cited mark ROARING LION, on the opposer's likelihood of confusion claim against the applicant's STONE LION CAPITAL mark). *See also Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (holding that the Board gave insufficient weight to the impact of the use and registration of third-party marks containing "Peace" and "Love" against the backdrop of the opposer's statements during prosecution of its application to register PEACE & LOVE distinguishing the cited mark PEECE LUV CHIKIN); *M.C.I. Foods, Inc. v. Bunte*, 96 USPQ2d 1544, 1552 (TTAB 2010) (discussing the applicant's argument that during the prosecution of the application that matured into the opposer's registration of its LOS CABOS and design composite mark, the opposer "argued that the dominant portion of that mark was the design element," but concluding that "LOS CABOS is the dominant element of its LOS CABOS and design mark.").

Second, Applicant did not introduce the record from Opposer's applications for us to consider Opposer's purported statements.

C. The similarity or dissimilarity and nature of the goods and services

Applicant is seeking to register its FRAME and design mark for a wide variety of anti-aging preparations. Opposer has registered the marks in its pleaded registrations for bags in International Class 18, clothing in International Class 25, and retail and online store services in International Class 35.

To properly assess the similarity or dissimilarity and nature of the goods and services, we first must determine the definition of anti-aging preparations or what makes anti-aging preparations different from other cosmetics and personal care products. Applicant contends that its products “are used for the prevention of aging.”⁵⁴ The prevention of aging is a scientific impossibility. Therefore, we need more than just Mr. Suceava’s testimony to prove a product can prevent aging. The argument that anti-aging preparations prevent aging stretches credulity.

Applicant states that by adding the preface “anti-aging preparations” when it moved to amend its description of goods, “the goods have not been broadened, but have been clarified and limited.”⁵⁵

As can be seen in the proposed amended description of goods, Applicants have inserted qualifying and clarifying language by adding “anti-aging preparations, namely” before the listing of goods, which would be logically encompassed by the goods previously listed in the application.⁵⁶

Thus, according to Applicant, anti-aging preparations are a subclass of cosmetics and personal care products in International Class 3. Specifically, anti-aging preparations “support skin and whole-body wellness, and thus slow down and prevent

⁵⁴ Suceava Testimony Decl. ¶ 23 (35 TTABVUE 7).

⁵⁵ Applicant’s motion to amend its application, p. 4 (25 TTABVUE 5).

⁵⁶ *Id.*

the effects of aging.”⁵⁷ Anti-aging preparations are used for “maintenance and restoration of patients’ skin.”⁵⁸

We combine traditional Italian expertise in medicinal plants from the Mediterranean basin with advanced scientific and technological research, in order to support whole-body wellness and thus prevent the effects of aging.⁵⁹

Because Applicant is seeking to register its cosmetics and personal care products in International Class 3, they are non-medicated cosmetics and personal care products. Medical preparations are in International Class 5. TMEP § 1401.02(a). Thus, Applicant intends to offer non-medicated cosmetics and personal care products to support whole-body wellness and to prevent the effects of aging.

In sum, Applicant’s anti-aging preparations preface is merely advertising text or puffery to describe the wholesome effects of its products. It is nothing more than how any other manufacturer of cosmetics or personal care products would tout the beneficial aspect of their products. The record simply does not support Applicant’s claim that anti-aging preparations are a commercially recognized subclass of cosmetics and personal care products. Therefore, we find that the term “anti-aging preparations” does not have a commercially significant meaning.

To prove that Opposer’s goods and services are related to Applicant’s cosmetics and personal care products, Opposer introduced copies of 23 use-based third-party

⁵⁷ Suceava Testimony Decl. ¶ 2 (35 TTABVUE 2-3).

⁵⁸ *Id.* at ¶ 23 (35 TTABVUE 7). Applicant also contends that its products “are used for the prevention of aging.” *Id.* However, we need more than Mr. Suceava’s testimony to believe that any product cannot prevent aging.

⁵⁹ Suceava Testimony Decl. Exh. 1 (35 TTABVUE 19).

registrations encompassing the products listed in Applicant’s application and for bags, in International Class 18, clothing, in International Class 25, or retail or online store services in International Class 35,⁶⁰ as well as excerpts from 20 third-party websites showing third parties advertising the sale of cosmetics and bags in International Class 18 and clothing in International Class 25.⁶¹

Third-party registrations based on use in commerce that individually cover a number of different goods and services may have probative value to the extent that they serve to suggest that the listed goods and services are of a type that may emanate from the same source. *In re Country Oven, Inc.*, 2019 USPQ2d 443903, *8 (TTAB 2019); *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d mem.* 864 F.2d 149 (Fed. Cir. 1988). Representative registrations, with relevant portions of the identifications, are listed below:

MARK	REG. NO.	GOODS/SERVICES
FRÉDÉRIC FEKKAI	2130740	A full line of cosmetic, toiletry, and hair care products, including eye shadow, eyeliner, mascara, under-eye concealer,

⁶⁰ 33 TTABVUE 16-165. We do not consider Registration Nos. 5320502 (33 TTABVUE 20), 6203899 (33 TTABVUE 40), 6161957 (33 TTABVUE 55), 5724144 (33 TTABVUE 77), 6144677 (33 TTABVUE 94), 6115804 (33 TTABVUE 97), 5220638 (33 TTABVUE 102), 6142047 (33 TTABVUE 108), 6172604 (33 TTABVUE 120), 5975002 (33 TTABVUE 149) because they were registered under Section 44 of the Trademark, 15 U.S.C. § 1126, not use in commerce.

We did not consider Registration No. 4975446 (33 TTABVUE 159) because it was registered under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a), not use in commerce.

Finally, we did not consider Registration No. 6115195 (33 TTABVUE 80) because it did not include any of Opposer’s goods or services.

⁶¹ 31 TTABVUE 124-529 and 32 TTABVUE 2-350.

MARK	REG. NO.	GOODS/SERVICES
		<p>eye cream, facial masks, and suntan lotion;</p> <p>Totes, makeup bags, travel cases and clutches;</p> <p>Robes, slippers and scarves</p>
AVON NOW	6222787	<p>Fragrances, namely, colognes and perfumes; cosmetics, namely, mascara, eye shadow, eyebrow pencil; personal care products, namely, body, face and hand cream, skin lotion, suntan lotion;</p> <p>Clothing, namely, blouses, skirts, shorts, pants, dresses, shirts, sweaters, and footwear</p>
BOTTEGA VENETA	4702411	<p>Body lotion, body cream, body oil, after shave balm;</p> <p>Clutch bags, messenger bag, should bag, handbags, tote bags, travel bags, wallets, coin purse;</p> <p>Dresses, shorts, shirts, sweaters, denim jackets, t-shirts, tops, denim skirts, jeans;</p> <p>Retail store services and online retail stores services featuring clothing, handbags, purses, wallets, luggage, fragrances and perfumes</p>
BOWIE JANE	6037534	<p>Cosmetic creams, cosmetic preparations for body care, lip repairers, eyebrow cosmetics, skin fresheners, skin moisturizers used as cosmetics, tanning oils;</p> <p>Sport pants, sport shirts with short sleeves, t-shirts, travel clothing contained in a package comprising jackets, pants, skirts, tops</p>
EFFORLESS LUXE	6099186	<p>Cosmetics in the form of milks, lotions, and emulsions; lip repairers, foundation, adhesives for affixing false eyelashes,</p>

MARK	REG. NO.	GOODS/SERVICES
		anti-aging moisturizers used as cosmetics, tanning oils; Handbags, purses and wallets, tote bags; Blouses, jeans, skirts, t-shirts, denim jackets,

As noted above, Opposer introduced excerpts from third-party websites for Christian Louboutin, Jimmy Choo, H&M, Armani, Bottega Veneta, Calvin Klein, Carolina Herrera, Chanel, Chloé, Dior, Givenchy, Gucci, Harrods, Hermès, Marc Jacobs, Prada, Ralph Lauren, Tom Ford, Tory Burch, Saint Laurent, Zara, and Burberry advertising the sale of cosmetics, bags, and clothing.⁶²

Applicant argues that its cosmetics and personal care products (i.e., anti-aging preparations) and Opposer’s clothing and bags are “not identical or even similar.”⁶³ However, the issue is not whether purchasers would confuse the parties’ goods or services, but rather whether there is a likelihood of confusion as to the source of these goods or services. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1737 (TTAB 2018) (“the test is not whether consumers would be likely to confuse these goods, but rather whether they would be likely to be confused as to their source.”).

⁶² 31 TTABVUE 124-529 and 32 TTABVUE 2-350.

⁶³ Applicant’s Brief, p. 27 (45 TTABVUE 32).

In determining whether the goods or services are related, it is not necessary that the parties' goods or services be similar or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes that a party claiming damage establish that the goods or services are related in some manner or that conditions and activities surrounding marketing of these goods or services are such that they would or could be encountered by the same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Coach Servs.*, 101 USPQ2d at 1722; *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010).

The record before us – 23 third-party registrations covering Applicant's cosmetics and personal care products and Opposer's bags, clothing, or retail store services, as well as the excerpts from third-party websites advertising the sales of all the above-noted products – demonstrates that all of these products and retail store services may emanate from a single source.

Applicant also argues, as best as we can understand Applicant's argument, that Opposer's excerpts from third-party websites only have limited probative value because the third parties are famous brands that enjoy a broad scope of protection, whereas “[t]here is not evidence to show that Opposer and Opposer's Marks are famous or deserve the same degree of scope of legal protection.”⁶⁴

⁶⁴ Applicant's Brief, pp. 27-29 (45 TTABVUE 32-34).

We disagree. First, as discussed above, Opposer's FRAME marks fall on the strong side of the spectrum of from very weak to very strong. While Opposer's FRAME marks may not be as well known as Jimmy Choo, Armani, or Calvin Klein, Opposer has developed a strong market presence (e.g., FRAME "was made popular by 'It' girls including Poppy Delevingne, Lily Aldridge, and Kate Bosworth,"⁶⁵ FRAME is a "celeb fave clothing line,"⁶⁶ and FRAME is "a denim label known for its high-profile insider fashion collaborations").⁶⁷

Second, the variety of products on which renown designers place their marks are well known to consumers. Even consumers of modest means recognize that designer marks are placed on a wide variety of products. Therefore, the use of designer labels on a wide variety of products has probative value to show that the various products may emanate from a single source. We can infer that when some consumers familiar with Opposer's FRAME marks for clothing and various types of bags encounter Applicant's FRAME and design mark for cosmetics and personal care products, they may mistakenly believe that Applicant's products emanate from the same source as the FRAME clothing and bags because of the similarity of the marks.

We find that the Applicant's cosmetics and personal care products and Opposer's bags, and retail store services are related products.⁶⁸

⁶⁵ 31 TTABVUE 106.

⁶⁶ 31 TTABVUE 87.

⁶⁷ 31 TTABVUE 101.

⁶⁸ Our finding that Applicant's amended and narrower description of goods is related to Opposer's bags and clothing products also means that the products in Applicant's original description of goods are related to Opposer's bags and clothing products.

D. Established, likely-to-continue channels of trade and classes of consumers

To prove that the goods and services at issue are offered in the same channels of trade to the same classes of consumers, Opposer introduced excerpts from third-party retailers Neiman Marcus, NET-A-PORTER.COM, Saks Fifth Avenue, Bergdorf Goodman, and Bloomingdales advertising the sale of the goods at issue.⁶⁹

These are the same channels of trade as those through which Opposer sells its FRAME branded goods. It is very likely that, when walking into a store, a consumer will see Applicants' Products and the products offered under Opposer's FRAME Marks within moments of each other. Similarly, the evidence establishes that cosmetics, perfume, and skincare products are frequently advertised and sold on the same web pages, or at least on the same websites. In addition, both Applicant and Opposer advertise and promote their products in similar ways with a European-influenced style, at similar price points, and to consumers seeking high quality products.⁷⁰

First, Opposer did not introduce any evidence regarding what consumers will see when walking into a store. "Attorney argument is no substitute for evidence." *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005); *see also Cai*, 127 USPQ2d at 1799.

Second, a few of the third-party retailer webpages display cosmetics or personal care products and bags or clothing advertised for sale on the same webpages. *See e.g.*, Bergdorf Goodman (30 TTABVUE 171-172), Bloomingdale's (30 178 and 215), Macy's (30 TTABVUE 182 and 186) and Saks Fifth Avenue (30 TTABVUE 200). However,

⁶⁹ 30 TTABVUE 171-254.

⁷⁰ Opposer's Brief, p. 30 (43 (TTABVUE 31)).

while the products appear on the same webpage, consumers are directed to different sections of the website. The retailer is not offering the products together as a unit, as complementary products, or as part of an ensemble. It is common knowledge that brick and mortar and online department stores sell an enormous variety of products. *See Recot v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899-1900 (Fed. Cir. 2000) (“[P]roducts should not be deemed related simply because they are sold in the same kind of establishments,” therefore, “[a]bsent some evidence ... that the products are sold in close proximity to one another, we discern no error in the Board’s finding” that the products are not offered in the same channels of trade); *Fruit of the Loom, Inc. v. Fruit of the Earth, Inc.*, 3 USPQ2d 1531, 1533 (TTAB 1987) (“A wide range of goods is sold in such outlets as supermarkets and drug stores, but applicant’s products [hair shampoo, skin care cream, bath and body oil, toilet soap and skin lotion] are displayed in the health and beauty aids section and not in the clothing or domestics aisles.”).

The evidence that the goods are advertised together is not persuasive. There is no evidence that the goods are frequently purchased together in a single shopping trip. There is no evidence that consumers encounter the products in the same marketing milieu. We find, therefore, that the established, likely-to-continue channels of trade is a neutral factor.

E. Conditions under which sales are made

Applicant contends that the consumers of each party are “careful, and sophisticated in purchasing the products of the respective parties.”⁷¹

The entire premise of Applicants’ brand is that it is a quintessentially Italian brand, specifically from the Mediterranean area, and based entirely on health and wellness. Applicants’ various anti-aging skincare products and treatments can vary between \$74.00 - \$606.00 for individual products, while kits can retail for between \$1,334.00 - \$3,032.00. Such dermo-cosmetic skincare products are highly specialized, technological and scientific, and in a niche segment of luxury anti-aging skincare products. When visiting a retail store, clients must make appointments in advance and when they visit, they receive exclusive, one-on-one attention by skincare professionals who perform a personalized skincare analysis and provide consultation and complete the steps to receive a made-to-measure kit, formulated specifically to fit their needs.⁷²

Accordingly, Applicant’s consumers are discerning and engaged when considering Applicant’s products.⁷³

Likewise, Applicant points out that Opposer’s products are also in the luxury segment and they are high priced. “Clearly, an ordinary consumer would not make such purchases on ‘impulse’.”⁷⁴ Therefore, Applicant concludes:

[T]he buyers and consumers of both Applicants’ and Opposer’s goods are careful and sophisticated in their purchasing of such products and are not likely to confuse

⁷¹ Applicant’s Brief, p. 32 (45 TTABVUE 37).

⁷² Applicant’s Brief, p. 33 (45 TTABVUE 38).

⁷³ Applicant’s Brief, pp. 33-34 (45 TTABVUE 38-39).

⁷⁴ Applicant’s Brief, p. 34 (45 TTABVUE 39).

the products or the source of the products with one another.⁷⁵

The problem with Applicant's argument is that we must consider the goods as they are described in the application and the pleaded registrations. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys, Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."); *Paula Payne Prods. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods").

We also do not read limitations into the identification of goods. *In re i.am.symbolic*, 123 USPQ2d at 1748; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"); *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *47 (TTAB 2020); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) ("We have

⁷⁵ Applicant's Brief, p. 34 (45 TTABVUE 39).

no authority to read any restrictions or limitations into the registrant's description of goods.”).

Because neither Applicant's products, nor Opposer's products, are restricted or limited as to channels of trade, classes of consumers, quality, or price, we must consider Applicant's and Opposer's goods to include all goods of the type identified. *See, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413-14 (TTAB 2018) (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein). We cannot resort to extrinsic evidence to restrict Applicant's or Opposer's products. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

Because there are no restrictions in the application and the pleaded registrations as to channels of trade, classes of consumers, price or quality, there is no reason to infer that the consumers or purchasers of these products will be particularly discriminating or careful in distinguishing Applicant's cosmetics and personal care products from Opposer's bags and clothing. *See Stawski v. Lawson*, 129 USPQ2d 1036, 1054 (TTAB 2018) (citing *Aquitaine Wine*, 126 USPQ2d at 1195).

We find that the conditions under which sales are made is a neutral factor.

F. Conclusion

Because Opposer's FRAME marks are both inherently and commercially strong, the marks of the parties are similar and the goods and services are similar, we find that Applicant's mark FRAME and design for "anti-aging personal care preparations," namely, cosmetics and personal care products are likely to cause confusion with Opposer's FRAME marks for clothing, in International Class 25, and bags, in International Class 18, and retail store and retail online sales services.

Decision: We sustain the opposition under Section 2(d) of the Trademark Act, and registration to Applicant in International Class 3 is refused.