

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Oral Hearing Held: April 5, 2022

Mailed: April 12, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

—————
*Sony Pictures Television Inc.*¹

v.

Damien C. Noorbakhsh and Samir Rajic

Opposition No. 91253442

Richard S. Mandel of Cowan, Liebowitz & Latman, P.C.,
for Sony Pictures Television Inc.

Joseph Breall and Jill T. Lin of Breall & Breall LLP,
for Damien C. Noorbakhsh and Samir Rajic.

—————
Before Taylor, Pologeorgis, and Allard,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

—————
¹ By order dated March 31, 2022, the Board granted Sony Pictures Television Inc.'s motion to be substituted as party plaintiff in this case because the original opposer, Cobra Kai Jiu Jitsu, LLC, assigned all rights, title and interest in its pleaded registration and pending application to Sony Pictures Television Inc. after trial and briefing. *See* 29 TTABVUE. We also acknowledge both Opposer's and Applicants' change of correspondence address filed on March 3, 2022 and March 30, 2022, respectively. *See* 25 and 27 TTABVUE.

Citations in this opinion to the briefs and other docket entries refer to TTABVUE, the Board's online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

Damien C. Noorbakhsh and Samir Rajic (“Applicants”) seek to register on the Principal Register the standard character mark COBRA KAI (“KAI” disclaimed) for “T-shirts” in International Class 25.²

Sony Pictures Television Inc. (“Opposer”) opposes the registration of Applicants’ mark on the ground of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on Opposer’s alleged prior common law use and registration of the mark COBRA KAI JIU JITSU for providing general fitness and mixed martial arts facilities that require memberships and are focused in the fields of general fitness, exercise, and mixed martial arts.³ In further support of its likelihood of confusion claim, Opposer (1) alleges prior common law use of the mark COBRA KAI JUI JITSU and design for athletic clothing, including T-shirts; and (2) pleads ownership of pending application Serial No. 87940262 for the mark COBRA KAI JIU JITSU and design, as displayed below, for, inter alia, “Martial arts uniforms; Martial arts uniforms, namely, gis; Clothing for wear in wrestling games; Fight shorts for mixed martial arts or grappling; Mixed martial arts suits” in International Class 25.

² Application Serial No. 87928467 was filed on May 19, 2018, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The application includes the following translation statement: “The English translation of ‘KAI’ in the mark is ‘ASSOCIATION’.”

³ Notice of Opposition (1 TTABVUE).



Applicants filed an answer to the notice of opposition in which they denied the salient allegations asserted therein.⁴ Additionally, Applicants asserted the following purported affirmative defenses: (1) Opposer’s pleaded COBRA KAI JIU JITSU mark is weak, (2) Applicants’ adopted their involved mark in good faith, and (3) estoppel.⁵ The first and second purported affirmative defenses are mere amplifications of Applicants’ denials to the allegations in the notice of opposition and are not true affirmative defenses, so we do not address them as such. *See, e.g., DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *1 (TTAB 2020) (Applicant “raised certain ‘affirmative defenses’ that are mere amplifications of Applicant’s denials, and which we do not consider as separate affirmative defenses.”).

Finally, Applicants counterclaimed to partially cancel Opposer’s pleaded registration by requesting that the Board restrict Opposer’s use of its registered mark to the entirety of its mark or as a mark consisting of a stylized cobra facing the viewer,

⁴ Applicants’ Answer to notice of opposition. (4 TTABVUE).

⁵ *Id.* (4 TTABVUE 6-8).

surrounded by the words “Cobra” on the left hand side, “Kai” on the right hand side and “Jiu Jitsu” beneath the cobra.⁶

I. Record

The record includes the pleadings⁷ and, pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Applicants’ involved application file and the file of Opposer’s pleaded registration. The record also includes the evidence summarized below.

A. Opposer’s Evidence

1. Notice of Reliance on the following:⁸ (a) screenshot of search results purportedly from the Nevada Secretary of State website provided to show when Opposer was formed; (b) screenshot of search results purportedly from the state trademark database provided on the Nevada Secretary of State website purportedly to show when Opposer’s mark was used as a trademark on clothing; (c) status and title copy of Opposer’s pleaded Registration No. 5094663 for the standard character mark COBRA KAI JIU JITSU; (d) application file contents of the underlying application for Opposer’s pleaded registration for the mark COBRA KAI JIU JITSU; (e) status and title copy of Opposer’s pleaded pending application Serial No. 87940262 for “Martial arts uniforms; Martial arts uniforms, namely, gis; Clothing for wear in wrestling games; Fight shorts for mixed martial arts or grappling; Mixed martial arts suits” in Class 25 and “Providing general fitness and mixed martial arts facilities that require memberships and are focused in the fields of general fitness, exercise, and mixed martial arts” in Class 41; and (f) screenshot

⁶ Applicants’ Counterclaim. (4 TTABVUE 8-9).

⁷ We note that Opposer attached exhibits to its pleading. We do not consider these exhibits as evidence because “an exhibit attached to a pleading [except for a plaintiff’s pleaded registration(s)] is not evidence on behalf of the party to whose pleading the exhibit is attached, and must be identified and introduced in evidence as an exhibit during the period for the taking of testimony.” Trademark Rule 2.122(c), 37 C.F.R. § 2.122(c); *see also Poly-Am., L.P. v. Ill. Tool Works Inc.*, 124 USPQ2d 1508, 1510 n.5 (TTAB 2017) (exhibits to the petition for cancellation, consisting of copies of patents, photographs of certain goods identified in the involved registrations, packaging for certain of the identified goods and Internet materials, was not evidence to the proceeding and therefore not considered), *aff’d*, No. 3:18-cv-00443-C (N.D. Tex. Oct. 29, 2019), *appeal dismissed*, No. 19-11180 (5th Cir. Feb. 4, 2020).

⁸ 10 TTABVUE.

from the website www.mindbodyonline.com displaying for sale clothing items under Opposer's mark COBRA KAI JIU JITSU and design.

B. Applicants' Evidence

1. Testimony declaration of joint Applicant Damien C. Noorbakhsh and an accompanying exhibit comprised of three photographs of Applicants' T-shirts displaying their COBRA KAI mark.⁹
2. Notice of Reliance on the following:¹⁰ (a) Opposer's responses to Applicants' first set of interrogatories; (b) status and title of third-party registrations submitted to demonstrate purportedly the weakness of Opposer's pleaded COBRA KAI JIU JITSU mark; and (3) various screenshots of third-party websites to show ostensibly the commercial weakness of Opposer's pleaded COBRA KAI JIU JITSU mark.

C. Opposer's Rebuttal Evidence

1. Testimony Declarations of (1) Simpson Go, the manager and instructor of Cobra Kai Jiu Jitsu LLC, Opposer's predecessor-in-interest, (2) Joe Stevenson, manger of Joe Stevenson's Cobra Kai, and (3) Sterling Redlack, manager and instructor of Redlack Deleurme & Co, each discussing martial arts lineage and their purported individual relationships with each other, and also acknowledging Opposer's prior use of the mark Cobra Kai Jiu Jitsu from their own use of the same.

We note that the parties have submitted printouts from various websites downloaded from the Internet. Although admissible for what they show on their face, *see* Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2), these webpages also contain hearsay that may not be relied upon for the truth of the matters asserted unless supported by testimony or other evidence. Fed. R. Evid. 801(c); *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1038 (TTAB 2018);

⁹ 12 TTABVUE.

¹⁰ 11 TTABVUE.

Safer, Inc. v. OMS Invs., Inc., 94 USPQ2d 1031, 1039-40 (TTAB 2010); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 704.08(b) (2021) (“The probative value of Internet documents is limited. They can be used to demonstrate what the documents show on their face. However, documents obtained through the Internet may not be used to demonstrate the truth of what has been printed.”).

Finally, because Applicants did not pursue their affirmative defense of estoppel at trial or in their main brief, this affirmative defense is forfeited. *In re Google Techs. Holdings, LLC*, 980 F.3d 858, 2020 USPQ2d 11465 (Fed. Cir. 2020).

II. Applicants’ Evidentiary Objections

Applicants have lodged objections to the rebuttal testimony declarations submitted by Opposer on the grounds that certain testimony provided in each declaration should be stricken for lack of foundation and personal knowledge.¹¹ We disagree. Each of the declarants stated in their respective testimony declarations that they are “over eighteen years old and have personal knowledge of all facts and circumstances set forth in this Declaration.” A declaration — with or without documentary support — may be considered where the declaration (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the declarant is competent to testify to the matters stated therein. *Cf. Ava Ruha Corp. v. Mother’s Nutritional Center, Inc.*, 113 USPQ2d 1575, 1578 (TTAB 2015) (Fed. R. Civ. P. 56(c)(4) allows testimony from personal knowledge based on either review of files and records or on the position with the company held

¹¹ See Appendix to Applicants’ Brief (15 TTABVUE 23-30).

by the declarant); *see also GAF Corp. v. Amatol Analytical Servs., Inc.*, 192 USPQ 576, 577 (TTAB 1976) (“It is established that . . . use of a mark may be established by the oral testimony of a single witness where such testimony is clear, consistent, convincing, circumstantial and uncontradicted.”). Here, the testimony provided by each declarant was based on their personal knowledge and there is nothing in the record to indicate that the declarants were not competent to testify on the matters subject to their respective declarations. Moreover, to the extent Applicants believed that the testimony provided by the declarants was not clear, credible or consistent, they could have cross-examined each one of them. Applicants, however, chose not to do so. Accordingly, Applicants’ evidentiary objection is overruled and we have accorded, to the extent necessary and appropriate, whatever probative value the subject testimony merits.

III. Entitlement to a Statutory Cause of Action¹²

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),

¹² Even though we now refer to standing as an entitlement to a statutory cause of action, our prior decisions and those of the Federal Circuit interpreting “standing” under §§ 1063 and 1064 of the Trademark Act remain applicable. *See Spanishtown Enters., Inc. v. Transcend Resources, Inc.*, 2020 USPQ2d 11388, at *2 (TTAB 2020).

reh'g en banc denied, 981 F.3d 1083, 2020 USPQ2d 11438 (Fed. Cir. 2020), *cert. denied*, __ S.Ct. __, 2021 WL 4507693 (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 Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (TTAB 1982); *Spanishtown Enters.*, 2020 USPQ2d 11388, at *1.

Because Opposer's pleaded registration is of record, Opposer has met the requirements for establishing an entitlement to a statutory cause of action to oppose Applicants' involved application. *See N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 (TTAB 2015) (citing *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000)). This registration forms the basis for a likelihood of confusion claim under 15 U.S.C. § 1052(d) that is not wholly without merit. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). *See also Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727-28 (Fed. Cir. 2012).

We further note that Applicants' entitlement to a statutory cause of action to seek a partial cancellation of Opposer's pleaded registration is inherent in their position as defendants in this opposition, which position demonstrates that Applicants have

an interest in this controversy beyond that of the general public. *See Alberto-Culver Co. v. F.D.C. Wholesale Corp.*, 16 USPQ2d 1597, 1603 (TTAB 1990) and *General Mills, Inc. v. Nature's Way Products, Inc.*, 202 USPQ 840, 841 (TTAB 1979).

IV. Applicants' Counterclaim Seeking Partial Cancellation of Opposer's Pleaded Registration

We first turn to Applicants' asserted counterclaim to partially cancel Opposer's pleaded registration. Applicants allege that "Opposer has always used the mark 'COBRA KAI JIU JITSU' in its entirety or as a mark consisting of a stylized cobra facing the viewer, surrounded by the words 'Cobra' on the left hand side, 'Kai' on the right hand side, and 'Jiu Jitsu' beneath the cobra on its clothing items."¹³ Additionally, Applicants assert that "utilizing the entirety of the mark is necessary for Opposer to distinguish itself amongst third-party use of 'COBRA KAI' in the marketplace."¹⁴ In view thereof, Applicants request that the Board partially cancel Opposer's Registration No. 5094663 by restricting Opposer's use to the entirety of its mark ("Cobra Kai Jiu Jitsu") in order to avoid a likelihood of confusion with Applicants' involved mark.¹⁵

The Board is an administrative tribunal of the United States Patent and Trademark Office. The Board is empowered to determine only the right to register a mark. Trademark Act § 17, 15 U.S.C. § 1067, Trademark Act § 18, 15 U.S.C. § 1068, Trademark Act § 20, 15 U.S.C. § 1070, Trademark Act § 24, 15 U.S.C. § 1092. *See*

¹³ Applicants' Counterclaim, ¶ 31; 4 TTABVUE 8.

¹⁴ *Id.* at ¶ 32; 4 TTABVUE 8.

¹⁵ *Id.* at ¶ 33; 4 TTABVUE 8.

Conolty v. Conolty O'Connor NYC LLC, 111 USPQ2d 1302, 1309 (TTAB 2014); *Blackhorse v. Pro-Football, Inc.*, 111 USPQ2d 1080, 1082-83 (TTAB 2014). Accordingly, the Board cannot grant injunctive relief to restrict the use of a mark. *See General Mills Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1591 (TTAB 2011) (“The Board has no authority to determine **the right to use**, or the broader questions of infringement, unfair competition, damages or **injunctive relief**.”) (emphasis added). Thus, Applicants’ counterclaim must fail for lack of subject matter jurisdiction.

V. Opposer’s Section 2(d) Claim

Section 2(d) of the Trademark Act 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.” 15 U.S.C. § 1052(d). To prevail on its Section 2(d) claim, Opposer must prove, by a preponderance of the evidence, that it has priority in the use of its pleaded mark and that use of Applicants’ mark is likely to cause confusion, mistake, or deception as to the source or sponsorship of Applicants’ goods, *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000), even in the absence of contrary evidence or argument. *Threshold TV, Inc. v. Metronome Enters., Inc.*, 96 USPQ2d 1031, 1040 (TTAB 2010).

A. Priority

Because Opposer's pleaded registration for the standard character mark COBRA KAI JIU JITSU is of record, priority is not an issue with respect to the services listed in Opposer's pleaded registration. *See Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108,110 (CCPA 1974)).

Opposer, however, also alleges prior common law use of its pleaded COBRA KAI JIU JITSU mark used in association with athletic apparel, including T-shirts. As the alleged prior user, Opposer bears the burden of proving its claim of acquisition of prior common law proprietary rights in its pleaded mark by a preponderance of the evidence. *Hydro-Dynamics, Inc. v. George Putnam & Co., Inc.*, 811 F.2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987); *see also Embarcadero Techs., Inc. v. RStudio, Inc.*, 105 USPQ2d 1825, 1834 (TTAB 2013). (“[O]pposer must prove by a preponderance of the evidence that its common law rights were acquired before any date upon which applicant may rely.”).

“As a general matter, priority in a Trademark Act § 2(d) case goes to the party which made first use of its mark on the relevant goods.” *Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 USPQ2d 1134, 1139 (TTAB 2013). Insofar as Applicants did not submit any testimony or evidence during their assigned testimony period concerning the dates of first use of their proposed COBRA KAI mark, Applicants have not demonstrated actual use of the COBRA KAI mark for the goods identified in their involved application prior to the filing date of their intent-to-use application. Accordingly, the earliest date that Applicants may only rely on for priority purposes

for their identified goods is their application filing date, i.e., May 19, 2018, their constructive use date. *See, e.g., Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009) (“applicant may rely without further proof upon the filing date of its application as a ‘constructive use’ date for purposes of priority”); *Levi Strauss & Co. v. R. Josephs Sportswear, Inc.*, 30 USPQ2d 1328, 1332 (TTAB 1994) (an application filing date for a use-based application can establish first use of a mark); Trademark Act § 7(c).

Opposer submitted the testimony of Mr. Simpson Go, the manager and instructor of Opposer’s predecessor-in-interest, who testified that he “officially formed Cobra Kai Jiu Jitsu LLC in 2014” and the Opposer has been “selling merchandise bearing the name ‘Cobra Kai Jiu Jitsu’ since it was officially formed.”¹⁶ Mr. Go’s testimony, however, does not identify with any specificity the “merchandise” upon which Opposer used its pleaded COBRA KAI JIU JITSU mark. Thus, this testimony does not establish that Opposer has priority of use of its pleaded mark in connection with T-shirts. Likewise, the testimony of Opposer’s competitors, i.e., Joe Stevenson’s Cobra Kai and Redlack Deleurme & Co., also does not establish Opposer’s priority of use of its pleaded COBRA KAI JIU JITSU mark in association with T-shirts. While the representative of each competitor testified that Opposer had priority of use of its pleaded COBRA KAI JIU JITSU mark used in association T-shirt over each competitor, neither competitor provided any testimony as to when they themselves

¹⁶ Go Decl. ¶ 7 (13 TTABVUE 7).

or Opposer actually began using the mark COBRA KAI JIU JITSU in connection with T-shirts.¹⁷ Thus, this competitor testimony also does not establish Opposer's common law priority use of its pleaded mark with T-shirts. Finally, while Opposer submitted the contents of its pleaded pending application, including screenshots from its website showing its pleaded mark used on T-shirts,¹⁸ the screenshots were accessed on May 28, 2018, a date subsequent to the filing date of Applicants' involved application.¹⁹

In view of the foregoing, we find, on this record, that Opposer has not proven by a preponderance of the evidence that it has priority of use of its pleaded common law COBRA KAI JIU JITSU mark used in association with T-shirts.

B. Strength of Opposer's COBRA KAI JIU JITSU Mark

"In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition." *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017) (citing *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476

¹⁷ Stevenson Decl. ¶ 4 and Redlack Decl. ¶ 4 (13 TTABVUE 12 and 15).

¹⁸ Opposer's Notice of Reliance, Exh. 5 (10 TTABVUE 33-60).

¹⁹ We note that the dates of use set forth in Opposer's pleaded pending application or Nevada state registration are not evidence of use of Opposer's mark. *See, e.g., Life Zone Inc.*, 87 USPQ2d at 1960 (alleged date of use in application not evidence); *Baseball Am., Inc. v. Powerplay Sports, Ltd.*, 71 USPQ2d 1844, 1848 n.10 (TTAB 2004) (dates of use and specimens not evidence); *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464, 1467 (TTAB 1993) (without proof of use, application filing date, not dates of use alleged in the application, is the earliest use date on which the applicant may rely), *recon. denied*, 36 USPQ2d 1328 (TTAB 1994). *See also Faultless Starch Co. v. Sales Producers Associates, Inc.*, 530 F.2d 1400, 189 USPQ 141, 142 n.2 (CCPA 1976) ("State registrations alone do not establish use."); *Angelica Corp. v. Collins & Aikman Corp.*, 192 USPQ 387, 390 (TTAB 1976) (Missouri state registration "is not evidence of use of the mark and has little or no bearing on the issue of likelihood of confusion").

(TTAB 2014)); *see also 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 (secondary meaning).”).

a. Conceptual Strength

With regard to the conceptual strength of Opposer’s COBRA KAI JIU JITSU mark, we note that Opposer’s pleaded registration issued on the Principal Register without a showing of acquired distinctiveness under Section 2(f) of the Trademark Act. Accordingly, because no challenge to the lack of inherent distinctiveness of Opposer’s COBRA KAI JIU JITSU mark has been lodged by Applicants, we find Opposer’s mark, when viewed in its entirety, is inherently distinctive and, therefore, is entitled to the normal scope of protection accorded inherently distinctive marks, subject to following.

The Federal Circuit, however, has held that if there is evidence that a mark, or an element of a mark, is commonly adopted by many different registrants, that may indicate that the common element has some non-source identifying significance which undermines its conceptual strength as an indicator of a single source. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ... that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak’”) (quoting *Juice*

Generation, Inc. v. GS Enters. LLC, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)).

Here, Applicants have submitted, under their notice of reliance, copies of numerous third-party registrations and pending applications for marks comprising the term COBRA, in whole, or in part.²⁰ We initially note that pending applications are evidence only that the applications were filed on a certain date *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1193 n.8 (TTAB 2007); *see also Olin Corp. v. Hydrotreat, Inc.*, 210 USPQ 62, 65 n.5 (TTAB 1981) (“Introduction of the record of a pending application is competent to prove only the filing thereof.”). Thus, we have given no consideration to these third-party pending applications in our analysis pertaining to the conceptual strength of Opposer’s pleaded COBRA KAI JIU JITSU mark.

As to the third-party registration evidence submitted by Applicants, the subject registered marks are predominantly for clothing items. None are for the services listed in Opposer’s pleaded registration, i.e., “providing general fitness and mixed martial arts facilities that require memberships and are focused in the fields of general fitness, exercise, and mixed martial arts.” Accordingly, this evidence does not establish that Opposer’s COBRA KAI JIU JITSU mark is conceptually weak for the services listed in its pleaded registration. *See, e.g., Omaha Steaks Int’l v. Greater Omaha Packing*, 908 F.3d 1315, 128 USPQ2d 1686, 1694 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must

²⁰ Applicants’ Notice of Reliance, Exh. B (11 TTABVUE 20-90).

focus “on goods shown to be similar”); *TAO Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1058 (TTAB 2017) (third party registrations in unrelated fields “have no bearing on the strength of the term in the context relevant to this case”); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01(d)(iii) (July 2021).

b. Commercial Strength of Opposer’s COBRA KAI JIU JITSU Mark

i. Fame of Opposer’s COBRA KAI JIU JITSU Mark

The fifth *DuPont* factor (fame) examines the extent to which the public perceives the mark as indicating a single source of origin. *DuPont*, 177 USPQ at 567. A famous or commercially strong mark is one that has extensive public recognition and renown. *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1172 (TTAB 2011) (fame or commercial strength is “based on the marketplace recognition value of the mark.”). “Fame of an opposer’s mark, if it exists, plays a ‘dominant role in the process of balancing the DuPont factors.’” *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000). Famous marks enjoy a “wide latitude of legal protection since they are more likely to be remembered and associated in the public mind than weaker marks.” *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ.2d 1689, 1694 (Fed. Cir. 2005).

Fame or commercial strength for likelihood of confusion purposes may be measured indirectly by, for example, “the volume of sales and advertising expenditures of the goods sold under the mark ...and other factors such as length of time of use of the mark; wide-spread critical assessments; notice by independent

sources of the products identified by the marks; and the general reputation of the products and services.” *Weider Publ’ns, LLC v. D & D Beauty Care Co.*, 109 USPQ2d 1347, 1354 (TTAB 2014), *appeal dismissed per stipulation*, No. 2014-1461 (Fed. Cir. Oct. 10, 2014).

Here, Opposer did not submit any evidence regarding its sales or advertising figures for the services provided under its COBRA KAI JIU JITSU mark. Thus, the fifth *DuPont* factor is neutral.

ii. Similar Marks on Similar Services – 6th *DuPont* Factor

We next address the sixth *DuPont* factor, the number and nature of similar marks in use on similar services. *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016). The Federal Circuit has held that evidence of extensive registration and use of a term by others for similar goods [or services] can be “powerful” evidence of the term’s weakness. *Jack Wolfskin*, 116 USPQ2d at 1136; *Juice Generation*, 115 USPQ2d at 1674. If the evidence establishes that the consuming public is exposed to widespread third-party use of similar marks for similar goods or services, it “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imps., Inc.*, 73 USPQ2d at 1693.

Here, Applicants have submitted screenshots from various third-party websites showing use of marks comprising the term COBRA for services purportedly similar to those of Opposer. The third-party uses are as follows:²¹

²¹ Applicants’ Notice of Reliance, Exh. C (11 TTABVUE 91-151).

- Cobra Command CrossFit
- Cobra Defense Team
- King Cobra Mixed Martial Arts
- Cobra Gymnastics & Dance
- Cobra Boxing and Fitness
- Cobra Kai MMA Dojo
- Joe Stevenson's Cobra Kai

After a careful review of the third-party use evidence, we find that only four of the third-party uses submitted are for services identical or sufficiently similar to those offered by Opposer in the United States under its pleaded mark, namely, Cobra Command CrossFit, King Cobra Mixed Martial Arts, Cobra Boxing and Fitness, and Joe Stevenson's Cobra Kai.²² However, these four instances of similar use are insufficient in number to be probative of any commercial weakness of Opposer's COBRA KAI JIU JITSU mark for the services listed in Opposer's pleaded registration. *See, e.g., In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff'd mem.*, Slip Op. No. 18-2236 (Fed. Cir. Sept. 13, 2019) (four third-party

²² The record reveals that Cobra Kai MMA Dojo is a mixed martial arts gym located in Osaka, Japan. There is no evidence of record that U.S. consumers have been exposed to this foreign entity. Thus, this evidence has little to no probative value in our analysis concerning the commercial strength of Opposer's COBRA KAI JIU JITSU mark. *See In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1265 n.9 (TTAB 2011) (no basis to conclude U.S. consumers exposed to website for Australian brewery; those webpages not considered); *cf. In re King Koil Licensing Co.*, 79 USPQ2d 1048, 1050 (TTAB 2006) (while consumers may visit foreign websites for informational purposes, they are more likely to focus on local Internet retailers; impact of foreign websites discounted). We also find that the websites for Cobra Defense Team and Cobra Gymnastics & Dance show that the services provided are sufficiently dissimilar from those listed in Opposer's pleaded registration and, therefore, also have limited, if any, probative value.

registrations and no third-party uses were “a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant”); *In re i.am.symbolic*, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (where the conflicting marks were identical, evidence of the coexistence of the cited registered mark with two third-party registrations of the same mark for the same or similar goods “falls short of the ‘ubiquitous’ or ‘considerable’ use of the mark components present in” *Jack Wolfskin* and *Juice Generation*). *Cf. TPI Holdings, Inc. v. TrailerTrader.com, LLC*, 126 USPQ2d 1409, 1427-28 n.92 (TTAB 2018) (67 third-party registrations and numerous uses of TRADER-formative marks showed that the formative was weak). *Cf. TPI Holdings, Inc. v. TrailerTrader.com, LLC*, 126 USPQ2d 1409, 1427-28 n.92 (TTAB 2018) (67 third-party registrations and numerous uses of TRADER-formative marks showed that the formative was weak). Indeed, even if we were to consider the four uses particularly probative, such evidence would be “a far cry from the large quantum of evidence of third-party use and registration that was held to be significant in both” *Jack Wolfskin*, 116 USPQ2d at 1136, and *Juice Generation*, 115 USPQ2d at 1674” (quoting *In re Inn at St. John’s*, 126 USPQ2d at 1746).²³ Accordingly, the sixth *DuPont* factor is neutral.

In sum, the evidence of record neither demonstrates that Opposer’s pleaded COBRA KAI JIU JITSU mark is conceptually or commercially weak for the services

²³ In *Jack Wolfskin*, there were at least 14 third-party registrations and uses of paw print marks that demonstrated the weakness of that design element in the opposer’s mark, 116 USPQ2d at 1136 n.2, while in *Juice Generation*, there were approximately 26 third-party registrations and uses of marks containing the words “Peace” and “Love” that demonstrated the weakness of those words in the opposer’s marks. 115 USPQ2d at 1673 n.1.

listed in its pleaded registration. Rather, the record shows that Opposer's COBRA KAI JIU JITSU mark, when viewed in its entirety, is inherently distinctive and thus is entitled to the normal scope of protection afforded inherently distinctive marks.

C. Similarity of the Marks

We next consider the first *DuPont* likelihood of confusion factor, which involves an analysis of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imports Inc.*, 73 USPQ2d at 1691 (quoting *DuPont*, 177 USPQ at 567). "The proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs.*, 101 USPQ2d at 1721 (internal citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Our analysis cannot be predicated on dissection of the involved marks. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). Rather, we are obliged to consider the marks in their entireties. *Id.*; *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) ("It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion."). Nonetheless, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided

the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161.

Opposer's mark is COBRA KAI JIU JITSU in standard characters. Applicants' mark is COBRA KAI also in standard characters.

Here, the parties' respective marks are similar in appearance, sound, connotation and commercial impression in light of the shared term COBRA KAI. Indeed, Applicants' mark is encompassed in its entirety in Opposer's mark. Likelihood of confusion is often found where the entirety of one mark is incorporated within another. *See Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL LANCER confusingly similar to BENGAL); *Wella Corp. v. Cal. Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT confusingly similar to CONCEPT); *Johnson Publ'g Co. v. Int'l Dev. Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY confusingly similar to EBONY DRUM for cosmetic products); *In re Denisi*, 225 USPQ 624, 626 (TTAB 1985) (PERRY'S PIZZA confusingly similar to PERRY'S for restaurants); *In re El Torito Rests. Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (MACHO COMBOS confusingly similar to MACHO).

The marks are also similar because they both begin with or consist in their entirety of the wording COBRA KAI. It is well accepted that the lead element of a mark is most likely to be impressed upon the mind of a purchaser and remembered. *See Palm Bay Imps.*, 73 USPQ2d at 1692; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering

the marks, consumers will first notice the identical lead term); *Presto Prods Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). As such, consumers will focus more on the phrase COBRA KAI in Opposer’s mark as the source-indicator for its identified services. This especially holds true since the inclusion of the descriptive, if not generic, and disclaimed wording JIU JITSU in Opposer’s mark will not detract from the overall similarities between the marks at issue. Disclaimed matter that is descriptive of or generic for a party’s goods or services is typically less significant or less dominant when comparing marks. *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, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); TMEP § 1207.01(b)(viii).

Finally, consumers who are familiar with Opposer’s COBRA KAI JIU JITSU martial arts instruction services and who then encounter Applicants’ mark COBRA KAI for T-shirts may think that they are variant marks identifying a companion product promoting the services offered under Opposer’s mark. *See, e.g., Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *7 (TTAB 2019) (“ROAD WARRIOR looks, sounds, and conveys the impression of being a line extension of WARRIOR”); *Joel Gott Wines LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1433 (TTAB 2013) (“Purchasers of opposer’s GOTT and JOEL GOTT wines are likely to assume that applicant’s goods, sold under the mark GOTT LIGHT and design, are merely a line extension of goods emanating from opposer”); *Schieffelin & Co. v.*

Molson Cos., 9 USPQ2d 2069, 2073 (TTAB 1989) (“Those consumers who do recognize the differences in the [BRADOR and BRAS D’OR] marks may believe that applicant’s mark is a variation of opposer’s mark that opposer has adopted for use on a different product.”).’

Quite simply, we find that the marks are quite similar, particularly taking into account “the recollection of the average customer, who retains a general rather than specific impression of marks,” *i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018), and the fact that the “marks ‘must be considered . . . in light of the fallibility of human memory’ and ‘not on the basis of side-by-side comparison.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977)).

In sum, while we have not overlooked the wording JIU JITSU in Opposer’s mark, we nonetheless find that marks are more similar than dissimilar. Thus, the first *DuPont* factor strongly favors a finding of likelihood of confusion.

D. Relatedness of the Goods and Services

We next address the second *DuPont* likelihood of confusion factor focusing on the comparison of the goods identified in Applicants’ involved application, i.e., T-shirts, with the services listed in Opposer’s pleaded registration for the mark COBRA KAI JIU JITSU.

It is settled that it is not necessary that the respective goods and services be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. The respective goods and services need only be

“related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that goods [and services] emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); see also *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

Opposer argues that while its services and Applicants’ goods are not identical, they are related since gym and martial arts facilities routinely provide branded clothing.²⁴ The record shows that Opposer provides T-shirts as a promotional item for its general fitness and mixed martial arts facilities.²⁵ Opposer, however, did not submit any evidence showing that third parties provide T-shirts as a promotional item for the services they render. Notwithstanding, the Board observed more than 25 years ago that “[i]t is common knowledge that other logo-imprinted products are used as promotional items for a diverse range of goods and services” *Turner Ent. Co. v. Nelson*, 38 USPQ2d 1942, 1945 (TTAB 1996) (granting summary judgment to owner of GILLIGAN’S ISLAND mark for entertainment services in the nature of a television series in opposition under Section 2(d) to registration of GILLIGAN’S ISLAND for “suntan oil, suntan lotion, sunblock, sunless tanning lotion, after sun moisturizing lotion, lip balm, hand and body lotion, hair shampoo and body bar soap.”). The Board subsequently reiterated that “[i]t is common knowledge, and a fact of which we can

²⁴ Opposer’s Trial Brief, p. 16 (14 TTABVUE 17).

²⁵ Opposer’s Notice of Reliance (10 TTABVUE 38-43 and 63).

take judicial notice, that the licensing of commercial trademarks on ‘collateral products’ has become a part of everyday life.” *L.C. Licensing, Inc. v. Berman*, 86 USPQ2d 1883, 1889 (TTAB 2008) (citing *Turner Ent.*, 38 USPQ2d at 1945-46); *see also NASDAQ Stock Market, Inc. v. Antartica, S.r.l.*, 69 USPQ2d 1718, 1732 (TTAB 2003) (finding under the second *DuPont* factor that individuals familiar with opposer, its services, and collateral products, “when confronted with applicant’s mark used on at least some of its identified goods, will consider such goods either to be promotional items of opposer or products branded with opposer’s mark in conjunction with opposer’s sponsorship of an event.”).

Accordingly, because we have found that promotional items such as T-shirts are commonly offered by single entity under the same mark as the services it provides, the second *DuPont* factor also favors a finding of likelihood of confusion.

E. Similarity of Trade Channels/Classes of Purchasers

Next we consider established, likely-to-continue channels of trade, the third *DuPont* factor. We initially note that since there are no restrictions as to trade channels or classes of purchasers set forth in the identification of goods of Applicants’ involved application or the listed services in Opposer’s pleaded registration, we presume Applicants’ goods and Opposer’s services travel through all usual channels of trade for such goods and services and are offered to all normal potential purchasers for such services, including the general public. *Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA); *see also Stone Lion*, 110 USPQ2d at 1161.

With respect to the trade channels, we recognize that T-shirts and the provision

of martial arts or physical fitness facilities are not typically offered in the same channels of trade.²⁶ Nonetheless, such goods and services would be offered to and encountered by the same or overlapping classes of consumers, namely, individuals interested in martial arts. In this regard, we reiterate that neither Opposer's nor Applicants' identifications of goods and services is restricted as to classes of purchasers. Accordingly, we must presume that the parties' respective goods and services are marketed to overlapping classes of purchasers for these types of goods and services, which would include ordinary consumers that are martial arts enthusiasts.

To the extent that the respective goods and services would be offered to and encountered by the same or overlapping classes of consumers, this *DuPont* factor favors a finding of likelihood of confusion.

F. Sophistication of Purchasers

“The fourth DuPont factor considers ‘[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.’” *Stone Lion*, 110 USPQ2d at 1162 (quoting *DuPont*, 177 USPQ at 567). Applicant argues, without any evidence, that the relevant consumers of Opposer's services are sophisticated²⁷

We disagree. While we recognize that some gym memberships may be a fairly significant monetary commitment, requiring a relatively mindful and, therefore,

²⁶ The record indicates that Opposer offers its martial arts facility services under its pleaded COBRA KAI JIU JITSU via its own website, www.ckjj.com, at its physical location, and at convention sites. See Applicants' Notice of Reliance, Exh. A, Response to Applicants' Interrogatory No. 15 (11 TTABVUE 18).

²⁷ Applicants' Brief, p. 9 (15 TTABVUE 10).

sophisticated, purchasing decision, there is no evidence of record regarding the price point of Opposer's martial arts facility membership or, for that matter, any particular difference in the level of sophistication of the two parties' consumer bases. Nonetheless, even sophisticated purchasers are not immune from confusion as to the origin of the respective goods and services, especially where, as here, the similar nature of the marks and the relatedness of the goods and services outweigh any sophisticated purchasing decision. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Associates, Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods). *See also In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (citing *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)) ("Human memories even of discriminating purchasers ... are not infallible."). Thus, the fourth *DuPont* factor is neutral.

G. Actual Confusion

We next turn to the seventh *DuPont* factor (nature and extent of any actual confusion) and the related eighth *DuPont* factor (extent of the opportunity for actual confusion), raised by Opposer in its trial brief.

No evidence of actual confusion was submitted. The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Applicants of their mark for a significant period of time in the same markets as those served by Opposer under its mark. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff'd*, 637 F.3d 1344, 98

USPQ2d 1253 (Fed. Cir. 2011); *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred); *Red Carpet Corp. v. Johnstown Am. Enters. Inc.*, 7 USPQ2d 1404, 1406-1407 (TTAB 1988); *Central Soya Co., Inc. v. N. Am. Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981) (“[T]he absence of actual confusion over a reasonable period of time might well suggest that the likelihood of confusion is only a remote possibility with little probability of occurring”).

Although one of the joint Applicants testified that Applicants have not received any inquiries or reports of confusion or mistake concerning their T-shirts being associated with or related to Opposer's gym or martial arts facilities,²⁸ Applicants have not submitted any evidence demonstrating the length of time Applicants have used their mark in commerce or the amount of sales or advertising of Applicants' goods. This may be the case because Applicants' involved application is based on a claim of a bona fide intent to use the mark in commerce. Thus, it is impossible to ascertain the extent of consumer exposure or recognition of Applicants' mark so as to determine whether any real opportunity for actual confusion to have occurred.

Accordingly, we find the seventh and eighth *DuPont* factors to be neutral.

²⁸ Noorbakhsh Decl., ¶ 8 (12 TTABVUE 3).

H. Ninth *DuPont* Factor: Variety of Goods and Services on which the Cited Mark is or is not Used

The ninth *DuPont* factor considers the variety of goods on which a mark is or is not used. *DuPont*, 177 USPQ at 567. “If a party in the position of plaintiff uses its mark on a wide variety of goods, then purchasers are more likely to view a defendant’s related good under a similar mark as an extension of the plaintiff’s line.” *Shannon DeVivo v. Celeste Ortiz*, 2020 USPQ2d 10153, *15 (TTAB 2020); *See also, e.g., In re Hitachi High-Technologies Corp.*, 109 USPQ2d 1769, 1774 (TTAB 2014) (“[C]onsumers who may be familiar with various products in the [Opposer’s] product line, when confronted with applicant’s mark, would be likely to view the goods marked therewith as additional products from [Opposer]. One of the circumstances mentioned in the ninth *DuPont* factor is the variety of goods on which a prior mark is used.”).

Opposer argues that the ninth *DuPont* factor favors a finding of likelihood of confusion because Opposer has shown actual use of its pleaded COBRA KAI JIU JITSU mark in the provision of services relating to martial arts training and a variety of clothing relating to martial arts training including t-shirts, rash guards, gis, and uniforms for wrestling. We find such uses are insufficient to persuade us that Opposer has used its mark on a such a diverse variety of goods and services that this *DuPont* factor favors a finding of likelihood of confusion. Opposer has not even provided any information about sales of such goods sold or services rendered under its pleaded COBRA KAI JIU JITSU mark. We therefore find the ninth *DuPont* factor to be neutral.

I. Applicant’s Right to Exclude Others from Using its Mark

The eleventh *DuPont* factor considers any evidence that an applicant has a right to exclude third parties from using its mark. Opposer argues that Applicants have failed to submit any evidence to demonstrate that they have the right to exclude others from using their proposed COBRA KAI mark.

We agree with Opposer. Because Applicants have not provided any information about the advertising and sales of their goods sold under their COBRA KAI mark, and because there is no evidence that Applicants have successfully asserted their rights so as to “exclude” third parties from using their mark, this *DuPont* factor also is neutral. *See, e.g., DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *15 (TTAB 2020) (citing *McDonald's Corp. v. McSweet LLC*, 112 USPQ2d 1268, 1284-85 (TTAB 2014) (“Applicant’s sales figures and Applicant’s advertising and promotional expenditures are not sufficient to establish an appreciable level of consumer recognition.”) (internal citation omitted)).

J. Extent of Potential for Confusion

The twelfth *DuPont* factor considers the “extent of potential confusion, i.e., whether de minimis or substantial.” *DuPont*, 177 USPQ at 567. Opposer argues that the extent of potential for confusion is significant.²⁹

We agree with Opposer. Because we have found that (1) the marks at issue are similar; (2) the parties’ respective goods and services are related; and (3) the parties’

²⁹ Opposer’s Trial Brief, p. 20 (14 TTABVUE 21).

respective goods and services are provided in the same or overlapping trade channels to the same or overlapping consumers, the potential for confusion is not de minimis.

Accordingly, this *DuPont* factor favors a finding of likelihood of confusion.

K. Applicants' Purported Good Faith Adoption of Their Involved COBRA KAI Mark

Applicants argue that they adopted their COBRA KAI mark in good faith, with no intent to trade on Opposer's mark.³⁰ However, it is settled that while evidence of bad faith adoption typically will weigh against an applicant, good faith adoption typically does not aid an applicant attempting to establish no likelihood of confusion. *See Eveready Battery Co., Inc. v. Green Planet, Inc.*, 91 USPQ2d 1511, 1156 (TTAB 2009).

VI. Conclusion

We have considered all of the parties' arguments and evidence of record, and all relevant *DuPont* factors. We find that the marks at issue are similar; that Opposer's services listed in its pleaded registration are related to Applicants' identified goods; that they would move in overlapping trade channels; and that they are offered to overlapping classes of purchasers. We thus find that Opposer has established by a preponderance of the evidence that Applicants' mark COBRA KAI for the identified goods so resembles Opposer's COBRA KAI JIU JITSU mark for its listed services as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act, notwithstanding any purchaser sophistication.

Decision: The opposition is sustained and Applicants' counterclaim is denied

³⁰ Applicants' Brief pp. 15-16 (15 TTABVUE 19-20).

Opposition No. 91253442

without prejudice for lack of subject matter jurisdiction.