

**This Opinion is Not a
Precedent of the TTAB**

Mailed: April 18, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Texas Lottery Commission

v.

Ali Ansari

Opposition No. 91264107

Dwayne K. Goetzel of Kowert, Hood, Munyon, Rankin & Goetzel, P.C.,
for Opposer Texas Lottery Commission.

Dileep P. Rao, Rao DeBoer Osterrieder, PLLC,
for Applicant Ali Ansari.

Before Cataldo, Hudis, and Johnson,
Administrative Trademark Judges.

Opinion by Johnson, Administrative Trademark Judge:

Ali Ansari (“Applicant”) seeks to register the mark TEXAS TWO STEP (“Applicant’s Mark”), in standard characters, on the Principal Register for “distilled spirits” in International Class 33.¹

¹ Application Serial No. 88851620 was filed on March 28, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C § 1051(b), based upon Applicant’s allegation of a bona fide intent to use the mark in commerce.

Citations to the record are from the publicly available documents in TTABVUE, the Board’s electronic docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). The number preceding “TTABVUE” corresponds to the docket entry number; the

In its Notice of Opposition,² the Texas Lottery Commission (“Opposer”) pleads prior use and registration of the following marks (collectively, “Opposer’s Marks” or “TEXAS TWO STEP Marks”):

- (1) Registration No. 2727836 for TEXAS TWO STEP, in standard characters, for “lottery services” in International Class 41;³ and



- (2) Registration No. 2762360 for , for “lottery services” in International Class 41.⁴

As grounds for opposition, Opposer alleges that use of Applicant’s Mark would be likely to cause confusion with, and dilution by tarnishment of, Opposer’s Marks under Sections 2(d) and 43(c) of the Trademark Act, 15 U.S.C. § 1052(d) and 1125(c).

In his Answer,⁵ Applicant denied the salient allegations of the Notice of Opposition and asserted four purported affirmative defenses. (5 TTABVUE 3). Applicant’s first “affirmative defense” of failure to state a claim upon which relief can be granted is not a true affirmative defense. *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, *4 n.5 (TTAB 2021) (citing *U.S. Olympic Comm. v. Tempting Brands Neth. B.V.*, 2021 USPQ2d 164, *4 (TTAB 2021)). Because Applicant did not file a motion to dismiss pursuant to

number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry, if applicable. Citations to the application record are to pages in the Trademark Status and Document Retrieval (TSDR) database of the United States Patent and Trademark Office (USPTO). Citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TTABVUE Case Viewer.

² Notice of Opposition, 1 TTABVUE.

³ Registration No. 2727836 (“836 Registration”), registered June 17, 2003; renewed.

⁴ Registration No. 2762360 (“360 Registration”), registered Sept. 9, 2003; renewed.

⁵ Answer, 5 TTABVUE.

Fed. R. Civ. P. 12(b)(6) during the interlocutory phase of this proceeding, nor did Applicant file a brief, we deem this “affirmative defense” waived. *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 n.6 (TTAB 2013).

Applicant’s second affirmative defense is “that this practice of ‘trademark bullying’” is “barred by the equitable doctrine of unclean hands.” Trademark bullying is not a cognizable affirmative defense in inter partes proceedings before the Board, but unclean hands is. However, Applicant offered no argument or evidence in support of his unclean hands defense. It is therefore deemed waived. *Sabhnani*, 2021 USPQ2d 1241, at *4 n.5 (defenses not pursued by Respondent in its brief deemed waived) (citing *Ayoub, Inc. v. ACS Ayoub Carpet Serv., Inc.*, 118 USPQ2d 1392, 1394 n.4 (TTAB 2016)).

Applicant’s third affirmative defense that Opposer is not damaged, will not be damaged, and cannot demonstrate that it will be damaged, is merely an amplification of Applicant’s denial of a likelihood of confusion that we do not treat as a separate defense. *Id.* Likewise, Applicant’s fourth affirmative defense that the marks are not confusingly similar is also an amplification of Applicant’s denial of a likelihood of confusion and not a separate defense. *Id.*

In his last affirmative defense, “Applicant reserves the right to assert additional defenses as they become known to all the claims asserted against them, whether submitted and/or tendered.” Applicant’s “attempt to reserve the right to add defenses is improper under the Federal Rules of Civil Procedure, because that would not give ... [Opposer] fair notice of such defenses.” *Philanthropist.com, Inc. v. Gen. Conf. Corp. of Seventh-Day Adventists*, 2021 USPQ2d 643, *4 n.6 (TTAB 2021); *see also FDIC v. Mahajan*, 923 F. Supp. 2d 1133, 1141 (N.D. Ill. 2013) (“[A]ffirmative defenses that purport

to reserve the right to add affirmative defenses at a later date ... are stricken because they are improper reservations under the Federal Rules.”).

The case is briefed by Opposer. Applicant did not file a brief or introduce any evidence into the record. To prevail on its Trademark Act Section 2(d) and 43(c) claims, Opposer must prove, by preponderance of the evidence, its entitlement to a statutory cause of action, priority, as well as likelihood of confusion and dilution by tarnishment. *See Jansen Enters., Inc. v. Rind*, 85 USPQ2d 1104, 1107 (TTAB 2007). Having considered the evidentiary record, Opposer’s arguments, and applicable authorities, we find that Opposer has not carried this burden. For the reasons set forth below, we dismiss the opposition.

I. The Evidentiary Record

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant’s involved application. Additional evidence introduced into the record is listed below.

A. Opposer's Evidence⁶

Opposer submitted a Notice of Reliance,⁷ introducing into the record the following copies of printed pages from the Texas Lottery website, located at texaslottery.com, as of June 18, 2021:

1. Texas Lottery Homepage/Index (6 TTABVUE 5-7);
2. Texas Two Step Winning Numbers for 06/16/2021 (6 TTABVUE 8-10);
3. Texas Two Step Past Winning Numbers (6 TTABVUE 11-14);
4. How to Play Texas Two Step (6 TTABVUE 15-17);
5. Scratch Ticket and Retailer Locator (6 TTABVUE 18-19);

⁶ Opposer attached several documents to its brief. “[E]xhibits to briefs are generally unnecessary and discouraged.” TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 801.01 (2021); *see also ITC Entm’t Grp. Ltd. v. Nintendo of Am. Inc.*, 45 USPQ2d 2021, 2022-23 (TTAB 1998) (filing duplicative submissions is a waste of time and resources, and is a burden on the Board). Specifically, exhibits attached to a party’s brief can be given no consideration unless they were properly made of record during the time for taking testimony. TBMP § 704.05(b); *see also Hole in 1 Drinks, Inc. v. Lajitay*, 2020 USPQ2d 71345, *2 (TTAB 2020) (exhibits attached to brief not considered). Consequently, we will consider the file of Applicant’s involved application, and evidence that was properly introduced into the record via Opposer’s Notice of Opposition and Notice of Reliance. Any other documents (or excerpts from those documents), will not be considered.

⁷ 6 TTABVUE (“NoR”). In its NoR, Opposer listed its First Set of Interrogatories (NoR #3), Request for Production of Documents and Things (NoR #4), and Requests for Admissions (NoR #5), noting that responses were not received for any of the discovery requests. However, Opposer did not attach these three documents to its NoR. Instead, Opposer attached the three documents to its brief. Trademark Rule 2.120(k)(3)(i), 37 C.F.R. § 2.120(k)(3)(i), states, in relevant part, “an answer to an interrogatory, an admission to a request for admission, or a written initial disclosure, which may be offered in evidence under the provisions of paragraph (k) of this section, may be made of record in the case by filing ... a copy of the interrogatory and answer thereto with any exhibit made part of the answer, or a copy of the request for admission and any exhibit thereto **and the admission (or a statement that the party from which an admission was requested failed to respond thereto)** ... together with a notice of reliance in accordance with § 2.122(g). **The notice of reliance and the material submitted thereunder should be filed during the testimony period of the party that files the notice of reliance.**” (emphasis added). Because Opposer did not properly enter them into the record through its NoR, we cannot consider Opposer’s untimely submitted First Set of Interrogatories, Request for Production of Documents and Things, and Requests for Admissions.

6. Texas Lottery Commission Texas Two Step Winner Summary Report for Draw 2096 (6 TTABVUE 20);
7. Texas Lottery Commission Texas Two Step Winner Summary Report for Draw 2094 (6 TTABVUE 21);
8. Texas Lottery Commission Texas Two Step Winner Summary Report for Draw 2092 (6 TTABVUE 22);
9. Texas Lottery Commission Texas Two Step Winner Summary Report for Draw 2090 (6 TTABVUE 23);
10. Texas Lottery Drawings – Webcast (6 TTABVUE 24-25);
11. Check Your Ticket – Texas Two Step (6 TTABVUE 26-27); and
12. Texas Lottery Advertising Sensitivity Guidelines (6 TTABVUE 28-29).

Opposer also attached to its Notice of Opposition printed USPTO Trademark Electronic Search System (TESS) records for its pleaded registrations '836 and '360 and “plain” copies of registrations '836 and '360.⁸

B. Applicant's Evidence

Applicant did not submit any evidence.

II. The Parties and their Marks

A. Opposer

Opposer Texas Lottery Commission is a Texas government state agency that has offered lottery services under its TEXAS TWO STEP Marks since at least as early as 2001. (1 TTABVUE 4 ¶ 2). Opposer alleges that its TEXAS TWO STEP Marks are famous

⁸ Notice of Opposition, 1 TTABVUE 10-11, 15-17.

and have “enormous goodwill.” (1 TTABVUE 5, ¶¶ 9, 11). Opposer also alleges that it sold over 174 million dollars of lottery tickets featuring the TEXAS TWO STEP Marks between 2017 and 2019. (*see* 1 TTABVUE 5, ¶ 9).

B. Applicant

Applicant Ali Ansari, a Texas resident, is the owner of Application Serial Number 88851620, TEXAS TWO STEP, for “distilled spirits” in International Class 33.

III. Entitlement to a Statutory Cause of Action⁹

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, *3 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (2021) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A party in the position of plaintiff may oppose registration of a mark when doing so is within its zone of interests and it has a reasonable belief in damage that is proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, *6-7 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021) (holding that the test in *Lexmark* is met by demonstrating: (1) a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement; and (2) a reasonable belief in damage proximately caused by registration of the mark).

⁹ Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063 and 1064, under the rubric of “standing.” We now refer to this inquiry as “entitlement to a statutory cause of action.” Despite the change in nomenclature, our prior decisions and those of the U.S. Court of Appeals for the Federal Circuit interpreting “standing” under Sections 13 and 14 of the Trademark Act remain applicable. *Chutter, Inc. v. Great Mgmt. Grp.*, 2021 USPQ2d 1001, *10 n.39 (TTAB 2021) (citing *Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388, *2 (TTAB 2020)).

Here, Opposer's pleaded registrations for its TEXAS TWO STEP Marks¹⁰ establish that Opposer is entitled to oppose the registration of Applicant's Mark under Sections 2(d) and 43(c) of the Trademark Act. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (registration establishes "standing"); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (where opposer alleged likelihood of confusion, testimony that opposer uses its mark "is sufficient to support opposer's allegations of a reasonable belief that it would be damaged"). Once Opposer has proven its entitlement to a statutory cause of action on one pleaded ground, it has established its entitlement for any other ground. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727-28 (Fed. Cir. 2012).

IV. Priority

Section 2(d) of the Trademark Act permits an opposer to file an opposition on the basis of ownership of "a mark or trade name previously used in the United States ... and not abandoned." Because Opposer established ownership and validity of its pleaded registrations¹¹ and Applicant did not file a counterclaim to cancel the pleaded registrations, priority is not at issue with respect to the registered marks and the services identified therein. *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)).

¹⁰ Notice of Opposition, 1 TTABVUE 4, 10-11, 15-17.

¹¹ *Id.* at 4.

V. Likelihood of Confusion

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) (cited in *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015)). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “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. “While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.” *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015). “Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 75 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source and to protect registrants from damage caused by registration of confusingly similar marks. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

Varying weights may be assigned to the various *DuPont* factors depending on the evidence presented. See *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344,

98 USPQ2d 1253, 1260 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Two key considerations are the similarities between the marks and the relatedness of the goods and services. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (“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.’”)).

A. The Similarity or Dissimilarity of the Marks

First we address 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. Sept. 13, 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).

The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*,

207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Because the goods and services at issue are distilled spirits and lottery services, the average purchaser is an ordinary consumer.

The parties' standard character marks are identical in appearance, sound, connotation, and commercial impression. Applicant's Mark, which covers all font sizes and types, also incorporates the most distinctive wording of Opposer's composite mark,



. See *Citigroup*, 98 USPQ2d at 1259 (owner was “entitled to depictions of the standard character mark regardless of font style, size, or color”). Thus, Applicant's Mark is nearly identical to the dominant portion of Opposer's composite mark. The wording “Texas Two Step” in Opposer's composite mark appears in larger sized type than the wording “Texas Lottery,” that is, at best, descriptive of Opposer's “lottery services.” Furthermore, “the presence of an additional term in the mark does not necessarily eliminate the likelihood of confusion if some terms are identical.” *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260-61 (Fed. Cir. 2010) (finding ML in standard characters confusingly similar to ML MARK LEES in stylized form); see also *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (finding STONE LION CAPITAL confusingly similar to LION and LION CAPITAL).

With regard to the boot design in Opposer's composite mark, it is settled that where, as here, a mark is comprised of both words and a design, the words are normally accorded greater weight, in part because consumers are likely to remember and use the words to request the goods. Cf. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911

(Fed. Cir. 2012) (“the verbal portion of a word and design mark likely will be the dominant portion”). We find, as a result, that Applicant’s Mark is highly similar to Opposer’s composite mark.

The first *DuPont* factor, the similarity of the marks, weighs heavily in favor of a finding of likelihood of confusion.

B. The Relatedness of the Goods and Services and the Channels of Trade

When analyzing the second and third *DuPont* factors regarding the relatedness of the goods and services and the channels of trade, we look to the identifications in the application and cited registrations. *Stone Lion*, 110 USPQ2d at 1162; *see 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 sales of the goods are directed.”). Where the Applicant’s Mark and Opposer’s standard character mark are identical, and Applicant’s Mark is identical to the dominant portion of Opposer’s composite mark, the relationship between the goods and/or services need not be as close to support a finding of likelihood of confusion as would be required if there were differences between the marks. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010).

The issue is not whether the goods and/or services will be confused with each other, but rather whether the public will be confused as to their source. *See Recot, Inc. v. 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. It is this sense of relatedness that matters in the likelihood of confusion analysis.”). It is sufficient that the goods and/or services of the applicant and the registrant are related in some manner or that the conditions surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that, because of the marks used in connection therewith, would lead to the mistaken belief that they originate from the same source. *See, e.g., Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000).

Opposer maintains that lottery tickets bearing its TEXAS TWO STEP Marks “are sold in multiple locations throughout the state, including those shown [in evidence], which lists grocery stores, convenience stores, and service stations” (7 TTABVUE 11), and that “Applicant intends to sell distilled spirits, which are likewise sold in grocery stores, convenience stores, and service stations.” (7 TTABVUE 11-12). In support of its argument, Opposer introduced into evidence a printed copy of a Texas Lottery webpage titled “Scratch Ticket and Retailer Locator” with search results showing retailers in the 77423 ZIP code at which purchasers can check their TEXAS TWO STEP lottery tickets (6 TTABVUE 18-19), but the search results do not show that those retailers sell distilled spirits.¹² Opposer did not proffer any evidence specifically showing that distilled spirits

¹² The definition of “distilled spirit,” also called “distilled liquor,” is an alcoholic beverage “that is obtained by distillation from wine or other fermented fruit or plant juice or from a starchy material (such as various grains) that has first been brewed. The alcoholic content of distilled liquor is higher than that of beer or wine.” *ENCYCLOPAEDIA BRITANNICA* (2022) (<https://www.britannica.com/topic/distilled-spirit>) (last accessed Apr. 13, 2022). The definition of

are offered for sale at locations where Opposer's lottery services are offered, nor did Opposer proffer third-party evidence demonstrating that distilled spirits and lottery services (including lottery tickets) are offered at the same retail locations. Moreover, the record lacks third-party registrations showing distilled spirits and lottery services being offered under the same mark.

Without supporting evidence, we cannot find on this record, and are loath to presume, that any of the retailers listed in the search results of the Texas Lottery webpage printout offer "distilled spirits." "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), *cited in Diamond Hong, Inc. v. Zheng Cai*, 2018 BL 69257, *3 (TTAB 2018), *aff'd sub nom. Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797 (TTAB 2018). Consequently, the second and third *DuPont* factors, the goods and trade channels, weigh against a finding of likelihood of confusion.

C. Conclusion

Applicant's Mark, TEXAS TWO STEP, and Opposer's standard character mark, TEXAS TWO STEP, are identical, and Applicant's Mark is highly similar to Opposer's



composite mark. Any one factor may control a particular Trademark Act Section 2(d) case, and that factor could be the parties' respective goods and services.

"alcoholic beverage" is "any fermented liquor, such as wine, beer, or distilled spirits, that contains ethyl alcohol, or ethanol (CH₃, CH₂, OH), as an intoxicating agent." *ENCYCLOPAEDIA BRITANNICA* (2022) (<https://www.britannica.com/topic/alcoholic-beverage>) (last accessed Apr. 13, 2022). The Board may take judicial notice of encyclopedia entries, census data, standard reference works and of commonly known facts. *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.24 (TTAB 2013) (judicial notice taken of entry for "tea" from Encyclopedia Britannica).

M2 Software, Inc. v. M2 Commc'ns., Inc., 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006). Here, the sparse record compels us to conclude that there is insufficient evidence from which to infer that the respective goods and services are related, or the channels of trade are similar. Had the record been developed more fully, the result might have been different, but “Section 2(d) of the Trademark Act is concerned about the likelihood of confusion, not some theoretical possibility built on a series of imagined horrors.” *Elec. Data Sys. Corp. v. EDSA Micro Corp.*, 23 USPQ2d 1460, 1465 (TTAB 1992).

Balancing the *DuPont* factors for which there is evidence and argument, we find insufficient evidence of likelihood of confusion under Trademark Act Section 2(d).

VI. Dilution by Tarnishment

Finally, Opposer alleges that its marks are famous (1 TTABVUE 5 ¶ 9), and that the registration of Applicant's Mark would tarnish Opposer's Marks. (1 TTABVUE 5, ¶ 12). In turn, Applicant denies that Opposer's Marks are famous and that the registration of its mark will tarnish Opposer's Marks. (5 TTABVUE 2, ¶¶ 3, 5).

To prevail on its dilution claim, Opposer must show that: (1) it owns a famous mark that is distinctive; (2) Applicant is using a mark in commerce that allegedly dilutes Opposer's famous mark; (3) Applicant's use of its mark began after Opposer's became famous; and (4) Applicant's use of its mark is likely to cause dilution by blurring or tarnishment. *N.Y. Yankees P'ship v. IET Prods. & Servs. Inc.*, 114 USPQ2d 1497, 1502 (TTAB 2015) (quoting *Coach Servs.*, 101 USPQ2d at 1723-24).

Opposer's Trademark Act Section 43(c) dilution claim fails because Opposer has not proffered any evidence in support of it; the modest amount of evidence before us is

provided without much, if any, context.¹³ In addition, there is no evidence in the record showing that Applicant has begun to use his mark. On this record, we decline to presume that Opposer has made a sufficient showing of any of the factors necessary for it to prevail on its dilution claim, for “[a]ttorney argument is no substitute for evidence.” *Enzo Biochem*, 76 USPQ2d 1622.

Decision: The opposition is dismissed as to both of Opposer’s claims under Trademark Act Section 2(d) and Trademark Act Section 43(c).

¹³ *See, e.g.*, 6 TTABVUE 20-23 (TEXAS TWO STEP winner summary reports).