

This Opinion is Not a
Precedent of the TTAB

Mailed: September 23, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Threshold Enterprises Ltd.

v.

Sevag Dani Tufenkjian

—
Opposition No. 91266595
—

Rachel Chanin of Vallejo Antolin Agarwal Kanter LLP,
for Threshold Enterprises Ltd.

Rexford Brabson of T-Rex Law, P.C.,
for Sevag Dani Tufenkjian.

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Before Cataldo, Lykos and Lynch,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

On June 18, 2020, Sevag Dani Tufenkjian (“Applicant”) filed an application to register on the Principal Register the standard character mark TRUUEGAN for goods ultimately identified as “Dietary supplements; Dietary and nutritional supplements; Nutritional supplements; Vitamin supplements; Vitamin and mineral

supplements; all the foregoing made from vegan ingredients” in International Class 5.¹

Threshold Enterprises Ltd. (“Opposer”) opposes registration of Applicant’s mark on the grounds of priority and likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). In the Notice of Opposition, Opposer pleaded ownership of Registration No. 4835622 for the mark VEGAN TRUE (VEGAN disclaimed) on the Principal Register for “Vegan dietary supplements; vegan herbal supplements; vegan nutritional supplements; vegan food supplements; vegan vitamins: in International Class 5.² Opposer also pleaded prior common law use of

¹ Application Serial No. 90009557, filed under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use the mark in commerce. The mark appears on the drawing page as “TruuVegan” (i.e., upper and lower case letters) but retains a claim as to standard characters and not special form. The presentation of the mark on the drawing page does not change the nature of the mark from a standard character mark to a special form mark. *See* Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a) (setting forth requirements for standard character mark). *See also In re Calphalon Corp.*, 122 USPQ2d 1153, 1158-61 (TTAB 2017) (applicant’s amendment of mark from SHARPIN to SharpIn did not transform mark from standard character to special form). Our references to Applicant’s mark in this opinion in all uppercase letters reflects the fact that a term, when applied-for or registered as a mark in standard character format, is not limited to any particular presentation as to upper and lower case lettering. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000) (“Registrations with typed drawings are not limited to any particular rendition of the mark and, in particular, are not limited to the mark as it is used in commerce.”).

Citations to the record throughout the decision include references to TTABVUE, the Board’s online docketing system. The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry. *See, e.g., Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

² Notice of Opposition ¶ 3; 1 TTABVUE 4. The record shows that the mark registered October 20, 2015, claiming September 12, 2014 as the date of first use anywhere and in commerce; combined Section 8 and 15 declaration accepted and acknowledged.

the mark VEGAN TRUE “[s]ince at least five years prior to Applicant’s filing date” in connection with the same goods listed in its pleaded registration.³

In his Answer, Applicant denied the salient allegations of the Notice of Opposition, and asserted various affirmative and putative defenses (i.e. amplifications of his denials).⁴ Insofar as none of the affirmative defenses were pursued at trial or on brief, they are deemed waived. *See, e.g., Peterson v. Awshucks SC, LLC*, 2020 USPQ2d 11526, at *1 n.3 (TTAB 2020) (various affirmative defenses deemed waived because no evidence or argument presented at trial).

The case is fully briefed. Opposer, as plaintiff in this proceeding, bears the burden of establishing its entitlement to a statutory cause of action and Section 2(d) claim by a preponderance of the evidence. *See Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1107 (TTAB 2007).

I. The Record

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

A. Opposer’s Main Trial Period

Opposer did not take any testimony depositions or submit any testimony declarations during its main trial period. Opposer filed on November 1, 2021, a Notice

³ Notice of Opposition, ¶ 4; 1 TTABVUE 4.

⁴ Answer, “Affirmative Defenses” ¶¶ 1-5, 7 TTABVUE 10.

of Reliance on the following documents (8 TTABVUE):

Ex. A: Internet printouts from Opposer's website "Source Naturals" at <https://www.sourcenaturals.com/products> accessed on April 15, 2021.

Ex. B: Printouts from the USPTO's Trademark Status and Document Retrieval ("TSDR") database of Opposer's pleaded Registration No. 4835622 and portions of the application file.

Ex. C: The May 19, 2016 Office Action for Application Serial No. 86560626 for the mark TRUVEGAN.

B. Applicant's Trial Period

Applicant submitted his own testimony declaration ("Tufenkjian Decl.") (11 TTABVUE) as well as a Notice of Reliance filed January 24, 2022 on the following documents (9-10 TTABVUE):

Ex. A: Online dictionary entries for "tru" from THE URBAN DICTIONARY, THE FREE DICTIONARY, INTERNET SLANG, DEFINITION.ORG, NOSLANG.COM, and "u" from THE COLLINS ENGLISH DICTIONARY, THE URBAN DICTIONARY, AND THE FREE DICTIONARY, all accessed on accessed on January 24, 2022.⁵

Ex. B: Copies of third-party registration certificates.

C. Opposer's Rebuttal Trial Period

Opposer filed a Rebuttal Notice of Reliance on March 7, 2022 on the following

⁵ We have not considered the definition of "u" from the online OXFORD ENGLISH DICTIONARY for "UK English" (9 TTABVUE 53) since this has no bearing on U.S. consumer perception. *Cf. In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1596 (TTAB 2018) ("While evidence of foreign use may in some cases be probative, in this case it does not serve to tell us the norms specific to pet owners in the United States, who are the relevant consumers.").

documents (13 TTABVUE):

Ex. A: Online dictionary definitions and other Internet materials accessed January 25, 2022 related to the term “truu.”

Ex. B.: Internet materials showing that the stock ticker “TRUU” as a designation for True Drink Holdings, Inc. accessed January 26, 2022.

Ex. C: A printout of a May 2005 report entitled “Dietary Supplements: Balancing Consumer Choice & Safety” by the New York State Task Force on Life & the Law at https://www.health.ny.gov/regulations/task_force/docs/dietary_supplement_safety.pdf. accessed on February 14, 2022.

II. Opposer’s Evidentiary Objections

A. Applicant’s Notice of Reliance - Dictionary Entries

Opposer objects to the online dictionary entries Applicant submitted in Exhibit A of his Notice of Reliance to the extent that he requests that the “Board take judicial notice of the word ‘tru’ being a shortening of the word ‘true’, and the letter ‘u’ being a shortening of the word ‘you’.”⁶ Opposer’s objection is overruled. Applicant’s judicial notice request on the Notice of Reliance coversheet was unnecessary. Judicial notice is only required of materials not part of the record. *See* Fed. R. Evid. 201 (Judicial Notice of Adjudicative Facts).⁷

Opposer also objects to the online dictionary entries of “tru” from THE URBAN DICTIONARY, THE FREE DICTIONARY, INTERNET SLANG, DEFINITION.ORG,

⁶ Applicant’s Notice of Reliance, Cover Sheet, 9 TTABVUE 2.

⁷ “Unless the parties otherwise stipulate, the rules of evidence for proceedings before the Trademark Trial and Appeal Board are the Federal Rules of Evidence,” Trademark Rule 2.122(a), 37 C.F.R. § 2.122(a).

NOSLANG.COM, and “u” from THE URBAN DICTIONARY, AND THE FREE DICTIONARY on the grounds that “the evidence is unreliable, unverifiable, and immaterial.”⁸ Opposer argues that entries are untrustworthy because they reflect the opinion of crowdsourced authors, pointing to the entry for “tru” from THE URBAN DICTIONARY, as one example of an unidentified author. Opposer requests that the Board not consider this evidence.

The objection is overruled. Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2), provides that a copy of the relevant portion of a webpage may be introduced into evidence through a notice of reliance provided that the propounding party includes the URL (source) and the date the webpages were accessed. The rule, by definition, includes online dictionary entries. However, keeping in mind Opposer’s objections, we have only accorded this evidence whatever probative value it merits. *Cf. In re Hinton*, 116 USPQ2d 1051, 1053 n.10 (TTAB 2015) (“The Board gives guarded consideration to evidence taken from Wikipedia, bearing in mind the limitations inherent in this reference work, so long as the non-offering party has an opportunity to rebut the evidence by submitting other evidence that may call its accuracy into question.”); *In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2062 n.3 (TTAB 2013) (Board considered entries obtained from the online Urban Dictionary because they were submitted early enough to afford applicant an opportunity to submit any alternative meanings or otherwise question the reliability of the definitions).

⁸ Opposer’s Brief, Appendix, p. 2; 14 TTABVUE 27.

B. Motion to Strike the Tufenkjian Testimony Declaration

Opposer objects to Applicant's testimony declaration on the grounds that it lacks foundation, is irrelevant and immaterial. More specifically, Opposer objects to Applicant's testimony regarding his reasons for selecting TRUUEGAN as his trademark, and as well as his testimony regarding his interpretation of the connotation, pronunciation and commercial impression of his mark.⁹ Opposer also objects to Applicant's testimony regarding the level of sophistication of prospective consumers of Applicant's goods as speculative and lacking foundation given that the application was filed on an intent-to-use basis.¹⁰ Opposer therefore moves to strike the declaration in its entirety.

The Board declines to strike Applicant's testimony declaration in its entirety since it was taken in accordance with the applicable rules. *See Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1047 (TTAB 2017) (following well-established Board policy of generally not striking testimony taken in accordance with applicable rules on the basis of substantive objections); *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc. dba Watermark Cruises*, 107 USPQ2d 1750, 1755 (TTAB 2013), *aff'd*, 565 F. App'x 900 (Fed. Cir. 2014) (mem.) (same); *Krause v. Krause Publ'ns Inc.*, 76 USPQ2d 1904, 1907 (TTAB 2005) (same). Nonetheless, we have considered the probative value of his testimony in light of Opposer's objections. *See Alcatraz*, 107 USPQ2d at 1755. For example, we have disregarded any opinion

⁹ Tufenkjian Declaration ¶¶ 2-6; 11 TTABVUE 2-3.

¹⁰ *Id.* at 6; 11 TTABVUE 3.

testimony regarding the ultimate disposition of the Section 2(d) claim; Applicant is a fact witness and not an expert. *See e.g., Tao Licensing*, 125 USPQ2d at 1047; *The Mennen Co. v. Yamanouchi Pharm. Co.*, 203 USPQ 302, 305 (TTAB 1979). We have also weighed the probative value of Applicant's testimony against any potential bias.

III. Entitlement to a Statutory Cause of Action

An opposer in an inter partes case must prove entitlement to a statutory cause of action. *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1401 (2015). Section 13 of the Trademark Act, 15 U.S.C. § 1063(a), states:

Any person who believes that he would be damaged by the registration of a mark upon the principal register, including the registration of any mark which would be likely to cause dilution by blurring or dilution by tarnishment under section 1125(c) of this title, may, upon payment of the prescribed fee, file an opposition in the Patent and Trademark Office, stating the grounds therefor, within thirty days after the publication under subsection (a) of section 1062 of this title of the mark sought to be registered.

To establish entitlement to a statutory cause of action under Section 13 of the Trademark Act, Opposer must demonstrate (1) that its claims fall within the zone of interests protected by the statute (i.e., has a "real interest" in the outcome of the proceeding); and (2) damage proximately caused by the proposed registration (i.e., a reasonable basis for its belief in damage). *See Meenaxi Enter., Inc. v. Coca-Cola Co.*, 2022 USPQ2d 602, at *2 (Fed. Cir. 2022) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129, 132 (2014)); *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *4-8 (Fed. Cir. 2020); *Australian Therapeutic*

Supplies Pty. Ltd. v. Naked TM, LLC, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020); *Empresa*, 111 USPQ2d 1162; *see also Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999) (defining a “real interest” as a “direct and personal stake” in the outcome of the proceeding).

Opposer has demonstrated through the TSDR printouts made of record that it is the owner of its pleaded registration, and that the registration is valid and subsisting.¹¹ Based on this evidence, we find Opposer has a reasonable belief of damage that is proximately caused by Applicant’s applied-for mark. The opposition therefore falls within the zone of Opposer’s interests as protected by Section 13 of the Trademark Act.

IV. Section 2(d) Claim

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 consider each element of this claim, priority and likelihood of confusion, below.

A. Priority

Applicant challenges Opposer’s priority, arguing that it has not proven prior common law rights or use in its pleaded mark VEGAN TRUE since 2015 as alleged

¹¹ Opposer’s Notice of Reliance, Ex. B; 8 TTABVUE 41-51.

in the Notice of Opposition. Applicant highlights that Opposer's only purported sales evidence consists of printouts from Opposer's website at www.sourcenaturals.com showing Opposer's VEGAN TRUE mark displayed on bottles for a wide variety of vitamins and dietary supplements.¹²

We agree with Applicant that Opposer has not demonstrated priority based on prior common law rights in its pleaded mark. Although Internet printouts may be admissible under notice of reliance (see Trademark Rule 2.122(e)(b), 37 C.F.R. § 2.122(e)(b)), their probative value is limited because they may not be used to demonstrate the truth of matter asserted therein. *See* Fed. R. Civ. P. 801(c) (definition of hearsay) and 802 (the rule against hearsay); *see also Schiedmayer Celesta GmbH v. Piano Factory Grp., Inc.*, 2019 USPQ2d 341894, at *3, *9 nn. 8, 15 (TTAB 2019) (Internet evidence relied on solely for "what these sources state, rather than the truth of what they state" and for what they show on their face), *aff'd*, 11 F.4th 1363, 2021 USPQ2d 913 (Fed. Cir. 2021). In the absence of a testimony deposition or declaration based on a witness' personal knowledge and proper foundation, the printouts from Opposer's website constitute hearsay and cannot be used to establish prior use in commerce. *See* Fed. R. Civ. P. 801(c) and 802; *see also Spiritline Cruises LLC v. Tour Mgmt. Servs., Inc.*, 2020 USPQ2d 48324, at *2 (TTAB 2020) (Internet printouts properly introduced under a notice of reliance without supporting testimony considered only for what they show on their face rather than

¹² Opposer's Notice of Reliance Ex. A; 8 TTABVUE 5-39.

for the truth of the matters asserted).

However, Opposer also pleaded priority based on its ownership of a federal registration. This may serve as a separate basis for establishing priority. *See King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Because Opposer properly made of record its valid and subsisting pleaded registration¹³ and Applicant did not counterclaim to cancel it, priority is not at issue for the mark and goods identified therein. *See id.*

B. Likelihood of Confusion

Having established Opposer's priority, we are left with the issue of likelihood of confusion. Our analysis is based on all of the probative evidence of record. *In re E. I. DuPont 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 making our determination, the Board has considered each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed.

¹³ Notice of Reliance Ex. B; 8 TTABVUE 41-51.

Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). These factors, and the other *DuPont* factors argued by each party, are discussed below.

1. The Similarity or Dissimilarity of the Goods and the Established, Likely-to-Continue Channels of Trade and Classes of Consumers

We first compare the goods as they are identified in the involved application and Opposer’s registration, the second *DuPont* factor. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018); *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) and *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). *See also B&B Hardware*, 135 S. Ct. at 1300 (recognizing that an “applicant’s right to *register* must be made on the basis of the goods described in the application”). We need not find similarity as to each good listed in the application. “It is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.” *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5

(TTAB 2015); *see also Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

Applicant's goods are identified as "**Dietary supplements**; Dietary and nutritional supplements; **Nutritional supplements**; Vitamin supplements; Vitamin and mineral supplements; **all the foregoing made from vegan ingredients.**" Emphasis added. Opposer's goods include "Vegan dietary supplements" and "vegan nutritional supplements." Although worded slightly differently, on their face, Applicant's and Opposer's goods are in-part identical.

This brings us to the third *DuPont* factor, the established, likely-to-continue channels of trade and classes of consumers as delineated in the identifications. *See Detroit Athletic Co.*, 128 USPQ2d at 1051. Because the goods are in-part identical and unrestricted as to trade channels, we must presume that these particular goods travel in the same ordinary trade and distribution channels. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011). In addition, it is presumed that Applicant's and Opposer's identical items are offered to all normal potential consumers, namely the members of the general public seeking vegan dietary

supplements and vegan nutritional supplements. *See id.*; *see also Octocom*, 16 USPQ2d at 1787.

For these reasons, the second and third *DuPont* factors weigh strongly in favor of finding a likelihood of confusion.

2. The Similarity or Dissimilarity of the Marks¹⁴

Keeping in mind where the goods are in-part identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines, *Bridgestone Ams. Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012), we now turn to the first *DuPont* 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 Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (citing *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.”

¹⁴ Applicant’s arguments that the marks are dissimilar based on Opposer’s purported actual use of the mark with the house mark SOURCE NATURALS miss the point. *See* Opposer’s Notice of Reliance Ex. A (Internet printouts from Opposer’s website “Source Naturals” at <https://www.sourcenaturals.com/products> accessed on April 15, 2021); 8 TTABVUE 5-39. Opposer has established priority based on its prior registration for the mark VEGAN TRUE. For this reason, our comparison is based on the mark as depicted in Opposer’s registration without regard to whether the mark will appear with a house mark when in actual use. *Cf. In re Shell Oil Co.*, 26 USPQ2d at 1690 n.4 (applicant’s arguments that the applied-for mark would appear with applicant’s house mark were not considered in the likelihood-of-confusion determination); *see also In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) (“[W]e do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and the application. We must compare the marks as they appear in the drawings, and not on any labels that may have additional wording or information.”).

In re Inn at St. John's, LLC, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). *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 test regarding similarity “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) (internal quotation marks and citation omitted)). Further, the marks “must be considered ... in light of the fallibility of memory” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quotation 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 Bay State Brewing Co., Inc.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (citing *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991)), *aff'd per curiam*, 972 F.2d 1353 (Fed. Cir. 1992); *see also In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009). “Similarity is not a binary factor but is a matter of degree.” *St. Helena Hosp.*, 113 USPQ2d at 1085 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)).

Applicant argues that the marks TRUUEVEGAN and VEGAN TRUE differ in appearance, sound, meaning and commercial impression. Applicant asserts that

TRUUEGAN is pronounced not as “true vegan” but rather as “true you vegan.”¹⁵ He further contends that even if pronounced by consumers as “true vegan,” the marks have notable distinctions in sound and appearance because the words appear in the reverse order, are spelled differently, and spaced differently. With regard to connotation and commercial impression, Applicant maintains that “[t]he intentional misspelling of ‘True’ and ‘You’ as a unique ‘TRUU’ suggests ‘a casual, youthful, and trendy commercial impression quite opposite of the plain and conservative ‘VEGAN TRUE.’”¹⁶

Applicant’s arguments are unpersuasive. “[T]here is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the brand owner.” *Viterra*, 101 USPQ2d at 1912 (citing *Interlego AG v. Abrams/Gentile Entm’t Inc.*, 63 USPQ2d 1862, 1863 (TTAB 2002) (finding similarity between LEGO and MEGO, despite the applicant’s contention that consumers would pronounce MEGO as “me go”). “[C]orrect pronunciation as desired by the applicant cannot be relied upon to avoid a likelihood of confusion.” *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 n.3 (TTAB 1987). For this reason, it is equally plausible that consumers will pronounce Applicant’s mark TRUUEGAN as “true vegan.”

With the pronunciation of “true vegan” in mind, Applicant’s mark constitutes a transposition of Opposer’s mark VEGAN TRUE. While the transposition of words may in some instances create a different commercial impression, that is not the case

¹⁵ Tufenkjian Decl. ¶ 2; 11 TTABVUE 1-2 .

¹⁶ Applicant’s Brief, p. 9; 15 TTABVUE 10.

here. *Compare In re Wine Soc’y of Am. Inc.*, 12 USPQ2d 1139, 1142 (TTAB 1989) (holding THE WINE SOCIETY OF AMERICA and design for wine club membership services including the supplying of printed materials, and AMERICAN WINE SOCIETY 1967 and design for newsletters, bulletins, and journals, likely to cause confusion); *In re Nationwide Indus., Inc.*, 6 USPQ2d 1882, 1884 (TTAB 1988) (holding RUST BUSTER (with “RUST” disclaimed) for rust-penetrating spray lubricant, and BUST RUST for penetrating oil, likely to cause confusion); and *In re Gen. Tire & Rubber Co.*, 213 USPQ 870, 871 (TTAB 1982) (holding SPRINT STEEL RADIAL (with “STEEL” and “RADIAL” disclaimed) for pneumatic tires, and RADIAL SPRINT (with “RADIAL” disclaimed) for radial tires, likely to cause confusion) *with In re Best Prods. Co.*, 231 USPQ 988, 989-90 (TTAB 1986) (holding BEST JEWELRY and design (with “JEWELRY” disclaimed) for retail jewelry store services, and JEWELERS’ BEST for bracelets, not likely to cause confusion). Both Applicant’s mark TRUUEGAN (when pronounced as “true vegan”) and Opposer’s VEGAN TRUE mark suggest that their respective products are authentically vegan, i.e. devoid of animal product ingredients.¹⁷ As such, their connotation and commercial impression

¹⁷ The Board takes judicial notice of the following definitions from the online U.S. English version of THE CAMBRIDGE DICTIONARY accessed at <https://dictionary.cambridge.org/us/dictionary/english/> on September 22, 2022:

The adjective “true” defined as “not false;” and

“Vegan,” when used as an adjective, as “not eating, using, or including any animal products.”

See Fed. R. Evid. 201(b)(2) and (c)(2); *see, e.g., In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1767-1768 (TTAB 2016) (Board may take judicial notice of online dictionary definitions also available in printed form); *In re Cordua Rests. LP*, 110 USPQ2d 122, 1229 n.4 (TTAB 2014)

are identical.

Although the transposition of the terms comprising the marks results in some differences in sound and appearance, overall these differences are easily outweighed by the similarities from their shared components, as well as their identical meaning and overall commercial impression. Furthermore, the in-part identity of Applicant's and Opposer's goods reduces the degree of similarity between the marks necessary to find a likelihood of confusion. *Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010). Accordingly, this *DuPont* factor weighs in favor of finding a likelihood of confusion.

3. Fame of Opposer's VEGAN TRUE Mark

Applicant argues that Opposer failed to show that its registered mark VEGAN TRUE is famous under the fifth *DuPont* factor. *See, e.g., Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017); *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002). A plaintiff is under no obligation to prove that its mark falls on the higher end of the fame spectrum of "very strong to very weak" "amongst a "significant portion of the relevant consuming public." *See Palm Bay*, 73 USPQ2d at 1694 (internal quotation omitted). Insofar as it is the duty of a plaintiff in a Board proceeding to assert and prove that its mark falls on the higher end of the fame spectrum to clearly prove it, *see Leading Jewelers Guild Inc. v. LJOW Holdings LLC*,

(Board took judicial notice of the definitions of "churrasco" from English language dictionaries), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

82 USPQ2d 1901, 1904 (TTAB 2007), and Opposer did not make any such attempt here, we deem this *DuPont* factor neutral.

4. Strength of Opposer's VEGAN TRUE Mark

In determining the strength of a plaintiff's mark, we consider both its inherent strength, based on the nature of the mark itself, and, if there is evidence in the record of marketplace recognition of the mark, its commercial strength. *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.*, 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).

Applicant postulates that Opposer's registered mark VEGAN TRUE is weak and entitled to only a narrow scope of protection. Applicant did not introduce any evidence of third-party uses that would pertain to a diminished commercial strength of Opposer's mark, the sixth *DuPont* factor. *See Palm Bay*, 73 USPQ2d at 1693 (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”); *Tao Licensing*, 125 USPQ2d at 1059 (“As to *commercial* weakness, ‘the probative value of third-party trademarks depends entirely upon their usage’”) (quoting *Palm Bay*, 73 USPQ2d at 1693). Instead, Applicant challenges the inherent or conceptual strength of the cited mark. Applicant relies on 86 third-party registrations for dietary

or nutritional supplements, vitamins, or related goods that include the word TRUE, or the phonetic equivalent thereof, in their marks.¹⁸

Third-party registrations alone may be relevant, in the manner of dictionary definitions, “to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (internal quotation marks omitted). *See also 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); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976) (even if “there is no evidence of actual use” of “third-party registrations,” such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”). “[E]vidence of third-party registrations is relevant to ‘show the sense in which . . . a mark is used in ordinary parlance.’” *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at *3 (TTAB 2020).

We agree with Applicant that the large number of third-party registrations incorporating the word “true” or the phonetic equivalent thereof for the same or similar goods demonstrates conceptual weakness to the extent that the term is suggestive of product authenticity. We further recognize that the word “vegan” in Opposer’s registered VEGAN TRUE mark has been disclaimed, meaning that we can

¹⁸ Applicant’s Notice of Reliance, Ex. B; 9 TTABVUE 67-219 and 10 TTABVUE 2-217. *See also* chart in Applicant’s Brief summarizing this evidence, pp. 12-18; 15 TTABVUE 13-19.

assume, at a minimum, that the term is merely descriptive and therefore inherently weak. But significantly, none of the third-party registrations are for marks that include both the words “true” and “vegan” (or the phonetic equivalents thereof) for the same or similar goods. When a mark is registered on the Principal Register, “we must assume that it is at least suggestive.” *In re Fiesta Palms, LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007). Because Opposer’s registration is “prima facie evidence of the validity of the registered mark,” see Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), we must also assume that Opposer’s mark as a whole is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act. See *Tea Bd. of India*, 80 USPQ2d at 1889. See also *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *10 (TTAB 2020). Thus, while acknowledging that the highly suggestive nature of Opposer’s mark somewhat diminishes its inherent and conceptual strength, given that it is the only mark in the record comprised of both words “vegan” and “true,” we afford Opposer’s mark “the normal scope of protection to which inherently distinctive marks are entitled.” *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1347 (TTAB 2017).

5. Purchasing Conditions

We turn now to the fourth *DuPont* factor, the conditions under which the goods are likely to be purchased, e.g., whether on impulse or after careful consideration, as well as the degree, if any, of sophistication of the consumers. A heightened degree of care when making a purchasing decision may tend to minimize likelihood of

confusion. *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 224 USPQ 969, 971 (Fed. Cir. 1985) (because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED). Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay*, 73 USPQ2d at 1695.

Applicant, pointing to the factual findings of other courts and his own testimony, argues that prospective consumers of the parties' vegan dietary and nutritional supplements would exercise a high level of care insofar as they are seeking products devoid of animal products and would take time to read the ingredients to ensure they are authentically vegan.¹⁹ Applicant contends that such consumer sophistication diminishes the likelihood of confusion since these prospective consumers would be concerned with their own health and animal health.²⁰

Other than Applicant's own self-serving testimony and attorney argument, we have no objective evidence in the record that consumers seeking vegan nutritional and dietary supplements inherently possess some type of specialized knowledge or exercise a higher degree of care when making buying decisions. *See, e.g., In re FCA*

¹⁹ *See* Tufenkjian Declaration ¶ 6; 11 TTABVUE 2-3.

²⁰ Opposer disputes that the relevant consumers are sophisticated and careful with their purchasing decisions, citing a report entitled "Dietary Supplements: Balancing Consumer Choice & Safety." *See* Opposer's Rebuttal Notice of Reliance, Ex. C; 13 TTABVUE 23-131. In the absence of supporting testimony, the report constitutes hearsay and cannot be relied upon for the truth of the matter asserted therein. We therefore have not relied on this report in making our determination regarding the fourth *DuPont* factor.

US LLC, 126 USPQ2d 1214, 1223 (TTAB 2018) (“We have no evidence that a compact car buyer has the same type or degree of ‘personal involvement’ with a car utilized for commuting or similar purposes, as compared to that an off-roading enthusiast would have...”). In addition, a party may not restrict the scope of its goods and/or the scope of the goods covered in an application or registration by extrinsic argument or evidence, for example, as to the quality or price of the goods. *See, e.g., Id.* at 1222 (“Applicant seeks registration of its mark for all ‘passenger automobiles,’ which we must interpret to include the smallest and least expensive subcompacts as well as expensive vehicles for specialized uses.”); *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008). The parties’ respective identifications of goods are not limited in any way as to purchasers, conditions of sale, quality or price. It therefore must be assumed that both parties’ goods are available to all consumers seeking vegan dietary supplements and vegan dietary supplements at a variety of price ranges. *See Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1357 (Fed. Cir. 2000) (must focus on identifications, regardless of any actual marketplace evidence of “the particular channels of trade, or the class of purchasers to which sales of the goods or services are directed”); *Bay State Brewing*, 117 USPQ2d at 1960. This includes the discriminating purchaser who carefully scrutinizes the labelling to ensure that such products are genuinely vegan as well as the less informed consumer.

Focusing on the least sophisticated potential customers of the respective goods, which in this case consists of members of the general public seeking vegan dietary and nutritional supplements, we find that the fourth *DuPont* factor weighs in favor

of a likelihood of confusion. *See Stone Lion*, at 110 USPQ2d at 1163 (“Although the services recited in the application also encompass sophisticated investors, Board precedent requires the decision to be based ‘on the least sophisticated potential purchasers.’”).

6. Actual Confusion and Contemporaneous Use

We turn now to the seventh *DuPont* factor, the nature and extent of any actual confusion, and the related eighth *DuPont* factor, the extent of the opportunity for actual confusion as argued by Opposer.

As Opposer correctly observes, the current filing basis of the involved application is intent-to-use under Trademark Action Section 1(b). In addition, we have no evidence that Applicant has used his applied-for mark in commerce. As such, actual confusion cannot yet occur and evidence of actual confusion cannot yet exist. Furthermore, even if the record showed otherwise, Opposer has failed to demonstrate use in commerce of its pleaded mark. As a result, we are unable to gauge whether there has been a meaningful opportunity for actual confusion to occur in the marketplace. *See Guild Mortg.*, 2020 USPQ2d at *6 (“The eighth *du Pont* factor... — ‘[t]he length of time during and conditions under which there has been concurrent use without evidence of actual confusion,’ see *du Pont*, 177 USPQ at 567 — requires us to look at actual market conditions, to the extent there is evidence of such conditions of record.”) Accordingly, these *DuPont* factors are neutral.

7. The Variety of Goods on which Opposer’s Mark is Used

Opposer next raises the ninth *DuPont* factor, the variety of goods on which a

mark is or is not used (house mark, “family” mark, product mark). *See DuPont*, 177 USPQ at 567; *see also New Era Cap*, 2020 USPQ2d at *6. Opposer contends that this factor weighs in favor of finding a likelihood of confusion, claiming that its TRUE VEGAN mark is used in connection with a full line of dietary supplements of approximately 17 different products. In support thereof, Opposer relies on Internet printouts from Opposer’s website “Source Naturals” depicting these various products with the TRUE VEGAN label.²¹

While not explicitly identified as such, it appears that Opposer now claims ownership of a family of marks. *See J & J Snack Foods Corp. v. McDonald’s Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991) (defining a family of marks as “a group of marks having a recognizable common characteristic, wherein the marks are composed and used in such a way that the public associates not only the individual marks, but the common characteristic of the family, with the trademark owner.”). To the extent Opposer is claiming a family of marks based on the wording TRUE VEGAN, such arguments will not be considered because this allegation was neither pleaded nor tried by the implied or express consent of the parties under Fed. R. Civ. P. 15(b). *See Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1927 (TTAB 2011) (petitioner’s “family of marks” claim, raised for the first time in its brief not considered because it was neither pleaded nor tried by the parties).

²¹ Opposer’s Notice of Reliance, Ex. A; 8 TTABVUE 5-39.

We hasten to add that even if Opposer had properly pleaded a family of marks, on this record it was not proved because we have no evidence of actual use of Opposer's mark in commerce. *See Hester Indus. Inc. v. Tyson Foods Inc.*, 2 USPQ2d 1645, 1647 (TTAB 1987) (party asserting family of marks must show "that prior to the first use by the alleged interloper, the various marks said to constitute the 'family,' or at least a goodly number of them, were used and promoted together in such a manner as to create among purchasers an association of common ownership based upon the 'family' characteristic."). As explained above, the printouts from Opposer's website constitute hearsay and cannot be used to establish use in commerce. *See Fed. R. Civ. P. 801(c) and 802.* And for the same reason, any arguments pertaining to the variety of goods on which Opposer's mark is used as a house mark or product mark necessarily fail.

In view of the foregoing, we deem this factor neutral in our *DuPont* analysis.

8. Market Interface

Opposer also raises the tenth *DuPont* factor, "the market interface between applicant and the owner of a prior mark." *DuPont*, 177 USPQ at 567. This *DuPont* factor contemplates "consent" to register or use; agreement provisions designed to preclude confusion, i.e. limitations on continued use of the marks by each party; assignment of mark, application, registration and good will of the related business;

and/or laches and estoppel attributable to owner of prior mark and indicative of lack of confusion.²² *Id.*

The record is devoid of evidence of any past dealings between the parties which might be indicative of a lack of confusion in the present case. In other words, Opposer has not consented to Applicant's use or registration of the mark; nor does the record show that the parties entered into any co-existence or consent agreements or any other type of arrangement such as a licensing agreement. Since there is no evidence of market interface between Applicant and Opposer, the tenth *DuPont* factor is neutral.

9. Right to Exclude

The eleventh *DuPont* factor involves "the extent to which applicant has a right to exclude others from use of its mark on its goods." *DuPont*, 177 USPQ at 567. This factor requires us to consider evidence pertaining to an applicant's right to exclude others from use of its mark.

Opposer argues that Applicant has no rights to exclude others from using the mark because Applicant does not own a federal registration for TRUUEGAN, nor has Applicant demonstrated actual use of the applied-for mark in commerce.

The record is devoid of evidence that Applicant has any right to exclude others from using the mark TRUUEGAN except for any rights based on the subject

²² Opposer incorrectly argues that the Trademark Act Section 1(b) filing basis of the involved application precludes making a finding here.

application which is opposed in this proceeding. Consequently, the eleventh *DuPont* factor is neutral.

10. Extent of Potential Confusion

Lastly, we direct our attention now to the extent of potential confusion, i.e., whether de minimis or substantial, the twelfth *DuPont* factor. *DuPont*, 177 USPQ at 567. Applicant maintains that when taking into account all the *DuPont* factors, there is only a de minimis potential for confusion. We disagree. Since the goods are in-part legally identical and therefore presumably marketed in the same trade channels to the same purchasers, the potential for confusion therefore cannot be deemed de minimis. Accordingly, this *DuPont* factor favors a finding of likelihood of confusion.

11. Balancing the *DuPont* Factors

The highly suggestive nature of Opposer's mark VEGAN TRUE diminishes its conceptual strength. However, given that the record is devoid of third-party marks comprised of both words "vegan" and "true" for the same or similar goods, Opposer's registered mark is entitled to the normal scope of protection. In light of the shared terms and plausible pronunciation of Applicant's TRUUEVEGAN mark as a transposition of Opposer's VEGAN TRUE mark, the marks are similar in sound, appearance, connotation and commercial impression. The in-part identity of Applicant's and Opposer's goods and their overlapping channels of trade and classes of purchasers not only weigh heavily in favor of a finding of likelihood of confusion, but also reduce the degree of similarity between the marks necessary to find a likelihood of confusion. Purchasing conditions also weigh in favor of a finding of

likelihood of confusion. The remaining factors discussed above are neutral. Weighing these factors, we find confusion likely.

Accordingly, we find that Opposer has proved its entitlement to a statutory cause of action, priority, and likelihood of confusion by a preponderance of the evidence.

Decision: Opposer's Section 2(d) claim is sustained.