

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: January 28, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

RLP Ventures, LLC

v.

Panini America, Inc.

Opposition No. 91268816

Willard A. Stanback of Willard Alonzo Stanback PC,
for RLP Ventures, LLC.

Tonia A. Sayour and Kira-Khanh McCarthy of Wolf, Greenfield & Sacks, P.C.,
for Panini America, Inc.

Before Cataldo, Pologeorgis, and Lavache,
Administrative Trademark Judges.

Opinion by Lavache, Administrative Trademark Judge:

Panini America, Inc. (“Applicant”) seeks registration of the standard character mark **MOSAIC** on the Principal Register for “Collectible trading cards; Sports trading cards,” in International Class 16.¹

¹ Application Serial No. 88953368 was filed on June 8, 2020, based on Applicant’s allegation of use in commerce under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), claiming March 1, 2017, as both the date of first use and the date of first use in commerce.

RLP Ventures, LLC (“Opposer”) opposes registration of Applicant’s mark based on priority and likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d).² In support of its pleaded claim, Opposer alleges prior use and ownership of two registrations on the Principal Register, each for the standard character mark **MOSAEC**. One of these registrations lists the following goods in International Class 16: “Printed instructional, educational, and teaching materials in the field of foreign languages and cross-cultural communication; Fiction books on a variety of topics; Non-fiction books on a variety of topics.”³ The other lists the following services in International Class 41:

Entertainment services, namely, providing information by means of a global computer network in the fields of celebrities, entertainment, and popular culture; Entertainment services, namely, providing on-line reviews of entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, and dance; Providing a website featuring entertainment information in the field(s) of entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, dance, and news; Providing information, news and commentary in the field of entertainment; Providing information, news and commentary in the field of recreation and leisure activities; Provision of information relating to children's entertainment.⁴

² Notice of Opposition, 1 TTABVUE.

Citations to the record reference TTABVUE. The number preceding TTABVUE corresponds to the docket entry number, and any numbers following “TTABVUE” refer to the page numbers of the docket entry where the cited materials appear.

³ Registration No. 5664353 issued on January 29, 2019. The registration lists June 1999 as both the date of first use and the date of first use in commerce. On April 11, 2024, Opposer filed a combined declaration of use and incontestability under Sections 8 and 15 of the Trademark Act, 15 U.S.C. §§ 1058, 1065.

⁴ Registration No. 5409856 issued on February 27, 2018. The registration lists September 3, 1998, as both the date of first use and the date of first use in commerce. On May 28, 2004, Opposer filed a declaration of use under Section 8 of the Trademark Act, 15 U.S.C. § 1058.

Applicant's answer denies most of the salient allegations asserted in the notice of opposition, admitting only that Applicant filed Application Serial No. 88953368 and that "copies of registrations are attached to the notice [of opposition]."⁵ Opposer and Applicant both filed briefs.⁶

As explained below, we find that Opposer has not met its burden to show, by a preponderance of the evidence, that there is a likelihood of confusion between Opposer's marks and Applicant's mark, and thus we dismiss the opposition.

I. Record

The record includes the pleadings and, pursuant to Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), Applicant's involved application file. The record also includes the evidence summarized below.

A. Opposer's Evidence

1. Opposer's Amended First Notice of Reliance: printouts of USPTO records showing status and title of Registration Nos. 5664353 and 5409856, and related application submissions; Applicant's interrogatories; Applicant's request for production; Opposer's responses to interrogatories; Opposer's responses to request for production; printouts from the USPTO records showing the title and status of Registration Nos. 1809166 and 2487941; and a webpage printout from Wikipedia;⁷
2. Opposer's Second Notice of Reliance: printouts of USPTO records showing status and title of Registration Nos. 5664353 and 5409856,

⁵ Applicant's Answer, 4 TTABVUE 2-3.

⁶ Opposer's Brief, 80 TTABVUE; Applicant's Brief, 81 TTABVUE.

⁷ 60 TTABVUE; 61 TTABVUE (confidential). Opposer submitted this amended notice of reliance because, on September 29, 2023, the Board sua sponte struck Opposer's original notice of reliance in its entirety for failure to confine the submitted exhibits to those permitted under the Trademark Rules concerning notices of reliance. 56 TTABVUE 10-15. After striking the original notice of reliance, the Board granted Opposer leave to file an amended

and related registration maintenance filings; webpage printouts from mosaec.com; and demographic data from social media accounts;⁸

3. Testimony Declaration of Ramona Prioleau, founder and owner of Opposer RLP Ventures, LLC, and accompanying exhibits;⁹
4. Supplemental Trial Declaration of Ramona Prioleau (“Supplemental Declaration”), and accompanying exhibits;¹⁰ and
5. Rebuttal Testimony Declaration of Ramona Prioleau, and accompanying exhibits;¹¹

B. Applicant’s Evidence

1. Applicant’s First Notice of Reliance: printout of USPTO record for Serial No. 88953368; excerpts from the transcript of a Rule 30(b)(6) deposition of Ramona Prioleau; and Opposer’s responses to interrogatories;¹² and
2. Testimony Declaration of Robert Hull, CFO of Panini America, Inc., and accompanying exhibits.¹³

II. Evidentiary Objections

On April 1, 2024, the Board issued an order¹⁴ that, inter alia, **deferred** until final decision Applicant’s motion to strike (i) Exhibits AA, AB, and X to Opposer’s Supplemental Declaration¹⁵ on grounds of lack of foundation and authentication, and

notice of reliance confined to only those exhibits timely submitted during its trial period and permissible under the Trademark Rules concerning notices of reliance. *Id.* at 13.

⁸ 78 TTABVUE; 79 TTABVUE (confidential).

⁹ 44 TTABVUE.

¹⁰ 63 TTABVUE; 64 TTABVUE; 65 TTABVUE (confidential); 66 TTABVUE (confidential).

¹¹ 77 TTABVUE.

¹² 73 TTABVUE.

¹³ 75 TTABVUE.

¹⁴ 72 TTABVUE.

¹⁵ 63-64 TTABVUE, 65-66 TTABVUE (confidential).

(ii) paragraphs 43-57 of Opposer's Supplemental Declaration as improperly including new substantive information not previously submitted during its testimony period. In Applicant's trial brief, Applicant renewed the objections relevant to the deferred motion to strike.¹⁶ Therefore, per our prior order, we consider them now.

A. Exhibits AA, AB, and X to Opposer's Supplemental Declaration

Exhibit AA of Opposer's Supplemental Declaration is a printout of a Wikipedia webpage listing purported trading card companies, and Exhibit AB is a printout of the webpage <https://mosaec.com/bring-brittney-griner-home>.¹⁷ According to Opposer, Exhibit X¹⁸ to the Supplemental Declaration consists of exhibits that Opposer served on Applicant "with respect to Applicant's Request for Production."¹⁹ These various sub-exhibits under Exhibit X include: (1) website printouts from mosaec.com, with and without URLs and access dates;²⁰ (2) printouts from third-party websites, some with URLs and access dates, and some without;²¹ (3) TSDR printouts from the USPTO database showing the current title and status of Opposer's pleaded

¹⁶ Applicant's Brief, 81 TTABVUE 8-9.

¹⁷ Opposer's Supplemental Declaration, 63 TTABVUE 8, 410, 412.

¹⁸ *Id.* at 415-687; 64 TTABVUE 3-187.

¹⁹ 63 TTABVUE 7.

²⁰ 63 TTABVUE 415-18, 458-512, 518-36, 640-43, 645-52, 656-87; 64 TTABVUE 177, 184.

²¹ 63 TTABVUE 452-57, 537-38, 545-603; 64 TTABVUE 186-87. Examples include printouts from godaddy.com and the website for the New York State Department of State Division of Corporations, both of which included URLs and access dates. Among those items without URLs and access dates, are an online press releases from PRWeb concerning arts and entertainment awards given out by mosaec.com, and website printouts showing profile pages associated with MOSAEC on the online social platforms FourSquare, Google, Instagram, LinkedIn, Snapchat, and Tumblr (as well as the terms of use or user agreements for those platforms).

registrations (Registration Nos. 5409856 and 5664353), as well as the initial application filings underlying the registrations (Application Serial Nos. 86587316 and 87670342);²² (4) copies of email communications between Opposer and others;²³ (5) copies of records of Opposer, including “sales trackers,” credit card statements, a receipt showing payment for an email list, calendar entries (physical and digital), airline and parking receipts, a price list,²⁴ demographic data from social media accounts (confidential),²⁵ educational course receipts (confidential),²⁶ and a consent and release form (confidential);²⁷ (6) copies of materials created by Opposer or otherwise associated with the MOSAEC mark or mosaec.com, including a brochure, a syllabus for a high school journalism class listing Ramona Prioleau as the instructor, postcards, a poster, returned postal mail concerning a journalism mentoring and instruction program offered under the MOSAEC mark, an associated mentoring agreement,²⁸ and “a hand-stitched book.”²⁹

Applicant argues that the evidence in Exhibits AA, AB, and X should be stricken because Opposer’s Supplemental Declaration “fails to authenticate any of these documents, clarify what relevant facts the documents are intended to relay, and

²² 63 TTABVUE 420-449.

²³ *Id.* at 451, 516-17, 539-44, 604.

²⁴ *Id.* at 613-25; 64 TTABVUE 3-4, 8-25, 27-170, 172-73.

²⁵ 65 TTABVUE 616-50, 655-89(confidential); 66 TTABVUE 6-12 (confidential).

²⁶ 65 TTTABVUE 651-54 (confidential).

²⁷ 66 TTABVUE 181 (confidential).

²⁸ 63 TTABVUE 513-15, 611, 627, 629-35, 637-38.

²⁹ *Id.* at 11; 64 TTABVUE 179-82.

provides no information as to when these documents were created, who created them, and whether they were maintained by someone with knowledge of the facts stated therein.”³⁰ Applicant further contends there is no “evidence that these exhibits would be admissible under a hearsay exception” inasmuch as “[t]here is no indication that the records were made as ‘a regular practice of that activity.’”³¹

Generally, “[t]he Board is entitled to weigh the evidence and has the discretion on how it considers evidentiary objections, especially in cases where numerous objections have been lodged or the objections are not outcome determinative.” TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 707.07 (2024); *see also Int’l Dairy Foods Ass’n v. Interprofession du Gruyère*, Opp. No. 91232427, 2020 TTAB LEXIS 268, at *22 (TTAB 2020) (declining to rule on applicant’s 150 individual evidentiary objections, ruling instead on only a selected few), *aff’d*, 575 F. Supp. 3d 627 (E.D. Va. 2021), *aff’d*, 61 F.4th 407 (4th Cir. 2023).³² Here, Applicant’s objections apply to well over 400 pieces of evidence of various types. And Applicant itself has not further specified its objections beyond the general arguments quoted above, nor has it addressed its objections to particular pieces of evidence within the referenced exhibits. Under these circumstances, we also choose

³⁰ Applicant’s Motion to Strike, 67 TTABVUE 9.

³¹ *Id.* (quoting Fed. R. Evid. 803(6)(A) and (C)).

³² As part of an internal Board pilot program to broaden acceptable forms of legal citation in Board cases, case citations in this opinion are in the form recommended in TBMP § 101.03. This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For opinions of the Board, this opinion cites to the Lexis legal database and cites only precedential decisions. Practitioners should also adhere to the practice set forth in TBMP § 101.03.

to address the objections generally as they apply to the categories noted above, rather than focusing on particular pieces of evidence. *See id.*; *Pierce-Arrow Soc’y v. Spintek Filtration, Inc.*, Opp. No. 91224343, 2019 TTAB LEXIS 388, at *8-9 (TTAB 2019) (“[W]e see no compelling reason to address the objections individually except insofar as they relate to the outcome-determinative evidence and testimony.”) We add that, in our analysis of the likelihood of claim below, we have kept in mind Applicant’s objections, giving appropriate probative value to the testimony and evidence according to its merits, and citing any particular evidence we have credited. *See Pierce-Arrow Soc’y*, 2019 TTAB LEXIS 388, at *9; *Krause v. Krause Publ’ns Inc.*, Can. No. 92041171, 2005 TTAB LEXIS 487, *10 (TTAB 2005) (“Where we have relied on testimony to which respondent objected, it should be apparent to the parties that we have deemed the material both admissible and probative to the extent indicated in the opinion.”).

1. Internet Materials

The Internet materials in Exhibits AA, AB, and X to Opposer’s Supplemental Declaration that include an indication of their source (i.e., a URL) and the date of access or publication are self-authenticating and admissible as evidence. *Hangzhou Mengku Tech. Co. v. Shanghai Zhenglang Tech. Co.*, Opp. No. 91272143, 2024 TTAB LEXIS 575, at *7 (TTAB 2024); *Icon Health & Fitness, Inc. v. Eifit LLC*, Opp. No. 91272143, 2022 TTAB LEXIS 119, at *17 (TTAB 2022) (“A URL and date appearing on the face of Internet documents submitted under cover of testimony . . . is sufficient to establish authentication.”); *see* Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2). However, unless such Internet materials are accompanied by supporting testimony,

they constitute hearsay and thus may be considered only for what they show on their face, not for the truth of their contents. *See* Fed. R. Evid. 802; 37 C.F.R. § 2.122(e)(2); *Optimal Chem. Inc. v. Srills LLC*, Can. No. 92063200, 2019 TTAB LEXIS 302, at *6 n.13 (TTAB 2019) (noting that website printouts “contain[] hearsay that may not be relied upon for the truth of the matters asserted unless supported by testimony or other evidence”); *Safer, Inc. v. Oms Invs.*, Opp. No. 91176445, 2010 TTAB LEXIS 51, at *29 (TTAB 2010) (noting that Internet materials “are admissible only to show what has been printed, not the truth of what has been printed”).

To the extent that Opposer seeks to rely on these self-authenticating internet materials for the truth of their contents, it has not provided sufficient testimony or evidence that would allow us to do so. In fact, we have found no such testimony or evidence in the record, and Opposer has not otherwise pointed to any. We therefore **sustain** Applicant’s objection to the various Internet materials on hearsay grounds. However, this evidence is not stricken from the record; we instead consider it for whatever limited probative value it may have based on what it shows on its face (e.g., that mosaec.com published articles concerning sports figures).³³ *See Hangzhou Mengku Tech.*, 2024 TTAB LEXIS 575, at *8-9 (finding Internet materials insufficiently supported by testimony or evidence, but considering the materials for

³³ We also note that, while Opposer’s Supplemental Declaration does not clearly specify the relevance of these materials, the Board is nonetheless capable of determining and weighing the relevance, as well as the strength or weakness, or any other inherent limitations, of the evidence. *See, e.g.*, Canc. No. 92068086, *Sabhnani v. Mirage Brands, LLC*, 2021 TTAB LEXIS 464, at *10-11 (TTAB 2021); *RxD Media, LLC v. IP Application Dev. LLC*, Opp. No. 91207333, 2018 TTAB LEXIS 37, at *10 (TTAB 2018), *aff’d*, 377 F. Supp. 3d 588 (E.D. Va. 2019).

what they showed on their face); *Ricardo Media Inc. v. Inventive Software, LLC*, Opp. No. 91235063, 2019 TTAB LEXIS 283, at *2 (TTAB 2019) (noting Internet articles unaccompanied by testimony may not be considered for the truth of the matters asserted but are admissible for what they show on their face).

Any remaining Internet materials in Exhibit X that do not include a URL or access date are not self-authenticating and thus Opposer must identify and authenticate them through witness testimony. *See Icon*, 2022 TTAB LEXIS 119, at *17-18 (“The absence of URL or date alone . . . is not a valid basis to strike the testimony exhibits from the record, if authentication is otherwise established.”); TBMP § 704.08(c) (“Materials that do not fall within 37 C.F.R. § 2.122(e) . . . may nevertheless be introduced into evidence through the testimony of a person who can clearly and properly authenticate and identify the materials, including identifying the nature, source and date of the materials.”). “The degree of authentication required depends on what the party offering the evidence seeks to establish.” *Icon*, 2022 TTAB LEXIS 119, at *18. In this case, Opposer’s Supplemental Declaration is devoid of testimony indicating the nature of these Internet materials, their source, their date, or what Opposer seeks to establish through them. Therefore, we **sustain** Applicant’s motion to strike any Internet materials lacking a URL and access date, and we have not considered them.

2. Opposer’s Registrations and Applications

Opposer’s pleaded registrations (Registration Nos. 5409856 and 5664353), as well as the initial application filings underlying the registrations (Application Serial Nos. 86587316 and 87670342), are official records. TBMP § 704.07 (“Electronic versions of

applications and registrations printed from the USPTO's databases are official records.”). Accordingly, they are self-authenticating and require no extrinsic evidence of authenticity for admissibility.³⁴ *See Safer*, 2010 TTAB LEXIS 51, at *22 (“[T]he Office's files are in electronic form and accessible to all via the Internet, and to that extent they are both official records and in general circulation.”); *Conde Nast Publ'ns Inc. v. Vogue Travel, Inc.*, 1979 TTAB LEXIS 107, at *3 n.5 (TTAB 1979) (“‘[O]fficial records’ . . . are records prepared by a public officer which are self-authenticating in nature (and hence require no [extrinsic] evidence of authenticity as a condition precedent to admissibility), such as certified copies of public records.”) (no proceeding number in original); TBMP §§ 704.03(b) (“The file of a particular application or registration that is not the subject of a proceeding may be made of record either in connection with testimony or by notice of reliance.”), 704.07 (“[O]fficial records are considered self-authenticating, and as such, require no extrinsic evidence of authenticity as a condition to admissibility.”).

We therefore **deny** Applicant's motion to strike as to this evidence.

3. Other Exhibit X Evidence

The remaining items in Exhibit X can be broadly described as business communications, business records, and materials created by Opposer for the purpose of promoting or marketing Opposer's business endeavors. The relevance of much of

³⁴ We note that Opposer's registrations were already properly of record because they were pleaded in Opposer's complaint, which included “a current copy, printout, or screenshot of information from the electronic database records of the Office from TSDR showing the current status and title (owner) of the registration[s].” TBMP § 704.03(b)(1)(A).

this evidence is unclear and, in any event, none of it is outcome determinative. Therefore, we exercise our discretion and decline to rule on Applicant's motion to strike as to these items. *Pierce-Arrow Soc'y*, 2019 TTAB LEXIS 388, at *8-9.

B. Paragraphs 43-57 of Opposer's Supplemental Declaration

Applicant argues that “[p]aragraphs 43-57 of Opposer's Supplemental Declaration should be stricken, as these paragraphs impermissibly raise new arguments and facts unrelated to rebuttal and are therefore in violation of the Board's Order [at 56 TTABVUE 25].”³⁵ Applicant does not further specify what the new arguments and facts are, leaving that burden to us. We note that paragraph 43 further identifies the nature of the evidence in Exhibit X that Opposer had previously attempted to introduce into the record at 44 TTABVUE. This covers the same evidence in Exhibit X that we found not to be outcome determinative, as discussed above. And, consistent with that finding, we decline to rule on Applicant's objection as to paragraph 43. As to paragraphs 44-53 in the Supplemental Declaration, they are identical to paragraphs 43-52 in Opposer's first testimony declaration at 44 TTABVUE 8-9. Therefore, we find that these paragraphs comply with the Board's order at 56 TTABVUE and **deny** Applicant's motion to strike them.

III. Opposer's Entitlement to a Statutory Cause of Action

Establishing an entitlement to a statutory cause of action, formerly referred to as “standing” by the Federal Circuit and the Board, is a threshold requirement in every

³⁵ Applicant's Motion to Strike, 67 TTABVUE 10; *see also* Applicant's Brief, 81 TTABVUE 8-9 (renewing objections).

inter partes case.³⁶ *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1373 (Fed. Cir. 2020). Thus, as plaintiff in this opposition proceeding, Opposer must prove its entitlement to a statutory cause of action by a preponderance of the evidence. *See, e.g., Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 TTAB LEXIS 228, at *8 (TTAB 2022).

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*, 978 F.3d at 1304-07; *see also Made in Nature*, 2022 TTAB LEXIS 228, at *18.

Here, Opposer has submitted printouts of its pleaded registrations from TSDR showing their current status and title.³⁷ These pleaded registrations form the basis of a likelihood-of-confusion claim that is not wholly without merit, and thus establish Opposer's entitlement to oppose Applicant's application. *N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, Opp. No. 91189692, 2015 TTAB LEXIS 96, at *8 (TTAB 2015) ("Opposer's standing is established with respect to its likelihood of confusion and dilution claims by its . . . registrations . . . , which the record shows to be valid and subsisting, and owned by Opposer.") (citing *Cunningham v. Laser Golf Corp.*, 222

³⁶ We now refer to "entitlement to a statutory cause of action" instead of "standing," but our prior decisions and those of the Federal Circuit interpreting "standing" under Trademark Act Sections 13 and 14, 15 U.S.C. §§ 1063, 1064, remain applicable. *See Spanishtown Enters., Inc. v. Transcend Res., Inc.*, Can. No. 92070340, 2020 TTAB LEXIS 481, at *4-5 (TTAB 2020).

³⁷ Notice of Opposition, 1 TTABVUE 16-20; 32-36. *See* TBMP § 704.03(b)(1)(A).

F.3d 943, 945 (Fed. Cir. 2000)). Specifically, Opposer's ownership of these registrations establishes both an interest in a mark similar to the mark for which Applicant seeks registration and a reasonable belief in damage should Applicant's mark be registered. *See Corcamore*, 978 F.3d at 1304-07.

IV. Priority

Priority is not an issue in this case because Opposer's valid and subsisting registrations are properly of record and Applicant has not counterclaimed to cancel them. *Heil Co. v. Tripleye GmbH*, Opp. No. 91277359, 2024 TTAB LEXIS 494, at *44 (TTAB 2024) (citing *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1402-03 (CCPA 1974); *Nkanginieme v. Appleton*, Opp. No. 91256464, 2023 TTAB LEXIS 64, at *4 (TTAB 2023) ("Opposer's registration removed priority as an issue.")).

V. Likelihood of Confusion

We turn now to Opposer's likelihood-of-confusion claim. Trademark Act Section 2(d), in relevant part, prohibits registration of a mark that "so resembles a mark registered in the Patent and Trademark Office . . . as to be likely, when used on or in connection with the goods [or services] of the applicant, to cause confusion." 15 U.S.C. § 1052(d). Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham*, 222 F.3d at 951. To determine whether confusion is likely, we analyze all probative evidence relevant to the factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) ("*DuPont*"). *See In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003).

In every Section 2(d) case, two key *DuPont* factors are the similarity or dissimilarity of the marks and the relatedness of the respective goods or services, because the “fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976). Here, we have considered these *DuPont* factors, as well as any other factors that are relevant and for which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 1356 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 1205 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Ultimately, however, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 1199 (CCPA 1973).

A. Comparison of the Marks

We begin our analysis with the first *DuPont* factor, which focuses on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005) (quoting *DuPont*, 476 F.2d at 1361). Similarity as to any one of these elements may be sufficient to support a finding that the marks are confusingly similar. *See Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 732 (CCPA 1968) (“It is sufficient if the similarity in either form,

spelling or sound alone is likely to cause confusion.”); *In re Inn at St. John’s, LLC*, Ser. No. 87075988, 2018 TTAB LEXIS 170, at *13 (TTAB 2018).

“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.” *In re i.am.symbolic*, 866 F.3d 1315, 1324 (Fed. Cir. 2017) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012) (internal quotation marks 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 Box Sols. Corp.*, Ser. No. 76267086, 2006 TTAB LEXIS 176, at *14 (TTAB 2006).

All elements of the respective marks must be considered. *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). However, “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 consideration of the marks in their entireties.” *Id.*

Here, Applicant’s mark is **MOSAIC** in standard characters and Opposer’s mark is **MOSAEC**, also in standard characters.

The only difference in the spelling of the two marks is that the third syllable in Opposer’s mark begins with an “E,” whereas the third syllable in Applicant’s marks begins with an “I,” consistent with the accepted spelling of the term “mosaic.” Thus, the marks are highly similar in terms of appearance, and the slight difference in

spelling does little to visually distinguish the marks. *See In re Peace Love World Live, LLC*, Ser. No. 86705287, 2018 TTAB LEXIS 220, at *23 (TTAB 2018) (“Slight differences in marks do not normally create dissimilar marks.”); *In re Great Lakes Canning, Inc.*, Ser. No. 73365360, 1985 TTAB LEXIS 75, at *4-7 (TTAB 1985) (finding CAYNA and CANA to be similar).

As to the sound of the marks, we acknowledge that, generally, there is no correct pronunciation of a trademark that is not a known word. *See In re Belgrade Shoe Co.*, 411 F.2d 1352, 1353 (CCPA 1969). And it is not possible for a trademark owner to control how purchasers will vocalize its mark. *See Centraz Indus., Inc. v. Spartan Chem. Co.*, Opp. No. 91159335, 2006 TTAB LEXIS 20, at *10 (TTAB 2006). In this case, however, MOSAEC varies in spelling by only one letter and thus is highly similar to the known word MOSAIC. Therefore, it is reasonable to conclude that consumers viewing the respective marks would view them as phonetic equivalents and thus pronounce them the same way.

Applicant argues that the respective marks “convey entirely distinct commercial impressions,” because its MOSAIC mark is “a real word with a recognized definition,” whereas MOSAEC is “is an acronym which consumers do not recognize as a real word.”³⁸ Specifically, Applicant asserts that the “‘SAEC’ in MOSAEC stands for ‘Style,’ ‘Art,’ ‘Entertainment,’ and ‘Culture.’”³⁹ This contention is supported by Opposer’s interrogatory response indicating that “Ramona Prioleau conceived the

³⁸ Applicant’s Brief, 81 TTABVUE 20.

³⁹ *Id.*

mark MOSAEC as an acronym from the words ‘More Style, Art, Entertainment and Culture.’”⁴⁰ Applicant, however, has not pointed to any other evidence of record that supports the conclusion that consumers are aware that MOSAEC is an acronym, or that, absent such awareness, consumers would otherwise perceive it as such. *Cf., e.g., Eveready Battery Co. v. Green Planet, Inc.*, Opposition No. 91180015, 2009 TTAB LEXIS 490, at *27 (TTAB 2009) (discounting the historical significance of the term SCHICK when comparing marks because it was not clear that consumers were aware of, or otherwise recognized, that significance).

Given that MOSAIC and MOSAEC are highly similar in appearance and may be pronounced the same, it is just as likely, if not more so, that consumers will view MOSAEC not as an acronym, but as a novel spelling of MOSAIC, and will accord MOSAEC the same meaning as MOSAIC, when viewing the respective marks in connection with the respective goods and services.⁴¹ *See, e.g., In re Infinity Broad. Corp.*, Ser. No. 75689077, 2001 TTAB LEXIS 620, at *10 (TTAB 2001) (“As to meaning, our view is that applicant’s mark ‘KYNG,’ when viewed as the phonetic equivalent of the term ‘KING,’ would convey the meaning of the commonly understood term ‘king,’ that is, the same meaning conveyed by registrant’s marks.”). As to Applicant’s goods, consumers may view Applicant’s MOSAIC mark as connoting

⁴⁰ Opposer’s Supplemental Declaration, 63 TTABVUE 283. “Interrogatory answers, or admissions, may be admitted into evidence through the testimony of a witness as an alternative to the notice of reliance procedure.” TBMP § 704.10.

⁴¹ A “mosaic” is a “surface decoration made by inlaying small pieces of various colored material to form pictures or patterns,” “a picture or design made in mosaic,” or “something resembling a mosaic.” Opposer’s First Amended NOR, 60 TTABVUE 117 (definition of “mosaic” from Merriam-Webster.com).

a literal mosaic, as Applicant asserts that it chose the mark “because the word ‘mosaic’ suggests the arrangement of colors, shapes, images, and information displayed on its trading cards to form a ‘mosaic-like’ pattern.”⁴² Whereas consumers may view Opposer’s mark as connoting a figurative mosaic, in view of the fact that Opposer’s goods and services cover a wide variety of subject matter, including arts, entertainment, sports, and culture.⁴³ In either case, each mark connotes a mosaic. Thus, we find that the marks are more similar than not in terms of meaning and commercial impression.

Because the marks are highly similar in terms of appearance, sound, meaning, and overall commercial impression, the first *DuPont* factor weighs strongly in favor of a finding of likelihood of confusion.

B. Relatedness of the Goods and Services

The second *DuPont* factor concerns the similarity or dissimilarity and nature of the respective goods and services. *DuPont*, 476 F.2d at 1361. In determining the relatedness of the services, we must look to the goods as identified in Applicant’s application and the goods and services listed in Opposer’s registrations. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990)).

⁴² Applicant’s Brief, 81 TTABVUE 9.

⁴³ *See, e.g.*, Opposer’s Supplemental Declaration, 63 TTABVUE 665-687 (showing various webpages from mosaec.com).

It is sufficient that the goods and services are related in some manner, or that the conditions and activities surrounding their marketing are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs.*, 668 F.3d at 1396; *7-Eleven, Inc. v. Wechsler*, Opp. No. 91117739, 2007 TTAB LEXIS 58, at *18 (TTAB 2007). The issue is not whether consumers would confuse Applicant's goods with Opposer's goods and services, but rather whether there is a likelihood of confusion as to the source of these goods and services. *L'Oreal S.A. v. Marcon*, Opp. No. 91184456, 2012 TTAB LEXIS 77, at *16 (TTAB 2012); *In re Rexel Inc.*, Ser. No. 73241423, 1984 TTAB LEXIS 57, at *2 (TTAB 1984).

Here, Applicant's goods are "Collectible trading cards; Sports trading cards," in International Class 16.

Opposer's goods and services are:

Printed instructional, educational, and teaching materials in the field of foreign languages and cross-cultural communication; Fiction books on a variety of topics; Non-fiction books on a variety of topics, in International 16; and

Entertainment services, namely, providing information by means of a global computer network in the fields of celebrities, entertainment, and popular culture; Entertainment services, namely, providing on-line reviews of entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, and dance; Providing a website featuring entertainment information in the field(s) of entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, dance, and news; Providing information, news and commentary in the field of entertainment; Providing information, news and commentary in the field of recreation and leisure activities; Provision of information relating to children's entertainment, in International Class 41.

Opposer's only argument as to the relatedness of its goods and Applicant's goods is that they are "identical in part" because the respective sets of goods are both classified in International Class 16.⁴⁴ This argument is unavailing. The fact that two parties' respective goods are classified in the same international class does not automatically render the goods identical. Indeed, "the classification of goods and services by the USPTO is a purely administrative determination and is irrelevant to whether the involved goods and services are related." *Tripleye*, 2024 TTAB LEXIS 494, at *85 n.151 (citing *In re Detroit Athletic Co.*, 903 F.3d 1297, 1307 (Fed. Cir. 2018) ("Classification is solely for the 'convenience of Patent and Trademark Office administration,' and 'is wholly irrelevant to the issue of [likelihood of confusion].") (quoting *Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 975 (Fed. Cir. 1993))).

As to Opposer's services in International Class 41, Opposer argues that they are related to Applicant's goods, "because they commonly emanate from the same source."⁴⁵ In support, Opposer points to the following evidence of record:

- A printout of a Wikipedia page listing trading card companies;⁴⁶ and
- Printouts from the USPTO database showing the current title and status of Registration Nos. 1809166 and 2487941. The former registration is for the mark TOPPS (stylized) and lists the goods as "trading cards, comic books, magazines and books on sports and entertainment," in International Class

⁴⁴ Opposer's Brief, 80 TTABVUE 14.

⁴⁵ *Id.* at 14.

⁴⁶ Opposer's Amended First NOR, 60 TTABVUE 317.

16.⁴⁷ The latter registration is for the mark UPPER DECK AUTHENTICATED (typed form) and lists the goods as “autographed sports memorabilia, namely, photographs, magazine covers, and books,” in International Class 16.⁴⁸

As we noted earlier, we may consider the Wikipedia page only for whatever probative value it may have based on what it shows on its face. *See* Fed. R. Evid. 802; 37 C.F.R. § 2.122(e)(2); *Safer, Inc.*, 2010 TTAB LEXIS 51, at *29 (noting that Internet materials “are admissible only to show what has been printed, not the truth of what has been printed”). Here, the Wikipedia pages shows a list of other Wikipedia pages in the category of “Trading card companies.” Without corroborating evidence establishing that the listed companies are, in fact, trading card companies and that these trading card companies offer both collectible/trading cards and the goods or services offered by Opposer, they offer little weight to Opposer’s argument that the respective goods and services at issue here commonly emanate from the same source.

As to the other evidence referenced by Opposer, it is well settled that “use-based, third-party registrations, although not evidence that the marks shown therein are in

⁴⁷ *Id.* at 279-91. Opposer also references exhibits that appear at 60 TTABVUE 251-273 and 276-277. *See* Opposer’s Brief, 80 TTABVUE 14. However, those exhibits were stricken from the record per the Board’s order at 72 TTABVUE 21. Therefore, we have not considered this evidence. Lastly, Opposer references its own pleaded registration for MOSAEC (80 TTABVUE 14), which is of limited probative value as to whether the goods and services at issue here commonly emanate from the same source.

⁴⁸ 60 TTABUVE 293-315. The registration shows other terms in brackets, including “trading cards.” *Id.* at 293. However, such brackets indicate that the goods enclosed within them were deleted sometime after registration. *Id.*; *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1402.12 (November 2024) (“The Post Registration Section of the USPTO uses single square brackets to indicate that goods/services have been deleted from a registration either by amendment under 15 U.S.C. §1057, filing of a partial affidavit of continued use under 15 U.S.C. §1058 or 15 U.S.C. §1141k, or filing of a partial renewal application under 15 U.S.C. §1059.”).

use or that the public is familiar with them, nonetheless have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark.” *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, Opp. No. 91197659, 2013 TTAB LEXIS 314, at *27-28 (TTAB 2013); *see also Made in Nature*, 2022 TTAB LEXIS 228, at *54-55; *In re Albert Trostel & Sons Co.*, Ser. No. 74186695, 1993 TTAB LEXIS 36, at *7 (TTAB 1993); *In re Mucky Duck Mustard Co.*, Ser. 73603019, 1988 TTAB LEXIS 11, at *9 n.6 (TTAB 1988).

However, the two third-party registrations provided by Opposer offer little support for its argument that the goods and services are related. Specifically, Registration No. 2487941 lists books, but does not list trading cards or collectible cards. Thus, it lists some of Opposer’s goods, but none of Applicant’s. That leaves Registration No. 1809166, which lists both “trading cards” and “books on sports and entertainment,” but none of Opposer’s Class 41 services. This single third-party registration falls far short of establishing that Applicant’s goods and Opposer’s goods and services **commonly** emanate from the same source. *Cf., e.g., Venture Out Props. LLC v. Wynn Resorts Holdings, LLC*, Opp. No. 91167237, 2007 TTAB LEXIS 1, at * (TTAB 2007) (finding “numerous third-party registrations” suggest that applicant’s and opposer’s services “are of a type that may emanate from a single source in connection with the same mark”); *In re Comexa Ltda*, Ser. No. 75396043, 2001 TTAB LEXIS 274, at *7 (TTAB 2001) (finding 48 third-party registrations probative as to the relatedness of the goods at issue).

Opposer has not identified in its brief any other evidence that would support its position, nor have we found any in our review of the record.⁴⁹ Accordingly, we find that Opposer has failed to offer persuasive evidence that its goods and services are related to Applicant's goods. The second *DuPont* factor therefore weighs strongly against a finding of likelihood of confusion.

C. Similarity of Trade Channels

Next, we consider established, likely-to-continue channels of trade, the third *DuPont* factor. *DuPont*, 476 F.2d at 1361. As to this factor, Opposer reiterates that the respective goods here are legally identical and thus "the Board is entitled to presume that the channels of trade and classes of consumers are considered identical."⁵⁰ However, as already discussed, the respective goods are not legally identical and thus we may not rely on the associated legal presumption that the trade channels and classes of consumers are the same. *See In re Vittera Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (finding Board entitled to rely on the presumption that trade channels and consumers were the same where the goods at issue were identical); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 754 (CCPA 1968) (noting that where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

Opposer also argues that, because neither Opposer's registrations nor Applicant's application include trade channel restrictions, the Board must presume that the

⁴⁹ Again, at 80 TTABVUE 15, Opposer references exhibits that were stricken from the record per the Board's order at 72 TTABVUE 21. We have not considered this evidence.

⁵⁰ Opposer's Brief, 80 TTABVUE 15.

respective goods and services travel in ordinary channels of trade for such goods and services.”⁵¹ We agree with this general proposition, but that is not the end of the analysis. Even if we presume that the goods and services travel in the ordinary channels of trade, we must still determine what those ordinary channels of trade are, in addition to identifying the relevant classes of consumers. *See, e.g., DC Comics v. Cellular Nerd LLC*, Opp. No. 91246950, 2022 TTAB LEXIS 453, at *60-62 (TTAB 2022) (agreeing the with the proposition that normal trade channels and classes of consumers may be presumed in the absence of relevant restrictions, but considering what the evidence of record showed as to those factors).

Opposer claims that both Applicant and Opposer “market to consumers interested in sports,” and that Opposer’s goods and services “are targeted to consumers of all types, including sports enthusiasts.”⁵² Applicant, for its part, contends that “the goods and services travel in distinct channels of trade,” because its goods are available for purchase on its website and “in hobby and retail stores, particularly those that specialize in collectible and sports trading cards,” whereas Opposer’s goods and services are sold on Opposer’s website.⁵³

The evidence does show that both Applicant’s goods and Opposer’s goods and services are offered through websites as well as physical retail spaces.⁵⁴ And, based

⁵¹ *Id.* at 16.

⁵² *Id.* at 15-16.

⁵³ Applicant’s Brief, 81 TTABVUE 18.

⁵⁴ In an interrogatory response, Opposer described the channels of trade for its goods and services as “remotely and in person, including online, telephone, as well as indoor and outdoor marketplaces.” 63 TTABVUE 319. Applicant’s CFO testified that Applicant’s goods were

on the evidence of record, we agree with Opposer that, as a general matter, consumers of Opposer's website featuring entertainment information in the field of sports or recreation could share an interest in sports with consumers of Applicant's sports trading cards. There could also be some overlap between the two groups of consumers. For instance, a sports trading card collector could seek out information about sports on websites featuring such information. However, that is the extent of putative overlap of trade channels and consumers established by the record, and our speculation regarding such overlap is not a substitute for evidence on this *DuPont* factor.⁵⁵ That is, Opposer has not directed us to, nor have we found, any evidence showing that consumers will actually encounter Applicant's goods and Opposer's goods and services in the same marketing setting or retail environment, or that the same consumers purchase both Applicant's goods and Opposer's goods and services. *See Coach Servs.*, 668 F.3d at 1371 ("Although there could be some overlap in the classes of purchasers for the parties' products, we agree it is unlikely that, in the circumstances in which the products are sold, customers would associate . . . COACH brand products with educational materials used to prepare students for standardized tests. And, there is nothing in the record to suggest that a purchaser of test preparation materials who also purchases a luxury handbag would consider the goods

available in "over 45,000 stores nationwide" and "also available for purchase online through [Applicant's] website." Applicant's Testimony Declaration, 75 TTABVUE 5.

⁵⁵ We note that the Internet is a pervasive medium—so much so that "the mere fact that goods and services may both be advertised and offered through the Internet is not a sufficient basis to find that they are sold through the same channels of trade." *Parfums de Couer Ltd. v. Lazarus*, Opp. No. 91161331, 2007 TTAB LEXIS 36, at *31-32 (TTAB 2007).

to emanate from the same source.”); *DC Comics*, 2022 TTAB LEXIS 453, at *61-62 (finding opposer had failed to show trade channel overlap, noting that “there is no testimony or evidence that shows consumers will encounter [the relevant goods and services] in the same marketing milieu”); *Sports Auth. Mich., Inc. v. PC Auth.*, Opp. No. 91113785, 2002 TTAB LEXIS 65, at *37 (TTAB 2002) (“There is nothing in the record, however, to suggest that merely because the same consumer may purchase these items, such consumer would consider the goods as likely to emanate from the same source or have the same sponsorship.”).⁵⁶

Therefore, we find that the third *DuPont* factor is, at most, neutral; it certainly does not weigh significantly in favor of finding a likelihood of confusion.

D. Purchasing Conditions and Sophistication of Purchasers

Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 476 F.2d at 1361. Here, Applicant contends that the consumers of its trading cards “are highly discerning”⁵⁷ and “careful in their purchasing decisions” because of the collectible nature of the goods.⁵⁸ Applicant also points out that “collectible and

⁵⁶ Opposer did provide testimony and supporting evidence that it had “offer[ed] for sale a collection of sports-themed cards in connection with the 50th anniversary of Title IX.” Opposer’s Supplemental Declaration, 63 TTABVUE 355. A webpage printout from mosaec.com displaying these cards can be found at 64 TTABVUE 184. The webpage describes the cards as “postcards” that “depict women in various sports through the years.” *Id.* These postcards are therefore qualitatively different than Applicant’s collectible and sports trading cards. Thus, they offer little support for the proposition that collectible and sports trading cards are offered in the same marketing milieu as Opposer’s goods and services.

⁵⁷ Applicant’s Brief, 81 TTABVUE 20.

⁵⁸ *Id.* at 21.

sports trading cards retail for hundreds, sometimes thousands, of dollars.”⁵⁹ Opposer does not present any arguments concerning consumer sophistication or purchasing conditions.

The record shows that new trading card sets can sell for hundreds of dollars,⁶⁰ but also shows cards being sold for under \$20.⁶¹ In addition, Applicant’s identification of goods includes no restrictions as to the relevant purchasers or purchasing conditions. Accordingly, we must presume that the relevant consumers here could include both the general public, who may make impulse purchases of inexpensive cards, as well as sophisticated purchasers, who may exercise heightened discernment in purchasing expensive cards. *See In re FCA US LLC*, Ser. No. 85650654, 2018 TTAB LEXIS 116, at *29 (TTAB 2018).

Accordingly, we find this factor to be neutral.

E. Actual Confusion

The seventh and eighth *DuPont* factors relate, respectively, to the nature and extent of any actual confusion and the extent of the opportunity for actual confusion. *See DuPont*, 476 F.2d at 1361. These “factors are interrelated; the absence of evidence of actual confusion, under the seventh *DuPont* factor, by itself is entitled to little weight in our likelihood of confusion analysis unless there also is evidence, under the eighth *DuPont* factor, that there has been a significant opportunity for actual confusion to have occurred.” *Keystone Consol. Indus. v. Franklin Inv. Corp.*, Can. No.

⁵⁹ *Id.*

⁶⁰ Applicant’s Testimony Declaration, 75 TTABVUE 11.

⁶¹ Applicant’s First NOR, 73 TTABVUE 35.

92066927, 2024 TTAB LEXIS 290, at *75-76 (TTAB 2024) (citing *In re Cont'l Graphics Corp.*, Ser. No. 75033628, 1999 TTAB LEXIS 500, at *9 (TTAB 1999); *Gillette Can. Inc. v. Ranir Corp.*, Opp. No. 91082769, 1992 TTAB LEXIS 24, at *19 (TTAB 1992)).

Applicant asserts that Opposer and Applicant “have co-existed in the marketplace for over seven years with no instances of actual confusion.”⁶² And Opposer does not dispute that there have been no instances of actual confusion.⁶³ However, there is insufficient evidence to ascertain whether a significant number of consumers have been exposed to both marks for the respective goods and services, or whether there has otherwise been a reasonable opportunity for confusion to have occurred. *See, e.g., In re Guild Mortg.*, Ser. No. 86709944, 2020 TTAB LEXIS 17, at *25 (TTAB 2020) (“[T]here is a lack of evidence that in the actual marketplace, the same consumers have been exposed to both marks for the respective services, such that we could make a finding as to the length of time during and conditions under which there has been concurrent use without evidence of actual confusion.”). Specifically, the record contains some information regarding Applicant’s sales revenues,⁶⁴ which appear impressive, though we do not know how impressive without additional context, such

⁶² Applicant’s Brief, 81 TTABVUE 21. Applicant’s CFO testified that “[s]ince at least as early as March 1, 2017, [Applicant] has continuously and exclusively used the mark MOSAIC in connection with its collectible and sports trading cards.” Applicant’s Testimony Declaration, 75 TTABVUE 3.

⁶³ In response to Applicant’s interrogatory asking Opposer to “[s]tate whether Opposer is aware of any actual confusion between its use of the mark MOSAEC for any goods or services and Applicant’s use of the mark MOSAIC for any goods,” Opposer answered “none currently, but discovery is ongoing.” Applicant’s First NOR, 73 TTABVUE 196.

⁶⁴ Applicant’s Testimony Declaration, 76 TTABVUE 5 (confidential).

as information about competitors' sales. Opposer has stated that it does not track sales totals for its goods or services.⁶⁵ The record does contain some information about Opposer's advertising expenditures,⁶⁶ but, again, we have no other context to evaluate the scale of those expenditures or their impact. Thus, we are unable to determine whether the absence of actual confusion is legally significant here. *See Keystone*, 2024 TTAB LEXIS 290, at *78-79 ("Because of the more limited nature of Respondent's activities . . ., we find the evidence of concurrent use based on actual market conditions does not indicate a significant opportunity for confusion to occur.") *Time Warner Ent. Co. v. Jones*, Opp. No. 91112409, 2002 TTAB LEXIS 462, at *35-36 (TTAB 2002) (finding that, despite thirteen years of concurrent use of the parties' marks, "we cannot conclude that applicant's sales and advertising . . . have been so substantial that the absence of actual confusion is surprising or legally significant").

Accordingly, we treat the seventh and eighth *DuPont* factors as neutral. *See In re Davey Prods. Pty*, Ser. No. 77029776, 2009 TTAB LEXIS 524, at *22-25 (TTAB 2009).

VI. Conclusion

Having reviewed all of the evidence and arguments as they apply to the relevant *DuPont* factors, we find that the marks at issue are highly similar under the first *DuPont* factor, but Opposer has failed to establish that Applicant's goods and Opposer's goods and services are sufficiently related under the second *DuPont* factor.

⁶⁵ Applicant's First NOR, 73 TTABVUE 181-83.

⁶⁶ Applicant's First NOR, 74 TTABVUE 142 (confidential).

All other relevant *DuPont* factors are neutral.⁶⁷ On balance, we conclude that the second *DuPont* factor outweighs the first, and find that Opposer has failed to satisfy its burden to show, by a preponderance of the evidence, that confusion as to source is likely.⁶⁸ See *Boston Red Sox Baseball Club LP v. Sherman*, Opp. No. 91172268, 2008 TTAB LEXIS 67, at *29 (TTAB 2008) (“In appropriate cases, a single du Pont factor may be dispositive of the likelihood of confusion analysis.”) (citing *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375 (Fed. Cir. 1998); *Kellogg Co. v. Pack’Em Enters.*, Opp. No. 91080586, 1990 TTAB LEXIS 3, at *15 (TTAB 1990), *aff’d*, 951 F.2d 330 (Fed. Cir. 1991)).

Decision: The opposition to registration of Applicant’s MOSAIC mark is dismissed.

⁶⁷ In its brief, Applicant asserts that “Opposer has filed dozens of opposition proceedings against MOSAIC-containing marks for a vast majority of goods and services most of which are unrelated to the goods and services RLP actually offers in connection with its MOSAEC mark” and argues that Opposer “is impermissibly attempting to claim rights in the term ‘mosaic’ in gross.” 81 TTABVUE 22. Applicant requests that the we take judicial notice of these other proceedings. *Id.* However, the Board does not take judicial notice of USPTO records. See, e.g., *Flame & Wax, Inc. v. Laguna Candles, LLC*, Can. No. 92072343, 2022 TTAB LEXIS 272, at *42 n.57 (TTAB 2022). In any event, Opposer’s other activities before the Board are not relevant to the decision here.

⁶⁸ Opposer argues that any doubt as to the likelihood of confusion must be resolved in its favor as the prior registrant. Opposer’s Brief, 80 TTABVUE 16-17. However, no such doubt exists here. Opposer also contends that “[t]he continued existence of the Applicant’s Application is likely to cause harm and damage to Opposer in that it falsely represents to the public that there is an association between Applicant and Opposer and the goods that are offered under the respective marks.” *Id.* at 17. This contention does not appear to implicate a *DuPont* factor and, instead, is more relevant to Opposer’s entitlement to a statutory cause of action. To the extent this contention relates to a claim other than likelihood of confusion, no such claims were pleaded and thus are not at issue here.