

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: August 4, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

OTG Experience, LLC

v.

Andy Moeckel

Opposition No. 91270860

Jordan A. Lavine of Flaster Greenberg PC
for OTG Experience, LLC.

Kristen G. Roberts of Trestle Law, APC,
for Andy Moeckel.

Before Wolfson, Goodman, and Pologeorgis,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Andy Moeckel (“Applicant”) seeks registration on the Principal Register of the mark THE FLIP FLOP GUY (in standard characters), identifying “Marinades; Sauces” in International Class 30 and “Food preparation; Personal chef services” in International Class 43.¹

¹ Application Serial No. 88910610 was filed on May 11, 2020 based on Applicant’s assertion of a bona fide intent to use the mark anywhere and in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

OTG Experience, LLC (“Opposer”) opposes registration on the ground of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on its ownership of a registration issued on the Principal Register for the mark FLIP FLOP PANCAKE SHOP (in standard characters, PANCAKE SHOP disclaimed), identifying “Retail store services featuring publications, prepackaged food, candy and beverages” in International Class 35 and “Restaurant services; Take-out restaurant services” in International Class 43.² Opposer also alleges prior common law use of the mark FLIP FLOP PANCAKE SHOP for the same services identified in the registration since “at least as early as June 23, 2017.”³

In its answer, Applicant denies the salient allegations in the notice of opposition.⁴

Each party filed a trial brief and Opposer filed a reply brief.⁵

² Registration No. 5589582 issued on October 23, 2018. Notice of Opposition, paragraph 5, 1 TTABVUE.

³ Notice of Opposition, paragraph 6, 1 TTABVUE.

⁴ Answer, 4 TTABVUE.

Applicant included amplifications of his denial of likelihood of confusion as a “defense,” and a reservation of rights to assert further affirmative defenses, neither of which are affirmative defenses. *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *6 (TTAB 2022) (reservation of rights to add affirmative defenses is improper under the federal rules because it does not give fair notice of the affirmative defense); *Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, at *3 n.5 (TTAB 2022) (“amplifications [of denials] are not true affirmative defenses”).

Applicant also alleges “failure to state a claim” in his answer which is not a true affirmative defense because it relates to an assertion of the insufficiency of the pleading of Opposer’s claim rather than a statement of a defense to a properly pleaded claim. This “defense” has been waived because it was not pursued. *Shenzhen IVPS Tech. Co.*, 2022 USPQ2d 1035, at *3 n.5.

⁵ References to the briefs and the record refer to the Board’s TTABVUE docket system. Opposer’s brief is at 14 TTABVUE and its reply brief is at 16 TTABVUE. Applicant’s brief is at 15 TTABVUE.

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the involved application. In addition, the parties introduced the following testimony and evidence.

Opposer submitted a first notice of reliance on its pleaded registration, 7 TTABVUE, and a second notice of reliance on third-party registrations, 8 TTABVUE. Opposer also submitted the declaration testimony of Justin Blatstein, Senior Vice President, Markets, with exhibits,⁶ 9 TTABVUE.

Applicant submitted a first notice of reliance on third-party registrations, 12 TTABVUE, a second notice of reliance on responses to requests for admissions, 11 TTABVUE, and a third notice of reliance on website articles, 13 TTABVUE. Applicant also submitted the declaration testimony of Andy Moeckel, with exhibits, 10 TTABVUE.

II. Entitlement to a Statutory Cause of Action

In every inter partes case, the plaintiff must establish its statutory entitlement to bring an opposition or cancellation proceeding. 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) proximate causation. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *4 (Fed. Cir. 2020).

⁶ Many of the exhibits are not of a resolution that allows the text to be readable even when enlarged. We have disregarded illegible portions of the exhibits. See *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1758 (TTAB 2013), *aff'd mem.*, 565 F. App'x 900 (Fed. Cir. 2014). (“[T]he Board can only review evidence that is clear and unobstructed”; “Petitioner has a duty to ensure that the evidence it submits is legible.”).

Demonstrating a real interest in opposing registration of a mark satisfies the zone-of-interests requirement, and demonstrating a reasonable belief in damage by the registration of a mark demonstrates damage proximately caused by registration of the mark. *Id.* at 7-8.

Opposer has properly made its pleaded registration of record by submitting a copy from the USPTO Trademark Status and Document Retrieval (TSDR) electronic database, under notice of reliance.⁷ Trademark Rule 2.122(d)(2), 37 C.F.R. § 2.122 (d)(2).

The pleaded registration establishes Opposer's direct commercial interest and real interest in the proceeding and its reasonable belief in likely damage, establishing its entitlement to oppose registration of Applicant's trademark.⁸ *See Herbko Int'l v. Kappa Books*, 308 F.3d 1156, 64 USPQ2d 1375, 1377 (Fed. Cir. 2002) ("In most settings, a direct commercial interest satisfies the 'real interest' test"); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (pleaded registrations "suffice to establish ...direct commercial interest"; a belief in likely damage can be shown by establishing a direct commercial interest); *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *11 (TTAB 2023) (valid and subsisting pleaded registration made of record establishes entitlement to oppose); *Shenzhen IVPS Tech. Co.*, 2022 USPQ2d 1035, at *13-14 (TTAB 2022) (valid and subsisting pleaded

⁷ Opposer's notice of reliance 7 TTABVUE.

⁸ Applicant did not address Opposer's entitlement in his brief.

registration establishes opposer's direct commercial interest in the proceeding and its belief in damage in connection with likelihood of confusion claim) (citation omitted).

III. Priority

Because Opposer's pleaded registration is of record and Applicant has not brought a counterclaim against it, priority is not an issue with respect to the services identified in the registration.⁹ *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

IV. Likelihood of Confusion

Our determination under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as "*DuPont* factors").

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See 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."). We discuss the *DuPont* factors for which there is relevant argument and evidence. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019) (the Board considers each *DuPont* factor for which there is evidence and

⁹ Applicant did not address Opposer's priority in his brief.

argument); *see also Herbko Int'l*, 64 USPQ2d at 1380 (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”).

A. Strength of Opposer’s mark

In determining the strength of a mark, we consider both its conceptual strength based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength”); *Top Tobacco, L.P. v. North Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength). Market strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006). In tandem, if there is evidence in the record, we consider whether the mark has commercial weakness in the marketplace. *DuPont*, 177 USPQ at 567.

Opposer argues that its mark is “conceptually and commercially strong.” Opposer’s brief, 14 TTABVUE 21. Opposer points out, “since the record evidence does not contain other third-party commercial uses of ‘FLIP FLOP’ in connection with restaurants or retail store services in the United States,” *id.*, there is no evidence in the record demonstrating that FLIP FLOP is commercially weak in the marketplace.

Therefore, we only consider the conceptual and commercial strength of Opposer's FLIP FLOP PANCAKE SHOP mark under the fifth *DuPont* factor, supported by Opposer's testimony and evidence that its mark is well known.

To determine the conceptual strength of Opposer's mark, we evaluate its intrinsic nature, that is, where it lies "along the generic-descriptive-suggestive-arbitrary (or fanciful) continuum of words." *In re Davia*, 110 USPQ2d 1810, 1814 (TTAB 2014). We may consider dictionary definitions in connection with determining conceptual strength of a mark. *See In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1673 (TTAB 2018) (considering dictionary definition of "smoking hot" in relation to identified goods, cosmetics, for purposes of determining conceptual strength of the mark and finding the term highly suggestive as it indicates the purpose or intended result of the goods); *In re Azteca Restaurant Enters. Inc.*, 50 USPQ2d 1209, 1212 (TTAB 1999) (suggestiveness of Azteca established by dictionary definition and further confirmed by third-party registrations); *see also Hancock v. Am. Steel & Wire Co. of N. J.*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) (dictionary definitions considered "to determine the ordinary significance and meanings of words.").

We take judicial notice of the dictionary definitions of "flip" and "flop."¹⁰ Flip is defined as "to turn over, especially with a short rapid gesture: to flip pancakes with a spatula."¹¹ Flop is defined as "to change suddenly, as from one side or party to

¹⁰ The Board may take judicial notice of dictionary definitions, including definitions in online dictionaries which exist in printed format or that have regular fixed editions. *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013).

¹¹ RANDOM HOUSE UNABRIDGED DICTIONARY (dictionary.com accessed August 2, 2023).

another (often followed by over).”¹² We also take judicial notice that as combined, “flip-flop” is defined as “Informal. to make a sudden or unexpected reversal, as of direction, belief, attitude, or policy.”¹³ Opposer states that “Opposer’s FLIP FLOP PANCAKE SHOP mark is suggestive of its restaurant services” and “Opposer’s mark is therefore suggestive and inherently distinctive” with respect to its restaurant services. Opposer’s brief, 14 TTABVUE 20. Thus, Opposer acknowledges the suggestiveness of the term FLIP FLOP in connection with the preparation of pancakes, which Opposer’s witness indicates is a “culinary focus” of its restaurant services. Blatstein declaration, paragraph 19, 9 TTABVUE. Opposer also asserts that “[w]ith respect to retail store services, ‘FLIP FLOP’ does not call to mind any connection to Opposer’s services, and the mark is arbitrary as to these services.” Opposer’s brief, 14 TTABVUE 20.

Because FLIP FLOP PANCAKE SHOP is registered on the Principal Register without a claim of acquired distinctiveness, we presume that the mark as a whole is inherently distinctive. Trademark Act Section 7(b), 15 U.S.C. § 1057(b). Although inherently distinctive, the mark is suggestive of a restaurant that serves pancakes, which are commonly turned over “with a spatula.” *See e.g., Sock It To Me, Inc. v. Aiping Fan*, 2020 USPQ2d 10611, at *9-10 (TTAB 2020) (SOCK IT TO ME taken as a whole, is inherently distinctive, although its strength is somewhat limited by its first word, SOCK, which is generic for socks; the disclaimer constitutes a tacit

¹² RANDOM HOUSE UNABRIDGED DICTIONARY (dictionary.com accessed August 2, 2023).

¹³ RANDOM HOUSE UNABRIDGED DICTIONARY (dictionary.com accessed August 2, 2023).

admission that the word SOCK is not inherently distinctive); *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 94 USPQ2d 1645, 1668 (TTAB 2010) (“CITIBANK, although inherently distinctive, is suggestive”), *aff’d*, 637 F.3d 1344 (Fed. Cir. 2011).

Turning to commercial strength, Opposer argues that its FLIP FLOP PANCAKE SHOP mark is well known, or commercially strong.

Commercial strength of a mark may be measured indirectly by the volume of sales and advertising expenditures in connection with the goods or services sold under the mark, and other factors such as length of time of use of the mark; widespread critical assessments; notice by independent sources of the goods or services identified by the marks; and the general reputation of the goods or services. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1308 (Fed. Cir. 2002) (recognizing indirect evidence as appropriate proof of strength); *Weider Publ’ns, LLC v. D & D Beauty Care Co.*, 109 USPQ2d 1347, 1354 (TTAB 2014), *appeal dismissed per stipulation*, No. 14-1461 (Fed. Cir. Oct. 10, 2014). A mark’s renown may “var[y] along a spectrum from very strong to very weak.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (internal quotations omitted).

Opposer’s witness testified that “OTG is an award-winning airport food and beverage operator with more than 350 restaurants and retail boutiques in 10 major and frequently traveled airports across North America,” and that it “is particularly well-known for its involvement in the transformation of Terminal C at the Newark International Airport.” Blatstein declaration, paragraphs 6, 12, and 13, 9 TTABVUE.

Opposer's witness testified that Newark International Airport is the "fifteenth-busiest airport in the country," serving more than 43 million passengers in 2017 and more than 46 million passengers in 2019. Blatstein declaration, paragraph 13, 9 TTABVUE.¹⁴

Opposer's FLIP FLOP PANCAKE SHOP opened in terminal C in 2017. Blatstein declaration, paragraph 17 and 18, 9 TTABVUE. Opposer's witness states that

Based upon the use of the FLIP FLOP PANCAKE SHOP trademark since June, 2017, the number of travelers that have dined at the FLIP FLOP PANCAKE SHOP, the number of persons that have passed through Terminal C in the Newark International Airport and seen the restaurant, and based upon the many unsolicited press mentions of OTG's renovation of Terminal C at Newark International Airport, I believe that the FLIP FLOP PANCAKE SHOP trademark has become closely associated with OTG, and that the FLIP FLOP PANCAKE SHOP trademark has acquired distinctiveness as a trademark of OTG.

Blatstein declaration, paragraph 21, 9 TTABVUE.

As to press mentions, Opposer's witness provided articles from Bloomberg, Conde Nast Traveler, and an unnamed New Jersey publication, all relating to the renovation of terminal C in the Newark International Airport, and a Fast Company ranking for Opposer OTG.¹⁵ Blatstein declaration, Exhibits B and D. Applicant also provided articles from the internet discussing Opposer's transformation of terminal C in the

¹⁴ Exhibits A and B relate to Opposer OTG. They are offered by the witness in connection with his testimony about Opposer OTG. The text of exhibit A and Exhibit B are not legible and we give them no consideration. Exhibit C consists of articles about CIBO Express Gourmet Market, a food purveyor offered by OTG, and corroborates witness testimony about media coverage relating to CIBO Express automated checkout technology. The second article provided under Exhibit C is not legible and we give it no consideration.

¹⁵ As indicated, in n.14 Exhibit B (Fast Company) is not legible and we give it no consideration. In addition, the article from the New Jersey publication provided under Exhibit D is not legible and we give it no consideration.

Newark International Airport. Applicant's third notice of reliance, 13 TTABVUE. These articles discuss the renovation; some also list by name food and beverage options offered in terminal C. In the articles where the restaurants are listed and FLIP FLOP PANCAKE SHOP is mentioned, it is listed along with the names of all the other restaurants in terminal C.¹⁶

These articles are hearsay, and to the extent that there is no witness testimony about any of the specific content of the articles, they are evidence only of the manner in which the mark is used by third parties and of the fact that the public has been exposed to the articles and may be aware of the information they contain. *See WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1040 (TTAB 2018) (printouts from the various websites submitted by opposer with its notice of reliance are hearsay absent testimony from a competent witness).

None of the articles submitted by both Opposer's witness and by Applicant (by way of notice of reliance) feature the FLIP FLOP PANCAKE SHOP mark, and when the restaurant is named in an article, it is a brief mention buried in a list with other restaurants. As a result, these articles would not have a significant impact on the purchasing public. Additionally, most of the articles provided by Applicant appear to be directed to the trade rather than the general public, e.g., Moodie Davitt, Restaurant Development+Design, Aviation Pros., Airport Experience News, and

¹⁶ Once a document is admitted into evidence, it may be considered by the Board for any relevant purpose and relied on by any adverse party. *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031, 1040 (TTAB 2010) (citation omitted). Not all of the articles provided by Opposer and Applicant list the names of the food providers in terminal C or mention FLIP FLOP PANCAKE SHOP.

Passenger Terminal Today. *See Old Swiss House, Inc. v. Anheuser-Busch, Inc.*, 569 F.2d 1130, 196 USPQ 808, 810 (CCPA 1978) (“12 articles, each published only once, which appeared in various newspapers and trade journals” and in which “in all but one, [the] mark . . . was buried in the body of the articles” . . . “is not the type of public exposure of a mark that would be expected to have any significant impact on the purchasing public”); *Blue Man Productions, Inc. v. Tarmann*, 75 USPQ2d 1811, 1817 (TTAB 2005) (articles that mention BLUE MAN GROUP in passing are of little or no probative value; some of the publications appear to be of limited circulation or are trade publications or are directed to specific audience segments, such that they are not likely to be seen by large numbers of the general public). Therefore, these articles are of little probative value in showing FLIP FLOP PANCAKE SHOP is well known.

We also find that Mr. Blatstein’s testimony is insufficient to establish that FLIP FLOP PANCAKE SHOP is a well-known mark. His testimony and Opposer’s arguments based on his testimony are directed more to the reputation of Opposer OTG than the fame of the FLIP FLOP PANCAKE SHOP mark. Opposer’s brief, 14 TTABVUE 20. Applicant agrees that “OTG has provided evidence that OTG has achieved some level of brand recognition” but points out that “notably absent in its submissions is any indication that the FLIP FLOP PANCAKE SHOP mark has achieved any sort of name recognition in the marketplace.” Applicant’s brief, 15 TTABVUE 16. Opposer has not provided any sales figures or advertising figures for Opposer’s restaurant or retail store, instead relying on a general witness statement about an unknown amount of passenger traffic in terminal C. Opposer’s witness

testimony is vague and lacking in specifics to support a finding that the FLIP FLOP PANCAKE SHOP mark is well known.¹⁷

Because we find that Opposer has not established FLIP FLOP PANCAKE SHOP is well known, the mark is entitled to the normal scope of protection accorded an inherently distinctive mark.

The fifth *DuPont* factor relating to strength of the mark is neutral.¹⁸

B. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we examine the similarities and dissimilarities of the parties' marks in their entirety as to appearance, sound, meaning, and commercial impression. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (*quoting DuPont*, 177 USPQ at 567). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d at 1812; *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156

¹⁷ As Applicant points out, Mr. Blatstein's testimony about peak terminal traffic (4-9 PM) at Newark International Airport references hours in the afternoon and evening whereas Opposer's restaurant serves only breakfast. Applicant's brief, 15 TTABVUE 7 (referencing Blatstein testimony paragraph 14, 9 TTABVUE; Applicant's second notice of reliance, response to request for admission 9, (admission that Opposer serves breakfast at its restaurant)). Further, Opposer's witness testified that the "culinary focus" of FLIP FLOP PANCAKE SHOP "is a breakfast spot offering pancakes with various sides." Blatstein declaration, paragraph 20, 9 TTABVUE. Applicant contends that Opposer offers lunch and dinner in the same location under a different brand name, Notorious P.I.G., and references articles from its third notice of reliance in support. Applicant's brief, 15 TTABVUE 14. However, the articles submitted under notice of reliance are hearsay and cannot be considered for the truth of the matters asserted therein. Nonetheless, they show that consumers have been exposed to Opposer's use of the mark during typical breakfast, but not lunch or dinner, hours.

¹⁸ As noted, there is no evidence to invoke consideration of the sixth *DuPont* factor.

USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”).

“The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning, LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Our analysis cannot be predicated on dissecting the marks into their various components; the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). It is nevertheless appropriate, for rational reasons, to regard certain features of the marks as being more dominant or otherwise significant, and therefore to give those features greater weight in the analysis. *See In re Nat’l Data Corp.*, 224 USPQ at 751-52.

Disclaimed matter in a mark is typically less significant or less dominant when comparing marks. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). Highly suggestive matter generally is also entitled to less weight in the analysis. *In re Stirbl*, 62 USPQ2d 1446, 1448 (TTAB 2002).

Applicant's mark is THE FLIP FLOP GUY and Opposer's mark is FLIP FLOP PANCAKE SHOP. Both parties' marks are in standard characters and are not limited to any particular font style, size, or color. Trademark Rule 2.52(a), 37 CFR § 2.52(a).

In Applicant's mark, the definite article THE is insignificant as a source identifier or differentiator between marks and "does not have trademark significance." *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009) (finding WAVE and THE WAVE confusingly similar). The word GUY in Applicant's mark is highly suggestive of an individual who is performing services, and is entitled to less weight in the analysis.¹⁹ *See Blue Man Prods., Inc. v. Tarmann*, 75 USPQ2d at 1820 (BLUE MAN GROUP refers to "these performers, and the fact that each person in this group is a 'blue man'"). Thus, the dominant term in Applicant's mark is FLIP FLOP.

As to Opposer's mark, PANCAKE SHOP is disclaimed and is descriptive, if not generic, of a place that serves a specific type of food (pancakes).²⁰ *See In re Azteca Rest.* 50 USPQ2d at 1211 (the disclaimed words MEXICAN RESTAURANT in applicant's mark AZTECA MEXICAN RESTAURANT "clearly are generic for the

¹⁹ We take judicial notice of "guy" as a "man, fellow." MERRIAM-WEBSTER DICTIONARY (merriam-webster.com accessed August 2, 2023).

²⁰ Opposer states that PANCAKE SHOP is descriptive and has been disclaimed. Opposer's brief, 14 TTABVUE 15.

type of [food] services offered by applicant”). Thus, the dominant term in Opposer’s mark is FLIP FLOP.

Based on the foregoing, we give more weight to FLIP FLOP in the analysis.

FLIP FLOP in both marks suggests a manner of cooking. *See In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *4 (TTAB 2019) (COUNTRY OVEN “for both the goods and the services, evokes the nature and style of how the products are baked”). According to Applicant’s witness, FLIP FLOP relates to a style of game meat cooking. Moeckel declaration, paragraphs 5 and 6, 10 TTABVUE 3. FLIP FLOP also suggests the manner of cooking pancakes which requires they be flipped and flopped down on the cooking surface. *See* dictionary definitions discussed supra. Applicant states that “both marks incorporate the phrase ‘flip flop’ (which is suggestive of both the act of flipping meat on a barbeque and that of flipping a pancake).” Applicant’s brief, 15 TTABVUE 11.²¹

²¹ We take judicial notice that a “flip flop” is defined as “: a rubber sandal loosely fastened to the foot by a thong.” MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, accessed August 2, 2023). Applicant alternatively argues that consumers encountering Applicant’s mark are more likely to have the general impression of a man wearing or even selling plastic sandals. Applicant’s brief, 15 TTABVUE 12. Opposer points out there is no evidence of record in this proceeding to support the notion that an ordinary consumer would think “pancakes” when encountering Opposer’s mark and “plastic sandals” when encountering Applicant’s mark. Opposer’s reply brief, 16 TTABVUE 7.

We must consider Applicant’s mark in relation to the identified goods and services, none of which relate to selling sandals. Applicant also states he provides additional branding so that it is clear that he is referring to a cooking technique by use of the term FLIP FLOP. Applicant’s brief, 15 TTABVUE 12. *See also* Moeckel declaration Exhibit B, 10 TTABVUE 21. By Applicant’s own admission, his branding does not relate to a man wearing flip flops. *See Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.* 748 F.2d 669, 223 USPQ 1281, 1284 (Fed. Cir. 1984) (“trade dress may nevertheless provide evidence of whether the word mark projects a confusingly similar commercial impression.”). Therefore, we find that the

As previously noted, Opposer acknowledges the suggestiveness of FLIP FLOP in connection with a pancake restaurant, and its witness indicates pancakes are the culinary focus of its restaurant services. Opposer's brief 14 TTABVUE 20. Also as previously noted, Opposer argues that FLIP FLOP is arbitrary in connection with its retail store services. Opposer's brief, 14 TTABVUE 20.

As to sound and appearance, we find the FLIP FLOP portions of the parties' marks are identical, although the additional terms (THE and GUY and PANCAKE SHOP, respectively) do create some dissimilarities. However, these differences are not as significant as the similarities in appearance and sound created by the common dominant term FLIP FLOP in each mark. We find the marks more similar than dissimilar in appearance and sound.

As to connotation and commercial impression of FLIP FLOP, the marks have similar connotations as they suggest a manner of cooking food. As to the marks as a whole, Applicant's mark FLIP FLOP is followed by the highly suggestive term GUY which suggests a person (personal chef or food preparer) who performs the service of flipping and flopping food; THE in Applicant's mark merely providing emphasis as to the performer of the services (GUY). *In re Thor Tech, Inc.*, 90 USPQ2d at 1635 (definite article "the" used before a noun denotes a particular person). Opposer's mark, on the other hand, suggests a pancake restaurant (shop) where pancakes are flipped and flopped down on the cooking surface in preparing them.

commercial impression for consumers of FLIP FLOP in Applicant's mark will be one relating to food goods and services and not sandals.

We recognize that THE and GUY added to Applicant's mark and PANCAKE SHOP added to Opposer's mark gives the parties' marks a somewhat different connotation. Nonetheless, the meaning of FLIP FLOP remains the same in both marks. We find the similarities in sound, appearance, and connotation of FLIP FLOP outweigh any differences in connotation due to the other elements in each mark.

Furthermore, when Applicant's and Opposer's marks are considered in their entireties, the marks engender sufficiently similar overall commercial impressions when used in connection with the parties' goods and services. *See e.g., Specialty Brands*, 223 USPQ at 1283 ("It is the similarity of commercial impression between SPICE VALLEY and SPICE ISLANDS that weighs heavily against the applicant"); *Mother's Rests. Inc. v. Mother's Other Kitchen, Inc.*, 218 USPQ 1046, (TTAB 1983) (MOTHER'S PIZZA PARLOUR and MOTHER'S OTHER KITCHEN in connection with identical restaurant services confusingly similar).

The first *DuPont* factor weighs in favor of likelihood of confusion.

C. Similarity or Dissimilarity of the Goods and Services

We next consider the second *DuPont* factor, "[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration." *DuPont*, 177 USPQ at 567. Our comparison is based on the goods as identified in Applicant's application and Opposer's pleaded registration. *See Stone Lion Cap. Partners v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (citation omitted).

Applicant's goods are "Marinades and Sauces" and its services are "Food preparation and Personal chef services." Opposer's services are "Retail store services

featuring publications, prepackaged food, candy and beverages; and Restaurant services and Take-out restaurant services.”

Applicant argues that Applicant’s marinade and sauce goods and Opposer’s retail store and restaurant services are not related, pointing out that “Opposer’s registration does not expressly cover any goods and does not identify ‘marinades’ as a product to be made available through its retail store services.” Applicant’s brief, 15 TTABVUE 14. Applicant also argues that the parties’ services are unrelated, pointing out that Opposer’s registration for restaurant services does not “encompass personal chef services.” Applicant’s brief, 15 TTABVUE 14.

With regard to Applicant’s goods and services and Opposer’s services, they need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and services] emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Applicant states that he provides personal chef services at public and private events and focuses on cooking wild game, and he does not intend to offer restaurant services of any kind. Applicant’s brief, 15 TTABVUE 13. Applicant indicates his marinades are offered online, are not prepackaged foods, are not grab and go, and he does not intend to offer retail store services. Moeckel declaration, paragraphs 7-8, 10

TTABVUE; Applicant's brief, 15 TTABVUE 13. He also asserts that aside from there being no evidence that Opposer offers marinades of any kind, Applicant's food preparation and personal chef services and Opposer's restaurant services are not related because the type of foods prepared by Applicant (big game barbecue) are different than the type of foods offered by Opposer (pancake shop).²² Applicant's brief, 15 TTABVUE 14; Moeckel declaration, paragraph 6, 10 TTABVUE.

However, the question of registrability of an applicant's mark must be decided on the basis of the identification of goods and/or services set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods or services. *Octocom Sys. Inc. v. Houston Comps. Svcs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). There is nothing in Applicant's identification of goods that limits Applicant's food preparation and personal chef services to big game barbeque, and there is nothing in Opposer's identification that limits the type of restaurant to one that serves pancakes or breakfast items.

Thus, we must make our determination based on the identification in the application and pleaded registration and not based on Applicant's and Opposer's actual use as shown through extrinsic evidence. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (The relevant inquiry focuses on the goods and services described in the application and registration, and not on real-world conditions); *Stone Lion*, 110 USPQ2d at 1161-62 (the Board must "give full

²² Opposer does admit it specializes in pancakes. Opposer's response to Applicant's request for admissions no. 9. Applicant's second notice of reliance, 11 TTABVUE.

sweep” to an identification of goods [or services] regardless of registrant’s actual business).

In this case, Opposer’s registration for “restaurant services and take out restaurant services” is broad and unrestricted and must be deemed to include restaurants offering all types of foods. Even were we to limit our consideration of Opposer’s restaurant services to restaurants that serve only pancakes, this would not avail Applicant since his “food preparation services” and “personal chef services” are broad and unrestricted and must be deemed to include preparation of all types of foods, including pancakes and breakfast foods.

We now turn to Opposer’s evidence of relatedness which consists of third-party registrations.

Evidence that a single company offers the goods and services of both parties, if presented, is relevant to a relatedness analysis. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). “[U]se-based, third-party registrations, although not evidence that the marks shown therein are in use or that the public is familiar with them, nonetheless have probative value to the extent that they serve to suggest that the goods [or services] 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.*, 107 USPQ2d 1424, 1432 (TTAB 2013) (finding that third-party registrations covering both wine and water were probative of the relatedness of those beverages).

Opposer has submitted third-party registrations to show the relatedness of Opposer's restaurant and retail store services to Applicant's sauces and marinades and to show the relatedness of Opposer's restaurant services to Applicant's food preparation and personal chef services.²³

Applicant has countered the third-party registration evidence as to his services with other third-party registrations that he asserts show "the dissimilarity between the services offered by the parties." Applicant's first notice of reliance, 12 TTABVUE. The fifteen third-party registrations offered by Applicant are to show Opposer's "restaurant services" but do not cover "personal chef services."²⁴ However, the mere fact that other third-party registrations do not offer both types of services (restaurant services and personal chef services) does not undercut the probative value of third-party registrations showing that some parties do offer both restaurant and personal chef services under the same mark. *In re G.B.I. Tile and Stone Inc.*, 92 USPQ2d 1366, 1370 (TTAB 2009).

²³ Opposer's second notice of reliance, 8 TTABVUE. Opposer submitted a total of eleven registrations from the TESS (Trademark Electronic Search System) database. The four third-party registrations Opposer provided based on Section 44 or Section 66 of the Trademark Act, all of which are less than five years old, are not probative. *See In re 1st USA Realty Professionals Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007) ("Because these registrations [based on Section 44 or Section 66 of the Trademark Act] are not based on use in commerce they have no probative value in showing the relatedness of the services, and they have not been considered.").

²⁴ Applicant states in his brief that these third-party registrations show that "airport-based restaurant and retail service providers do not typically provide personal chef services or sell marinades for use by home cooks." Applicant's brief, 15 TTABVUE 5. However, there is nothing on the face of these registrations that reflects that the services are airport-based or that the registrants do not own additional registrations for their marks for these services. In any event, Opposer's services are not so restricted and encompass all types of restaurant services, regardless of location.

a. Opposer's restaurant services and Applicant's marinades and sauces

As to the third-party registrations submitted to show the relatedness of Applicant's marinades and sauces and Opposer's restaurant services, we find the following three registrations most relevant:

Reg. No. 6630258 showing "restaurant services" and "marinades" and "sauces" offered under the same mark.²⁵

Reg. No. 6724002 showing "restaurant services" and "marinades" and "pesto sauce"²⁶ offered under the same mark.

Reg. No. 6346785 showing "marinades" and "barbecue sauce, pasta sauce"²⁷ and "restaurant services" under the same mark.²⁸

When considering the relatedness of food products and restaurant services, there is no per se rule that mandates a finding that confusion is likely whenever food products and restaurant services are sold under similar marks. *In re Azteca Rest. Enter. Inc.*, 50 USPQ2d at 1210. Rather, "[t]o establish likelihood of confusion, a party must show something more than that similar or even identical marks are used for food products and for restaurant services." *Jacobs v. Int'l Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982). Thus, "relatedness of food services and food items is not to be assumed and ... evidence sufficient to meet the 'something more'

²⁵ This registration is also provided to show the relatedness of "restaurant services" and "food preparation services."

²⁶ Applicant's "sauces" are broadly identified and encompass pesto sauce.

²⁷ Applicant's "sauces" are broadly identified and encompass barbecue and pasta sauce.

²⁸ This registration is also provided to show the relatedness of "marinades" and "sauces" and "retail store services."

standard is necessary.” *In re Giovanni Food Co., Inc.*, 97 USPQ2d 1990, 1992 (TTAB 2011) (citations omitted).

We find that these registrations, aside from being small in number, are insufficient to establish “something more” to show relatedness of Applicant’s sauces and marinades and Opposer’s restaurant services. *Cf. In re Azteca Rest. Enters. Inc.*, 50 USPQ2d at 1211 (“something more” shown for Mexican food and restaurant services by evidence in the record that three food items listed in registrant’s registrations were defined by dictionary definitions as “Mexican cookery,” that ten use-based third-party registrations covered restaurant services and the Mexican food items, that the applicant’s menu showed applicant served a variety of Mexican fare, that the last page of applicant’s menu offered a “Jar of Azteca Hot Sauce,” showing applicant already marketed for retail sale a food product under the mark AZTECA, and that the mark included the terms “Mexican Restaurant,” making clear that applicant serves Mexican fare).

We find on this record that Opposer has not established the relatedness of its restaurant services to Applicant’s marinades and sauces. The second *DuPont* factor weighs in favor of a finding of no likelihood of confusion with respect to Opposer’s restaurant services and Applicant’s Class 30 goods.

b. Opposer’s retail store services and Applicant’s marinades and sauces

Opposer’s retail store services are limited to publications, candy, beverages and prepackaged food. Applicant’s goods are marinades and sauces. We take judicial notice of the definitions for “marinade,” “sauce” and “food.” A “marinade” is defined

as “a savory usually acidic sauce in which meat, fish, or a vegetable is soaked to enrich its flavor or to tenderize it.”²⁹ A “sauce” is defined as “: a condiment or relish for food.”³⁰ “Food is defined as “: material consisting essentially of protein, carbohydrate, and fat used in the body of an organism to sustain growth, repair, and vital processes and to furnish energy.”³¹

Opposer provided one registration to show relatedness of marinades and sauces and retail store services:

Reg. No. 6346785 showing “online retail store services featuring pies and apparel” and “online retail store services featuring spices, spice blends, food seasonings, marinades, barbecue sauce, pasta sauce, glasses.”³²

As indicated, Opposer’s retail store services are restricted to publications, prepackaged food, candy and beverages. Opposer’s retail store services do not offer goods that can be used in food preparation such as sauces and marinades but only offer prepackaged prepared foods.

We find this one registration, which shows the online offering of a food, i.e., “pies” as well as “spices, food seasonings, marinades [and] barbecue sauce,” insufficient to establish that there is an overlap between Opposer’s retail store services (limited to

²⁹ MERRIAM-WEBSTER DICTIONARY (merriam-webster.com accessed August 2, 2023).

³⁰ MERRIAM-WEBSTER DICTIONARY (merriam-webster.com accessed August 2, 2023).

³¹ MERRIAM-WEBSTER DICTIONARY (merriam-webster.com accessed August 2, 2023).

³² This registration is also provided to show the relatedness of “marinades” and “sauces” and “restaurant services.”

publications, prepackaged food, candy and beverages) and Applicant's marinades and sauces.

Therefore, we find on this record that Opposer has not established relatedness of its retail store services and Applicant's marinades and sauces. The second *DuPont* factor weighs in favor of a finding of no likelihood of confusion with respect to Opposer's retail store services and Applicant's Class 30 goods.

c. Opposer's restaurant services and Applicant's food preparation and personal chef services

Opposer also provided third-party registration evidence to show the relatedness of Applicant's food preparation, personal chef services, and Opposer's restaurant services.³³ The following five registrations are most relevant:

Reg. No. 6743192 showing "restaurant services" and "food preparation" and "personal chef services" under the same mark.

Reg. No. 6777833 showing "restaurant services" and "personal chef services" and "preparation of food and beverages" under the same mark.

Reg. No. 6657697 showing "restaurant services" and "personal chef services" and "preparation of food and beverages" under the same mark.

Reg. No. 6681110 showing "restaurant services" and "food preparation services" and "personal chef services" under the same mark.

³³ Opposer's second notice of reliance, 8 TTABVUE. The registrations Opposer provided based on Section 44 and 66, as noted in n.23, are not probative.

Reg. No. 6630258 showing “restaurant services” and “food preparation services” under the same mark.³⁴

We find this evidence is sufficient to show relatedness of Opposer’s restaurant services and Applicant’s food preparation and personal chef services.³⁵

The second *Dupont* factor weighs in favor of likelihood of confusion in connection with Opposer’s restaurant services and Applicant’s Class 43 services.

In sum, the second *Dupont* factor weighs in favor of likelihood of confusion for Opposer’s restaurant services and Applicant’s food preparation and personal chef services, but against likelihood of confusion for Applicant’s marinades and sauces and Opposer’s retail store and restaurant services.

D. Similarity or Dissimilarity of Trade Channels

Under the third *DuPont* factor, we consider the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567. We base our consideration of the channels of trade on the basis of the goods and services recited in the application and pleaded registration. *Octocom Sys., Inc. v. Houston Comput. Servs., Inc.*, 16 USPQ2d at 1787 (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application, regardless of what the record may

³⁴ This registration is also listed as relevant evidence of the relatedness of “marinades” and “sauces” and “restaurant services.”

³⁵ We note that food preparation is typically an inherent part of restaurant services which prepares meals for purchase.

reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.”).

Because there are no restrictions or limitations in Opposer's identification of services or Applicant's identifications of goods and services as to trade channels, we presume that the goods or services would be marketed in all normal trade channels and to all normal classes of purchasers for such goods or services. *See Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1357 (Fed. Cir. 2000) (“When the registration does not contain limitations describing a particular channel of trade or class of customer, the goods or services are assumed to travel in all normal channels of trade.”).

Applicant argues that airport restaurant services do not typically offer personal chef services and bottled marinades. Applicant's brief, 15 TTABVUE 8. Applicant also argues that Opposer offers its services at a brick and mortar location while Applicant offers its goods online, and Applicant's services are not offered at a “physical storefront.” Applicant's brief, 15 TTABVUE 14-15.

However, an applicant may not restrict the scope of its goods or services or the scope of the goods or services covered in an opposer's pleaded registration by extrinsic argument or evidence. *See, e.g., In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1165 (TTAB 2013) (citations omitted). Thus, regardless of Applicant's testimony that his goods are only sold online and Opposer's testimony and admissions that it operates one brick and mortar retail location at the Newark International Airport, we must consider, in view of the unrestricted trade channels in the application and

registration, that Applicant's goods and services and Opposer's services will be sold or offered in all channels of trade normal for such goods or services. *See Coach Servs.*, 101 USPQ2d at 1723 (absent limitation, "goods are presumed to travel in all normal channels . . . for the relevant goods [or services].")

We have no specific testimony or other evidence in the record to establish the commonality of the trade channels between Applicant's goods and services and Opposer's services. Opposer argues that there are overlapping trade channels but has not identified any specific evidence in the record to support this statement. Opposer's brief 14 TTABVUE 22; Reply brief 16 TTABVUE 13.

Therefore, we find the third *DuPont* factor relating to channels of trade is neutral. *See e.g., Bond v. Taylor*, 119 USPQ2d 1049, 1054 (TTAB 2016) (finding insufficient information in the record to arrive at a determination of trade channels and deeming this factor neutral in the *DuPont* analysis).

E. Conditions of Sale

The fourth *DuPont* factor considers the "conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing." *DuPont*, 177 USPQ at 567. We must make our determination based on the least sophisticated consumer. *Stone Lion*, 110 USPQ2d at 1163-64 (affirming that TTAB properly considered all potential investors for recited services, which included sophisticated investors, but that precedent requires consumer care for likelihood-of-confusion decision to be based "on the least sophisticated potential purchasers"). We consider that the parties' goods and services are offered at all price points since neither

Applicant's identification of goods and services nor Opposer's identification of services include such limitation.

Both Applicant and Opposer agree that the purchasers of their goods and services are the general public and can be the same consumers: individuals looking to purchase prepared food, food preparation and personal chef services, or packaged items for food preparation. Applicant's brief, 15 TTABVUE 15; Opposer's brief 14 TTABVUE 22; Opposer's reply brief, 16 TTABVUE 11. Opposer's witness testimony emphasizes its purchasers include ordinary members of the general public, i.e., airline passengers. Blatstein declaration, paragraph 18 and 21, 9 TTABVUE. Applicant's witness testimony also indicates that his goods and services are offered to the general public, which includes home cooks and individuals who hire personal chef services such as "the hunting community and beyond." Moeckel declaration paragraphs 5, 7, and 11, 10 TTABVUE. According to Applicant, consumers interested in his personal chef services must contact him directly. Moeckel declaration, paragraph 8, 10 TTABVUE.

Opposer argues that "there is no evidence to support that Opposer's customers would be highly sophisticated or making careful and calculated purchasing decisions" and suggests that the purchase of its services does not require a high degree of care. Opposer's brief, 14 TTABVUE 22; Opposer's reply brief, 16 TTABVUE 12. Applicant argues that the purchase of Opposer's services "may well be making an impulse purchase" "[b]ut that same individual is likely to take considerably more time and effort in sourcing and hiring someone to provide personal chef services" which

requires “advance planning and a more significant investment than that involved in grabbing breakfast on the go.” Applicant’s brief, 15 TTABVUE 5.

We find that the purchase of Applicant’s marinades and sauces or prepackaged food and beverages from Opposer’s retail store is done with nothing more than ordinary care as is the decision to purchase food from Opposer’s restaurant. On the other hand, the purchase of Applicant’s food preparation or personal chef services for a public or private event would require more research and care.

However, because we do not have specific testimony or other evidence as to purchasing conditions for Applicant’s food preparation and personal chef services, we find the fourth *DuPont* factor neutral. *See Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *8 (TTAB 2019) (finding fourth *DuPont* factor neutral even if parties’ goods are not subject to impulse buying in the absence of evidence in the record showing consumers will exercise a higher degree of care).

F. Actual Confusion

Under the seventh and eighth *DuPont* factors, we consider the nature and extent of any actual confusion in light of the length of time and conditions under which there has been contemporaneous use of Opposer’s and Applicant’s marks. *DuPont*, 177 USPQ at 567. The seventh and eighth *DuPont* 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. *See In re Cont’l Graphics Corp.*, 52 USPQ2d 1374,

1377 (TTAB 1999); *Gillette Can. Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Under the eighth *DuPont* factor, we “look at actual market conditions, to the extent there is evidence of such conditions of record.” *See In re Guild Mtg. Co.*, 2020 USPQ2d 10279, at *6 (TTAB 2020).

Applicant argues there is no actual confusion under the seventh *DuPont* factor, Applicant’s brief, 15 TTABVUE 17, while Opposer argues that the seventh and eighth *DuPont* factors are neutral because Applicant’s application is intent-to-use. Opposer’s brief, 14 TTABVUE 23. Although Applicant filed his application as intent-to-use, Applicant’s testimony indicates that he has been using his mark in connection with the services since 2016 and in connection with the goods since 2020. Moeckel declaration, paragraphs 3, 4, 6, 7, 8 and 9, 10 TTABVUE. Applicant testified that he has never experienced any consumer confusion relating to the parties’ marks. Moeckel declaration, paragraphs 17, 18, 20, 10 TTABVUE.

Opposer’s witness testified that it offers its retail store services and restaurant services at terminal C in the Newark International Airport. Blatstein declaration, paragraph 18, 9 TTABVUE. Opposer also admitted in response to Applicant’s requests for admissions that the Flip Flop Pancake Shop has one physical location in Newark, New Jersey, at the Newark International Airport. Applicant’s second notice of reliance, Opposer’s response to requests for admissions nos. 1, 2, and 3, 11 TTABVUE. Applicant’s witness testified that he offers his marinades only online on his website and provides his in-person food preparation and personal chef services at public and private events across the country “from southern California” to “upstate

New York”; the personal chef services require initial contact from the consumer. Moeckel declaration testimony, paragraphs 4, 5, 7, 8, 9, 11, 10 TTABVUE.

Both Applicant and Opposer have been offering services during the overlapping period of 2017 through the present, and Applicant has been offering its goods since 2020 to the present. However, we find there has been little opportunity for confusion to occur for the following reasons:

- 1) Opposer only operates in the Newark Liberty International Airport limiting the potential for geographic overlap;
- 2) Applicant’s services require the consumer to contact him directly and are not in a fixed location but are event driven (both public and private); and
- 3) Applicant’s goods are offered only online via Applicant’s website.

We find the seventh and eight *DuPont* factors neutral.

G. Variety of Goods and Services on which the Cited Mark is or is not Used

The ninth *DuPont* factor considers “[t]he variety of goods on which a mark is or is not used (house mark, “family” mark, product mark).” *DuPont*, 177 USPQ at 567. “If a party in the position of plaintiff uses its mark on a wide variety of goods, then purchasers are more likely to view a defendant’s related good under a similar mark as an extension of the plaintiff’s line.” *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *15 (TTAB 2020).

Opposer argues that “the ninth factor favors Opposer because each seat at the FLIP FLOP PANCAKE SHOP restaurant is equipped with an iPad offering games, food and beverage ordering, internet access, and flight information, and the mark is

being used in connection with related retail store services.” Opposer’s brief, 14 TTABVUE 23.

Applicant argues that Opposer’s use of iPads, or offering the use of the internet and enabling consumers to view flight status and play games “does not lead to a finding that Opposer uses THE FLIP FLOP PANCAKE SHOP mark in connection with [the] sale of any services other than the pancake shop and grab and go retail services included in its registration.” Applicant’s brief, 15 TTABVUE 17.

According to Opposer’s witness, Opposer OTG has 350 restaurants in 10 airport locations and is known for its technology and custom experience offered to customers by placing “iPads at its retail restaurant locations, which allow travelers to place food and retail orders from vendors in the airport, check on flight status, and play games.” Blatstein declaration, paragraph 10, 9 TTABVUE. It appears from this testimony that these services are offered by OTG rather than under the specific restaurant name (“OTG is especially well-known for its technology platform that is provided in close association with its restaurant and retail concepts.” Blatstein declaration, paragraph 10, 9 TTABVUE). But even if the food ordering, internet access and flight information services were offered under Opposer’s pleaded FLIP FLOP PANCAKE SHOP mark, we find that offering iPads to airport customers for food ordering, internet access, or flight status is either ordinary, routine, expected, or incidental, is admittedly part of Opposer’s technology platform to deliver its restaurant services at all of its airport restaurants, and would not constitute a separate service. Lastly, even

if the offering of games is considered an additional separate service, it alone would not be sufficient to show use of the mark on a diverse variety of services.

We find the ninth *DuPont* factor to be neutral.

V. Balancing the factors

We have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. We find the first *DuPont* factor weighs in favor of likelihood of confusion. The second *DuPont* factor weighs in favor of likelihood of confusion as between Applicant's food preparation and personal chef services and Opposer's restaurant services but weighs against likelihood of confusion as between Applicant's marinades and sauces and Opposer's restaurant and retail store services. The third, seventh, eighth, and ninth *DuPont* factors are neutral.³⁶

We find confusion is likely as to Applicant's food preparation and personal chef services and Opposer's restaurant services. We find confusion is not likely as to Applicant's marinades and sauces and Opposer's restaurant and retail store services.

Decision: The opposition is sustained under Section 2(d) as to Applicant's Class 43 food preparation and personal chef services and dismissed as to Applicant's Class 30 marinades and sauces. The application will proceed to registration for Applicant's Class 30 goods.

³⁶ Opposer summarily argues that the remaining *DuPont* factors are neutral, while Applicant summarily argues that the remaining *DuPont* factors are neutral or favor Applicant. Opposer's brief, 14 TTABVUE 23; Applicant's brief, 15 TTABVUE 18. Because there is no specific argument or evidence presented as to these remaining factors, we find them neutral.