

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: February 29, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Juvia's Holdings LLC
v.
Sustainable Nutrition, Inc.

Opposition No. 91271554

Michael K. Fretwell of Laubscher & Laubscher, P.C.,
for Juvia's Holdings LLC.

Sustainable Nutrition, Inc., Pro Se.¹

Before Taylor, Wellington, and Elgin,
Administrative Trademark Judges.

Opinion by Elgin, Administrative Trademark Judge:

Sustainable Nutrition, Inc. ("Applicant") seeks registration on the Principal Register of the marks ADJUVIA in standard characters and ADJUVIA and design

¹ On September 30, 2022, the Board granted a request by Applicant's former attorney to withdraw as counsel of record. 9 TTABVUE. After Applicant did not respond to two Board orders regarding its legal representation, the Board sustained the opposition for apparent loss of interest. 11 TTABVUE. Applicant's CEO John Carberry requested relief from final judgment pursuant to Fed. R. Civ. P. 60(b). 13 TTABVUE. The Board granted the motion, reinstated the opposition, noted Mr. Carberry's intention to proceed on behalf of Applicant pro se, and reset the remaining trial schedule. 15 TTABVUE 5-6.

Citations in this opinion to the briefs and other materials in the case docket refer to TTABVUE, the Board's online docketing system. See *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020).



, both for: “Anti-aging cream; Anti-wrinkle cream; Moisturizing creams,” in International Class 3; and “Nutritional supplements consisting primarily of astaxanthin and coconut oil with none of the foregoing for the treatment of diabetes,” in International Class 5.²

Juvia’s Holdings LLC (“Opposer”) filed a Notice of Opposition against registration of both of Applicant’s marks in both classes under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s marks are likely to cause confusion with Opposer’s registered marks containing the formative term JUVIA’s:

JUVIA’S (standard characters) for “Cosmetics; Cosmetics and make-up; Eye shadows” in International Class 3; and “Cosmetic brushes” in International Class 21;³

JUVIA’S PLACE (standard characters) for “On-line retail store services featuring cosmetics” in International Class 35;⁴

JUVIA’S PLACE (standard characters) for “Cosmetics” in International Class 3; and “Cosmetic accessories, namely, cosmetic brushes” in International Class 21;⁵

JUVIA’S PLACE (& design)  for “Cosmetics” in International Class 3; “Cosmetic brushes” in International

² Application Serial Nos. 88833789 (standard character) and 88833807 (design) were filed on March 13, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging first use and first use in commerce as early as March 1, 2020. Applicant describes the design mark as consisting of “the word ‘adjuvia’ centered beneath the shape of a heraldry shield. Inside the shield is a heart.”

³ Registration No. 5260666, issued on the Principal Register on August 8, 2017; maintained.

⁴ Registration No. 5260671, issued on the Principal Register on August 8, 2017; maintained.

⁵ Registration No. 5548457, issued on the Principal Register on August 28, 2018.

Class 21; and “On-line retail store services featuring cosmetics” in International Class 35;⁶

JUVIA’S TRIBE (standard characters) for “Providing online advice and information in the fields of cosmetics and applying cosmetics” in International Class 44;⁷

JUVIA’S SKIN (standard characters) (SKIN disclaimed) for “Cosmetic creams for skin care; Cosmetic preparations for skin care; Moisturizing preparations for the skin; Non-medicated skin care creams and lotions; Non-medicated skin care preparations; Non-medicated balms for use on skin; Non-medicated cleansers, namely, skin cleansers; Non-medicated cleansers, namely, facial cleansers; Non-medicated exfoliating preparations for skin” in International Class 3;⁸

and fifteen BY JUVIA’s formative marks in standard characters for “Cosmetics” in International Class 3.⁹

Applicant, in its Answer, “admitted and conceded” the following allegations in the

Notice of Opposition:

1. Opposer offers cosmetics products under the JUVIA’S and JUVIA’S PLACE marks. The products have been sold in the United States and around the world for more than five years through the juviasplace.com website, with Ulta Beauty, a well-known chain of beauty stores, and through

⁶ Registration No. 5857377, issued on the Principal Register on September 10, 2019.

⁷ Registration No. 6119636, issued on the Principal Register on August 4, 2020.

⁸ Registration No. 6680110, issued on the Principal Register on March 22, 2022. The application for this registration was filed on January 27, 2020 and issued during the course of this proceeding.

⁹ THE MAGIC BY JUVIA’S (Registration No. 5533377), THE ZULU BY JUVIA’S (Registration No. 5533378), THE NUBIAN BY JUVIA’S (Registration No. 5548773), THE NUBIAN 2 BY JUVIA’S (Registration No. 5548774), THE SAHARAN BY JUVIA’S (Registration No. 5548775), THE TRIBE BY JUVIA’S (Registration No. 5763638), THE SAHARAN II BY JUVIA’S (Registration No. 5814140), THE WARRIOR BY JUVIA’S (Registration No. 5857630), THE WARRIOR II BY JUVIA’S (Registration No. 5857631), THE FESTIVAL BY JUVIA’S (Registration No. 5857632), THE DOUCE BY JUVIA’S (Registration No. 5863243), AFRIQUE BY JUVIA’S (Registration No. 5889924), THE NUBIAN LOOSE HIGHLIGHTER BY JUVIA’S (Registration No. 6035499), THE ROYALTY I BY JUVIA’S (Registration No. 6035500), and THE ROYALTY II BY JUVIA’S (Registration No. 6035501).

other channels. Opposers [sic] provide a range of goods, including, but not limited to, eyeshadow palettes, concealer, foundation, blush, lip stick, and lip gloss.

2. Opposer is the owner of United States Trademark Registrations and Applications for the JUVIA'S mark and many JUVIA'S-formative marks which identify goods in International Class 3, including cosmetics and skin care products. The following registrations and application, owned by Juvia's Holdings LLC, are currently valid and subsisting: [list of Opposer's pleaded registrations and application]
3. Through significant use, advertising and sales, the JUVIA'S and JUVIA'S formative family of marks have become well-known in the cosmetics industry.
4. Applicant filed application Serial Nos. 88/833,789 and 88/833,807 for registration on the principal register on March 13, 2020. The application is based on use of the ADJUVIA marks in commerce in connection with "Anti-aging cream; Anti-wrinkle cream; Moisturizing creams" in International Class 3 since March 1, 2020 and "Nutritional supplements consisting primarily of astaxanthin and coconut oil" in International Class 5 since March 1, 2020.
5. Applicant's use and filing dates are after Opposer's dates of first use and filing of U.S. trademark applications for its of its [sic] JUVIA'S and JUVIA'S-formative family of marks.¹⁰

Applicant denied the other salient allegations in the Notice of Opposition. To the extent that Applicant's Answer also amplified its denials,¹¹ we do not consider these

¹⁰ 4 TTABVue 16-18. Applicant qualified its admission to paragraph 4 as follows: "However, the brand Adjuvia was first used 8 August 2016 and there are many compositions and carriers and ingredients in the Adjuvia product line in addition to always including SN's lipid rich nano emulsified astaxanthin. The main application for Adjuvia in addition to topicals is a nutraceutical. Reference Adjuvia Immune Booster, attached."

¹¹ See *id.* at 18-25. We discuss below the evidentiary significance of some of the admissions and Applicant's amplifications of certain denials in our analysis of Opposer's Section 2(d) claim.

averments as affirmative defenses. *See Hornblower & Weeks Inc. v. Hornblower & Weeks Inc.*, 60 USPQ2d 1733, 1738 n.7 (TTAB 2001).

Opposer filed the testimony declaration of its owner Chinyere Eburu with exhibits, and a main brief.¹² Applicant did not file evidence or a trial brief, but it was not required to do so.¹³ *See, e.g., Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701, 1704 (TTAB 2002) (“It is the opposer which bears the burden of coming forward with evidence to support its case.”).

We sustain the opposition as to Class 3 in the applications and dismiss the opposition as to Class 5 in the applications.

I. The Evidentiary Record

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the files of Applicant’s subject applications. In addition, Opposer introduced the Testimony Declaration of Chinyere Eburu, with accompanying exhibits that include: (1) Printouts from Opposer’s Internet website;¹⁴ (2) TSDR records of Opposer’s pleaded registrations;¹⁵ and (3) Internet articles, identified by the witness as “true and correct copies of unsolicited articles that include the Juvia’s

¹² *See* 5 TTABVUE (declaration) and 16 TTABVUE (Opposer’s brief).

¹³ The materials attached to Applicant’s Answer, 4 TTABVUE 27-65, are not of record because they were not introduced in evidence at trial. *See* Trademark Rule 2.122(c), 37 C.F.R. § 2.122(c).

¹⁴ 5 TTABVUE 8-27 (Exhs. 1-2).

¹⁵ *Id.* at 28-168 (Exhs. 3-23).

Place or Juvia's Skin brands and JUVIA'S, JUVIA'S PLACE, or JUVIA'S SKIN marks.”¹⁶

II. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A plaintiff may oppose or seek to cancel registration of a mark when doing so is within the zone of interests protected by the statute and it has a reasonable belief in damage that would be proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and a reasonable belief in damage by the registration of a mark, which demonstrates damage proximately caused by registration of the mark); *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 2022 USPQ2d 602, at *3-4 (Fed. Cir. 2022) (“While the zone-of-interest test is not especially demanding . . . it nonetheless imposes a critical requirement.”) (cleaned up).

Here, Opposer's pleaded registrations are of record. Because these registrations form the basis of a plausible likelihood of confusion claim, Opposer has established a reasonable belief of damage that is proximately caused by the potential registration

¹⁶ *Id.* at 4 ¶ 10, 169-508 (Exhs. 24-46). Ms. Eburu's declaration also identifies Exhibits 47-48, but they are not attached.

of Applicant's mark. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (registration establishes "standing"); *Barbara's Bakery v. Landesman*, 82 USPQ2d 1283, 1285 (TTAB 2007) (pleaded registration of record and opposer's likelihood of confusion claim was plausible). Further, Applicant does not contest Opposer's entitlement to a statutory cause of action in the proceeding.

III. Opposer's Pleaded Family of Marks

We must first consider Opposer's allegations in the Notice of Opposition that it owns a "family" of JUVIA'S-formative marks in connection with cosmetics.¹⁷ Our analysis under Section 2(d) is based on all of the probative evidence of record relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"). Proof of a family of marks could be relevant in a likelihood of confusion dispute in at least one of two ways:

First, as the seminal *du Pont* decision suggests by mentioning it in the ninth *DuPont* factor, which talks about the "variety of goods," it could affect the analysis of the similarity of goods Where a senior user employs a family of marks on a range of products, a junior user with a mark that has the family characteristic is less able to argue that the difference in the goods has significant weight, because consumers are accustomed to seeing the "family" on a range of goods. Second, in a case like the present where the family comprises a common suffix (or prefix) in marks, or a single term in multiple-term marks, a junior user/applicant may find it harder to argue that the difference in the "non-family" part of its mark weighs against confusion, because consumers are accustomed to

¹⁷ See Notice of Opposition ¶¶ 3, 5, 6, 7 (1 TTABVue 13-14).

seeing the family component together with another element coming from one source (the senior user).

New Era Cap Co., 2020 USPQ2d 10596, at *6 (citing *DuPont*, 177 USPQ at 567).

The burden of proving a common law family of marks falls with Opposer, the party asserting the existence of the family. *Id.* at *7 (citing *TPI Holdings Inc. v. Trailertrader.com LLC*, 126 USPQ2d 1409, 1419 (TTAB 2018)).

[I]t is well settled that the mere ownership of a number of marks sharing a common feature (or even ownership of registrations thereof) is insufficient to establish a claim of ownership of a “family” of marks characterized by the feature in the absence of competent evidence showing that prior to the first use by the alleged interloper, the various marks said to constitute the “family,” or at least a goodly number of them, were used and promoted together in such a manner as to create among purchasers an association of common ownership based upon the ‘family’ characteristic. . . .

TPI Holdings, 126 USPQ2d at 1419-20 (citing *Hester Indus. Inc. Tyson Foods Inc.*, 2 USPQ2d 1645, 1647 (TTAB 1987)).

As we discuss above, Applicant “admitted and conceded” in its Answer that Opposer has a “JUVIA’S formative family of marks [which] have become well-known in the cosmetics industry.” “While it is true that legal conclusions cannot be ‘admitted’ in the sense of an admission against interest . . . when a plaintiff pleads a legal conclusion, and the defendant in its answer admits the plaintiff’s pleading, it is as if the parties had stipulated to the matter, thus removing it as an issue to be determined by the Board.” *CBS Inc. v. Mercandante*, 23 USPQ2d 1784, 1788 n.9 (TTAB 1992) (citing *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151 (CCPA 1978)). Thus, we find that, on this record, Applicant

has effectively stipulated that Opposer owns a family of JUVIA's formative marks in connection with cosmetics products. We analyze the import of this finding, below.

IV. Section 2(d) Claim

To prevail on a claim of likelihood of confusion under Trademark Act Section 2(d), a party must prove that it owns

[A] mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States . . . and not abandoned, as to be likely, when used on or in connection with the goods of the [registrant], to cause confusion, or to cause mistake, or to deceive.

See also Cunningham, 55 USPQ2d at 1844; *Otto Roth & Co. v. Univ. Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981); *Life Zone Inc. v. Middleman Grp. Inc.*, 87 USPQ2d 1953, 1959 (TTAB 2008).

A. Priority

Opposer made of record copies of valid and subsisting registrations for its pleaded marks and Applicant has not counterclaimed to cancel Opposer's pleaded registrations. Consequently, priority is not at issue with respect to Opposer's registered marks and the goods and services identified in those registrations. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974) (priority is not an issue in an opposition where opposer pleads and proves that it owns registration for its pleaded mark); *see* Trademark Act Section 7(c), 15 U.S.C. § 1057(c) (applicant may rely on filing date of its involved application as its priority date). Moreover, Applicant has "admitted and conceded" that the "use and filing dates [of the subject application] are after Opposer's dates of first use and filing of U.S.

trademark applications for its of its [sic] JUVIA'S and JUVIA'S-formative family of marks."¹⁸ Opposer has established priority in its pleaded registrations.

However, this admission does not establish that Opposer has priority in its common law family of JUVIA'S Marks before Applicant's filing date of March 13, 2020. Ms. Eburu's testimony declaration states only the following with regard to Opposer's use of its marks:

3. Juvia's Holdings is owner of the JUVIA'S, JUVIA'S PLACE, JUVIA'S SKIN and related trademarks which are used with the cosmetics brands Juvia's Place and Juvia's Skin.

4. The Juvia's Place and Juvia's Skin branded products are offered in the United States and around the world through www.juviasplace.com and with numerous retail stores.

5. Attached as Exhibits 1 and 2 are true and correct copies of the About Juvia's Place and About Juvia's Skin pages, respectively, from the www.juviasplace.com website.

6. A wide variety of cosmetics are offered under the Juvia's Place and Juvia's Skin brands, including but not limited to, eyeshadow, eyeliner, foundation, concealer, powders, blush, bronzer, highlighters, lipstick, lip gloss, lip balm, cleansers, serums, skin creams, skin balms, exfoliating pads, oils, skin care solutions, and moisturizers.

7. The JUVIA'S and JUVIA'S PLACE marks have been used with cosmetics since 2013.

....

11. Through substantial use, advertising, and recognition, the JUVIA'S, JUVIA'S PLACE and JUVIA'S SKIN marks have become well known in the cosmetics industry.¹⁹

¹⁸ Answer ¶ 5 (4 TTABVUE 18).

¹⁹ Eburu Decl. ¶¶ 3-6, 11 (5 TTABVUE 3-4).

This testimony does not establish that Opposer used and promoted its family of marks together prior to Applicant's priority date. None of the evidence of record attached to Ms. Eburu's declaration is probative. Opposer's website excerpts (Exhibits 1-2) were printed on August 8, 2022, after Applicant's priority date.²⁰ None of the third-party website articles (Exhibits 24-46) which bear a date of publication prior to March 13, 2020 discuss Opposer's pleaded marks together – at most, they mention JUVIA'S and JUVIA'S PLACE (and in one undated article, JUVIA'S PLACE and JUVIA'S SKIN).²¹

In view of the lack of evidence, we find Opposer has not proven priority in its common law family of marks. Therefore, we proceed to analyze Opposer's Section 2(d) claim as based on its individual pleaded marks.

B. Likelihood of Confusion

Because each class in Applicant's identical multi-class applications is, in effect, a separate application, we consider each class separately, and determine whether Opposer has shown, by a preponderance of the evidence, that Applicant's ADJUVIA marks are likely to be confused with Opposer's JUVIA'S formative marks. *Monster Energy Co. v. Tom & Martha LLC*, 2021 USPQ2d 1197, at *4 n.15 (TTAB 2021) ("With multiple class applications, the Board treats each class as a single class application, and the claims and evidence are considered as they bear on each class,

²⁰ See 5 TTABVue 8-27.

²¹ See *id.* at 169-508.

separately.”) (citing *G&W Labs., Inc. v. G W Pharma Ltd.*, 89 USPQ2d 1571, 1574 (TTAB 2009)).

We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. . . . Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020) (citing *In re Dixie Rests.*, 41 USPQ2d at 1406-07).

In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“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.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

We focus our analysis on the pleaded mark JUVIA'S SKIN in Opposer's Registration No. 6680110 because it is most likely to support a finding of likelihood of confusion. If we find confusion likely between Applicant's mark and the JUVIA'S SKIN pleaded mark, we need not consider the likelihood of confusion between Applicant's mark and Opposer's other pleaded marks. On the other hand, if we find no likelihood of confusion based on the JUVIA'S SKIN registration, we would not find confusion likely based on Opposer's other pleaded marks and the goods and services for which they are registered. *See, e.g., Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *12 (TTAB 2023) (confining likelihood of confusion analysis to most similar pleaded mark) (citing *Sock It To Me, Inc. v. Aiping Fan*, 2020 USPQ2d 10611, at *6 (TTAB 2020)) (subsequent history omitted); *In re Max Cap. Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

1. Similarity or Dissimilarity of the Goods, Channels of Trade, and Classes of Purchasers

We begin with the second and third *DuPont* factors, which respectively consider “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” and “the similarity or dissimilarity of established, likely-to-continue trade channels.” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *19 (TTAB 2021) (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018)).

In analyzing the relatedness of the goods under the second *DuPont* factor, we look to the identifications in the applications and pleaded registrations. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018); *Stone Lion Cap.*

Partners v. Lion Capital LLP, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “[L]ikelihood of confusion can be found ‘if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); see also *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (“complementary” food items found related); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991) (various items that may be purchased in a single shopping trip found related).

a. International Class 3

Applicant’s goods in Class 3 include “moisturizing creams.” Opposer’s registration for JUVIA’S SKIN includes “moisturizing preparations for the skin.” Thus, the goods are legally identical in part. We need not go beyond these identical goods to consider Applicant’s other goods in this class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (it is sufficient for a finding of likelihood of confusion as to a class if relatedness is established for any one of the identified goods within the class); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff’d*, 123 USPQ2d 1744 (Fed. Cir. 2017).

Although Opposer does not present argument as to the third *DuPont* factor, because the goods described in the applications and this pleaded registration are in

part legally identical and have unrestricted trade channels, we must presume that the channels of trade and classes of purchasers are the same. *See In re Vitterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (identical goods are presumed to travel in same channels of trade to same class of purchasers); *Am. Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011) (where the services were legally identical, “the marketing channels of trade and targeted classes of consumers and donors are the same”).

The identity of these goods and their presumed overlapping channels of trade and classes of purchasers not only weigh heavily in favor of finding a likelihood of confusion under these factors, but also reduces the degree of similarity between the marks necessary to find a likelihood of confusion. *In re Vitterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *In re Max Cap. Grp.*, 93 USPQ2d at 1248.

b. International Class 5

Applicant’s goods in this class are “Nutritional supplements consisting primarily of astaxanthin and coconut oil with none of the foregoing for the treatment of diabetes.” Opposer argues that its “cosmetics and skin care goods” (without indicating any particular registration on which it relies) are related to Applicant’s goods in Class 5 for three reasons.

First, Opposer points to Applicant’s averment in its Answer that Applicant’s products contain antioxidants.²² Opposer argues, without evidence, that antioxidants

²² See 16 TTABVUE 13.

provide UV (ultra-violet radiation) protection; and Opposer relies on its website evidence to show that that its products contain Vitamin C, which it argues (again without evidence) is an antioxidant and provides UV protection.²³ “Attorney argument is no substitute for evidence.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (citation omitted). Moreover, the website evidence is hearsay and does not prove that Opposer’s products contain Vitamin C. Fed. R. Evid. 802; *Empresa Cubana Del Tabaco d.b.a. Cubatabaco v. Gen. Cigar Co.*, 2022 USPQ2d 1242, at *7 (TTAB 2022) (where “the parties seek to rely on the contents of the Internet printouts for the truth of any assertion made therein, the statements in the websites are hearsay unless supported by testimony or other evidence”), *civil action filed*, No. 1:23-cv-00227 (E.D. Va. Feb. 20, 2023). In short, there is no evidence in the record regarding the purported qualities or benefits of Opposer’s products that would provide any relationship to Applicant’s nutritional supplements.

Second, Opposer argues that “there are 746 use-based, live records with the USPTO that include both cosmetics and nutritional supplements as the recited goods. Of those, 608 are registered.”²⁴ Opposer did not, however, supply copies of any of these referenced third-party registrations (or even list them). The Board does not take judicial notice of registrations which reside in the United States Patent and Trademark Office. *See, e.g., Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546,

²³ *Id.*

²⁴ *Id.*

1550 (TTAB 2012) (listing of third-party marks downloaded from Office database does not make registrations of record).

Finally, we do not find the non-precedential cases cited by Opposer to be persuasive,²⁵ as Opposer has not demonstrated that the facts and evidence in those cases are analogous to the facts and evidence presented in this proceeding. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1742 (TTAB 2014) (finding Opposer's argument that "[n]umerous cases have held nutritional supplements to be related to food and beverages" not persuasive: "[P]rior cases, precedential or not, are only useful to the extent that the facts in the prior cases are somewhat analogous to the facts in the current case.") (citations omitted). In view thereof, the second *DuPont* factor weighs against finding likelihood of confusion in Class 5.

Turning to the third *DuPont* factor, in the absence of any restrictions to the channels of trade or classes of purchasers in Applicant's Class 5 identification and the pleaded registration, we presume that Opposer's skin care products under its JUVIA'S SKIN mark and Applicant's nutritional supplements under its ADJUVIA marks are marketed in all of the normal channels of trade for such products. *See Cunningham*, 55 USPQ2d at 1846 (affirming Board finding that where the identification is unrestricted, "we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods"). Opposer presented only vague testimony that its products can be purchased in "numerous retail stores" and

²⁵ See 16 TTABVue 13-14 and n.2.

on its website.²⁶ It presented no evidence showing what the normal trade channels for Applicant's goods are, much less that the parties' trade channels overlap in any way that would lead purchasers to be confused as to the sources of the respective goods. In the absence of any probative evidence, the third *DuPont* factor is neutral as to Applicant's goods in Class 5.

2. Strength of Opposer's Pleaded Mark

Before comparing the marks, we first consider the strength of Opposer's pleaded mark to help inform us as to its scope of protection. "A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning)." *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010). Here, Opposer asserts that all of its JUVIA'S marks are conceptually and commercially strong.²⁷

Because Opposer's registration for JUVIA'S SKIN is on the Principal Register without a claim of acquired distinctiveness, the mark is presumed to be inherently distinctive for the goods identified in the registration. Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *New Era Cap Co.*, 2020 USPQ2d 10596, at *10 ("Opposer's mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act."); *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB

²⁶ Eburu Decl. ¶ 4 (*id.* at 3); *see also* 4 TTABVUE 17 (Answer ¶ 1) (admitting Opposer offers "cosmetic products" under the JUVIA'S and JUVIA'S PLACE marks through "the juviasplace.com website, with Ulta Beauty, a well-known chain of beauty stores, and through other channels."

²⁷ 16 TTABVUE 9-11.

2006) (a "mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods.").

The term SKIN is disclaimed as descriptive of Opposer's skin care products. But Applicant did not submit any evidence that would show JUVIA'S is anything but coined or arbitrary. Therefore, we deem the mark as a whole to be conceptually strong. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 369 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (arbitrary terms are conceptually strong trademarks); *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004) (arbitrary marks typically are strong); *In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1479 (TTAB 2007) (completely unique and arbitrary, if not coined, nature of mark in relation to clothing entitles the registered mark to a broad scope of protection, and significantly increases the likelihood that the marks, when used in connection with the identical goods would cause confusion).

As to commercial strength, Ms. Eburu's un rebutted declaration asserts, without support, that "[t]hrough substantial use, advertising, and recognition, the JUVIA'S, JUVIA'S PLACE and JUVIA'S SKIN marks have become well known in the cosmetics industry."²⁸ Opposer also submitted Internet articles about JUVIA'S products to show

²⁸ Eburu Decl. ¶ 11 (5 TTABVue 4).

that they receive unsolicited publicity.²⁹ *See 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). Opposer argues there are no other JUVIA formative marks on the Federal Register in Classes 3 or 5 for any goods arguably related to any goods found in those classes, and Opposer is not aware of any uses of the same.³⁰

There is no specific evidence or testimony of record regarding the commercial strength or weakness of the JUVIA'S SKIN mark in the skin care industry. Only one of the Internet articles of record concerns the JUVIA'S SKIN mark for Opposer's skin care products, and that article on its face is "sponsored" by Opposer, not unsolicited.³¹ The mark has only been registered since 2022. And Opposer has not submitted any evidence of sales, advertising, or consumer recognition of the mark in support of its assertion that the mark JUVIA'S SKIN is commercially strong.

As a result, there is insufficient evidence to prove that Opposer's pleaded JUVIA'S SKIN mark is commercially strong, and therefore the mark is due the normal scope of protection for an inherently distinctive mark.

3. The Similarity or Dissimilarity of the Marks

We turn next to the first *DuPont* factor focusing on the similarity or dissimilarity of the parties' marks in their entirety as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Palm Bay Imps.*, 73 USPQ2d at


²⁹ *Id.* at 169-508 (Exhs. 24-46) (articles from websites such as allure.com, buzzfeed.com, refinery29.com, scarymommy.com, insider.com, stylecaster.com, thezoereport.com, thelist.com, vogue.com, and vogue.co.uk).

³⁰ 16 TTABVUE 14.

³¹ *See id.* at 443-48 (Exh. 44).

1691. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); *accord*, *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted). “The proper 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.’” *Cai*, 127 USPQ2d at 1801 (quoting *Coach Servs.*, 101 USPQ2d at 1721); *see also* *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012) (proper test whether marks are sufficiently similar in their overall commercial impression).

We also keep in mind that the degree of similarity between the marks necessary to find a likelihood of confusion declines where we have found, as we have here as to the goods in Class 3, that the marks are used on legally-in-part identical goods and thus offered in the same trade channels to the same class of consumers for such goods. *Coach Servs.*, 101 USPQ2d at 1721.

To recap, Applicant’s marks are ADJUVIA and  **adjuvia**, and Opposer’s pleaded mark is JUVIA’S SKIN (SKIN disclaimed). The first term of Opposer’s mark and Applicant’s marks are substantially similar in that all contain the letter string J-U-V-I-A. The addition of the “apostrophe S” in Opposer’s mark does not change the

appearance or pronunciation of the term enough that a prospective purchaser would be likely to distinguish it from Applicant's marks; it merely creates a possessive form of the term JUVIA, which is wholly contained in Applicant's mark. *See, e.g., Winn's Stores, Inc. v. Hi-Lo, Inc.*, 203 USPQ 140 (TTAB 1979) ("little if any trademark significance can be attributed to the apostrophe and the letter 's' in opposer's mark" WINN'S when compared to applicant's mark WIN-WAY). Nor is the prefix "AD" in Applicant's marks sufficient to distinguish them from Opposer's pleaded mark, particularly when pronounced.³² Keeping in mind that our comparison of the marks is not made on a side-by-side basis and that recall of purchasers is often hazy and imperfect, these slight differences are not likely to be noticed or remembered by consumers when encountering these marks under market conditions. *See e.g., Inter IKEA Sys. B.V.*, 110 USPQ2d at 1741 (AKEA is similar to IKEA); *Interlego AG v. Abrams/Gentile Entm't Inc.*, 63 USPQ2d 1862, 1863 (TTAB 2002) ("Obviously, the marks LEGO and MEGO are extremely similar in that they differ simply by one letter."); *U.S. Mineral Prods. Co. v. GAF Corp.*, 197 USPQ 301, 306 (TTAB 1977) ("AFCO' and 'CAFCO,' which differ only as to the letter 'C' in USM's mark, are substantially similar in appearance and sound.").

The addition of the disclaimed term SKIN in Opposer's pleaded mark is an obvious point of difference, both visually and aurally. But it is well-settled that disclaimed, descriptive matter generally has less significance in likelihood of confusion

³² Applicant averred in its Answer that ADJUVIA is a coined term evoking the term "adjuvant," or to help. 4 TTABVUE 20-23. There is no evidence of record as to the intended connotation of JUVIA'S.

determinations because consumers will tend to focus on the more distinctive parts of marks. *See In re Detroit Athletic Co.*, 128 USPQ2d at 1050 (citing *In re Dixie Rests.*, 41 USPQ2d at 1533-34)); *Cunningham*, 55 USPQ2d at 1846 (the “descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.”) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression.”). Moreover, as here, “it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.” *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988); *see also Palm Bay*, 73 USPQ2d at 1692. There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as the common element JUVIA, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Viterra*, 101 USPQ2d at 1908; *In re Nat’l Data Corp.*, 224 USPQ at 751. We conclude that the distinctive JUVIA’S portion of Opposer’s mark JUVIA’S SKIN is dominant.

Finally, the small heart design in Applicant’s composite mark does not distinguish it from Opposer’s pleaded mark. It is well-established that, when a mark consists of both words and a design, the literal portion of a mark generally is the dominant feature because it is the element by which consumers will refer to and call for the goods or services. *Id.* at 1911 (“the verbal portion of a word and design mark likely will be the dominant portion”); *In re Appetito Provisions Co.*, 3 USPQ2d 1553,

1554 (TTAB 1987) (holding that “if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services” and “because applicant’s mark shares with registrant’s mark that element responsible for creating its overall commercial impression, the marks are confusingly similar”).

When the pleaded and subject marks are viewed in their entirety, the strong visual and aural resemblance between them results in marks that have similar commercial impressions. These similarities outweigh any slight differences created by the use of the possessive “apostrophe S” and addition of the descriptive term in Opposer’s mark, and the addition of the “AD” prefix in both of Applicant’s marks and small heart design in Applicant’s composite mark.

Keeping in mind that the degree of similarity between the marks necessary for finding likelihood of confusion is lessened here as to the goods in Class 3 in view of the parties’ in part identical goods being offered in the same trade channels to the same class of consumers, we find the first *DuPont* factor weighs in favor of finding a likelihood of confusion as to the goods both classes, but more strongly as to the goods in Class 3.

4. Weighing and Balancing the *DuPont* Factors

We find that Opposer’s and Applicant’s marks are more similar than dissimilar.

As to the goods in Class 3, Applicant’s applications include goods that are, in part, legally identical to Opposer’s prior-registered goods, and travel in the same trade channels to the same consumers. Opposer has proven likelihood of confusion as to the goods in Class 3 by a preponderance of the evidence.

As to the goods in Class 5, when our findings under specific *DuPont* factors point in different directions with respect to the ultimate conclusion regarding the likelihood of confusion, we are required to explain our weighing of those factors in reaching our ultimate conclusion. *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023). Here, we conclude that there is insufficient evidence to prove that Opposer's and Applicant's goods in Class 5 are related. This outweighs the similarity of the marks. Opposer has failed to prove likelihood of confusion as to the goods in this class by a preponderance of the evidence. *Cf. Kellogg Co. v. Pack'Em Enters. Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

Decision

We sustain the opposition as to Class 3 in the applications and dismiss the opposition as to Class 5 in the applications.