

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: April 18, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Hostess Brands, LLC

v.

Holly Sue Williams

Opposition No. 91272724

Cathryn A. Berryman and Michael D. Karson of WINSTEAD PC
for Hostess Brands, LLC.

Avraham S.Z. Cohn of Cohn Legal PLLC
for Holly Sue Williams.

Before Shaw, Goodman and Cohen,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Holly Sue Williams (Applicant) seeks registration on the Principal Register of the mark SUZYQ (in standard characters), identifying “Backpacks; Wallets” and “purses” in International Class 18.¹

¹ Application Serial No. 90198147 was filed on September 21, 2020 based on Applicant’s assertion of a bona fide intent to use the mark for “backpacks and wallets” under Trademark Act Section 1(b), 15 U.S.C. § 1051(b) and based on Trademark Act Section 1(a), 15 U.S.C. § 1051(a) for “purses,” alleging July 31, 2020 as the date of first use and first use in commerce.

Hostess Brands, 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 SUZY Q'S (typed drawing), identifying "Cake" in International Class 30 and based on its alleged prior use of the mark SUZY Q'S for cake, a wide variety of apparel, goods including tote bags, and merchandise.²

In its answer, Applicant admitted that Opposer's pleaded registration is valid and subsisting and owned by Opposer; Applicant denied the remaining salient allegations in the notice of opposition.³

Opposer filed a brief but the Board struck Opposer's brief as overlength and indicated the brief will not be considered. 23 TTABVUE.

Applicant did not take testimony or introduce any evidence during Applicant's testimony period nor file a brief, but Applicant is not required to do so. *Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, * at 1 (TTAB 2022) (citation omitted).

² Registration No. 0738321 issued on September 25, 1962, Section 8 & 15 accepted and acknowledged; fourth renewal.

Effective November 2, 2003, Trademark Rule 2.52, 37 C.F.R. § 2.52, was amended to replace the term "typed" drawing with "standard character" drawing. A mark depicted as a typed drawing is the legal equivalent of a standard character mark. *See In re Brack*, 114 USPQ2d 1338, 1339 n.2 (TTAB 2015).

³ 5 TTABVUE. Applicant alleged additional matter in the answer in paragraphs 9-17 that are mere amplifications of the denials, setting forth Applicant's position in defending the opposition.

Record citations in this decision are to TTABVUE, the Board's publicly available docket history system. Specifically, the number preceding "TTABVUE" corresponds to the docket entry number(s), and any number(s) following "TTABVUE" refer to the page number(s) of the docket entry where the cited materials appear.

As plaintiff, Opposer bears the burden of proving its entitlement to a statutory cause of action and its Section 2(d) claim by a preponderance of the evidence. *See B&B Hardware, Inc. v. Hargis Ind., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015) (“The party opposing registration bears the burden of proof, see §2.116(b), and if that burden cannot be met, the opposed mark must be registered, see 15 U.S.C. §1063(b)”).

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. Opposer submitted a Notice of Reliance upon a copy of the notice of opposition, copies of Opposer’s registration files, copies of Opposer’s application files, website page screen shots from Opposer’s website, Applicant’s website, and third-party websites, social media page screen shots from Opposer’s social media, Applicant’s social media and third-party social media, and copies of registration files of third-party registrations, 10-14 TTABVUE. Opposer submitted the declaration testimony (with exhibits) of Christopher Balach, Vice President of Marketing and General Manager of Opposer, Hostess Brands, LLC, (Balach declaration), 15 TTABVUE;⁴ and the declaration testimony (with exhibits) of Lisa Mathison, Senior Director of Advertising & Digital Marketing of Opposer, Hostess Brands LLC (Mathison declaration), 16 TTABVUE.

⁴ Exhibits to Mr. Balach’s declaration include a copy of Opposer’s motion to compel with attached discovery requests and requests for admissions, Balach declaration, paragraphs 36-37, and exhibit U, 15 TTABVUE, which motion ultimately was granted by the Board as conceded. 9 TTABVUE. Although the requests for admissions are deemed admitted by operation of law, we find the requests for admissions are not probative.

II. Evidentiary Matters

A. Is the pleaded registration of record?

Opposer submitted a copy of the contents of the registration file of its pleaded SUZY Q'S registration by way of notice of reliance and by witness testimony. While the registration file includes a copy of the registration certificate, this does not make the registration of record as the copy of the registration certificate is not a current status and title copy. *Sterling Jewelers Inc. v. Romance & Co.*, 110 USPQ2d 1598, 1601 (TTAB 2014); Trademark Rule 2.122(d)(2), 37 C.F.R. § 2.122(d)(2). Also, Opposer's witnesses did not testify regarding the current status and title of the pleaded registration either.

Regardless, as indicated, Applicant has admitted in its answer that Opposer's pleaded registration is valid and subsisting and owned by Opposer; this admission makes the pleaded registration of record. *See Tiffany & Co. v. Columbia Indus., Inc.*, 455 F.2d 582, 173 USPQ 6, 8 (CCPA 1972).

B. Unpleaded Registrations

Opposer also submitted under notice of reliance and by witness testimony copies of the contents of the registration files of unpleaded registrations (HOSTESS, TWINKIES, DONETTES, SNO BALLS, DING DONGS, and HO HOS (identified by the witnesses as the "Hostess Brands")).⁵ Opposer's witnesses provided testimony related to these registrations but did not provide testimony or evidence as to the

⁵ In the notice of opposition, Opposer pleaded ownership of one registration and alleged the co-branding of its SUZY-Q'S mark with its "famous" HOSTESS mark. Notice of Opposition. Paragraph 6, 1 TTABVUE.

current status and title of them. Therefore, these registrations are not of record.⁶ *Sterling Jewelers Inc. v. Romance & Co.*, 110 USPQ2d at 1601.

In any event, these registrations are not probative of likelihood of confusion between Opposer's and Applicant's marks.⁷ The issue before us is whether the pleaded registration SUZY Q'S is confusingly similar to Applicant's mark SUZYQ and not whether there is confusion as to Applicant's SUZYQ mark and Opposer's HOSTESS house mark or its various other Hostess Brands product marks (i.e., HOSTESS, TWINKIES, DONETTES, DING DONGS, SNO BALLS, AND HO HOS).

⁶ Even if the registrations had been of record, there is a lack of fair notice to Applicant, and no motion to amend by Opposer has been filed under Fed. R. Civ. P. 15(b), which would provide another basis not to consider them. *Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1424 n.14 (TTAB 2014).

⁷ Both of Opposer's witnesses testified about Opposer's co-branding of its bakery goods.

Opposer submitted evidence regarding Opposer's practice of co-branding its HOSTESS house mark with its unpleaded product marks (i.e., TWINKIES, DONETTES, DING DONGS, SNO BALLS, AND HO HOS); the evidence in the record also shows the HOSTESS house mark displayed with the SUZY Q'S mark on packaging. Mathison declaration, exhibit A, 16 TTABVUE. However, the co-branding of Opposer's products is immaterial to the issue before us which is whether the pleaded registration SUZY Q'S is confusingly similar to Applicant's SUZYQ mark. *See CM Corp. v. Royal McBee Corp.*, 395 F.2d 1018, 158 USPQ 36, 37 n.4 (CCPA 1968) ("Certain exhibits reflect the parties' current practice of associating their house marks 'SCM' and 'Royal' with 'ELECTRA' and 'ELECTRESS', respectively. However, our concern here, of course, is whether 'ELECTRA', the mark actually registered, and 'ELECTRESS', the mark for which registration is sought, are confusingly similar when applied to the instant goods."); *Sealy, Inc. v. Simmons Co.*, 265 F.2d 934, 121 USPQ 456, 459 (CCPA 1959) ("Though appellant's labels include the house mark 'SEALY' in much the same manner that appellee's label includes 'SIMMONS,' this factor is not germane to the question of likelihood of confusion between the secondary trademarks. It is to be presumed that either 'BABY POSTUREPEDIC' or 'BABY POSTURE' may be used at any time without the respective house-marks."); *State Historical Society of Wisconsin v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc.*, 190 USPQ 25, 29 n.3 (TTAB 1976) (the mere fact that applicant's house mark appears in conjunction with the mark 'CIRCUS WORLD' is immaterial to the issue of likelihood of confusion in this case since applicant is seeking herein to register the mark 'CIRCUS WORLD' per se."). Therefore, this co-branding evidence of the SUZY Q's product mark with the HOSTESS mark is not probative.

C. Unpleaded Applications

Opposer also submitted copies of the contents of application files under notice of reliance and by witness testimony for the unpleaded marks HOSTESS, TWINKIES, DONETTES, SNO BALLS, DING DONGS, and HO HOS that identify clothing. Aside from the applications being unpleaded, see note 6, this evidence lacks probative value as it is only evidence of filing an application with the Office and nothing more. *Edom Lab'ys, Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012) (applications are evidence of nothing more than that they were filed with the USPTO); *In re Binion*, 93 USPQ2d 1531, 1535 n.3 (TTAB 2009) (same); *Glamorene Prods. Corp. v. Earl Grissmer Co., Inc.*, 203 USPQ 1090, 1092, n.5 (TTAB 1979) (same).

D. Third Party Registration Files

Opposer provided, by notice of reliance and by witness testimony, copies of the contents of third-party registration files; these files include a copy of the registration certificate, making these third-party registrations of record. *See Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230, 1232 n.2 (TTAB 1992) (soft copies of the registrations themselves, or the electronic equivalent thereof make third-party registrations of record).

E. Witness Testimony

The witness testimony of Mr. Balach and Ms. Mathison is marked by internal inconsistencies, insufficient context and contains many indefinite and conclusory statements, making their declaration testimony less persuasive in nature and diminishing the overall credibility, entitling the testimony to less weight. *Cerveceria Centroamericana v. Cerveceria India*, 892 F.2d 1021, 13 USPQ2d 1307, 1312 (Fed.

Cir. 1989) (the testimony of the witness regarding use was afforded little weight because it was “to say the least, vague”); *Hoyle Knitting Mills Inc. v. T.J. Manalo Inc.* 12 USPQ2d 1720, 1726-27 (TTAB 1989) (testimony marked by internal inconsistencies is much less persuasive). *Cf. Cutting Tools, Inc. v. Custanite Corp.* 220 USPQ 1006, 1009 (TTAB 1984) (where testimony was definite and there are no inconsistencies, no doubt cast on credibility).

For example, Ms. Mathison indicates the other Hostess Brands marks (HOSTESS, TWINKIES, DONETTES, SNO BALLS, DING DONGS and HO HOS) were in use either for decades in connection with clothing, clothing accessories, and merchandise; or were marketed on Opposer’s website and social media for the last six years; or were first available on Opposer’s website launch in April 2020; or Opposer elected to use the various Hostess Brands on clothing, clothing accessories, and merchandise on November 1, 2020. Mr. Balach testifies as to Opposer’s promotion and sale of apparel and goods including tote bags bearing the Hostess Brands marks (HOSTESS, TWINKIES, DONETTES, SNO BALLS, DING DONGS and HO HOS) for decades but in the same paragraph references April 2020 as the promotion and sale date for Hostess Brands marks used in connection with apparel and goods including tote bags.

III. Entitlement to a Statutory Cause of Action

A plaintiff’s entitlement to invoke a statutory cause of action for opposition or cancellation is a necessary element in every inter partes case. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020).

To establish entitlement to a statutory cause of action under Trademark Act Section 13, 15 U.S.C., § 1063, a plaintiff must demonstrate “an interest falling within

the zone of interests protected by the statute and ... proximate causation.” *Corcamore*, 2020 USPQ2d 11277, at *4 (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067-70 (2014)); *see also Meenaxi Enter., Inc. v. Coca-Cola Co.*, 2022 USPQ2d 602, at *2 (Fed. Cir. 2022). Stated another way, a plaintiff is entitled to bring a statutory cause of action by demonstrating a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020); *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014).

Because Opposer’s pleaded registration is of record by Applicant’s admission in the answer, we find that Opposer has established its statutory entitlement to oppose registration of Applicant’s mark. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000).

IV. Priority

Applicant has not sought to counterclaim to cancel Opposer’s pleaded SUZY Q’S registration, and in view of Applicant’s admission in the answer, priority is not an issue in this case as to Opposer’s SUZY Q’S mark and the “Cake” goods covered by the pleaded registration. *See King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

However, Opposer also has alleged prior rights in SUZY Q’S based on actual use on a “wide variety of merchandise, including apparel (such as t-shirts, hoodies, masks, lapel pins, baseball caps, beanies, scarfs and other clothing, among others) and goods (such as tote bags ... among others).” Notice of Opposition, paragraph 4, 1

TTABVUE. Therefore, we consider whether Opposer has established prior common law rights to any of these alleged goods in connection with the mark SUZY Q'S.

To prevail on a claim of likelihood of confusion based on ownership of common-law rights in a mark, the mark must be distinctive, inherently or otherwise, and Opposer must show priority of use. *See Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 44 (CCPA 1981). We find Opposer's SUZY Q'S mark is distinctive as there is an absence of argument or evidence showing otherwise. *Wet Seal Inc. v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1634 (TTAB 2007).

In a case involving common law rights, "the decision as to priority is made in accordance with the preponderance of the evidence." *Hydro-Dynamics Inc. v. George Putnam & Co. Inc.*, 811 F.2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987). *See also Standard Knitting Ltd. v. Toyota Jidosha Kabushiki Kaisha*, 11 USPQ2d 1917, 1929 (TTAB 2006) ("In order to establish priority based on common law rights, opposer's burden is to demonstrate by a preponderance of the evidence proprietary rights in TUNDRA and TUNDRA SPORT for clothing prior to June 1, 1998, the filing date of applicant's intent-to-use application").

Opposer's witness Ms. Mathison identifies 1961 as the first use date for the mark SUZY Q'S in connection with clothing, related clothing accessories, and merchandise. Mathison declaration, paragraph 5, 16 TTABVUE. Applicant relies on the September 21, 2020 application filing date for the use-based goods (purses); this filing date is also the constructive use date for the intent to use goods (backpacks and wallets).⁸

⁸ As indicated, Applicant did not submit any trial evidence to establish an earlier priority date.

Corporate Document Servs. Inc. v. I.C.E.D. Mgmt. Inc., 48 USPQ2d 1477, 1479 (TTAB 1998); *Zirco Corp. v. Am. Tel. and Tel. Co.*, 21 USPQ2d 1542, 1544 (TTAB 1991).

In considering the evidence of priority, “we look at the evidence as a whole, as if each piece of evidence were part of a puzzle which when fitted together, establishes prior use.” *See W. Florida Seafood Inc. v. Jet Rests. Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994). Oral testimony, if sufficiently probative, is normally satisfactory to establish priority of use. *Powermatics, Inc. v. Globe Roofing Prods. Co.*, 341 F.2d 127, 144 USPQ 430, 432 (CCPA 1965).

Although Opposer’s witness Ms. Mathison generally testified that Opposer manufactured and/or distributed “clothing and related clothing accessories and merchandise, and bakery goods using the exact mark SUZY Q’S or any variation thereof in interstate commerce since as early as 1961,” Mathison declaration, paragraph 5, we find this testimony is not sufficiently probative as it is vague and indefinite.

In particular, Ms. Mathison provided no specific testimony describing the type of clothing, clothing accessories, or merchandise used in connection with the SUZY Q’s mark, provided no specific dates of use of SUZY Q’S in connection with any particular clothing goods or clothing accessories or other merchandise, provided no information as to where or when these goods were sold, and offered no documentary evidence for any clothing, clothing accessories or merchandise under the SUZY Q’S mark.⁹ *See*

⁹ Ms. Mathison did testify to and submit documentary evidence showing promotion of apparel and other goods bearing Opposer’s other trademarks and identified by Ms. Mathison as the Hostess Brands (HOSTESS, TWINKIES, DONETTES, SNO BALLS, DING DONGS, and HO HOS). Mathison declaration, paragraphs 11, 18-23, 16 TTABVUE. As previously indicated,

Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC, 2022 USPQ2d 1035, at *8 (citing cases) (“Broad general statements by a witness that lack sufficient detail are usually not adequate, especially in the absence of corroborating documentary evidence”); *Mars Generation, Inc. v. Carson*, 2021 USPQ2d 1057, at *7 (TTAB 2021) (probative value of the witness testimony was “significantly undermined by his utter lack of detail ... or indeed any specifics other than the bald assertion that he used the marks for the service”).

Opposer’s witness Mr. Balach also provided no testimony about use of SUZY Q’s in connection with clothing and goods such as tote bags but instead testified about Opposer’s promotion and sale of apparel and goods (including tote bags) bearing its Hostess Brands marks (HOSTESS, TWINKIES, DONETTES, SNO BALLS, DING DONGS, and HO HOS) on its website www.hostesscakes.com, launched on or about April 2020. Balach declaration, paragraph 9, 15 TTABVUE.

In view of the foregoing, we find that Opposer has not established prior use of SUZY Q’s for any particular clothing goods or clothing accessories or other merchandise prior to Applicant’s application filing date.

Therefore, we consider likelihood of confusion only in connection with Opposer’s pleaded registration SUZY Q’S for cake.

V. Likelihood of Confusion

Our determination under Trademark Act Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of

this testimony is vague and inconsistent as to when Opposer started using the Hostess Brands marks in connection with apparel and other merchandise.

likelihood of confusion. *In re E. I. DuPont 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. *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 argument); *see also Herbko Int’l v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”).

The *DuPont* factors relevant to this proceeding are discussed below.

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 ... 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). We also consider, if there is evidence in the record, whether the mark has commercial weakness in the marketplace. *DuPont*, 177 USPQ at 567.

Because SUZY Q'S is registered on the Principal Register without a claim of acquired distinctiveness, we presume that the mark is inherently distinctive. Trademark Act Section 7(b), 15 U.S.C. § 1057(b). Nonetheless, we may consider whether an inherently distinctive mark is “weak as a source indicator” in the course of a *DuPont* analysis. See *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517-18 (TTAB 2016).

In connection with conceptual strength, third-party registrations may be relevant to show, in the same way dictionary definitions are used, that the mark or a portion of the mark is descriptive, suggestive, or so commonly used that the public will look to other elements to distinguish the source of the goods or services. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (evidence of third-party registrations is relevant to show the sense in which a mark is used in ordinary parlance; that is, some segment that is common to both parties' marks may have a normally understood and well-recognized descriptive or suggestive meaning); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-75 (Fed.

Cir. 2015) (third-party registration evidence may show that a term carries a highly suggestive or descriptive connotation in the relevant industry and therefore may be considered somewhat weak).

The term SUZY Q'S as used for cake is arbitrary,¹⁰ as a "known word used in an unexpected or uncommon way."¹¹ See *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180-81 (Fed. Cir. 2004) (defining an arbitrary mark as a "known word used in an unexpected or uncommon way" and observing that such marks are typically strong).

As to the term SUZY in Opposer's mark, Opposer's witness testified about two third-party registrations: SUZY SMITH (U.S. Registration No. 5048131 covering

¹⁰ Mr. Balach states that SUZY Q'S is fanciful. Balach declaration, paragraph 33, 15 TTABVUE. A term that is fanciful is "a non-dictionary word concocted by the trademark holder for its product" which is not the case here. *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 71 USPQ2d at 1180.

¹¹ Mr. Balach testified as to the naming of Opposer's cake SUZY Q's and referenced the Wayback machine web page attached as an exhibit: "This mark was coined in 1961 for their invention of a crème filled cake sandwich based in part upon the name of the daughter of Petitioner's predecessor in interest Continental Bakeries Vice President Cliff Isaacson." Balach declaration, paragraph 33 and 34, exhibit S, 15 TTABVUE.

Mr. Balach's testimony corroborates the web page which provides the same information. Notice of Reliance, 13 TTABVUE 320; Balach declaration, paragraph 34, exhibit S, 15 TTABVUE.

The web page also states on its face: "Suzy Q Is also the name of a dance step, a song, a recording artist and a popular nickname among the young and the young at heart." Opposer's Notice of Reliance, 13 TTABVUE 320.

We take judicial notice that Susy Q is "a dance step in which the hips and legs are swung sharply to one side while the shoulders and arms are bent forward and swung toward the opposite side with the clasped hands extended forward." MERRIAM-WEBSTER DICTIONARY merriam-webster.com, (accessed April 3, 2024). The Board may take judicial notice of dictionary definitions including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

goods that include clothing, backpacks, wallets, purses, and tote bags) and SUZY'S ZOO (U.S. Registration No. 2291269 covering goods that include clothing, backpacks and tote bags). Balach declaration, paragraphs 30-32, and exhibit Q and R, 15 TTABVUE 1049 and 1346-47.

Here, we have two third-party registrations in the record identifying non-food items which generally would not seem relevant. However, we have witness testimony that explains the relatedness of clothing and cake. Ms. Mathison testified that large bakeries (Krispy Kreme, Wonder, Sprinkles, TastyKake and Little Debbie) offer clothing branded items with their house marks. *See In re I.AM.Symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (adequate explanation required to explain how use of mark on different goods demonstrates weakness of the term with respect to goods in the registration).

In view of this explanation, we find these registrations may be considered probative in connection with conceptual strength of the term SUZY. Nonetheless, given the small number of registrations, we find that these registrations do not diminish the conceptual strength of the term SUZY in Opposer's mark.

As to third-party uses of SUZY or SUZY Q's, we have no evidence in the record as to use in the marketplace of SUZY or SUZY Q'S with cake. Therefore, there is no evidence of marketplace weakness in the record to contract the scope of protection of Opposer's mark in connection with any finding of commercial strength, which we discuss below.

Commercial strength 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). 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). Because fame plays a dominant role in the likelihood of confusion analysis and famous marks are entitled to a wide scope of protection, a plaintiff is obligated to clearly prove the fame of its mark. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1367 (Fed. Cir. 2012) (holding that it is the opposer's burden to prove fame of its mark); *Blue Man Prods., Inc. v. Tarmann*, 75 USPQ2d 1811, 1819 (TTAB 2005) (same).

Although the SUZY Q's mark is shown in the record as co-branded with the HOSTESS BRANDS mark, we must assess the fame of the SUZY Q's product mark separately from the house mark. In *Bose Corp. v. QSC Audio Prods. Inc.*, 63 USPQ2d at 1308, the Federal Circuit indicated that product mark fame must be proven separately:

Because fame plays such a dominant role in the confusion analysis, ... those who claim fame for product marks that

are used in tandem with a famous house mark can properly be put to tests to assure their entitlement to the benefits of fame for the product marks.

See also Promark Brands Inc. v. GFA Brands, Inc., 114 USPQ2d 1232, 1245 (TTAB 2015) (“where a party’s advertising and sales data is based on materials and packaging in which the mark at issue is almost always displayed with another mark, such data does not prove that the mark at issue possesses the requisite degree of consumer recognition”).

Opposer witnesses Mr. Balach and Ms. Mathison testified that the SUZY Q’S mark is widely recognized as indicating cake and has been in use since 1961. Balach declaration, paragraphs 3, 5, 15 TTABVUE; Mathison declaration, paragraph 8, 16 TTABVUE. Ms. Mathison also testified that SUZY Q’S is “well known and famous with respect to Petitioner’s business and related goods (including bakery goods).” Mathison declaration, paragraph 10, 16 TTABVUE.

Mr. Balach testified that the Hostess Brands (HOSTESS, TWINKIES, DONETTES, SNO BALLS, DING DONGS, and HO HOS) are well-known and famous in connection with bakery goods and that HOSTESS is widely recognized as indicating “cake” by the general public. Balach declaration, paragraphs 7, 8, 9, 21, 23, 15 TTABVUE.¹²

¹² Mr. Balach and Ms. Mathison also testified that Hostess Brands (HOSTESS, TWINKIES, DONETTES, SNO BALLS, DING DONGS, and HO HOS) are famous for branded “clothing apparel and accessories.” Balach declaration, paragraph 8, 15 TTABVUE; Mathison declaration, paragraph 24, 16 TTABVUE. However, in connection with clothing apparel or accessories, we need not consider Opposer’s testimony of fame of the SUZY Q’s mark or any Hostess Brands marks because Opposer did not establish prior rights in any mark(s) for these goods. And as already indicated, the HOSTESS mark and other marks identified as the

Opposer Hostess Brands uses a website hostesscakes.com, and social media platforms under the names Hostess or Hostess Snacks (Facebook, 1,120,155 million followers; Twitter 113,600 followers; Instagram 228,000 followers) to promote its bakery products. Balach declaration, paragraph 35, 15 TTABVUE; Mathison declaration, paragraph 48, 16 TTABVUE. The Hostess Brands' gross profit for 2022 was \$465,679,000, and the advertising and marketing expenditures for Hostess Brands was \$21.3 million, \$9.5 million, and \$6.2 million for the years ended December 31, 2022, 2021 and 2020 respectively. Balach declaration, paragraph 23, 15 TTABVUE; Mathison declaration, paragraph 49, 16 TTABVUE.

The evidence provided by Opposer's witnesses is insufficient to support a finding that SUZY Q's is a famous mark, widely recognized, or well-known. The witnesses provided no specific sales or advertising information for the SUZY Q's brand alone. Instead, Opposer's witnesses generally discussed sales, marketing and advertising expenditures as a whole for its other Hostess Brands marks (HOSTESS, TWINKIES, DONETTES, SNO BALLS, DING DONGS, and HO HOS). The social media accounts and website follower information does not support fame of the SUZY Q's mark as the website and social media accounts relate generally to the HOSTESS house mark and other Hostess Brands marks (HOSTESS, TWINKIES, DONETTES, SNO BALLS, DING DONGS, and HO HOS). Opposer has offered no specific evidence or testimony with respect to its sales or marketing expenditures or market share for its SUZY Q'S branded cake.

Hostess Brands are unpleaded, but in any event, are immaterial to whether the SUZY Q'S mark is well known or famous.

Although Opposer did provide testimony of its long use of SUZY Q'S since 1961 in connection with cake, long use of a mark alone is not sufficient evidence of fame. *See Wet Seal Inc.*, 82 USPQ2d at 1635-36 (“Long use and/or registration of a mark, without evidence of the extent of consumer exposure to or recognition of the mark over the years, is not sufficient to prove fame.”); *Saks & Co. v. Snack Food Ass’n*, 12 USPQ2d 1833, 1836 (TTAB 1989) (“In making our determination we have taken into consideration the long use and advertising of ‘SFA’ made by opposer, but the evidence of record is not sufficient for us to find ‘SFA’ is a famous mark which consumers are likely to associate with opposer when used for such different services as those rendered by applicant.”).

“[T]he fame factor is based on underlying factfinding ... [and] relevant evidence must be submitted in support of a request for treatment under the fame factor.” *Packard Press Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ 1351, 1356 (Fed. Cir. 2000). On this record, we cannot find that Opposer’s SUZY Q’S mark is well known, widely recognized, or famous.

In view of the foregoing, we find that Opposer’s mark is a conceptually strong mark that is entitled to the normal scope of protection of an inherently distinctive mark. The strength of the mark SUZY Q’S is neutral in the likelihood of confusion analysis.

B. Similarity or Dissimilarity of the Marks

We compare Applicant’s mark SUZYQ to Opposer’s registered mark SUZY Q’S for similarities or dissimilarities in appearance, sound, connotation and commercial

impression. *See Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En* 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

The test, under the first *DuPont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather, whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning, LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)).

Applicant's SUZYQ mark is in standard characters and Opposer's SUZY Q'S mark is in typed drawing form. Marks presented in standard or typed characters are not limited to any particular depiction and could conceivably be displayed in the same font style, or size, or color. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-11 (Fed. Cir. 2012); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) ([T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display").

Applicant's and Opposer's marks are similar in sound, appearance, connotation, and commercial impression in that they both contain the term SUZYQ OR SUZY Q. The addition of the apostrophe and "S" to create the possessive form ('S) in Opposer's mark (SUZY Q'S) has little significance in distinguishing the marks. *In re Binion*, 93 USPQ2d at 1534 (noting that "[t]he absence of the possessive form in applicant's mark ... has little, if any, significance for consumers in distinguishing it from the cited

mark”); *In re Curtice Burns, Inc.*, 231 USPQ 990, 992 (TTAB 1986) (finding the marks McKENZIE’S and McKENZIE “virtually identical in commercial impression”).

Also, the presence or absence of a space between SUZY and the letter Q in the parties’ marks is not a significant difference. *See Stockpot, Inc. v. Stock Pot Rest., Inc.*, 220 USPQ 52, 54 (TTAB 1983) (STOCK POT and STOCK POT are “phonetically identical and visually almost identical”), *aff’d*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984); *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (BEEFMASTER and BEEF MASTER are “practically identical”).

We find the marks are similar in appearance, sound, meaning and commercial impression. The first *DuPont* factor weighs in favor of likelihood of confusion.

C. Similarity or Dissimilarity of the Goods

Under the second *DuPont* factor we consider the “similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *DuPont*, 177 USPQ at 567. We evaluate the relatedness of the goods based on their identifications in the subject application and the pleaded registration. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014).

“[G]oods that are neither used together nor related to one another in kind may still ‘be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis.’” *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1356 (Fed. Cir. 2004) (citing *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000)). “Testimony that third-party companies sell both types of goods is pertinent to the

relatedness of the goods.” *Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 2024 USPQ2d 293, at *3 (Fed. Cir. 2024), (citing *Recot, Inc. v. Becton*, 54 USPQ2d 1898). See e.g., *Wet Seal, Inc.*, 82 USPQ2d at 1640 (witness testimony of three companies using single house mark for clothing and fragrances supported finding of relatedness).

As indicated, Opposer’s goods are “Cake” and Applicant’s goods are “Backpacks; Wallets” and “purses.”

Ms. Mathison testified that Opposer partnered in 2017 with a fashion designer to offer a limited edition handbag bearing the HOSTESS Brands name. Mathison declaration, paragraphs 16-17, 16 TTABVUE. Ms. Mathison testified that Opposer has promoted and sold apparel and goods (including tote bags) bearing its Hostess Brands marks (HOSTESS, TWINKIES, DONETTES, SNO BALLS, DING DONGS, and HO HOS) on its official consumer website and e-store and through third parties.¹³ Mathison declaration, paragraph 11, 16 TTABVUE.

¹³ Ms. Mathison also testified generally that Opposer and Applicant are “offering the same or related type of goods, namely handbags and tote bags” but provided no specific testimony of relatedness as to these goods. Mathison declaration, paragraph 29, 16 TTABVUE. Nor did Ms. Mathison provide specific testimony about Opposer offering tote bags under the SUZY Q’S mark.

In connection with her testimony, Ms. Mathison generally referenced Opposer’s social media pages and Opposer’s web page exhibits, but did not provide specific testimony about them. So although one of the social media posts shows Opposer offered a drawstring bag under the DONETTES product mark and a web page taken from the Wayback machine shows a tote bag with a small Hostess Brands logo house mark, absent specific witness testimony, this evidence is hearsay. See *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1040 (TTAB 2018) (absent testimony from a competent witness website print-outs are hearsay and do not prove that opposer has offered products or services under that pleaded mark); *Calypso Tech., Inc. v. Calypso Cap. Mgmt., LP*, 100 USPQ2d 1213, 1219 (TTAB 2011) (“In particular, with respect to articles and other material published on websites

Ms. Mathison testified that many “large commercial bakery companies ... offer clothing and clothing accessories (including bags) branded with the same marks as their bakery goods to the public on their official websites” and “estores.” Mathison declaration, paragraph 37, 16 TTABVUE. Ms. Mathison identifies LITTLE DEBBIE, SPRINKLES, TASTYKAKE, WONDER, and KRISPY KREME as large commercial bakeries that offer bakery goods and branded clothing and clothing accessory items under the same mark. Mathison declaration, paragraphs 32-37 and accompanying exhibits P-T, 16 and 18 TTABVUE. Ms. Mathison did not provide specific testimony about any of the particular goods displayed on any of the third-party commercial bakery web pages or social media page screen shots submitted as exhibits with her testimony.

The third-party web page and social media evidence shows on its face that generally, these large bakery companies offer clothing goods such as t-shirts, socks, hats, hoodies and merchandise such as drinking cups branded with a house mark.¹⁴ Although the evidence shows on its face that one of the third-parties (Wonder) offered a grocery tote and drawstring bag, this merchandise does not appear to be a clothing accessory nor commonly offered by the other commercial bakeries identified by Opposer.

or in publications, we have considered them only for the fact that they have been published and may have been viewed, but not for the truth of the statements made in them.”).

¹⁴ While the content of the screen shots of the social media or web pages is hearsay as to the truth of the statements contained thereon, we have considered this evidence as indicating that some of the public using the internet may have been exposed to the information contained in the screen shots.

As previously indicated, Opposer also made of record third-party registrations. These registrations are for LITTLE DEBBIE marks, SPRINKLES marks and KRISPY KREME marks that almost all cover clothing.¹⁵ Mathison declaration, paragraphs 38-44, 16 TTABVUE and exhibits U, V, Y, X, Z, AA, 19 TTABVUE; Opposer's notice of reliance, exhibit 21, 11 TTABVUE. Third-party registrations are not evidence of use or that the public is familiar with the mark's use on those goods. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973).

We also have the two third-party registrations SUZY SMITH and SUZYS ZOO which show the offering of clothing and tote bags, handbags, backpacks and purses under the same mark. However, the record is devoid of any evidence suggesting that wallets, handbags and backpacks may emanate from these large commercial bakery companies under a house mark or product mark and that consumers are accustomed to seeing backpacks, wallets and purses branded with a commercial bakery house mark or product mark.

We find that the evidence of record does not establish that cake and wallets, backpacks and purses are related.

The second *DuPont* factor weighs against a finding of likelihood of confusion.

¹⁵ Although one of the Little Debbie registrations does identify "reusable shopping bags; backpacks; coin purses; duffel bags; wallets; umbrellas; drawstring bags," Opposer's third-party social media evidence (Facebook and Instagram) for Little Debbie branded items does not reflect on its face such use in connection with these goods. Ms. Mathison did not provide specific testimony as to any of the goods identified on these social media pages.

D. The established, likely-to-continue trade channels, and the classes of purchasers

Under the third *DuPont* factor, we consider the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567. We also consider the portion of the fourth *DuPont* factor that addresses the “buyers to whom sales are made.” *DuPont*, 177 USPQ at 567. *See Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *7 (TTAB 2021) (considering the portion of the fourth *DuPont* factor, buyers to whom sales are made in conjunction with the second and third *DuPont* factors).

The purchasers of Opposer’s cake goods are the general public. Balach declaration, paragraph 5, 15 TTABVUE. Similarly, Applicant’s goods “are consumer goods sold to the general public (internet shoppers looking for handbags).” Mathison declaration, paragraphs 30, 31 and 45, 16 TTABVUE.

Here, both Opposer’s and Applicant’s identifications are unrestricted as to trade channels and customers. Moreover, in the absence of specific limitations in Applicant’s and Opposer’s respective identifications, we must assume that the products set forth in the identifications are sold in all normal channels of trade for goods of that type and that they would be purchased by all potential customers. *See CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *39-41 (TTAB 2020) (“[A]bsent an explicit restriction in the application, the identified goods in the application must be presumed to move in all channels of trade that would be normal for such goods and to all usual prospective purchasers for goods of that type.”).

Opposer's witnesses testified that its goods are offered in retail consumer and grocery stores and online grocery stores (such as Walmart, Albertson, UberCorner Shop, Instacart), convenience stores, and at vending machines. Mathison declaration, paragraphs 8, 9, 16 TTABVUE; Balach declaration, paragraphs 5, 6, 15 TTABVUE. Opposer's witnesses included website print-outs from online grocery stores showing the offering of Opposer's goods for purchase. Balach declaration, paragraphs 5, 6 and exhibit A, 15 TTABVUE; Mathison declaration, paragraph 9 and exhibit C, 16 TTABVUE.

Opposer's witness Ms. Mathison testified that Applicant sells handbags on Applicant's website and on Applicant's social media accounts such as Facebook. Mathison declaration, paragraph 28, 16 TTABVUE. Ms. Mathison included as an exhibit print-outs from Applicant's website and Applicant's social media pages. Mathison declaration, exhibit O, 17 TTABVUE.

The fact alone that both parties may offer their goods online is insufficient to find overlapping channels of trade.¹⁶ See *Inter Ikea Systems B.V. v. Akea LLC*, 110 USPQ2d 1734, 1743 (TTAB 2014) (rejecting opposer's theory that "any goods or services sold through retail stores, catalogs or over the Internet move through the same channels of trade and, therefore, for all intents and purposes, all goods and services potentially move through the same channels of trade"); *Parfums de Coeur, Ltd. v. Lazarus*, 83 USPQ2d 1012, 1021 (TTAB. 2007) ("the mere fact that goods and

¹⁶ Although Mr. Balach and Ms. Mathison stated that there is trade channel overlap as to clothing goods, as previously stated, Opposer did not establish prior rights for clothing goods in connection with the SUZY Q'S mark and here we consider those trade channels for the goods identified in the pleaded registration, "Cake."

services may both be advertised and offered through the Internet is not a sufficient basis to find that they are sold through the same channels of trade”).

Therefore, we find the *DuPont* factor relating to channels of trade neutral.

E. Balancing the Factors

We have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. The strength of the SUZY Q'S mark is neutral. Although Applicant's mark is nearly identical to Opposer's pleaded mark, the goods are unrelated and the trade channels neutral. We find confusion unlikely.

Decision: The opposition is dismissed.