

This Opinion is not a  
Precedent of the TTAB

Hearing: August 2, 2022

Mailed: August 18, 2022

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*In re Panini America, Inc.*

Serial No. 90004393

Norman H. Zivin, Tonia A. Sayour, and Kira McCarthy of Wolf, Greenfield & Sacks, P.C., for Panini America, Inc.

Andrea R. Hack, Trademark Examining Attorney, Law Office 108  
Kathryn E. Coward, Managing Attorney.

Before Zervas, Heasley, and Allard  
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Panini America, Inc., seeks registration on the Principal Register of the standard character mark CHOICE for “Collectible trading cards; Sports trading cards” in International Class 16.<sup>1</sup>

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the basis of likelihood of confusion with

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<sup>1</sup> Application Serial No. 90004393 was filed on June 16, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use anywhere and in commerce since at least as early as November 12, 2018.

the marks in the following eight registrations, owned by four registrants, identifying goods in Class 16:<sup>2</sup>

<b>Registrant</b>	<b>Reg. No.</b>	<b>Mark</b>	<b>Pertinent Goods</b>
Major League Baseball Players Association	3884422	PLAYERS CHOICE CLUB	Trading cards, namely, paper and cardboard trading cards.
	5728013	PLAYERS CHOICE ACADEMY	Trading cards, namely, paper and cardboard trading cards.
	4432795	PLAYERS CHOICE DIAMOND CLUB	Trading cards, namely, paper and cardboard trading cards.
	2553756		Trading cards.
	2537150	PLAYERS CHOICE	Trading cards.
President's Choice Trading Cards Inc.	5167943	PRESIDENT'S CHOICE	Trading cards.
Choice Marketing Inc.	2764342		Customized trading cards for organizations and individuals.
The Upper Deck Company, Inc.	3754752	COLLECTOR'S CHOICE	Trading cards. Cl. 16.

<sup>2</sup> Reg. No. 3884422 (in standard characters), issued on the Principal Register on Nov. 30, 2010, renewed. Reg. No. 5728013 (in standard characters, with "ACADEMY" disclaimed) issued on the Principal Register on April 16, 2019. Reg. No. 4432795 (in standard characters) issued on the Principal Register on Nov. 12, 2013, Section 8 declaration accepted. Reg. No. 2553756 (composite, with "MLB" disclaimed) issued on the Principal Register on March 26, 2002, renewed. Reg. No. 2537150 (typed drawing) issued on the Principal Register on Feb. 5, 2002, renewed. A typed drawing is the legal equivalent of a standard character mark. TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 807.03(i) (July 2022). Reg. No. 5167943 (in standard characters) issued on the Principal Register on March 21, 2017. Reg. No. 2764342 (composite, with "MARKETING SPORTSCARDS" disclaimed, issued on the Principal Register on Sept. 16, 2003, renewed. Reg. No. 3754752 (standard characters, "COLLECTOR'S" disclaimed) issued on the Principal Register on March 2, 2010, renewed.

When the refusal was made final, Applicant requested reconsideration, and two weeks later, filed this appeal.<sup>3</sup> After the Examining Attorney denied the request for reconsideration,<sup>4</sup> Applicant requested that the appeal be suspended and the file remanded to the Examining Attorney for consideration of additional evidence in support of a second request for reconsideration.<sup>5</sup> The Board granted Applicant's request and remanded the file to the Examining Attorney,<sup>6</sup> who denied the second request for reconsideration.<sup>7</sup> The appeal then resumed.<sup>8</sup> The Examining Attorney and counsel for Applicant fully briefed the appeal and argued their respective positions at an oral hearing. For the reasons discussed below, we affirm the refusal to register.

## **I. Likelihood of Confusion**

Section 2(d) of the Trademark Act provides that an applied-for mark may be refused registration if it:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive....

15 U.S.C. § 1052(d).

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<sup>3</sup> 1 TTABVUE, filed Aug. 12, 2021. References to the briefs and other materials in the appeal record refer to the Board's TTABVUE online docketing system.

<sup>4</sup> 4 TTABVUE, Aug. 17, 2021 Office Action (response to request for reconsideration). Citations to the prosecution file refer to the USPTO's Trademark Status & Document Retrieval ("TSDR") system and identify the documents by title, date, and page in the downloadable .pdf version.

<sup>5</sup> 10 TTABVUE.

<sup>6</sup> 11 TTABVUE.

<sup>7</sup> 12 TTABVUE, Dec. 15, 2021 Office Action (response to second request for reconsideration).

<sup>8</sup> 13 TTABVUE.

To determine whether there is a likelihood of confusion between the marks under Section 2(d), we analyze the evidence and arguments under the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 566 (CCPA 1973) (“*DuPont*”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019). “Not all of the *DuPont* factors are necessarily relevant or of equal weight in a given case, and any one of the factors may control a particular case. ... Only the *DuPont* factors of significance to the particular mark need be considered in the likelihood of confusion analysis.” *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 2022 USPQ2d 513, \*7 (Fed. Cir. 2022) (internal citation and punctuation omitted). “In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services.” *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, \*29 (TTAB 2021) (citing *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)).

#### **A. Similarity of the Goods, Channels of Trade, and Classes of Customers**

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration...,” and the third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567.

“With regard to the goods, channels of trade and classes of consumers, we must make our determinations under these factors based on the goods as they are identified in the application and cited registration[s].” *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018). *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017) (“The Board properly analyzed likelihood of confusion based on the mark as applied to the goods recited in Symbolic’s application compared to registrants’ marks and the goods recited in their registrations.”).

Here, seven of the eight cited registrations identify “trading cards.” Since the goods in these registrations are broadly described, they are deemed to encompass all goods of the nature and type described therein. *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413 (TTAB 2018). As such, they are deemed to encompass Applicant’s “Collectible trading cards; Sports trading cards.” Three of the registrations specify that their trading cards are “paper and cardboard,” but Applicant does not limit or restrict the composition of its trading cards, so this specification does not distinguish the goods. The remaining registration, i.e., the eighth one, specifies “Customized trading cards for organizations and individuals,” but as the Examining Attorney observes, “The broad wording of ‘customized trading cards for organizations and individuals’ presumably also encompasses all trading cards, as presumably consumers could customize any trading cards, and ‘organizations and individuals’ refers to any consumer.”<sup>9</sup> Applicant does not address these points in its main or reply briefs.

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<sup>9</sup> Examining Attorney’s brief, 16 TTABVUE 8.

We find accordingly that Applicant's collectible trading cards and sports trading cards are subsumed and included among the trading cards identified in the cited registrations, and legally identical thereto. *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (legally identical goods); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) ("Applicant's broadly worded identification of 'furniture' necessarily encompasses Registrant's narrowly identified 'residential and commercial furniture.'").

"Because the identifications of goods in the application and registration[s] are legally identical and unrestricted as to trade channels, we must also presume that both Applicant's and Registrant[s'] legally identical products travel in the same ordinary trade and distribution channels and will be marketed to the same potential consumers." *In re Hughes Furniture*, 114 USPQ2d at 1137 (citing *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion) and *In re Yawata Iron & Steel*, 159 USPQ at 723 (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same)).

The similarity and nature of the goods, and of established, likely-to-continue trade channels thus weigh in favor of finding a likelihood of confusion under the second and third *DuPont* factors.

#### **B. Consumer Sophistication and Care**








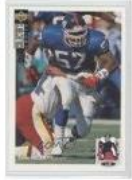
Under the fourth *DuPont* factor, we consider "[t]he conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing."

*DuPont*, 177 USPQ at 567.

Applicant contends that its trading cards sell for significant sums, often for several hundreds of dollars,<sup>10</sup> to sophisticated collectors who “exercise a high degree of care when making purchasing decisions because they must pay attention to the items that they are collecting.”<sup>11</sup>

As the Examining Attorney correctly observes, though,<sup>12</sup> Applicant’s evidence shows trading cards offered for sale from less than one dollar to \$1,123.23 for a Michael Jordan rookie card:

COLLECTOR'S CHOICE Save this search

 <p>1994 MICHAEL JORDAN U.D. Collector's Choice #635 Rookie eBay (1stclassbyalicia) <b>Buy: \$1,123.23</b></p>	 <p>1994 Collector's Choice #632 Barry Bonds Up Close - San Francisco Giants eBay (randomsl) <b>Buy: \$0.99</b></p>	 <p>1994 Upper Deck Collector's Choice Gold Signature John Glenn eBay (comc_consignment) <b>Buy: \$3.99</b></p>	 <p>1994-95 Upper Deck Collector's Choice Byron Houston #321 eBay (comc_consignment) <b>Buy: \$0.99</b></p>
 <p>1994-95 Upper Deck Collector's Choice Silver Signature Derek Jeter <b>Buy: \$3.13</b></p>	 <p>1994 Collector's Choice #629 Omar Vizquel <b>Buy: \$0.99</b></p>	 <p>Barry Bonds 1994 Upper Deck Collector's Choice #632 SF <b>Buy: \$2.47</b></p>	 <p>1994 Upper Deck Collector's Choice Corey Miller #291 <b>Buy: \$0.99</b></p>

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<sup>10</sup> Applicant’s brief, 14 TTABVUE 13-14 (citing Nov. 22, 2021 request for reconsideration Ex. D at 20, showing 2021 Bowman Chrome Baseball HTA Choice Box retailing at \$345.00).

<sup>11</sup> Applicant’s reply brief, 17 TTABVUE 5.

<sup>12</sup> Examining Attorney’s brief, 16 TTABVUE 13-14.

<sup>13</sup> Nov. 22, 2021 request for reconsideration at 17, ex. C, collectors.com/trading-cards/collectors-choice-collectors-choice 11/19/2021.

“Just as Michael Jordan’s talent (even in baseball) is rare, the card that sells for significant sums is also rare,” the Examining Attorney notes. “The applicant’s evidence clearly shows that the majority of trading cards sell for relatively insignificant sums.”<sup>14</sup>

We agree. The subject Application has no restriction or limitation as to the price of its trading cards, so Applicant’s goods could include lower cost cards, like the majority shown above, that may be purchased without a high degree of care. *In re FabFitFun*, 127 USPQ2d at 1673. “When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” *Id.* (quoting *Recot Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000)).

Since Applicant’s and Registrants’ identifications of goods contain no limitations as to classes of customers, these customers may come from all walks of life, at all levels of education and sophistication. *See Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, \*50-51 (TTAB 2022) (“prospective purchasers for the parties’ identified products include a variety of consumers, including consumers that do not have significant knowledge or experience with these ... products”). Some of these customers may exercise discernment and care in their choice of trading cards, but others, newcomers to the field, may not be so sophisticated or careful. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (where the customer class is mixed, the Board considers likelihood of

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<sup>14</sup> Examining Attorney’s brief, 16 TTABVUE 14.



confusion from the perspective of “the least sophisticated potential purchasers”) *cited in In re Information Builders Inc.*, 2020 USPQ2d 10444, \*4 (TTAB 2020). In fact, given the legal identity of the goods and the overlapping use of CHOICE in Applicant’s and Registrants’ marks, even careful purchasers who notice differences in the marks may ascribe them, not to differences in the goods’ sources, but to variations in product lines emanating from a single source. *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1739 (TTAB 2018).

Consequently, the conditions under which and buyers to whom sales are made do not mitigate the likelihood of confusion, and the fourth *DuPont* factor is neutral.

### **C. Number and Nature of Similar Marks**

The sixth *DuPont* factor “considers ‘[t]he number and nature of similar marks in use on similar goods.’” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). Third parties’ registration and use of similar marks can bear on the strength or weakness of registered marks in two ways: conceptually and commercially. They can:

show that a term “may have a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that [term] is relatively weak,” and “can show that customers have been educated to distinguish between different marks on the basis of minute distinctions.”

*Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1036 (TTAB 2016) (quoting *Jack Wolfskin Ausrustung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) and *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)).

Applicant suggests, based on such third-party evidence, that “CHOICE” is weak and at most suggestive when used on collectible and sports trading cards.<sup>15</sup> Applicant notes that:

the Examining Attorney cited eight variants of CHOICE-containing marks (owned by four different entities) used for similar goods. The co-existence of the cited marks on the Trademark Register establishes that consumers are able to distinguish these marks based on their slight differences. These active third-party registrations have so diluted the distinctiveness of the formative “choice” such that marks incorporating the term are entitled to a narrow scope of protection.<sup>16</sup>

According to Applicant, these third-party registrations corroborate the dictionary definitions of “choice”: “the act of picking or deciding between two or more possibilities” or “the best part” or “of high quality.”<sup>17</sup> To this, Applicant adds website “evidence of seven third-party uses of CHOICE-containing marks for collectible and sports trading cards”:<sup>18</sup>

- CHOICE MARKETING SPORTCARDS;
- PRESIDENT’S CHOICE TRADING CARDS;
- COLLECTOR’S CHOICE;
- BOWMAN CHROME BASEBALL HTA CHOICE BOX, Chicagoland Sports Cards;
- FOUNDER’S CHOICE TRADING CARD;
- PLAYERS CHOICE TRADING CARDS; and
- PLAYERS CHOICE SPORTS.<sup>19</sup>

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<sup>15</sup> Applicant’s brief, 14 TTABVUE 7.

<sup>16</sup> Applicant’s brief, 14 TTABVUE 9.

<sup>17</sup> Applicant’s brief, 14 TTABVUE 8, citing Merriam-Webster.com/dictionary 2/9/21, Feb. 10, 2021 Response to Office Action ex. A, at 11-15.

<sup>18</sup> Applicant’s brief, 14 TTABVUE 9.

<sup>19</sup> Nov. 22, 2021 request for reconsideration, exs. A-G, at 8, 10-30, request for remand, 10 TTABVUE 6-28. ChoiceSportsCards.com, PresidentsChoiceTradingCards.com,

Based on this evidence, Applicant contends that “the crowded field of CHOICE-Formative MARKS in the trading card space mitigates likelihood of confusion.”<sup>20</sup>

Applicant likens this case to *Knight Textile Corp. v. Jones Investment Co., Inc.*, 75 USPQ2d 1313 (TTAB 2005). In that case, the Board found no likelihood of confusion between the opposer’s mark, ESSENTIALS, and the applicant’s mark, NORTON MCNAUGHTON ESSENTIALS, both for women’s clothing. The applicant submitted dictionary definitions and evidence of twenty-three third-party registrations (owned by twenty-one different owners) of marks including the word ESSENTIALS for clothing items. Based on this evidence, the Board found that “ESSENTIALS” was so highly suggestive for clothing that “purchasers are able to distinguish among various ESSENTIALS marks by looking to other elements of the marks,” such as the applicant’s added house mark, NORTON MCNAUGHTON. *Id.* at 1314-17. As in *Knight Textile*, Applicant contends, “CHOICE” is the weak common element: “Additions to marks are sufficient to avoid a finding of likelihood of confusion if the marks convey significantly different commercial impressions or if the matter common to the marks is not likely to be perceived by purchasers as distinguishing source.”<sup>21</sup>

We find, however, that Applicant’s reliance on *Knight Textile* is misplaced. In that case, the applicant distinguished its mark from the opposer’s ESSENTIALS mark by **adding** the source-identifying words NORTON MCNAUGHTON. Here, Applicant **subtracts** all other distinguishing elements, leaving only the common element

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Collectors.com, ChicagolandSportsCards.com, ParksideCards.com, Walmart.com, PlayersChoiceSports.com, 11/19/21.

<sup>20</sup> Applicant’s reply brief, 17 TTABVUE 4 (initial capitalization of words omitted).

<sup>21</sup> Applicant’s brief, 14 TTABVUE 11.

CHOICE. As the Examining Attorney correctly observes, “Each of the cited registrations has another element in their marks to indicate source. Applicant’s mark is the sole mark without anything to show source other than the dilute[d], shared portion of the registrants’ marks.”<sup>22</sup> Applicant’s evidence does not weaken Registrants’ marks in a way that distinguishes Applicant’s mark.

Moreover, several of the websites Applicant adduces display Registrants’ marks—such as CHOICE MARKETING SPORTSCARDS, COLLECTOR’S CHOICE, and PRESIDENT’S CHOICE. Applicant acknowledges this overlap in its reply brief, reducing its claim of third-party users to four.<sup>23</sup> If we add those four third-party users to the four Registrants, Applicant concludes, “the record consists of at least 8 different owners of marks containing the word CHOICE in the trading card space.”<sup>24</sup>

That number, however, falls far short of the 23 ESSENTIALS marks owned by 21 different owners in *Knight Textile*, 75 USPQ2d at 1314. And it is “is a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant in both *Jack Wolfskin* and *Juice Generation*.” *Sabhani v. Mirage Brands*, 2021 USPQ2d 1241, \*25-26 (TTAB 2021) (quoting *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d*, 777 Fed. Appx. 516 (Fed. Cir. 2019)). *See Juice Generation*, 115 USPQ2d at 1674 (PEACE and LOVE deemed weak terms when used in connection with juice and restaurant services due to 26

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<sup>22</sup> Examining Attorney’s response to request for reconsideration, Dec. 15, 2021 at 2.

<sup>23</sup> Applicant’s reply brief, 17 TTABVUE 4-5.

<sup>24</sup> *Id.* at 5. We accept Applicant’s representation that the website evidence of PLAYER’S CHOICE trading cards were not sponsored by the Major League Baseball Players Association, as the trading cards were not related to baseball.

third-party registrations and uses of marks containing the words “peace” and “love” used for similar goods and services). On the whole, the record does not demonstrate such ubiquitous or considerable commercial use of CHOICE that trading card customers “have been educated to distinguish between different marks on the basis of minute distinctions.” *Juice Generation*, 115 USPQ2d at 1674.

Nor does the record demonstrate that the cited registered marks are conceptually weak. We presume the cited registered marks are inherently distinctive—at least suggestive—because they registered on the Principal Register, 15 U.S.C. § 1057(b). *See In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) (“inasmuch as the cited mark is registered on the Principal Register, we must assume that it is at least suggestive....”) *quoted in In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517 (TTAB 2016). Their disclaimers tacitly admit that certain terms (such as “MLB,” or “MARKETING SPORTSCARDS”) are not inherently distinctive. *Sock It to Me, Inc. v. Aiping Fan*, 2020 USPQ2d 10611, \*10 (TTAB 2020). But none disclaim “CHOICE.” Their use of “CHOICE” may suggest the desirability and quality of their goods, but all contain other elements that enable them to identify and distinguish their goods from one another, and to indicate their source. Consequently, we accord the cited registrations the normal scope of protection to which marks containing suggestive terms are entitled. 15 U.S.C. § 1057(b); *see Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (stating that likelihood of confusion strength varies along a spectrum from very strong to very weak).

In sum, the number and nature of similar marks in use on similar goods do not weaken Registrants' marks sufficiently to distinguish Applicant's mark. The sixth *DuPont* factor is therefore neutral.

**D. Similarity of the Marks**

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrants' marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). "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) *aff'd* 777 Fed. Appx. 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

Applicant argues that "The marks in this case are similar only to the extent that they contain the term CHOICE, a weak term when used in connection with the parties' goods."<sup>25</sup> If we consider the marks in their entireties, as we must, "[t]he additional elements in the cited marks include significant and distinguishing features,"<sup>26</sup> Applicant contends. "[S]ince Applicant's mark has no other elements, this is the very thing that distinguishes it from the other marks."<sup>27</sup> "The marks do not look or sound the same because Applicant's mark is the single one-word and one-syllable 'CHOICE' while the registered marks all have additional words, and some

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<sup>25</sup> Applicant's brief, 14 TTABVUE 14.

<sup>26</sup> Applicant's brief, 14 TTABVUE 13.

<sup>27</sup> Applicant's reply brief, 17 TTABVUE 3.

include unique design elements and stylization.”<sup>28</sup> In its reply brief, Applicant contends that the possessive nouns prefacing most of the cited registered marks convey a connotation and commercial impression that differs from Applicant’s mark:

The registered marks contain possessive nouns which indicates that “choice” means “the preferred option” (as in PRESIDENT’S CHOICE, COLLECTOR’S CHOICE, PLAYERS CHOICE). The fact that these marks utilize an apostrophe further underscores that consumers would interpret these marks in that sense. Indeed, when the terms in the cited registrations are read together, **they connote a selection made by someone** (e.g., presidents choosing, collectors choosing, or players choosing).

On the other hand, Applicant’s mark does not have a possessive noun and is the singular word CHOICE. ... Because there are no additional elements to give the term any other context, Applicant’s mark espouses the definition of a **higher quality, such as prime**.<sup>29</sup>

These attempted distinctions are unavailing. As the Examining Attorney puts it, “Each of the cited registrations contains some element (or multiple elements) that serves to differentiate one mark from the others, but the word ‘CHOICE’ in applicant’s mark has no other distinguishing element alongside it or incorporated into it to distinguish it from any of the registrants’ marks.”<sup>30</sup> Applicant’s mark contains no “minute distinctions” differentiating it from the registered marks. *Juice Generation*, 115 USPQ2d at 1674.

Applicant’s mark is, in fact, completely subsumed in the registered marks. “Likelihood of confusion often has been found where the entirety of one mark is

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<sup>28</sup> Applicant’s brief, 14 TTABVUE 11.

<sup>29</sup> Applicant’s reply brief, 17 TTABVUE 3-4 (emphases added).

<sup>30</sup> Examining Attorney’s brief, 16 TTABVUE 10.

incorporated within another.” *Hunter Indus., Inc. v. The Toro Co.*, 110 USPQ2d 1651, 1660 (TTAB 2014) (applicant’s PRECISION mark incorporated in opposer’s PRECISION DISTRIBUTION CONTROL mark) (citing *inter alia In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257 (Fed. Cir. 2010) (applicant’s mark ML is similar to registrant’s mark ML MARK LEES, both for skin care products).

*Mighty Leaf Tea* is instructive, as there, like here, the applicant contended that “the additional words MARK LEES distinguish the registrant’s mark from ML standing alone.” *Id.* at 1260. The Court of Appeals for the Federal Circuit nonetheless affirmed the Board’s finding of confusing similarity, agreeing that “the presence of an additional term in the mark does not necessarily eliminate the likelihood of confusion if some terms are identical.” *Id.* “The Board found that the presence of the name MARK LEES in the registered mark does not diminish the likelihood of confusion, because consumers familiar with the registered mark are likely to assume that applicant’s ML is merely a variation or shortened version of the registered mark.” *Id.* at 1258.

Here, as in *Mighty Leaf Tea*, Applicant’s adoption of CHOICE, standing alone, could lead trading card consumers to believe, mistakenly, that the registered marks are variations of its brand. “Consumers encountering these marks could mistakenly believe the former [applicant’s mark] is a variation on the registered mark used to identify a particular line ..., but nonetheless emanating from a common source.” *In re Dare Foods Inc.*, 2022 USPQ2d 291, \*11 (TTAB 2022). *See also Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at \*7 (TTAB 2019) (“ROAD WARRIOR look, sounds, and conveys the impression of being a line extension of



WARRIOR.”). Applicant states that the Examining Attorney provides no evidence that consumers would perceive CHOICE as an abbreviated version of Registrant’s marks.<sup>31</sup> But the marks are used on legally identical goods, so the degree of similarity needed to support a finding of likely confusion declines. *See Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) cited in *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008). And Applicant’s CHOICE mark is subsumed in Registrants’ marks, yielding the impression that the registered marks are line extensions of Applicant’s brand.

“The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific impression of marks.” *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018). Customers’ perceptions may differ from Applicant’s intent. *In re Yale Sportswear Corp.*, 88 USPQ2d 1121, 1125 (TTAB 2008) (“[A]n applicant’s or registrant’s intended interpretation of the mark is not necessarily the same as the consumer’s perception of it.”). Trading card customers are unlikely to perceive the fine distinction Applicant draws between Registrants’ marks connoting “**a selection made by someone**” and Applicant’s mark connoting “**a higher quality, such as prime.**”<sup>32</sup> The connotations intertwine, as collectors are more likely to select a prime, higher quality trading card.<sup>33</sup> Quality heightens desirability. So the marks convey a similar connotation and

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<sup>31</sup> Applicant’s brief, 14 TTABVUE 5, 12.

<sup>32</sup> Applicant’s reply brief, 17 TTABVUE 3-4 (emphases added).

<sup>33</sup> As Applicant stated in its main brief, Registrants’ marks admit of both interpretations: “[C]onsumers would understand the cited registrations as meaning either the preferred option of two or more possibilities (as in PRESIDENT’S CHOICE or COLLECTOR’S

commercial impression.

On the whole, then, we find that the marks are more similar than dissimilar, and the first *DuPont* factor weighs in favor of finding a likelihood of confusion.

## **II. Conclusion**

We have considered all of the arguments and evidence of record and all relevant *DuPont* factors. We have found that the marks at issue are similar; that Applicant's identified goods are legally identical to Registrants' goods; that they would move through the same trade channels to the same classes of consumers, some of whom may not exercise care and sophistication in their purchases, as the goods are presumed to include relatively inexpensive varieties of trading cards; and that the number and nature of similar marks in use on similar goods do not weaken Registrants' marks sufficiently to distinguish Applicant's mark. We conclude that Applicant's mark so resembles the cited registered marks as to be likely, when used on or in connection with Applicant's identified goods, to cause confusion, or to cause mistake, or to deceive. 15 U.S.C. § 1052(d).

“Avoidance of this kind of confusion about the provenance of goods is the very problem to which the Lanham Act was directed. *See DuPont*, 476 F.2d at 1360 (“The basic goal of the Act, which dealt with a good deal more than registration, was “the protection of trademarks, securing to the owner the good will of his business and protecting the public against spurious and falsely marked goods.”).” *Mighty Leaf Tea*, 94 USPQ2d at 1260.

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CHOICE) or as connoting a higher quality, such as prime (as in PLAYERS CHOICE CLUB or PLAYERS CHOICE DIAMOND CLUB).” Applicant's brief, 14 TTABVUE 8.

**Decision:** The refusal to register Applicant's mark CHOICE is affirmed.