

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: March 4, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*GTFM, Inc.*  
*v.*  
*Fresh Body, LLC*  
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Opposition No. 91209621  
to Application Serial No. 85451172  
—

Peter J. Vranum of Gordon Herlands Randolph & Cox  
for GTFM, Inc.

Daniel H. Bliss and Robert Hernquist of Howard & Howard  
for Fresh Body, LLC.

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Before Quinn, Cataldo and Gorowitz, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Fresh Body, LLC (“Applicant”) filed an application to register the mark shown  
below



(FRESH and BODY disclaimed) for “non-medicated skin care preparations, namely, lotions” in International Class 3; and “clothing, namely, shirts, pants, shorts,

sweatshirts, sportswear, in the nature of sweat pants and tank tops” in International Class 25.<sup>1</sup> The application includes a description of the mark as follows: “The mark consists of the stylized letters ‘F’ and ‘B’ inside two circles placed in between the words ‘FRESH’ and ‘BODY.’” The application also indicates that “[c]olor is not claimed as a feature of the mark.” Further, the application states that Applicant owns Registration No. 3939616.

GTFM, Inc. (“Opposer”) opposed registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used in connection with Applicant’s goods, so resembles Opposer’s previously used and registered FB marks for clothing in International Class 25 as to be likely to cause confusion.<sup>2</sup>

Applicant, in its answer, denied the salient allegations of likelihood of confusion.

### **Evidentiary Objections**

Before addressing the merits of this proceeding, we turn to consider the parties’ respective objections regarding each other’s Internet evidence, which are raised in the briefs.<sup>3</sup> Opposer asserts that Applicant’s website evidence has no probative value. Opposer also points out that Applicant failed to indicate in its notice of

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<sup>1</sup> Application Serial No. 85451172, filed October 19, 2011 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a *bona fide* intention to use the mark in commerce.

<sup>2</sup> In the cover sheet for the notice of opposition Opposer also made reference to “false suggestion of a connection” under Section 2(a), 15 U.S.C. § 1052(a), and “dilution” under Section 43(c), 15 U.S.C. § 1125(c). In its brief at final hearing (and in its reply brief) Opposer did not refer to these claims, let alone offer argument on either one. Accordingly, we consider them to have been waived. *See also* Board’s order, 29 TTABVUE 2.

<sup>3</sup> We will take up the dispute relating to Applicant’s reliance on its prior registration, *infra*.

reliance the relevance of any of its proffered evidence. For its part, Applicant contends that Opposer's Wikipedia evidence is inadmissible, and that if Applicant's website evidence is excluded, the same exclusion should apply to Opposer's website evidence.

With respect to Applicant's notice of reliance, Applicant failed to indicate the relevance of any of the listed evidence. Opposer did not object on this basis, however, until its brief at final hearing. Ordinarily, a procedural objection to a notice of reliance should be raised promptly, preferably by motion to strike if the defect is one that can be cured. *Hunt-Wesson Foods, Inc. v. Riceland Foods, Inc.*, 201 USPQ 881,883 (TTAB 1979) (objection that notice of reliance did not set forth relevance of appended documents raised for first time in brief waived). If the objection is one that could have been cured promptly, and was not timely raised, the objection is deemed to be waived. *See Manpower, Inc. v. Manpower Information Inc.*, 190 USPQ 18, 21 (TTAB 1976) (objection that notice of reliance failed to indicate relevance of materials was curable and should have been raised when notice was filed). *See generally* TBMP §§ 707.02(b), 707.02(b)(2) (2015). An objection to a notice of reliance on the ground that the notice does not comply with the procedural requirements of the particular rule under which it was submitted (*e.g.*, failure to state relevancy) generally should be raised promptly. If a party fails to raise an objection of this nature promptly, the objection may be deemed waived, unless the ground for objection is one that could not have been cured even if raised promptly. TBMP § 707.04.

Applicant's failure to list the relevance of the evidence could have been cured if such objection had been promptly raised. Opposer's objection, which is a procedural objection under Trademark Rule 2.122(e), should have been raised at a time when Applicant would have had an opportunity to cure the alleged deficiency, that is, by setting forth the relevancy of the proffered evidence. *See* TBMP §§ 532, 707.02(b)(2). Accordingly, Opposer's objection is late, and is considered to be waived.

Insofar as the respective website evidence is concerned, each party introduced this evidence in accordance with the guidelines established in *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031 (TTAB 2010). *See Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1461 n.9 (TTAB 2014). *See also* TBMP § 704.08(b). Accordingly, we have considered this evidence. As for its probative value, the Board is "capable of weighing the relevance and strength or weakness of the objected-to testimony and evidence, including any inherent limitations," and we have given it whatever appropriate probative weight it merits. *Inter Ikea Systems B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1737 (TTAB 2014). We would add that the probative value of Internet documents is limited. This evidence can be used to demonstrate what the documents show on their face, but such documents may not be used to demonstrate the truth of what has been printed. TBMP § 704.08(b).

As for Opposer's Wikipedia evidence, the Board has recognized the inherent unreliability of such evidence. *See, e.g., In re Hinton*, 116 USPQ2d 1051, 1053 n.10 (TTAB 2015). Moreover, the statements in the listing may not be relied upon for the

truth of the matter asserted. Accordingly, Opposer's stated reliance on the listing for the purpose of showing "fame" or how purchasers "understand the significance of the term 'FB'" is misplaced. Thus, although we have considered this evidence, its probative value is extremely limited.

### **The Record**

The record consists of the pleadings; the file of the involved application; Trademark Electronic Search System ("TESS") copies of four of Opposer's FB registrations, portions of Opposer's website, excerpts of a Wikipedia listing for "FUBU," and TESS copies of sixteen third-party registrations owned by a single entity for marks covering both body lotions and clothing, all introduced by way of Opposer's notices of reliance. Applicant, by way of a notice of reliance, introduced the following evidence: a TESS copy of its subsisting prior registration, portions of Applicant's website, a TESS copy of an application abandoned by Opposer, and TESS copies of several third-party registrations of FB-formative marks.<sup>4</sup> Opposer and Applicant filed briefs on the case.

### **Standing**

The Board, in its order dated January 2, 2015, entered summary judgment in favor of Opposer with respect to Opposer's standing. (29 TTABVUE 6-7).

Opposer claims ownership of the registered marks shown below, all of which are properly of record:

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<sup>4</sup> With its notice of reliance Applicant also submitted copies of its involved application, and one of Opposer's registrations. Inasmuch as these documents already were part of the record, Applicant's reliance on them is superfluous.



for “men's, women's and children's clothing, namely, sweatshirts, shirts, jeans, jackets, coats, sweatpants, slacks, suits, hats, headbands, visors, caps, dresses, shoes, sneakers, boots, wristbands, socks, T-shirts, belts, undergarments, neckties, dress shirts, collared shirts, rugby shirts, knit shirts, shorts and sandals” in International Class 25;<sup>5</sup>



for “clothing, namely, shirts, caps, pants, and footwear” in International Class 25;<sup>6</sup>

**FB**

(in standard characters) for “footwear; headwear; pants; shirts” in International Class 25;<sup>7</sup> and

**FB LEGACY**

(in standard characters) for “pants; shirts” in International Class 25.<sup>8</sup>

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<sup>5</sup> Registration No. 2065987, issued May 27, 1997; renewed.

<sup>6</sup> Registration No. 2374472, issued August 8, 2000; renewed.

<sup>7</sup> Registration No. 3955072, issued May 3, 2011.

<sup>8</sup> Registration No. 4053456, issued November 8, 2011.

**Priority**

With respect to priority, in view of Opposer’s ownership of valid and subsisting registrations for its FB marks, priority is not at issue with respect to the Class 25 goods identified in Opposer’s pleaded registrations. *King Candy, Inc. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

**Applicant’s Prior Registration Defense**

Before turning to the likelihood of confusion claim, we focus our attention on a procedural matter that impacts the substantive merits determination of this claim as it relates to the application for registration in Class 3. As an initial matter, a brief review of the history surrounding this matter is in order.

In the present application, Applicant claimed ownership of the registered mark shown below



for “non-medicated skin lotion” in International Class 3.<sup>9</sup> The registration includes the following statements: “The mark consists of the stylized letters ‘F’ and ‘B’ inside two circles. Color is not claimed as a feature of the mark.” (38 TTABVUE 6-8).

In its answer, although Applicant pleaded a number of assertions labeled as “Affirmative Defenses,” the assertions did not include a defense based on its ownership of a prior registration, the so-called “*Morehouse* defense.” See *Morehouse*

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<sup>9</sup> Registration No. 3939616, issued April 5, 2011.

*Mfg. Corp. v. J. Strickland and Co.*, 407 F.2d 881, 160 USPQ 715 (CCPA 1969). In denying Opposer's motion for summary judgment on its likelihood of confusion claim, the Board noted the absence of this defense in the answer and, thus, indicated that no consideration would be given to Applicant's reliance on its prior registration as it pertained to Opposer's motion. (29 TTABVUE 6-7).

At trial Applicant introduced a TESS copy of its prior registration during its testimony period. (38 TTABVUE 15-16). Opposer did not raise any objection to this evidence until its brief at final hearing. (39 TTABVUE 24-25).

Opposer now argues in its brief that the defense was not raised in the answer, and that the defense was not tried, either impliedly or explicitly, by the parties. Opposer also points to the Board's refusal to consider the defense when it took up Opposer's motion for summary judgment, and Applicant's failure to amend its answer to assert this defense. Further, as discussed above, Opposer highlights Applicant's failure in its notice of reliance to indicate the relevance of its prior registration.

As indicated earlier, Opposer's objection based on Applicant's failure to indicate the relevancy of the prior registration is considered waived. In view of the above, the registration is of record. Opposer is correct in asserting that Applicant never amended the answer to set forth its prior registration defense. Thus, the question becomes whether the prior registration defense was tried.<sup>10</sup> Implied consent to the trial of an unpleaded issue can be found only where the nonoffering party (1) raised

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<sup>10</sup> When the defense originally was raised on summary judgment at the pre-trial stage, this question obviously was not under consideration.

no objection to the introduction of evidence on the issue, and (2) was fairly apprised that the evidence was being offered in support of the issue. Fairness dictates whether an issue has been tried by consent – there must be an absence of doubt that the nonmoving party is aware that the issue is being tried. *Citigroup Inc. v. Capital City Bank Group, Inc.*, 94 USPQ2d 1645, 1655-56 (TTAB 2010) (Board deemed unpleaded affirmative defense of tacking by prior use of an unpleaded mark to have been tried by implied consent pursuant to Fed. R. Civ. P. 15(b)), *aff'd*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *Kasco Corp. v. Southern Saw Service Inc.*, 27 USPQ2d 1501, 1504 (TTAB 1993) (defendant raised no objection to evidence on unpleaded issue but was fairly apprised of its purpose). *See* TBMP § 507.03(b).

In the present case, Applicant claimed ownership of the registration in the present application; and the registration was made of record during trial. As discussed above, Opposer did not timely object to the introduction of the evidence when the evidence was submitted, and given the totality of circumstances regarding the proffer of this evidence herein, we only can conclude that Opposer was aware that the registration formed the basis of a defense.<sup>11</sup> Thus, we deem Applicant's defense based on its ownership of a prior registration to have been tried by the parties' implied consent. In view thereof, we deem Applicant's answer to be amended pursuant to Fed. R. Civ. P. 15(b) to conform to the evidence introduced at trial.

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<sup>11</sup> Given Applicant's assertion of its prior registration in defending against Opposer's motion for summary judgment, Applicant's defense at trial hardly should have come as a surprise to Opposer. Indeed, Opposer does not argue to the contrary.

Accordingly, we consider the merits of Applicant's *Morehouse* defense, and find that it is a good defense insofar as registration for the Class 3 goods is concerned. Applicant's prior unchallenged registration is for the mark shown below (left), while the present application is for the mark shown below (right).

 <p>“non-medicated skin lotion”</p>	 <p>“non-medicated skin care preparations, namely, lotions”</p>
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There is no question that although the goods are essentially identical, the marks are not. We find, however, that a prior Board decision is instructive on the applicability of Applicant's prior registration defense, notwithstanding the differences between Applicant's marks.

We find that applicant is entitled to judgment as a matter of law. In its application for registration, applicant claimed ownership of two previously-issued registrations and, in this proceeding, offered copies of those registrations in connection with the testimony of its witness. Both registrations are for the mark “VISION CENTER” – one registration for services identified as “optical, contact lens, and sun glass service, namely, examination of eyes, prescription of eye glasses and custom fitting of eye glasses, and sun glasses” and one registration for goods identified as “eye glasses and sun glasses.” An opposer cannot suffer damage, within the meaning of Section 13 of the Trademark Act, by the issuance of a registration if the applicant for such registration already owns an unchallenged registration of that mark for the same goods. *Morehouse Mfg. Corp. v. J. Strickland Co.*, 160 USPQ 715 (CCPA 1969). **While the mark applicant now seeks to register (“PEARLE VISION CENTER” and a design element) is different from its previously-registered mark (“VISION CENTER”), we believe applicant is,**

**nonetheless, entitled to judgment. This is so because opposer's claim of damage relates only to the "VISION CENTER" portion of applicant's mark and not to the "PEARLE" and design portions of the mark.** See *Ferro Corp. v. General Refractories Co.*, 162 USPQ 47 (TTAB 1969). (Opposer, owner of a registration for word mark "FERRO," objecting to registration of applicant's mark FERROX and design, cannot be damaged by issuance of a registration to applicant in view of applicant's ownership of a registration for word mark "FERROX" for same goods). (emphasis added).

*The Place for Vision, Inc. v. Pearle Vision Center, Inc.*, 218 USPQ 1022, 1023 (TTAB 1983).

In the present case, it is clear that Opposer's likelihood of confusion claim relates only to the FB portion of Applicant's mark, and not to the FRESH BODY and design features of the mark. In this connection, we note Opposer's emphasis in its brief that the marks share an identical dominant FB portion: "As is self-evident, the term FB is the dominant portion of Applicant's mark. Not only are the words FRESH and BODY disclaimed, but the FB component of the mark appears centrally and is circled which serves to highlight it." (39 TTABVUE 13); "the inclusion of FB is instrumental in creating the overall commercial impression of Applicant's mark" (39 TTABVUE 16); and "a consumer would remember the unusual and distinctive FB term from Applicant's mark." (*id.*). Throughout its arguments, Opposer diminishes the role of the disclaimed terms FRESH and BODY, describing them as "less significant and less dominant" (*id.*), and that "Applicant has adopted the Opposer's FB mark in its entirety and merely added FRESH and BODY to it." (39 TTABVUE 18). In its reply brief, Opposer states "Applicant has merely added its

trade name and/or house mark FRESH BODY to Opposer's FB mark." (42 TTABVUE 11).

Accordingly, as in *Place for Vision*, Opposer cannot be damaged by registration of the present applied-for mark when Applicant already owns an unchallenged registration for the same goods covered by a mark that is closer to Opposer's mark than the applied-for mark. See *Missouri Silver Pages Directory Publishing Corp. Inc. v. Southwestern Bell Media, Inc.*, 6 USPQ2d 1028, 1030-31 (TTAB 1988). Cf. *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1711-12 (TTAB 2010), *aff'd unpublished*, No. 11-1052, 11-1053 (Fed. Cir. Nov. 9, 2011). In view thereof, Opposer's likelihood of confusion claim in Class 3 is dismissed.<sup>12</sup>

### **Likelihood of Confusion**

The remaining likelihood of confusion issue before us is between the respective marks for goods in Class 25. Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Opposer must establish that there is a likelihood of confusion by a preponderance of the evidence. In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the

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<sup>12</sup> While we are not bound by the decisions of Examining Attorneys, we also note that Opposer's application Serial No. 85177257 (filed November 15, 2010 under Section 1(b) based on an intention to use the mark) to register the mark FB in standard characters for goods in Class 3, including "body lotion, lotions for face and body care," was refused registration under Section 2(d) on the basis of a likelihood of confusion with Applicant's mark shown in Registration No. 3939616. Opposer abandoned the application on September 20, 2012. (38 TTABVUE 65-66).

similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).<sup>13</sup>

Because all of Opposer's registered marks cover the same clothing items, and inasmuch as Opposer's FB mark in standard characters is closer to Applicant's mark than are Opposer's other marks, we concentrate our analysis on the likelihood of confusion between Applicant's mark and Opposer's FB mark in standard characters. *See The North Face Apparel Corp. v. Sanyang Indus. Co.*, 116 USPQ2d 1217, 1225 (TTAB 2015); *Fiserv, Inc. v. Elec. Transaction Sys. Corp.*, 113 USPQ2d 1913, 1917 (TTAB 2015).

#### **The Goods, Trade Channels, Purchasers and Conditions of Sale**

With respect to the second *du Pont* factor regarding the relatedness of the goods, we must look to the goods as identified in the application and Opposer's registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014), quoting *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). In the present case, Opposer's goods include "pants" and "shirts"; Applicant's goods include "pants" and "shirts." Thus, the goods are identical, at least in part.<sup>14</sup> *See Tuxedo Monopoly*,

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<sup>13</sup> Applicant's argument based on the fact that the Examining Attorney did not refuse the present application under Section 2(d) on the basis of any of Opposer's registrations is irrelevant. The Board is not bound by the Office's prior actions during examination. *In re Allegiance Staffing*, 115 USPQ2d 1319, 1324 (TTAB 2015); *In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1206 (TTAB 2009).

<sup>14</sup> Applicant argues the following: "Applicant promotes and sells personal hygiene products, and Applicant's use of the marks in [sic] Class 25 goods consists of promotional materials used to promote its Class 3 product line, such as t-shirts. While the medium may be the

*Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found as to the entire class if there is likely to be confusion with respect to *any* item that comes within the identification of goods in that class).

Given the identity of the goods in part, we presume that these goods travel through the same channels of trade (*e.g.*, clothing stores, boutiques and mass merchandisers) to the same classes of customers (ordinary consumers). *See In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). *See also In re Viterra 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). Ordinary consumers, who would be expected to exercise nothing more than ordinary care in purchasing pants and shirts because clothing items can be inexpensive, may even purchase them on impulse. “When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because

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same, the fields for which the goods are created are very different – Opposer markets clothing relating to hip hop culture, whereas Applicant’s primary goods are personal hygiene products (and Applicant also offers t-shirts and other clothing items that promote those personal hygiene products).” (41 TTABVUE 17). Suffice it to say, this argument is irrelevant given Applicant’s identification of goods upon which the likelihood of confusion determination must be based.

purchasers of such products are held to a lesser standard of purchasing care.” *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984).

The identity between Opposer’s and Applicant’s pants and shirts, the presumed identical trade channels, and the presumed overlap in purchasers, as well as the conditions of sale, are *du Pont* factors that weigh heavily in favor of a finding of likelihood of confusion.

### **The Marks**

With respect to a comparison of the marks under the first *du Pont* factor, we must compare Opposer’s mark to Applicant’s mark in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), quoting *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Inter IKEA Sys. B.V. v. Akea, LLC*,

110 USPQ2d at 1740; *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

In comparing the marks, we are mindful that where, as here, the goods are identical in part, the degree of similarity between the marks necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007).

Although marks must be considered in their entireties, it is settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the mark's commercial impression. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.").

With respect to Applicant's mark, the FB component prominently appears at the center of the mark and is circled, both of which serve to highlight this portion. Further, the terms FRESH and BODY have been disclaimed apart from the mark. *See, e.g., In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir.

1997) (“DELTA,” not the disclaimed generic term “CAFE,” is the dominant portion of the mark THE DELTA CAFE). In view thereof, FB is the dominant portion of Applicant’s mark.

There is no question that the presence of the words FRESH BODY in Applicant’s mark gives it an appearance and sound that is different from Opposer’s mark FB. Nevertheless, as indicated above, these words are less distinctive than the FB portion of Applicant’s mark, which portion is identical in sound and similar in appearance to the entirety of Opposer’s mark. Because Opposer’s mark FB is registered in standard character form Opposer is entitled to depict its mark in any font style, size, or color, including a stylization that approximates the one present in Applicant’s mark.<sup>15</sup> See *Citigroup Inc. v. Capital City Bank Group Inc.*, 98 USPQ2d at 1258-59. See also *In re Viterra Inc.*, 101 USPQ2d at 1909.

As to meaning, the words FRESH and BODY add a connotation to Applicant’s mark that is not present in Opposer’s mark. The letters FB in Applicant’s mark are likely to be perceived as the beginning letters of the FRESH BODY portion of the mark, whereas consumers familiar with Opposer may perceive the letters FB in Opposer’s mark as representing “Fubu.”

Although there are differences between the marks, we find that the common portion FB in the marks is instrumental in creating the commercial impression of each of the marks, serving to engender similar overall commercial impressions. The

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<sup>15</sup> We recognize that two of Opposer’s other registered marks comprise the letters FB depicted in a particular stylized form. Nevertheless, because Opposer’s standard character mark is not limited to this particular form or any other stylized form, Opposer’s standard character mark is deemed to encompass other altered or updated styles that may be used in the future.

words FRESH BODY in Applicant's mark reinforce the FB portion, which is an initialism for the words. In the present case, the words FRESH BODY are likely to be viewed as identifying the previously anonymous source of the identical goods sold under the mark FB by Opposer, and/or as a house mark. Alternatively, the letters FB standing alone in Opposer's mark may be perceived as simply a shortened form of Applicant's mark, especially when the respective marks are used in connection with identical goods. *See In re Chica, Inc.*, 84 USPQ2d 1845, 1848-49 (TTAB 2007) (holding CORAZON BY CHICA with design, and CORAZON with design, both for jewelry, likely to cause confusion, noting that, "to many consumers, applicant's mark for the identical word 'Corazon' followed by the phrase 'BY CHICA' will simply be viewed as the identification of the previously anonymous source of the goods sold under the mark CORAZON"); *In re Computer Sys. Ctr. Inc.*, 5 USPQ2d 1378, 1381 (TTAB 1987) (holding CSC ADVANCED BUSINESS SYSTEMS for retail computer store services and computer maintenance and repair services in connection therewith, and CSC for various computer-related services, likely to cause confusion, noting that "the inclusion of 'ADVANCED BUSINESS SYSTEMS' as a feature of applicant's mark is not likely to help customers ... distinguish the source of each party's service"); *In re Apparel Ventures, Inc.*, 229 USPQ 225, 226 (TTAB 1986) (holding applicant's mark, SPARKS BY SASSAFRAS (stylized), for clothing, and registrant's mark, SPARKS (stylized), for footwear, likely to cause confusion, noting that "[t]hose already familiar with registrant's use of its mark in connection with its goods, upon encountering applicant's mark on applicant's goods, could

easily assume that ‘sassafras’ is some sort of house mark that may be used with only some of the ‘SPARKS’ goods”).

As often stated, likelihood of confusion is not necessarily avoided between otherwise confusingly similar marks merely by adding what would appear to be a house mark (in this case, FRESH BODY, which is Applicant’s name); if the dominant portion of both marks is the same (in this case, the letters FB), then the marks may be confusingly similar notwithstanding peripheral differences. *See, e.g., Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 110 USPQ2d at 1161 (affirming Board’s finding that applicant’s mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION, and that the noun LION was the dominant part of both parties’ marks); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (“Viewed in their entireties with non-dominant features appropriately discounted, the marks [GASPAR’S ALE for beer and ale and JOSE GASPAR GOLD for tequila] become nearly identical.”); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (finding that, even though applicant’s mark PACKARD TECHNOLOGIES (with TECHNOLOGIES disclaimed) does not incorporate every feature of opposer’s HEWLETT PACKARD marks, a similar overall commercial impression is created).

In sum, the marks, when used in connection with identical goods, are similar, and this factor weighs in favor of a finding of likelihood of confusion.<sup>16</sup>

### **Third-Party Marks**

Applicant, in an attempt to diminish the distinctiveness of Opposer's mark FB, introduced copies of over forty third-party registrations. (38 TTABVUE 68-157). The registrations cover a wide variety of unrelated goods (and services), ranging from detergents to furniture to metal fasteners to toys. *None* of the registrations includes goods in Class 25, let alone specifically for pants or shirts.

Opposer's contention that Applicant's third-party registration evidence, absent evidence showing use or consumer awareness, is entitled to no probative weight is misplaced. Even where the record lacks proof of actual third-party use and the extent of third-party use, third-party registration evidence may show that a term carries a highly suggestive connotation in the relevant industry and therefore may be considered somewhat weak. *Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enterprises LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015).

Although we have considered this evidence, it merits little to no probative value. Not a single registration includes goods in Class 25, and thus none of the registrations covers pants or shirts. Thus, unlike *Jack Wolfskin* and *Juice Generation*, where the third-party evidence involved the very same restaurant

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<sup>16</sup> So as to be clear, in finding that the marks are similar, we have not accorded fame to Opposer's mark. As discussed *supra*, the Internet evidence bearing thereon is hearsay and cannot be relied upon for the truth of the matter asserted.

services and clothing at issue, here the third-party registration evidence relied upon by Applicant covers a much broader range of goods, *none* of which relate to clothing items. *See Century 21 Real Estate Corp. v. Century Life of America*, 23 USPQ2d at 1701 (third-party use on goods that are unrelated to those involved in the pending case is of little, if any, probative value).

We find the evidence for this *du Pont* factor is neutral.

### **Actual Confusion**

Applicant's assertion that the parties are unaware of any instances of actual confusion between the marks is entitled to very little weight. First, it is not necessary to show actual confusion in order to establish likelihood of confusion. *Herbko Int'l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. (2002)); *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990), *aff'g HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989). Second, the present application is based on an intention to use the mark; to the extent that there is evidence to suggest that the applied-for mark has been used, there is no corroborating evidence regarding the extent of such use, nor is there evidence regarding the extent of Opposer's use of its mark FB. The absence of evidence relating to the extent of use of Applicant's and Opposer's marks means that we are unable to gauge whether there have been meaningful opportunities for instances of actual confusion to have occurred in the marketplace. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000). Accordingly, the *du Pont* factor of the length of

time during and conditions under which there has been contemporaneous use of the marks without evidence of actual confusion is considered neutral.

**Conclusion**

We conclude that consumers familiar with Opposer's pants and shirts sold under the mark FB would be likely to mistakenly believe, upon encountering Applicant's mark FRESH BODY FB and design for identical goods, that the goods originate from or are associated with or sponsored by the same entity.

**Decision**

The opposition is sustained in Class 25, and registration in that class is refused. The opposition is dismissed in Class 3.