

This Opinion is Not a
Precedent of the TTAB

Oral Hearing: June 22, 2016

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Boston Scientific Corp. and Asthmatx, Inc.
v.
Holaira, Inc.
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Opposition No. 91215699
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Stephen R. Baird, Esq., Bradley J. Walz, Esq., and Timothy D. Sitzmann, Esq.,
Winthrop & Weinstine PA,
for Boston Scientific Corp. and Asthmatx, Inc.

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LLP,
for Holaira, Inc.

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Before Kuhlke, Ritchie, and Wolfson,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Holaira, Inc. (“Applicant”) seeks to register the mark HOLAIRA (in standard characters) on the Principal Register for “medical devices for treating obstructive lung diseases; medical apparatus and instruments for treating obstructive lung diseases,” in International Class 10.

Boston Scientific Corp. and Asthmatx, Inc. (“Opposers”) oppose registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), asserting a likelihood of

confusion with Opposers'¹ mark ALAIR (in standard characters), previously registered for “medical therapeutic devices for use in the treatment of pulmonary diseases, namely, catheters, probes, generators, bronchoscopes, and electrodes” in International Class 10² and for “training and teaching in the field of surgery and treatment of pulmonary diseases, namely training and teaching in the use and operation of medical devices for bronchial surgery or treatment, and distribution of course materials, namely printed materials and electronic media, in connection therewith” in International Class 41.³

The proceeding is fully briefed. For the following reasons, we sustain the opposition.

I. Evidentiary Objections

We first address the parties' objections to portions of the record.

A. Opposers' Objections

Opposers object to Applicant's submission via Notice of Reliance of third-party registrations and website printouts.⁴ The objections are overruled. The printouts of the registrations were downloaded from the USPTO Trademark Status and Document Retrieval (“TSDR”) database, and show status and title of the

¹ The record owner of the registrations is Asthmatx, Inc. During her deposition, Karen M. Passafaro, Opposer Boston Scientific Corp.'s vice-president of marketing, testified that “Boston Scientific acquired [Asthmatx], the product, and all the trademarks.” 21 TTABVUE 11.

² Reg. No. 2856168, issued June 22, 2004; renewed.

³ Reg. No. 3380080, issued February 12, 2008; Sections 8 and 15 combined declaration accepted and acknowledged.

⁴ 15 & 16 TTABVUE.

registrations; accordingly, they qualify for admission as official records under Trademark Rule 2.122(e). *See, e.g., In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 n.3 (T.T.A.B. 1994) (In order to make registrations of record, soft copies of the registrations themselves, or the electronic equivalent thereof, *i.e.*, printouts of the registrations taken from the electronic records of the Patent and Trademark Office's own data base, must be submitted); *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992). Contrary to Opposers' argument, the documents are not made inadmissible by the fact that they may also have been produced as supplemental discovery after the close of trial.⁵ Opposers' arguments that the Board should refuse to consider the third-party registrations because the marks are allegedly too dissimilar to be relevant or not used in connection with similar products are unpersuasive as they go to the probative value accorded to the evidence and not its admissibility. Even where the record lacks proof of actual third-party use and the extent of third-party use, third-party registration evidence will be admissible. *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).

As to the website pages, they qualify for admission under *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) (holding document obtained from the Internet admissible if it identifies its date of publication or date that it was

⁵ *See* 28 TTABVUE 27, Applicant's counsel's letter to Opposers' counsel, identifying supplemental production of documents.

accessed and printed, and its source (e.g., the URL)). It is well established, however, that the probative value of internet documents is limited because such printouts are inadmissible to prove the truth of the matters asserted therein. *Safer*, 94 USPQ2d at 1040. (“[Internet printouts] are admissible only to show what has been printed, not the truth of what has been printed.”). Thus, we have considered the internet printouts for what information the relevant public may have encountered in browsing websites pertaining to the goods involved herein, and have not considered them to demonstrate the truth of any statements made in any of the webpages.⁶

Opposers further object to Applicant’s introduction of a branding presentation (the “Strategem report”) created on behalf of Opposers (and submitted by Applicant under seal)⁷ on the ground that the Report has been offered for the truth of the matters asserted and therefore constitutes inadmissible hearsay. Applicant also submitted a trademark search report for the mark ALAIR⁸ to which Opposers also object on the same ground. Contrary to Applicant’s argument, Opposers have not waived their right to object to the admission into evidence of either document on hearsay grounds

⁶ Some of the documents submitted consist of search summary results from the Google® search engine. Such listings are of very limited probative value because they do “not show sufficient context in which the term is used on the listed web pages.” *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1461 n.10 (TTAB 2014). Nevertheless, we have considered the listings to the extent that we can glean from them any evidence of value.

⁷ 19 TTABVUE contains Applicant’s counsel’s affidavit identifying Exhibit 96 as a document entitled “Strategem Healthcare Communications – Asthmatx”; the presentation itself is filed under seal at 20 TTABVUE, Exhibit 96. The presentation was also made an Exhibit to the testimony of Karen M. Passafaro, Opposer Boston Scientific Corp.’s Vice-President of Marketing, at 22 TTABVUE, Applicant’s Exhibit 18 (confidential).

⁸ 19 TTABVUE 96. The trademark search report was not submitted under seal. It was also identified during Ms. Passafaro’s testimony, at 22 TTABVUE, Applicant’s Exhibit 1.

by failing to raise an objection to their overall inadmissibility during Ms. Passafaro's testimony. *See* Trademark Trial and Appeal Board Manual of Procedure ("TBMP") §§ 707.02(c); 707.04 (2016) (objections to testimony on substantive grounds, such as that the proffered evidence constitutes hearsay generally not waived for failure to raise them promptly). As the documents are relevant to the question of likelihood of confusion, we consider them for what they show on their face, which is that Opposers' employees may have been exposed to these internal reports and therefore may be aware of the information contained therein. With respect to the Strategem report, we have also considered Ms. Passafaro's statements made on the basis of her personal knowledge of events surrounding the presentation of the report. With respect to the trademark search report, we note that despite Ms. Passafaro's reading from the report, she had no personal knowledge of the marks displayed or enumerated therein.⁹ Statements regarding use or filing dates of any marks displayed or enumerated in a trademark search report are not evidence that the marks are in use or that the registrations are active. *See, e.g., Centraz Indus. Inc. v. Spartan Chemical Co., Inc.*, 77 USPQ2d 1698, 1701 (TTAB 2006) (trademark search report is not credible evidence of the third-party uses or registrations listed in the report); 2 *McCarthy on Trademarks and Unfair Competition* § 11:89 (4th ed.).

B. Applicant's Objections

⁹ 21 TTABVUE 67. Ms. Passafaro testified that she was not employed by Opposer Boston Scientific at the time the trademark search was conducted and the report prepared by outside counsel.

Applicant objects to the introduction of statements made by Ms. Passafaro that the ALAIR system was featured in news media,¹⁰ on the ground that such statements constitute hearsay unsupported by record evidence. While we do not disregard Ms. Passafaro's testimony simply because she did not specifically identify supporting documents, we disregard the testimony to the extent it refers to specific patient testimonials supposedly contained in the media reports, as hearsay. We further discount the probative value of the testimony because it is decidedly inconclusive as to whether, and in what manner, the involved mark was used in any media piece.

Applicant further objects to internet evidence submitted by Opposers as hearsay. For the reasons stated above, we consider the evidence but only for what it shows on its face, namely, that the website pages may have been viewed by the public, and that the public may therefore be aware of the information contained therein. *Safer*, 94 USPQ2d at 1040.

Applicant's objection to the declaration testimony of Narinder Shargill, Vice President of Clinical Strategy and Medical Affairs, Pulmonary Division at Boston Scientific Corp., and the exhibits attached thereto is overruled.¹¹ The testimony directly rebuts Mr. Wahr's testimony regarding potential uses of the parties' medical devices and the alleged overlap between asthma and chronic obstructive pulmonary disease ("COPD").¹² We hasten to add that Mr. Shargill's declaration and exhibits

¹⁰ 22 TTABVUE 57 (confidential).

¹¹ 24 TTABVUE 9-11, 25 TTABVUE (confidential). *See also* 23 TTABVUE 8-67, Exhibits 69 and 74-77. (attached to Opposers' Notice of Reliance of August 12, 2015).

¹² Chronic obstructive pulmonary disease is defined as "pulmonary disease (as emphysema or chronic bronchitis) that is characterized by chronic typically irreversible airway

have little bearing on our decision, because there are no limitations in either Applicant's or Opposers' identification of goods of their respective application and registration that restrict the goods to those for the treatment of only one type of pulmonary lung disease, such as asthma, COPD, bronchitis or emphysema.

Applicant's objection to the report of linguist Geoffrey Nunberg, Ph.D.¹³ as unreliable and overstepping the province of the Board, goes to the probative value to be accorded the evidence and not its admissibility. We overrule the objection but note that we have not relied on Dr. Nunberg's testimony on the ultimate issue of likelihood of confusion. The "opinions of witnesses, including those qualified as expert witnesses, on the question of likelihood of confusion are entitled to little if any weight and should not be substituted for the opinion of the tribunal charged with the responsibility for the ultimate opinion on the question." *Mennen Co. v. Yamanouchi Pharmaceutical Co., Ltd.*, 203 USPQ 302, 305 (TTAB 1979).

II. Description of the Record

The record consists of the pleadings and the file of the involved application. Trademark Rule 2.122(b)(1). The parties also stipulated that "documents produced during the discovery period that were created by a party or Six Degrees¹⁴ are

obstruction resulting in a slowed rate of exhalation—called also COPD." At <http://www.merriam-webster.com/dictionary/COPD>. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

¹³ 13 TTABVUE 11.

¹⁴ "Six Degrees" refers to an independent branding company employed by Applicant.

authentic, qualify as business records for purposes of [Fed. R. Evid.] 803(6)(B), and may be introduced into evidence through the affidavit of a party's counsel, subject to any objections other than authenticity or objections cured by [Fed. R. Evid.] 803(6)(B)."¹⁵

In light of our evidentiary rulings, the following is of record in this case:

1. Opposers' Evidence

a. Submitted under Notice of Reliance (filed May 6, 2015):

- Status and title copies of Reg. Nos. 2856168 and 3380080.¹⁶
- Applicant's answers and supplemental answers to certain of Opposer's interrogatories and requests for admissions.¹⁷
- Printouts from the American Heritage Dictionary of the English Language online dictionary of definitions for "all" and "whole;" printouts from West's online Legal Thesaurus/Dictionary of synonyms for "apparatus" and "device"; and printouts from the Merriam-Webster online dictionary for definitions of "all," "whole," and "hola" and synonyms for the word "whole."¹⁸
- Print-outs from websites focusing on lung diseases.¹⁹
- Copy of an article from Popular Science.²⁰
- Copy of an official record regarding Opp. No. 91216205.²¹

b. Submitted under Opposers' counsel's affidavit pursuant to the parties' stipulation (filed May 6, 2015):

¹⁵ 13 TTABVUE 9. The parties also stipulated that Opposers could offer the testimony of Dr. Narinder Shargill through a declaration, subject to Applicant's right to object to the testimony and to take cross-examination. ²⁴ TTABVUE 6. As noted *supra*, we sustain Applicant's objection to Dr. Shargill's testimony.

¹⁶ 12 TTABVUE 8 and 11, Exhibits 1 and 2.

¹⁷ 12 TTABVUE 19-34, Exhibits 5-7.

¹⁸ 12 TTABVUE 35-62, Exhibits 8-15.

¹⁹ 12 TTABVUE 69-97, Exhibits 18-25.

²⁰ 12 TTABVUE 63, Exhibit 16.

²¹ 12 TTABVUE 66, Exhibit 17.

- Parties' stipulation regarding submission of evidence.²²
- Expert Report of Geoffrey Nunberg, Ph.D and accompanying exhibits.²³
- Copies of marketing brochures distributed by Opposers.²⁴
- Copies of web pages from <<http://www.btforasthma.com>>.²⁵

2. Opposers' Testimony:

- Testimony of Karen M. Passafaro, Opposer Boston Scientific Corp.'s Vice-President of Marketing, with accompanying exhibits.²⁶
- Testimony of Matthew W. Sprague, Controller, Endoscopy Division, Boston Scientific Corp.²⁷

3. Applicant's evidence:

a. Submitted under Notice of Reliance (filed July 6, 2105):

- Printouts from the Trademark Status and Document Retrieval database ("TSDR") of third-party registrations of marks including the letter string "AIR."²⁸
- Printouts of websites purporting to show marks including "AIR."²⁹
- Opposer's answers to Applicant's interrogatories.³⁰
- Official records of the USPTO regarding Can. No. 92051129.³¹

b. Submitted under Applicant's counsel's affidavit pursuant to the parties' stipulation (filed July 6, 2015):

²² 13 TTABVUE 8, Exhibit 26.

²³ 13 TTABVUE 11.

²⁴ 13 TTABVUE 82 and 87, Exhibits 62 and 63.

²⁵ 13 TTABVUE 90-100, Exhibit 64-67.

²⁶ 21 TTABVUE 2-191; 22 TTABVUE (confidential).

²⁷ 21 TTABVUE 329-352; 22 TTABVUE (confidential).

²⁸ 15 TTABVUE, Exhibits 1-41 and 16 TTABVUE Exhibits 42-44.

²⁹ 16 TTABVUE Exhibits 45-76.

³⁰ 16 TTABVUE Exhibits 77 and 78.

³¹ 16 TTABVUE Exhibit 80 (Petition) and 81 (Answer).

- Copies of Opposers' operating manuals.³²
- Copies of screenshots of Opposers' website <btforasthma.com>.³³
- Copies of a patient brochure.³⁴
- Confidential documents (the Strategem report³⁵ and a trademark coexistence agreement³⁶).
- Copies of the ALAIR trademark search report.³⁷

4. Applicant's testimony of its CEO, Dr. Dennis Wahr (taken July 2, 2015).³⁸

III. Opposer's Standing and Priority

Standing is a threshold issue that must be proven by the plaintiff in every *inter partes* case. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1401 (2015); *John W. Carson Found. v. Toilets.com Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010). Opposers' standing to oppose registration of Applicant's mark is established by the pleaded registrations, which the record shows to be valid and subsisting, and owned by Opposer Asthmatx, Inc. See, e.g., *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Otter Prods. LLC v. BaseOneLabs LLC*, 105 USPQ2d 1252, 1254 (TTAB 2012). In addition, the record shows that Applicant first used its mark in 2013,³⁹ well after Opposer's registrations issued, and subsequent to

³² 19 TTABVUE Exhibits 83 and 84.

³³ 19 TTABVUE Exhibits 85-94.

³⁴ 19 TTABVUE Exhibit 95.

³⁵ 19 TTABVUE Exhibit 96.

³⁶ 19 TTABVUE Exhibit 98.

³⁷ 19 TTABVUE Exhibit 97.

³⁸ 30 TTABVUE 2-113; 29 TTABVUE (confidential).

³⁹ 29 TTABVUE 54.

Opposers' first use of its mark in 2010.⁴⁰ However, because the pleaded registrations are of record, priority is not an issue with respect to the mark and goods and services covered thereby. *Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)).

IV. Likelihood of Confusion

Our determination under Trademark Act Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services, the first two *du Pont* factors. *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."). Opposer bears the burden of proving its claim of likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848.

We address in turn each of the *du Pont* factors for which the parties submitted evidence or argument. We treat any other *du Pont* factors as neutral.

⁴⁰ 21 TTABVUE 14.

A. Similarity of the Goods

We start our analysis with the second *du Pont* factor, which assesses the similarity or dissimilarity of the parties' goods or services. For purposes of our likelihood of confusion determination, we concentrate our discussion on Opposers' use and registration of the mark ALAIR in connection with medical goods, rather than their use in association with educational services, because the services are complementary to the goods, and because Applicant's application does not include services.

Applicant's goods are described as "medical devices for treating obstructive lung diseases; medical apparatus and instruments for treating obstructive lung diseases." The registered goods in Reg. No. 2856168 are "medical therapeutic devices for use in the treatment of pulmonary diseases, namely, catheters, probes, generators, bronchoscopes, and electrodes." The goods are identical or overlapping as named. Specifically, both the application and the registration identify medical devices that treat pulmonary, *i.e.*, lung diseases.⁴¹ Moreover, "obstructive lung diseases," as identified in the application, are a subset of "pulmonary diseases" as identified by the registration, and the term "medical therapeutic devices" in the registration is encompassed by the more broadly worded phrase "medical devices" in Applicant's application. The enumeration of the types of devices in the description of goods of the registration does not eliminate the overlap.

⁴¹ "Pulmonary" is defined as "a : of, relating to, affecting, or occurring in the lungs <pulmonary tissue> <pulmonary edema> b : carried on by the lungs <pulmonary respiration>."

Applicant argues that the goods, by their nature, are specialized medical devices that treat entirely different types of pulmonary disease. While the record is mixed, it supports a finding that Applicant's HOLAIRA device will only treat COPD through a procedure Applicant calls "targeted lung denervation" while the ALAIR device will only treat asthma through a procedure Opposers call "bronchial thermoplasty."⁴² Nonetheless, there are no limitations in the application or registration restricting the scope of goods covered by either mark. Applicant's goods are medical devices, apparatus and instruments that treat "obstructive lung diseases," which encompasses asthma. Likewise, Opposers' catheters, probes, generators, bronchoscopes, and electrodes treat "pulmonary disease," which by definition may include COPD.⁴³ The parties' goods, as described, are legally identical. As neither Applicant's application or Opposer Asthmatx's registration specifies that the treatment provided by the medical device is capable of treating one type of lung disease to the exclusion of other types, we do not read such supposed "real-world conditions," to the extent any may exist, into the identifications. It is well established that in deciding whether goods are related, we must focus on the wording of the

⁴² As described by Applicant, "targeted lung denervation" uses a catheter inserted through the mouth that delivers thermal energy to a patient's main right and left bronchus, denaturing the nerves and allowing the airways to dilate. 30 TTABVUE 17. As described by Opposers, "bronchial thermoplasty" is a procedure that uses a catheter inserted through the mouth that delivers thermal energy to smooth muscle tissue inside of a patient's lungs, reducing the amount of tissue that might otherwise constrict the airflow. 21 TTABVUE 346; Exhibit 17.

⁴³ Further, Ms. Passafaro testified that although the Alair system is not presently indicated for the treatment of COPD, Opposers' future marketing plans may include the treatment of COPD. 21 TTABVUE 13.

application and registration, rather than what the record may reveal regarding the nature of either parties' goods. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) ("It was proper, however, for the Board to focus on the application and registrations rather than on real-world conditions, because 'the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application.'") (citing *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990)); see also *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) ("In opposition proceedings in which the opposer has pleaded a registration, the relatedness of the parties' goods is analyzed by reference to the express wording of the involved application and registration.").

Because of the legal identity of the goods, this *du Pont* factor weighs heavily in favor of a finding of likelihood of confusion.

B. Channels of Trade and Classes of Consumers

Despite Applicant's arguments, where, as here, there are no restrictions on trade channels or classes of consumers in either the application or registration, and the goods are legally identical, we must presume that those goods move in the same channels of trade and are available to the same classes of customers for such goods. See *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this presumption); see also *American Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods

are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers”).

Accordingly, the *du Pont* factors involving trade channels and classes of purchasers also favor a finding of likelihood of confusion.

C. Consumer Sophistication

Applicant argues that the consumers are highly sophisticated. We have no doubt that with respect to the physicians and hospital personnel responsible for purchasing either an ALAIR or HOLAIRA device, we confront the highest level of sophistication. The typical physician is an interventional pulmonologist, a highly specialized subset within the field of pulmonology, of which there are only about 150 in the United States.⁴⁴ The goods are expensive.⁴⁵ Prior to using the ALAIR device, physicians undergo intensive training and are proctored in administering the treatment.⁴⁶ Applicant intends to impose a proctoring requirement as well when its device is available.⁴⁷ These measures decrease the possibility that the physician or their affiliated hospital purchasing staff would become confused as to the source of the goods.⁴⁸

The same level of sophistication cannot be attributed to that sector of the consuming class that consists of the ultimate patients of the parties’ respective

⁴⁴ 29 TTABVUE 23.

⁴⁵ For Opposers: 18 TTABVUE 152 (confidential); for Applicant: 29 TTABVUE 66 (confidential).

⁴⁶ 21 TTABVUE 89.

⁴⁷ 29 TTABVUE 64.

⁴⁸ 33 TTABVUE 38.

medical apparatus on whom targeted lung denervation or bronchial thermoplasty may be performed. Opposers have shown that they directly market to patients at health fairs and “lung walks” and through their website.⁴⁹ During her testimony, Ms. Passafaro identified a brochure that “physicians could hand [] out to patients in their waiting rooms.”⁵⁰ The brochure includes the text: “[Y]ou might be a candidate for Bronchial Thermoplasty (BT) delivered by the Alair™ System. ... BT, delivered by the Alair System, is a safe outpatient procedure.” Ms. Passafaro explained how Opposers use the brochure: “This could have been used at patient events. I mentioned the American Lung Association, we do a lot of lung walks and asthma walks. And so things -- health fairs where there might be all kinds of different vendors that are there for different health things.”⁵¹ Opposers’ website also contains the tag line “BT, delivered by the Alair™ System”⁵² and a link to a survey for patients to fill out to determine the impact asthma may have on their life.⁵³ The survey results include a statement that reads: “Be sure to share your answers with your doctor – and discover how Bronchial Thermoplasty (BT) may help you live a fuller life. BT, delivered by the Alair™ system, is not another medication....”⁵⁴

⁴⁹ 12 TTABVUE 36, 38, 52.

⁵⁰ 12 TTABVUE 36.

⁵¹ 12 TTABVUE 36, Exhibit 3. *See also* at 20 TTABVUE 85 (“Your doctor wants to use the Alair™ System to treat your severe asthma. ... The Alair System is the tool that your doctor will use to perform BT.”).

⁵² 13 TTABVUE 94, Exhibit 65; *See also* 13 TTABVUE 96, Exhibit 66 (“The procedure is performed by a specially trained pulmonologist, using a device called the Alair System.”)

⁵³ 21 TTABVUE 49, Exhibit 6.

⁵⁴ 21 TTABVUE 315.

Although Applicant has no current plans to market directly to patients,⁵⁵ patients are the ultimate decision makers as to whether to undergo treatment. *Cf., Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1553 (Fed. Cir. 1991) (for purposes of genericness in context of automobile washing services, relevant public includes automobile owners and operators as well as operators and manufacturers of car wash equipment); *In re Artic Electronics Co., Ltd.*, 220 USPQ 836 (TTAB 1983) (arcade customers, as the ultimate users but not the purchasers, are part of the relevant public for purposes of likelihood of confusion). Adults browsing Opposers' website or attending a health fair will confront Opposers' use of the mark while searching for treatments for asthma, and it is reasonable to conclude that such individuals will associate the mark with the intended treatment and recollect the mark when requesting treatment from their doctor. This appears likely despite the more prevalent use of the term "bronchial thermoplasty" throughout Opposers' advertising, as the tag line "delivered by the Alair™ System" creates a separate commercial impression that will be impressed upon consumers, and the use of the™ symbol will reinforce the perception of ALAIR as a source indicator. And while the market today may include no active competitors in the field of BT, the record suggests that may very well not be the case in the future.⁵⁶

Patients are not sophisticated consumers regarding available treatments for asthma or obstructive pulmonary diseases. Applicant argues that despite a lack of

⁵⁵ 29 TTABVUE 59, 105-6.

⁵⁶ Some of Applicant's confidential branding documents suggest that Applicant may view patients in some role as consumers. 29 TTABVUE 405.

sophistication, the patient is guided every step of the way by the physician, so that it is impossible for the wrong treatment to be selected. However, the fact that the physician may be the “gatekeeper” of the therapy doesn’t necessarily enhance the patients’ sophistication as to which company is providing the system that their doctor is using to treat their pulmonary condition. As the applicable standard of care for a likelihood-of-confusion analysis is that of the least sophisticated consumer, and the patient class of consumer is not sophisticated, this factor must be considered neutral. *See Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (affirming that precedent requires consumer care for likelihood-of-confusion decision to be based “on the least sophisticated potential purchasers”); *Fiserv, Inc. v. Elec. Transaction Sys. Corp.*, 113 USPQ2d 1913, 1921 (TTAB 2015); *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004).

D. Similarity of the Marks

We turn next to the first *du Pont* factor, the similarity of the parties’ marks. In a likelihood of confusion analysis, we compare the marks in their entireties for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “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*, 101 USPQ2d at 1721 (citation omitted). Where, as here, the parties use their

marks in connection with goods that are legally identical, the similarity needed to support a determination that confusion is likely declines. *See Bridgestone Ams. Tire Operations LLC v. Federal Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012).

Applicant seeks to register the mark HOLAIRA. Opposers' mark is ALAIR. The only difference between the marks is the initial syllable of each, and the addition of an "a" at the end of Applicant's mark. In appearance, the marks are similar due to the presence of the shared "AIR" or "LAIR" portion in each. As to pronunciation, Opposers submitted the expert report of Dr. Nunberg, who testified that the marks would sound alike. He opined that HOLAIRA would be pronounced /hə'lerə/,⁵⁷ that ALAIR would be pronounced /ə'ler/, and that the initial "h" in Applicant's mark might be "suppressed."⁵⁸ Despite this testimony, it is well established that there is no correct pronunciation of a mark that, like both terms here, is not a recognized word. *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651 (Fed. Cir. 2014); *In re Viterra*, 101 USPQ2d at 1912. While we accord the Nunberg report some probative value, it falls short of compelling a finding that the marks would always sound alike. Nonetheless, we find that consumers are likely to vocalize the words in a similar manner, given that the stressed, middle portion in each mark is identical.

⁵⁷ The upside-down e is pronounced like an "a" in the word *soda* or "u" in the word *but*.

⁵⁸ 13 TTABVUE 14-5.

In addition to this strong visual similarity and somewhat similar pronunciation, the marks evoke highly similar connotations. They suggest a sense of one's "breathing in all the air" or getting "air to the whole lung." The word "all" (evoked by the "al" of Opposers' mark) and the word "whole" (evoked by the letter string "hol" in Applicant's mark) are established synonyms. The term "air" in both marks conveys the same meaning in relation to the goods, that of a product that benefits a patient's ability to breathe. When considered in their entirety, we find that both marks create similar overall commercial impressions when used on goods used to treat pulmonary or respiratory disease.

The first *du Pont* factor favors a finding that confusion between the marks is likely, particularly in light of the lesser similarity required because the respective goods are legally identical.

E. Number and Nature of Third Party Uses

Applicant asserts that the use of the letter strings AIR and LAIR are exceedingly common in marks related to respiratory treatments and that consequently, consumers will look to nuanced points of differentiation to distinguish the parties' marks. In support of this assertion, Applicant submitted copies of over 40 third-party registrations containing the term "AIR" for asthma drugs, inhalers for delivery of drugs to treat asthma and other respiratory conditions, and breathing apparatus, such as nasal pillow masks or devices that fit over one's nose or face to assist in breathing. In addition, Applicant submitted copies of webpages showing that "AIR" is common for marks used in connection with such goods. Opposers, on the other hand, argue that while "AIR" may be a common element in these marks, the term

“LAIR,” shared by both Applicant’s and Opposers’ mark, is not; thus the evidence fails to prove weakness of Opposers’ mark.

Third-party registrations can be used to demonstrate that a term may have a commonly accepted meaning, and that consumers will recognize it as a weak element, thereby distinguishing the marks based on other elements. “Such third party registrations show the sense in which the word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services.” *Institut National Des Appellations D’Origine v. Vintners International Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992); *see also Juice Generation*, 115 USPQ2d at 1674 (third-party registrations can be used “show the sense in which a mark is used in ordinary parlance”); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006). However, the “existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them.” *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973). *See also Jack Wolfskin*, 116 USPQ2d at 1136; *In re Davey Products Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009). Here, the evidence shows that asthma drugs and related goods (such as inhalers or breathing apparatus) move along the spectrum of treatments for asthma, and that even if such goods are not directly competitive with Opposers’ ALAIR device, they would be considered as alternative option treatments. Based on these registrations, the common English definition of the word “air,” and the fact that many of the registered marks appear in the marketplace as shown by the internet evidence, we find that the term “air” would be

considered a weak component of these marks. However, as a compound term, Opposers' mark ALAIR may be viewed not merely as a derivative of the word "air," but as a combination of the letter "A" and the term "LAIR." Only seven of the third-party registrations incorporate "LAIR."⁵⁹ Of these seven, two were registered on the basis of Trademark Act Section 66(a) or 44(e) and are entitled to little if any probative value because there is no basis for finding that they have ever been in use in commerce. *Cf. In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

The remaining five are:

1. Reg. No. 2659940 for the mark ALERE for "medical monitoring apparatus used to monitor and communicate data such as weight, blood pressure, blood glucose levels, other blood chemistry data, heart rate, EKG, coagulation time, peak flow, or other measurements of respiratory function in patients with chronic diseases such as asthma, diabetes, obesity, chronic hypertension, chronic renal disease and chronic obstructive pulmonary disease"; registered December 10, 2002; renewed.
2. Reg. No. 2144663 for the mark CIRCULAIRE for "medical apparatus, namely, aerosol products comprising delivery tubes, nebulizers and reservoir bags for use in delivering pharmaceutical preparations in the form of inhalants"; registered March 17, 1998; renewed.
3. Reg. No. 2048127 for the mark SINGULAIR for "pharmaceutical preparations for the treatment of respiratory disorders"; registered March 25, 1997, renewed.
4. Reg. No. 1566967 for the mark VENTILAIR for "medical air compressor for respiratory therapy"; registered November 21, 1989; renewed.

⁵⁹ One of the seven is ALERE, considered as a phonetic equivalent to ALAIRE.

5. Reg. No. 2998978 for the mark XOLAIR for “pharmaceutical preparations for use in the treatment of asthma”; registered September 20, 2005; renewed.

The probative value of Applicant’s evidence is further diminished inasmuch as the third-party marks also include additional wording, not found in Opposer Asthmatx’s registration or Applicant’s application, that engender a different commercial impression from either parties’ mark.⁶⁰ Overall, the evidence does not show that Opposers’ mark is so weak that consumers will recognize the differences between the marks. *Cf. Jack Wolfskin*, 116 USPQ2d at 1136 (third-party weakness evidence characterized as “voluminous”).

F. Applicant’s Intent

Opposers contend that Applicant intended to trade on Opposers’ goodwill in applying for its mark. The evidence in support of Opposers’ contention is mostly contained in the confidential record, specifically in the Six Degrees branding presentation and in internal emails. We find the evidence to fall short of showing that Applicant intentionally sought to trade off the goodwill of Opposers’ ALAIR mark. The fact that Opposers’ ALAIR system may be the only other device-based therapy for treatment of obstructive lung disease, or that the companies have developed similar marketing strategies does not prove Applicant’s intent to capitalize unfairly on Opposers’ mark. This factor is neutral.

⁶⁰ We further note that Reg. No. 2659940 for the mark ALERE was involved in Can. No. 92051129. Alere Medical Inc. had filed a petition to cancel Opposer Asthmatx’s registration for the mark ALAIR on June 18, 2009. The petition was dismissed with prejudice on January 5, 2010 pursuant to the parties’ settlement agreement in that case.

V. Conclusion

Considering all of the arguments and evidence of record as they pertain to the relevant *du Pont* factors, in comparing Applicant's HOLAIRA mark to Opposers' Registration No. 3848688 for the mark ALAIR, we conclude that the goods are legally identical and are therefore likely to be sold through the same channels of trade to the same classes of consumers, including those patients looking for treatment of severe asthma or COPD whom we do not assume to have any heightened level of sophistication. We find that the parties' marks are similar in appearance, pronunciation, connotation and overall commercial impression, and that consumers are likely to confuse the marks, even given the presence of third-party uses and registrations. On balance, we find the *du Pont* factors weigh in favor of finding a likelihood of confusion.

Decision: The opposition is sustained pursuant to Trademark Act Section 2(d).