

This Opinion is Not a
Precedent of the TTAB

Mailed: July 19, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Goya Foods, Inc.

v.

George Lage de Assis Rocha
—

Opposition No. 91247918
—

A. John P. Mancini, Amy E. Carroll and Jonathan W. Thomas of Mayer Brown
LLP, for Goya Foods, Inc.

Kevin J. Keener and Rishi Nair of Keener & Associates, P.C. for
George Lage de Assis Rocha.

Before Zervas, Bergsman and Coggins,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

George Lage de Assis Rocha (“Applicant”) is the owner of application Serial No.
88117538, filed on September 14, 2018, seeking registration on the Principal Register
pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), of the standard

character mark GOLA FOODS for “health food supplements” in International Class 5.¹ The application contains a disclaimer of the term FOODS.

In its Notice of Opposition,² Goya Foods, Inc. (“Opposer”) asserts “long-standing use of the marks GOYA and GOLLA as well as the trade name and mark GOYA FOODS (collectively, the ‘GOYA Marks’) in the United States in connection with a wide variety of food products ... for over eighty years,” and ownership of the following registrations for standard character or typed-form³ marks:⁴

Mark	Reg. No.	Goods	Reg. Date
GOLLA	5100642	processed vegetables in International Class 29	Dec. 13, 2016
GOYA	0764033	coffee, and edible olive oil in International Class 29 and 30	Jan. 28, 1964 (renewed)
GOYA	0962193	beef stew, vienna sausage, canned fruit juices, cereal, corn meal, hominy, crackers, edible oils, corn oil, olive oil, fruit syrup, grape juice, jellies and preserves, mayonnaise, olives, rice, soups, spaghetti, spices, salt, pepper, oregano, vinegar, flavoring extracts, meat sauce, sweet chocolate, tomato sauce, cheese, cream of coconut, canned vegetables, papaya nectar, peach nectar, guava nectar, spaghetti and meat balls, meat sauce and condiment, breadfruit; prepared sea food-namely, shrimp, spiced shrimp, and canned fish, pasteles, Puerto Rican sancocho,	June 26, 1973 (renewed)

¹ The application claims first use anywhere on January 2, 2017 and first use in commerce on January 30, 2017.

² 1 TTABVUE 1-12. References to the pleadings, the evidence of record, and the parties’ briefs are to the Board’s TTABVUE docket system. Coming before the designation TTABVUE is the docket entry number, and coming after this designation are the page and paragraph reference, if applicable.

³ Prior to November 2, 2003, “standard character” drawings were known as “typed” drawings. Effective November 2, 2003, Trademark Rule 2.52, 37 C.F.R § 2.52, was amended to replace the term “typed” drawing with “standard character” drawing. A typed mark is the legal equivalent of a standard character mark. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) (“until 2003, ‘standard character’ marks formerly were known as ‘typed’ marks.”).

⁴ Opposer also asserts Registration No. 4397659 for the standard character mark GOYA for baby food in International Class 5. The USPTO cancelled this registration on June 5, 2020. We therefore do not consider it in our alternative evaluation of Opposer’s claims.

Mark	Reg. No.	Goods	Reg. Date
		fruit cocktail, prepared coconut, and flan custard in International Class 29, 30 and 32	
GOYA	2502127	processed fruits and vegetables; dried fruits and vegetables; meats; seafood and fish; applesauce and cranberry sauce; processed olives; dried corn husks; snack foods, namely, plantain chips, potato chips, yucca chips and pork rinds; processed nuts and processed edible seeds; jams, jellies and fruit preserves; pickles; processed garlic, processed artichokes; processed pimentos; tomato paste; processed hot peppers; soups; meat extracts, and bouillon; edible oils and fats; prepared entrees consisting primarily of meat, poultry, fish or vegetables; milk; cheese; and lard in International Class 29	Oct. 30, 2001 (renewed)
GOYA	3570054	applesauce; artichoke paste; bouillon; cheese; cheese food; chili; cranberry sauce; dairy products excluding ice cream, ice milk and frozen yogurt; dried fruit and vegetables; dried fruit mixes; dried fruits; dried meat; edible fats; edible oils; fish; fish croquettes; frozen fruits; frozen vegetables; fruit paste; fruit preserves; fruit-based snack food; instant or pre-cooked soup; jams; lard; meat; meat extracts; milk; olive oil; pickled vegetables; pork; pork rinds; poultry; preserved fruits; processed artichokes; processed coconut; processed meat; processed olives; processed vegetables; seafood; snack mix consisting primarily of processed fruits, processed nuts and/or raisins; soups; vegetable chips; vegetable oils; vegetable-based snack foods; vegetable, fish, and meat croquettes in International Class 29; alimentary paste; bakery desserts; bakery goods; barbecue sauce; burritos; candy; capers; chocolate; chocolates and chocolate based ready to eat candies and snacks; cocoa; coffee; corn fritters; custards; dumplings; empanadas; enchiladas; fajitas; fish dumplings; flour; food seasonings; frozen confections; grain-based food beverages; grain-based snack foods; hominy; honey; hot sauce; marinades; mixes for bakery goods; mixes for making batter for hushpuppies; mixes for making batters for fried foods; noodles; pastries; pepper; picante sauce; rice; rice-based snack foods; salsa; sauces; seasoned coating for meat, fish, poultry; seasoned coating mixtures for foods; seasonings; snack cakes; spices; taco chips; tacos; tamales; tapioca; tomato sauce;	Feb. 3, 2009 (renewed)

Mark	Reg. No.	Goods	Reg. Date
		tortilla chips; tortillas; vinegar; wine vinegar in International Class 30; and fruit nectars; fruits drinks and fruit juices; nonalcoholic malt beverage; soft drinks; syrups for making soft drinks; vegetable juice in International Class 31	
GOYA	1354559	malta, namely a non-alcoholic malt beverages in International Class 32	Aug. 13, 1985 (renewed)
GOYA	3825092	computerized on-line retail store services in the field of foods and beverages; retail grocery stores; retail store services featuring foods and beverages in International Class 35	July 27, 2010 (renewed)
GOYA	4884552	distributorship services in the field of foods and beverages; wholesale food distributorship services” in International Class 35 delivery of goods; distribution services, namely, delivery of foods and beverages; packing, crating and warehousing services; Storage and delivery of goods; transport and delivery of goods; warehousing services; warehousing services, namely, storage, distribution, pick-up, packing, and shipping of foods and beverages in International Class 39	Jan. 12, 2016

Opposer alleges:

12. The grant of a registration to Applicant for the GOLLA Application should be denied based on a likelihood of confusion as a result of the prior existing GOYA Marks and applications that are used in connection with substantially identical in part, and related in part goods. [See Trademark Act Section 2(d), 15 U.S.C. § 1052(d).]

13. The GOLLA Mark sought to be registered is further likely to cause dilution of the distinctive qualities of certain of the registered GOYA Marks which would cause irreparable damage and injury to Opposer and the purchasing public. [See Trademark Act Section 43(c), 15 U.S.C. § 1125(c).]⁵

⁵ 1 TTABVUE 11.

Applicant denied Opposer's salient allegations in its Answer to the Notice of Opposition and raised acquiescence as an affirmative defense as well as certain other "affirmative defenses"⁶ which are merely amplifications of Applicant's denials.

Only Opposer filed a brief.⁷ Applicant therefore has waived its affirmative defense of acquiescence. *See Miller v. Miller*, 105 USPQ2d 1615, 1616 n.3 (TTAB 2013); *Baroness Small Estates Inc. v. Am. Wine Trade Inc.*, 104 USPQ2d 1224, 1225 n.2 (TTAB 2012).

For the reasons set forth below, we dismiss the opposition on both pleaded grounds.

I. Opposition Dismissed - No Evidence

Other than the pleadings and Applicant's opposed application, which are automatically of record pursuant to Trademark Rule 2.122(b), there is no evidence in the record which we may consider. First, Applicant submitted no evidence. Second, all of Opposer's evidence was submitted late and Opposer did not move to extend or reopen its testimony period.

The Board, in its August 21, 2020 order, set the closing date for Opposer's testimony period to October 5, 2020. On October 6, 2020, Opposer filed its first Notice of Reliance. Although this filing included a certificate of service stating that service was made on Applicant on October 5, 2020, the filing was not made until October

⁶ 5 TTABVUE 4.

⁷ Because Opposer has the burden of proof, Applicant had no obligation to submit evidence or a brief, and we do not construe his decision not to do so as a concession of the case. Trademark Rule 2.128(a)(1), 37 C.F.R. § 2.128(a)(1); *Yazhong Investing Ltd. v. Multi-Media Tech. Ventures, Ltd.*, 126 USPQ2d 1526, 1531 n.13 (TTAB 2018).

6th.⁸ On October 7, 2020, Opposer filed its second and third Notices of Reliance with a certificate of service showing service on Applicant on October 7, 2020.⁹

Trademark Rule 2.121(a) states:

The Trademark Trial and Appeal Board will issue a trial order ... assigning to each party its time for taking testimony and presenting evidence (“testimony period”). No testimony shall be taken or evidence presented except during the times assigned, unless by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board.

Because Opposer did not submit its evidence during its testimony period which ended on October 5, 2020, Opposer did not submit any timely evidence into the record. *See Baseball Am. Inc. v. Powerplay Sports*, 71 USPQ2d 1844, 1846 n.8 (TTAB 2004) (documentary evidence submitted outside assigned testimony period given no consideration); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 701 (2021). “As the plaintiff in this proceeding, opposer bears the burden of proof which encompasses not only the ultimate burden of persuasion, but also the obligation of going forward with sufficient proof of the material allegations of the notice of opposition, which, if not countered, negate applicant’s right to a registration.” *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1040 (TTAB 2010). Because there is no admission by Applicant nor proof to support

⁸ 10 TTABVUE 1 (ESTTA filing date) and 6 (certificate of service). The relevant date for purposes of timeliness is the date a filing is received by the Office, not its date of service. *See* Trademark Rule 2.195(a), 37 C.F.R. § 2.195(a) (“The filing date of an electronic submission is the date the Office receives the submission, based on Eastern Time . . .”).

⁹ 11 TTABVUE 1 (ESTTA filing date) and 5, 71 (certificates of service).

Opposer's claims, Opposer's claims must fail. In view thereof, Opposer's claims of likelihood of confusion and dilution are dismissed.

Decision: The opposition is dismissed on both grounds for opposition.

II. Opposition Dismissed on the Merits

In the event a reviewing court disagrees with our finding that all of Opposer's evidence was not timely submitted into the record, we have decided Applicant's claims on their merits.

A. Evidentiary Record

Opposer submitted the following:¹⁰

- Opposer's First Notice of Reliance submitting registrations certificates for the above-identified pleaded registrations and corresponding records from the USPTO's TSDR database showing current live status and Opposer's ownership of such registrations (10 TTABVUE 2-61);
- Opposer's Second Notice of Reliance submitting webpages from various news sources such as forbes.com, cnbc.com, latimes.com and fox5ny.com, as well as obamawhitehouse.archives.gov, and sirsmm.si.edu (Smithsonian National Museum of American History) (11 TTABVUE 68-187); and
- Opposer's Third Notice of Reliance submitting webpages from Opposer's and Applicant's websites, Facebook, Instagram, Twitter, Pinterest, YouTube and Amazon (11 TTABVUE 1-67).

¹⁰ Several of Opposer's Notice of Reliance exhibits are not in English and Opposer has not submitted a written translation. We have only considered those portions of such exhibits in English. See TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 104 (2021) ("Board proceedings are conducted in English. If a party intends to rely upon any submissions that are in a language other than English, the party should also file a translation of the submissions. If a translation is not filed, the submissions may not be considered.").

Opposer submitted no declaration or deposition testimony, only the three notices of reliance. Applicant submitted no testimony or other evidence.

B. Entitlement to Bring a Cause of Action

In every inter partes case, the plaintiff must establish its statutory entitlement to bring an opposition or cancellation proceeding. To establish entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute and (ii) proximate causation. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *4 (Fed. Cir. 2020), *cert. denied*, ___ U.S. ___ (2021). Demonstrating a real interest in opposing registration of a mark satisfies the zone-of-interests requirement, and demonstrating a reasonable belief in damage by the registration of a mark demonstrates damage proximately caused by registration of the mark. *Id.* at 7-8.

Opposer introduced copies of its pleaded registrations from the TSDR database showing their active status and title.¹¹ The pleaded registrations establish Opposer's direct commercial interest in the proceeding. *See Herbko Int'l v. Kappa Books*, 308 F.3d 1156, 64 USPQ2d 1375, 1377 (Fed. Cir. 2002) ("In most settings, a direct commercial interest satisfies the 'real interest' test"); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (pleaded registrations "suffice to establish ...direct commercial interest"; a belief in likely damage can be shown by establishing a direct commercial interest). Therefore, Opposer has demonstrated an interest falling within the zone of interests protected by the statute

¹¹ First Notice of Reliance, 10 TTABVUE 2-61.

and shown a reasonable basis for its belief of damage proximately caused by registration of the mark, thereby establishing its statutory entitlement to a cause of action. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at *3 (Fed. Cir. 2020), *reh'g en banc denied* 981 F.3d 1083, 2020 USPQ2d 11438 (Fed. Cir. 2020), *petition for cert. filed*; *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

C. Priority

Because Opposer's pleaded registrations are of record,¹² priority in the opposition proceeding is not at issue with respect to the marks and goods and services identified therein. *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)).

D. Likelihood of Confusion

We base our determination under Section 2(d) on an analysis of all probative facts in evidence 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, 567 (CCPA 1973) ("*DuPont*"), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). "In discharging this duty, the thirteen *DuPont factors* 'must be

¹² 10 TTABVUE 8-61.

considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) (quoting *DuPont*, 177 USPQ at 567)). “Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)). *See also ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). *See also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as

similarity of the marks and relatedness of the goods.”) (quoting *Herbko*, 64 USPQ2d at 1380).

Opposer, as plaintiff in the opposition proceeding, bears the burden of proving, by a preponderance of the evidence, that there is a likelihood of confusion. See *Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1848; and *Cerveceria Centroamericana, S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307 (Fed. Cir. 1989).

While Opposer pleaded common law trademark use of GOYA FOODS and use of GOYA FOODS as a tradename, it has not provided any proof of its priority for this term. Thus, we give no further consideration to Opposer’s alleged common law and trade name use of GOYA FOODS.

1. Similarity or Dissimilarity of the Marks

The first likelihood of confusion factor we consider focuses on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. Johns, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing the marks, we are mindful that “[t]he proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai*, 127 USPQ2d at 1801 (quoting *Coach Servs.*, 101 USPQ2d at 1721). *See also* *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *San Fernando Elec. Mfg. Co. v. JFD Elec. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977). 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 commercial impression created by the mark, provided the ultimate conclusion rests on a consideration of marks in their entireties. *See In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Because the goods and services at issue are directed to the public at large, the average customer is a member of the general public.

Turning first to Opposer’s GOLLA mark and Applicant’s GOLA FOODS mark, the terms GOLLA and GOLA differ only slightly, with one having an additional letter “L.” Despite this difference, the two terms can be pronounced identically. Further,

GOLLA and GOLA have no apparent meaning, and are very similar in appearance to one another.

Applicant's addition of the term FOODS does not render the marks dissimilar. First, the term – which has been disclaimed – is at a minimum highly descriptive of a characteristic of Applicant's supplements which Applicant's webpage indicates are extracted from various foods.¹³ It hence contributes little as an indicator of source for Applicant's identified goods. "That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark." *In re Nat'l Data Corp.*, 224 USPQ at 751. Second, FOODS is the second term in Applicant's mark, and "it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered." *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). *See, e.g., In re RiseSmart*, 104 USPQ2d 1931, 1935 (TTAB 2012) (finding ASSURANCE to be the dominant term in applicant's marks TALENT ASSURANCE and JOB ASSURANCE where TALENT and JOB were both disclaimed as descriptive). For the foregoing reasons, we find that GOLA is the dominant portion of Applicant's mark.

Because of the similarity between GOLA – the dominant term in Applicant's mark – and GOLLA, we find that the GOLLA and GOLA FOODS marks, when

¹³ *See* Applicant's webpage identifying "health ingredients such as Açaí extract powder (rich in antioxidants), Acerola Extract Powder (rich in vitamin C), Camu Camu extract powder (the fruit with more [sic] vitamin C in the world), Propolis, Guaco, Cat's claw, Taheebo e Copaiba oil." Opposer's Third Notice of Reliance, 11 TTABVUE 46.

considered in their entirety, are marks without meaning but similar in sound, appearance and commercial impression.

Turning next to the Opposer's GOYA mark and Applicant's GOLLA FOODS mark, we find these marks to also be similar. The substitution of the letter "L" in GOLLA for the letter "Y" in Opposer's mark does little to affect the similarity in sound and appearance of these terms. In addition, both marks appear to be without meaning in connection with their identified goods and services, although GOYA is the surname of the renowned Spanish painter Francisco José de Goya¹⁴ and some consumers may have some familiarity with him. (There is no evidence in the record that today, others have the same surname.) Further, as discussed above, the term FOODS, as the highly descriptive second term in Applicant's mark, contributes little as an indicator of source. The marks therefore are marks without meaning but similar in sound, appearance and commercial impression.

The *DuPont* factor regarding the similarity of the marks weighs in favor of a finding of likelihood of confusion with both of the pleaded GOYA and GOLLA marks.

2. Similarity or Dissimilarity of the Goods and Services

We turn next to the similarity or dissimilarity of the goods and services as identified in Applicant's application and Opposer's registrations. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-62 (Fed.

¹⁴ See <https://www.merriam-webster.com/dictionary/Goya%20%28y%20Lucientes%29>, accessed on July 5, 2021). We take judicial notice of this definition. 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).

Cir. 2014) (“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”); *Octocom Sys. Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that 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 regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”); *Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.”).

It is enough that the goods and services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the parties’ goods and services. *Coach Servs.*, 101 USPQ2d at 1722; *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

Opposer’s entire argument regarding the similarity of the goods and services is set forth below:

Goods or services that are complementary or likely to be purchased and used together are deemed to be “related.” *See Joseph Phelps Vineyards, LLC v. Fairmont Holdings LLC*, 122 U.S.P.Q.2d 1733, 1737 (Fed. Cir. 2017) (“relatedness is a broad concept; products may exhibit ‘relatedness’ when they are ‘complementary products sold

in the same channels of trade to the same classes of consumers’[“]. Where the goods or services at issue “have complementary uses, and thus are often used together or otherwise purchased by the same purchasers for the same or related purposes, such goods have generally been found to be sufficiently related such that confusion would be likely if they are marketed under the same or similar marks.” *In re Waiwera LLC*, 2015 WL 3430237, at *4 (T.T.A.B. May 15, 2015) (not precedential). *See, e.g., In re Martin’s Famous Pastry Shoppe, Inc.*, 223 U.S.P.Q. 1289, 1290-91 (Fed. Cir. 1984) (the mark MARTIN’S for bread is confusingly similar to the mark MARTIN’S for cheese, in part because the goods are complementary and often used and consumed together); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272 (TTAB 2009) (holding medical MRI diagnostic apparatus and medical ultrasound devices to be related, based in part on the fact that such goods have complementary purposes because they may be used by the same medical personnel on the same patients to treat the same disease). The goods and services offered by Opposer and the goods offered by Applicant are very similar, as both are used in the broad category of products related to food and nutrition. In fact, the goods and services offered by each are complimentary because they are often purchased together at a supermarket or grocery and they are used together—it is often that dietary supplements are taken together with a meal.¹⁵

Opposer does not cite to any evidence of record in support of its arguments, and we have not located a shred of evidence in the record which supports its arguments. “Attorney argument is no substitute for evidence.” *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005). Opposer’s arguments – including its arguments that the parties’ goods are purchased together at a supermarket or grocery store, that they are used together, and that dietary supplements are taken together with a meal – are hence unpersuasive. Opposer has

¹⁵ Opposer’s brief, 12 TTABVUE 22-23.

not even established that health food supplements¹⁶ are sold in supermarkets or grocery stores.¹⁷

With regard to the cases cited by Opposer, the Board has advised, “prior cases, precedential or not, are only useful to the extent that the facts in the prior cases are somewhat analogous to the facts in the current case.” *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1742 (TTAB 2014) (citing *In re Fleet-Wing Corp.*, 188 F.2d 476, 89 USPQ 369, 370 (CCPA 1951) (“It may be said at the outset that in cases like that at bar where the registration of one mark over a similar mark for goods of the same class is involved, there is rarely any decision of any court that is sufficiently analogous to be absolutely controlling. . . . Where the circumstances in a decided case differ, even only to a slight degree, from those in a case to be decided, it is often difficult to determine just what effect those differences should be given.”); *In re Jeep Corp.*, 222 USPQ 333, 335 n.2 (TTAB 1984) (each case must be decided on its own

¹⁶ “Supplement” is defined in Merriam Webster’s Dictionary as “dietary supplement” (<https://www.merriam-webster.com/dictionary/supplement>, accessed July 7, 2021). “Dietary supplement” is defined as “a product taken orally that contains one or more ingredients (such as vitamins or amino acids) that are intended to supplement one’s diet **and are not considered food.**” (<https://www.merriam-webster.com/dictionary/dietary%20supplement>, accessed July 7, 2021, emphasis added). We take judicial notice of these definitions.

¹⁷ Even if Opposer had demonstrated that health food supplements are sold in supermarkets or grocery stores, that would not end the inquiry. Supermarkets and grocery stores offer a “wide variety of products not only from different manufacturers within an industry but from also diverse industries, [that] have been brought together ... for the convenience of the consumer.” *Hy-Top Prods. Div. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). Because two products are found in a supermarket or grocery store does not compel a finding that goods are related. *See, e.g., Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 152-53 (CCPA 1978); *Federated Foods*, 192 USPQ at 29. Opposer’s evidence from Amazon depicting Applicant’s goods, shoes, books and laptop keyboard covers reinforces this point. *See* Opposer’s Third Notice of Reliance, 11 TTABVUE 58-62.

facts and merits, but prior cases have precedential value to the extent that they may involve similar facts); *In re Johanna Farms Inc.*, 8 USPQ2d 1408, 1410 (TTAB 1988) (stare decisis provides that “when a court has laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle, and apply it to all future cases, where the facts are substantially the same, regardless of whether the parties and properties are the same.”)). Without evidence in the current opposition, the cases cited by Opposer are not persuasive.

The *DuPont* factor regarding the similarity of the goods and services is therefore neutral in our analysis.

3. Channels of Trade

Where, as here, there are no trade channel limitations or restrictions in Opposer’s and Applicant’s identifications of goods and services, we must presume that Opposer’s and Applicant’s identified goods and services move in all channels of trade that would be normal for such goods and services, and that they would be purchased by all potential customers. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *Paula Payne Prods.*, 177 USPQ 77. In view of the nature of the identified goods and the services of Registration No. 3825092,¹⁸ we find that consumers of Opposer’s and Applicant’s goods, and Opposer’s Registration No. 3825092 services, are members of the general public. But without more, this does

¹⁸ The services identified in Registration No. 3825092 are “computerized on-line retail store services in the field of foods and beverages; retail grocery stores; retail store services featuring foods and beverages.”

little to persuade us that the same consumers will encounter the parties' goods and services in the same marketing milieu.

The services identified in Registration No. 4884552¹⁹ are intended for commercial customers and hence travel in channels of trade different from those of Applicant's health food supplements.

Opposer's argument pertaining to trade channels is, "Opposer and Applicant have a web presence and promote their goods through their respective websites and social media accounts ... and they necessarily both target individuals that are interested in health and nutrition."²⁰ Opposer cites to webpages and social media pages featuring Opposer's and Applicant's goods.²¹

Opposer's evidence has little probative value. Our precedent recognizes, "virtually everything is advertised and sold through the Internet." *Parfums De Coeur, Ltd. v. Lazarus*, 83 USPQ2d 1012, 1021 (TTAB 2007); *see also In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1088 (Fed. Cir. 2014) ("[A]dvertising on the Internet is ubiquitous and proves little, if anything, about the likelihood that consumers will confuse similar marks used on such goods or services.") (internal quotations omitted); *Standard Knitting, Ltd. v. Toyota Jidosha K. K.*, 186 Fed. App'x 1005, 77 USPQ2d

¹⁹ The services identified in Registration No. 4884552 are "distributorship services in the field of foods and beverages; wholesale food distributorship services; delivery of goods; distribution services, namely, delivery of foods and beverages; packing, crating and warehousing services; storage and delivery of goods; transport and delivery of goods; warehousing services; warehousing services, namely, storage, distribution, pick-up, packing, and shipping of foods and beverages."

²⁰ Opposer's brief, 12 TTABVUE 24.

²¹ *Id.*; Opposer's Third Notice of Reliance Exhs. A-J, 11 TTABVUE 7-67.

1917, 1932 (TTAB 2006). *Accord, Network Automation v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 97 USPQ2d 2036, 2045 (9th Cir. 2011) (“Today, it would be the rare commercial retailer that did not advertise online, and the shared use of a ubiquitous marketing channel does not shed much light on the likelihood of consumer confusion.”); *see also Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 354 F.3d 1020, 69 USPQ2d 1417, 1422 (9th Cir. 2004) (“Given the broad use of the internet today, the same could be said for countless companies. Thus, this factor merits little weight.”)

In sum, while the purchasers of the goods and the services of Registration No. 3825092 may overlap because some consumers who purchase supplements a priori necessarily buy food products, there is no probative information in the record about the trade channels of Opposer’s and Applicant’s goods and any services. The *DuPont* factor concerning trade channels is therefore neutral in the likelihood of confusion analysis.

4. Strength of Opposer’s mark.

In determining the strength of a mark, we consider both its inherent strength, based on the nature of the mark itself, and its commercial strength, based on marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning.”); *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent

strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006).

a. Inherent or Conceptual Strength

Opposer's standard character marks GOYA and GOLLA are registered on the Principal Register without a showing of acquired distinctiveness, and therefore are presumed to be inherently distinctive under Section 7(b) of the Trademark Act.

As mentioned earlier, the term GOLLA appears to have no meaning, and the term GOYA may have some significance as the surname of the renown Spanish painter Francisco José de Goya to certain consumers, but there is no evidence that today, others have the same surname. We therefore find that both marks are arbitrary marks as they pertain to Opposer's goods and services and hence conceptually strong marks.

b. Commercial Strength or Fame of Opposer's Mark

Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use. A famous mark has extensive public recognition and renown. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000); *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

"[F]ame 'varies along a spectrum from very strong to very weak.'" *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059,

1063 (Fed. Cir. 2003)). Because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, Opposer has the duty to clearly prove the fame of its mark. *Coach Servs.*, 101 USPQ2d at 1720, citing *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007).

Opposer argues:

The GOYA Marks are famous and strong. They have been in use for well over three-quarters of a century. See, e.g., 10 TTABVUE Ex. A-H. The media has covered Opposer widely over the years. See Opposer's Second Notice of Reliance[], 11 TTABVUE, Exs. A-J. For example, Opposer has been profiled in *Forbes* and has joined Former First Lady Michelle Obama in the "Mi Plato / My Plate" Campaign focusing on healthy eating. In addition, the fame of the GOYA Marks is such that there is a Goya Foods, Inc., Collection at the Smithsonian Institution's National Museum of American History. See Opposer's Second Notice of Reliance., 11 TTABVUE, Exs. A-J. (¶ 3). Opposer has thousands of followers on social media. 11 TTABVUE Exs. B-F. Further, Opposer has invested significant resources to enforce its exclusive rights to the mark, to avoid confusion or dilution of the distinctive quality of Opposer's marks. In short, the GOYA Marks are, and have for decades been, a globally recognized, commercially strong, distinctive brands. Therefore, they are entitled to "a wide latitude of legal protection."²²

Much of the evidence that Opposer relies on to establish the fame of its marks is hearsay under Fed. R. Evid. 802. We remind Opposer of the Board's decision in *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1039 (TTAB 2018), where the Board reiterated the rule set forth in *Safer, Inc. v. OMS*

²² Opposer's brief, 12 TTABVUE 25-26.

Invs., Inc., 94 USPQ2d 1031, 1040 (TTAB 2010) that “Internet evidence is only admissible for what it shows on its face, and because it does not fall within an exception to the hearsay rule, will not be considered to prove the truth of any matter stated therein.” *WeaponX*, 126 USPQ2d at 1041 (citing *Safer*, 94 USPQ2d at 1040). The Board considered the opposer’s screenshots from various websites. *Id.* at 1038. Several of the websites discussed new product lines offered under the WEAPONX mark or displayed goods or packaging bearing the mark. One of the websites displayed “a press release dated June 14, 2008 which states, inter alia, ‘WeaponX Performance announced today that its revolutionary new spark plug is now available to consumers on its new Web site, www.weaponxperformance.com’.” *Id.* The Internet evidence also included multiple screenshots displaying the WEAPONX mark on the opposer’s website at weaponxperformance.com. *Id.*

In *WeaponX*, the Board found that these webpages did not establish the opposer’s standing based on its alleged ownership and use of the WEAPONX mark:

[T]he printouts from the various websites submitted by Opposer with its notice of reliance show on their face that some entity is advertising products and services under the WEAPONX mark, but absent testimony from a competent witness, they are nonetheless hearsay. They do not prove that Opposer owns its pleaded WEAPONX mark or that it has offered products or services under that pleaded mark. As discussed supra, Opposer’s Internet evidence is only probative for what it shows on its face and not the truth of what has been printed

Id. at 1040 (citation omitted).

Thus, pursuant to *WeaponX* and *Safer*, we may not consider the factual assertions made in the webpages because they are not supported by any statement from a

competent witness. Without such assertions made in the webpages, Opposer has very limited evidence to support its allegation of fame of the GOYA mark.

Opposer argues:

Direct evidence of a mark's fame is not required. Instead, fame may be shown through indirect evidence, inter alia, such as the length of time the mark has been used, marketing expenditures, and media exposure. *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1371 (Fed. Cir. 2002); *Weider Publ'ns, LLC v. D&D Beauty Care Co.*, 109 U.S.P.Q.2d 1347, 1354 (T.T.A.B. 2014).²³

Opposer has not offered non-hearsay evidence that establishes the length of time that Opposer has used its marks. Opposer has not offered any marketing expenditures whatsoever. What Opposer has submitted is webpages from ten sources such as *mashed.com*, *nj1015.com*, *app.com* and *obamawhitehouse.archives.gov* to establish the fame of its marks. These limited examples of media exposure, some from obscure sources without readership information, fails to persuade us that Opposer's marks have had widespread media exposure and are famous marks.

Upon consideration of the foregoing, we find that Opposer's mark is entitled to a normal scope of protection accorded to inherently distinctive marks, and we weigh this *DuPont* factor slightly in favor of finding a likelihood of confusion. By no means has Opposer established that it has a famous mark.

²³ Opposer's brief, 12 TTABVUE 25.

5. The Number and Nature of Similar Marks in Use on Similar Goods

Of course, there is no evidence of third-party uses of similar marks on similar goods because Applicant did not participate at trial. This *DuPont* factor is therefore neutral.

6. The Existence or Lack of Confusion

With regard to the *DuPont* factors concerning consumers' actual confusion or lack of confusion between the marks at issue, Opposer argues that Applicant's mark "must have been in commerce for about four years, while Opposer's GOYA Marks have been in use for over 80 years"; and "because of the short period during which the Applicant's and Opposer's goods and services may have overlapped in the marketplace, the existence or lack of actual confusion between the marks is not relevant and should be deemed neutral in the likelihood of confusion analysis."²⁴

Once again, there is no evidence to support Opposer's arguments. As noted earlier in this opinion, "[a]ttorney argument is no substitute for evidence." *Enzo Biochem*, 76 USPQ2d at 1622.

Due to a lack of evidence, we find the *DuPont* factors regarding the actual confusion and lack of confusion neutral.

7. Variety of Goods and Services on Which the Prior Mark is Used

The ninth *DuPont* factor takes into account the variety of goods on which a mark is or is not used. *DuPont*, 177 USPQ at 567. If a party in the position of plaintiff uses its mark on a wide variety of goods, then purchasers are more likely to view a

²⁴ *Id.*, 12 TTABVUE 26-27.

defendant's related goods under a similar mark as an extension of the plaintiff's line. See, e.g., *In re Hitachi High-Technologies Corp.*, 109 USPQ2d 1769, 1774 (TTAB 2014) (“[C]onsumers who may be familiar with various products in the [opposer's] product line, when confronted with applicant's mark, would be likely to view the goods marked therewith as additional products from [the opposer]. One of the circumstances mentioned in the ninth *du Pont* factor is the variety of goods on which a prior mark is used.”).

Opposer argues:

Because consumers are accustomed to seeing these marks used in connection with a variety of food products and food and health-related products it would be reasonable for them to assume, when encountered with the GOLA Mark, that Opposer expanded its brand to “health food supplements,” or that such “health food supplements” are otherwise associated with or sponsored by Opposer.²⁵

In *Devivo v. Ortiz*, 2020 USPQ2d 93614 (TTAB 2020), the opposer's statement that she had used her mark on children's books, T-shirts, tank tops, sweatshirts, hoodies, coffee mugs, stickers, postcards, greeting cards, tote bags and informational and educational services did not persuade the Board that the opposer's use was insufficient to qualify as use of a mark on a variety of goods under this *DuPont* factor. The opposer had provided only minimal information about sales of such goods sold under her mark. Here, there is less probative evidence than in *Devivo* regarding use of Opposer's marks on its asserted goods, no evidence of Opposer's use of its marks

²⁵ *Id.*, 12 TTABVUE 27.

on any services, and all of Opposer's uses are in connection with food products or food services pertaining to the distribution or sale of food products.

We find this *DuPont* factor to be neutral in our analysis.

8. Remaining *DuPont* Factors

There is no direct evidence in the record regarding the remaining *DuPont* factors mentioned by Opposer in its brief, i.e., the number and nature of similar marks in use on similar goods,²⁶ the parties' market interface, the extent to which Applicant may exclude others, the extent of potential confusion, and bad faith adoption of Applicant's mark under the thirteenth *DuPont* factor. We find these factors to be neutral in our analysis.

9. Conclusion on Likelihood of Confusion

We have found that the parties' marks are similar; that Opposer's marks are arbitrary and entitled to a scope of protection normally accorded to arbitrary marks; and that the purchasers of the parties' goods and the services of Registration No. 3825092 overlap. Despite the fact that in any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services, *In re Chatam Int'l Inc.*, 71 USPQ2d at 1945-46, Opposer has not established that the parties' goods, and Opposer's services and Applicant's goods, are related or that their marketing channels overlap, or are related. The remaining *DuPont* factors are neutral in our analysis. In view thereof,

²⁶ Opposer states that this factor should weigh in its favor due to the lack of evidence. (Opposer's brief at p. 18, TTABVUE 26.) A lack of evidence does not require that this factor be resolved in favor of finding a likelihood of confusion.

we find that Opposer has failed to prove by a preponderance of the evidence that Applicant's mark for health food supplements will be likely to be confused with Opposer's marks for its goods and services set forth in its asserted registrations.

Opposer's likelihood of confusion claim is dismissed.

E. Dilution by Blurring

The Trademark Act provides a cause of action for the dilution of famous marks. Sections 13 and 43(c) of the Trademark Act, 15 U.S.C. §§ 1063 and 1125(c) provide as follows:

Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

Opposer contends that Applicant's mark will "blur" the distinctiveness of Opposer's GOYA and GOLLA marks. The Trademark Act defines dilution by blurring as the "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark." Section 43(c)(2)(B) of the Trademark Act, 15 U.S.C. § 1125(c)(2)(B). It "occurs when a substantial percentage of consumers, on seeing the junior party's mark on its goods, are immediately reminded of the famous mark and associate the junior party's mark with the owner of the famous mark, even if they do not believe that the goods emanate from the famous mark's owner." *N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1509 (TTAB 2015). "Dilution diminishes the 'selling power that a

distinctive mark or name with favorable associations has engendered for a product in the mind of the consuming public.” *Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164, 1182 (TTAB 2001) (internal citation omitted). The concern is that “the gradual whittling away of distinctiveness will cause the trademark holder to suffer ‘death by a thousand cuts.’” *Nat’l Pork Bd. v. Supreme Lobster and Seafood Co.*, 96 USPQ2d 1479, 1497 (TTAB 2010) (citation omitted). In deciding Opposer’s dilution claim, we consider the following factors:

- 1 Whether Opposer’s marks are distinctive;
2. Whether Opposer’s marks are famous;
3. Whether Opposer’s marks became famous prior to applicant’s date of constructive use; and
4. Whether Applicant’s mark is likely to cause dilution by blurring the distinctiveness of Opposer’s mark.

See Coach Servs., 101 USPQ2d at 1723-24 (test for use-based application) and *Nat’l Pork Bd. v. Supreme Lobster and Seafood Co.*, 96 USPQ2d at 1494-95 (test for intent-to-use application). Turning to the second requirement, a mark is defined under § 1125(c)(2)(A) as “famous” for dilution purposes --

... if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner. In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including the following:

- (i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.
- (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark.

(iii) The extent of actual recognition of the mark.

(iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

Opposer has the burden of establishing that its mark has become famous. “It is well-established that dilution fame is difficult to prove.” *Coach Servs.*, 101 USPQ2d at 1724 (quoting *Toro*, 61 USPQ2d at 1180). As noted in the statute, fame for dilution requires “widespread recognition by the general public.” *Id.* at 1725 (citing 15 U.S.C. § 1125(c)(2)(A)). Opposer must show that, when the general public encounters the mark “in almost any context, it associates the term, at least initially, with the mark’s owner.” *Id.*, (quoting *Toro*, 61 USPQ2d at 1180). A famous mark is one that has become a “household name.” *Id.* (internal citations omitted).

For the same reasons mentioned above in our discussion of fame in the likelihood of confusion section of this opinion, we find that Opposer’s evidence falls far short of proving that Opposer’s marks are famous for dilution purposes. *Compare Research in Motion Ltd. v. Defining Presence Mktg. Grp., Inc.*, 102 USPQ2d 1187 (TTAB 2012) (“we are convinced that the BLACKBERRY mark is famous based upon the groundbreaking role of this device in shaping the culture and technology of the early twenty-first century, the incredible volume of sales, opposer’s extensive promotional and advertising expenditures within the United States, and evidence of widespread media attention); *Nike Inc. v. Maher*, 100 USPQ2d 1018 (TTAB 2011) (“the mark JUST DO IT is one of the most famous advertising slogans created, and has been communicated ‘to wide demographic segments, across gender, age and lifestyle categories.’”).

Because Opposer has failed to establish the critical element of fame, we need not consider the other factors. Opposer's dilution by blurring claim therefore is dismissed.

Decision: The opposition is dismissed on both grounds for opposition.