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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

THERAGUN, LLC,

Opposer,

v.

THERAGEN, INC.,

Applicant.

Opposition No. 91/250,143

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Mark: THERAGEN

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REPLY BRIEF OF OPPOSER THERAGUN, INC.

Opposer Theragun, Inc. (“Opposer” or “Theragun”), through its undersigned counsel, hereby submits its Reply Brief in support of its Opposition to applicant Theragen, Inc.’s (“Theragen” or “Applicant”) applications to register THERAGEN and THERAGEN & Design.

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I. INTRODUCTION

The parties' marks are THERAGUN and THERAGEN. The issue before the board is whether THERAGEN, when used for electrostimulatory devices for tissue, bone, and joint treatment, creates a likelihood of confusion with THERAGUN when used for electric massage devices. The parties' agree that the most important issues are the similarities between the marks and the relatedness of the goods. Here, the marks are very similar and the goods are related.

Theragen argues that THERAGUN and THERAGEN are not "nearly identical." If Theragen does not consider these two marks "nearly identical," one wonders what Theragen's criteria for "near identity" is. But we need not squabble over labels. Whether we call THERAGUN and THERAGEN similar, "very substantially similar," or "nearly identical," it is apparent that: (1) in appearance, the marks differ only in their second to last letters; (2) in sound, the marks differ only in the initial sound of their final syllable; and (3) and in meaning, the marks both marks connote the delivery of therapy.

Theragen fails to address any of the evidence of relatedness of the parties' submitted by Theragun and instead relies on irrelevant evidence regarding limitations on the purposes, uses, trade channels, and intended consumers of its applied-for goods, as well as the nature of the goods themselves, that are not reflected in the application. Such evidence is clearly irrelevant; the "authority is legion" that an opposition "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 sales of the goods are directed." *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 16 U.S.P.Q.2d 1783, 1787, 918 F.2d 937 (Fed. Cir. 1990).

Theragen has moved to strike Theragun's rebuttal evidence, much of which responded directly to Theragen's evidence purporting to show that the relevant goods are unrelated. Even if such motion is granted in its entirety (and it should not be), the unchallenged evidence, including substantial evidence that the goods are related, shows that each of the relevant factors either weighs in of a finding of confusion or is neutral. Thus, the Opposition should be sustained.

II. A LIKELIHOOD OF CONFUSION EXISTS

A. THERAGUN and THERAGEN Are Nearly Identical

Casting doubt on either its credibility or its eyesight, Theragen argues that THERAGUN and THERAGEN are visually dissimilar. Reasonable minds must agree, however, that THERAGUN and THERAGEN are nearly identical in appearance. Indeed, the marks differ by only a single letter.

Theragen's hearing is fine. It can acknowledge that, while the first two syllables and the final sound of THERAGUN and THERAGEN are identical, the third syllables differ – “gu” vs. “ge.” Notwithstanding this difference, the marks are quite similar in sound as well.

Theragen argues that, notwithstanding these points of similarity, consumers will distinguish the marks because (1) the consuming public has been exposed to numerous third party uses of similar marks for related goods and services and (2) the parties' marks differ in connotation. Neither of these arguments has any merit.

1. The Record Is Devoid of Evidence of Third-Party Use

Theragen points to third-party registrations that include the term “thera” as evidence that confusion is unlikely. These third-party registrations, Theragen argues, are evidence that consumers will be able to “discern” the differences between THERAGUN and THERAGEN.¹ In support, Theragen cites an opinion from the Fifth Circuit Court of Appeals. This cherry-picked authority notwithstanding, it is well-settled, including in numerous decisions from the Board's primary reviewing courts, that “[t]he probative value of third-party trademarks depends entirely upon their usage.” *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 73 U.S.P.Q.2d 1689, 1693, 396 F.3d 1369 (Fed. Cir. 2005).² As has often been explained, the

¹ Applicant Brief, p. 15 (20 TTABVUE 20).

² See also, e.g., *In re Helene Curtis Indus., Inc.*, 134 U.S.P.Q. 501, 503-504, 305 F.2d 492 (C.C.P.A. 1962) (“Nor does it help an applicant on a section 2(d) likelihood of confusion issue to create a picture of already existing likelihood of confusion as between other marks by introducing a plethora of registrations of similar marks. We will not assume any knowledge on the part of the purchasing public of mere registrations in the Patent Office and neither will we assume that marks are in continuing use, so as to have had any effect on the mind of the purchasing public, merely because they have been registered.”); *Lilly Pulitzer, Inc. v. Lilli*

Board must “not assume any knowledge on the part of the purchasing public of mere registrations” or “that marks are in continuing use, so as to have had any effect on the mind of the purchasing public, merely because they have been registered.” *In re Helene Curtis Indus., Inc.*, 134 U.S.P.Q. at 503-504.

Here, Theragen has not submitted *any* evidence of how consumers will perceive the parties’ marks or whether they will be able to discern the minor differences between THERAGUN or THERAGEN. Likewise, Theragen has submitted *zero* evidence of third-party use of marks

Ann Corp., 153 U.S.P.Q. 406, 407, 376 F.2d 324 (C.C.P.A. 1967) (“[T]he existence of these registrations is not evidence of what happens in the market place or that customers are familiar with their use. Moreover, . . . the existence of confusingly similar marks already on the register will not aid an applicant to register another confusingly similar mark.”); *AMF Inc. v. Am. Leisure Prod., Inc.*, 177 U.S.P.Q. 268, 269-70, 474 F.2d 1403 (C.C.P.A. 1973) (“It appears that the board relied heavily upon the existence of third-party trademark registrations in reaching its decision. We have frequently said that little weight is to be given such registrations in evaluating whether there is likelihood of confusion. The existence of these registrations is not evidence of what happens in the market place or that customers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive.”); *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 177 U.S.P.Q. 462, 462-63, 476 F.2d 1004 (C.C.P.A. 1973) (“But in the absence of any evidence showing the extent of use of any of such marks or whether any of them are now in use, they provide no basis for saying that the marks so registered have had, or may have, any effect at all on the public mind so as to have a bearing on likelihood of confusion. The purchasing public is not aware of registrations reposing in the Patent Office and though they are relevant, in themselves they have little evidentiary value on the issue before us.”); *Stanadyne, Inc. v. Lins*, 180 U.S.P.Q. 649, 649, 490 F.2d 1396 (C.C.P.A. 1974) (“[I]n the absence of evidence of the extent of actual continuing use of registered marks, mere registrations are entitled to little weight in establishing whether there is likely to be confusion because registrations by themselves do not indicate how the public mind may have been conditioned.”); *Scarves by Vera, Inc. v. Todo Imports Ltd. (Inc.)*, 192 U.S.P.Q. 289, 294, 544 F.2d 1167 (2d Cir. 1976) (“The significance of third-party trademarks depends wholly upon their usage. Defendant introduced no evidence that these trademarks were actually used by third parties, that they were well promoted or that they were recognized by consumers.”); *In re The Clorox Co.*, 198 U.S.P.Q. 337, 343, 578 F.2d 305 (C.C.P.A. 1978) (Markey, J., concurring) (“Third party registrations are often cited in an effort to prove that, because the marks appearing in those registrations are similar to the mark in use by an applicant, an opposer, or cancellation petitioner, the public has learned to distinguish among them and would not be confused by the addition to the marketplace of the mark sought to be registered or by continued use of the mark sought to be maintained on a register. Whether the public has been so conditioned turns on whether it has been actually exposed to the similar third party marks in the marketplace, and on the extent and intensity of that exposure. A registration does not inherently evidence that exposure, and the presumption that registered marks of third parties are in use does not clothe the cited registrations with that evidentiary effect.”); *In re Mighty Leaf Tea*, 94 U.S.P.Q.2d 1257, 1259, 601 F.3d 1342 (Fed. Cir. 2010) (“[M]ere presence of similar third-party registrations, without more, is of only limited value for showing whether additional entrants would lead to confusion in use.”); *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 U.S.P.Q.2d 1043, 1059 (T.T.A.B. 2017) (“Respondent’s failure to establish the current nature and extent of use of the third-party marks . . . serves to diminish its probative value.”).

incorporating the prefix “thera.” Notably, in the cases relied upon by Theragen, the records include, in addition to third-party registrations, substantial evidence of third-party use. *See Amstar Corp. v. Domino's Pizza, Inc.*, 205 U.S.P.Q. 969, 975, 615 F.2d 252 (5th Cir. 1980) (record contained evidence of 15 third-party uses); *General Mills, Inc. v. Health Valley Foods*, 24 U.S.P.Q. 1270, 1278 (T.T.A.B. 1992) (record contained affidavit documenting the “widespread use” of relevant term). Without evidence of third-party use, the third-party registrations provide zero evidence about whether, how, or to what extent any of the registered marks are used or whether those marks have impacted the way the purchasing public would perceive the parties’ marks. *See, e.g.*, n. 2, *supra*.

Further, while Theragen has identified a number of third-party registrations for marks with the prefix “thera”,³ only one of the registered mark ends with the “n” sound present in both THERAGUN and THERAGEN, only one registered mark has a second syllable that begins with “g,” and none of the marks is nearly as similar to THERAGUN as THERAGEN is.⁴ In *Floralife, Inc. v. Floraline International Inc.*, the Board considered the impact of third-party uses of marks including the prefix “flora” on the potential for confusion between FLORALIFE and FLORALINE, both for use in the flower industry. 225 U.S.P.Q. 683, 686-87 (T.T.A.B. 1984). There, the Board found that the absence of third-party uses of the prefix “flora” combined with an ending similar to the opposer’s demonstrated the “distinctiveness” of the unified term FLORALIFE “rather than its weakness.” *Id.* Such is the case here. Even if there were evidence of third-party use of the prefix “thera” (and there is not), the fact that none of these marks bear similarity to THERAGUN apart from sharing the prefix “thera,” underscores the distinctiveness and strength of Opposer’s THERAGUN mark.

³ Though, as discussed in Section II.D.1, *infra*, not nearly as many such registrations exist as Theragen suggests.

⁴ Applicant’s Notice of Reliance (“Applicant’s NOR”), Exhs. 1-66 (11 TTABVUE 21-210).

2. **Any Differences In Connotation Are Overshadowed by the Marks’ Similarities**

Applicant argues that differences in connotation can “outweigh visual and phonetic similarity.” *Coach Servs. v. Triumph Learning LLC*, 101 U.S.P.Q.2d 1713, 1721, 668 F.3d 1356 (Fed. Cir. 2012). Here, there is no dispute that the common term “thera” has the same meaning with respect to both parties’ marks; Theragen concedes that both parties’ products provide therapy.⁵ It argues, however, that the different meanings of “gun” and “gen” overcome the identical meanings of “thera,” as well as the visual and phonetic similarities between the marks. This argument fails. Any differences in connotation are minor and are insufficient to overcome the striking similarity of THERAGUN and THERAGEN with respect to appearance and sound.

First, the authority cited by Applicant is easily distinguished from the present case. *Coach Servs.*, 101 U.S.P.Q.2d at 1721. There, although the parties’ both used the mark COACH, their goods were entirely unrelated – test preparation software and education materials vs. luxury handbags, accessories, luggage, and apparel – and the meaning of COACH was markedly different in the context of the parties’ respective goods – instructor vs. carriage for travel. *Id.* at 1721-22. The parties’ goods here are not nearly so different; although there may be some dispute as to the degree of similarity between the parties’ goods, there is no dispute that both parties goods are used to deliver therapy.⁶

Further, it is not proper to dissect the parties’ marks for purposes of comparison; it is “axiomatic that a mark should not be split up into its component parts and each part then compared with a corresponding part of the conflicting mark.” *Floralife, Inc.*, 225 U.S.P.Q. at 686-87 (*citing* 2 McCARTHY, *Trademarks and Unfair Competition* 23:15 (2d ed. 1984)) (FLORALIFE and FLORALINE confusingly similar for florists products and flower ordering services, notwithstanding different connotations of “life” and “line” and commonness of “flora” prefix).

⁵ Applicant’s Brief, pp. 8-9, 15 (20 TTABVUE 14-15, 20).

⁶ See Section II.B, *infra*.

Instead, the marks should be considered in their entireties. *Id.* (finding FLORALIFE has no recognized meaning). Thus, the Board should compare the meaning of the unitary terms THERAGUN and THERAGEN; neither term has any recognized meaning, increasing the potential for confusion.

Nonetheless, when examined by reference to their constituent parts, THERAGUN and THERAGEN are quite similar in meaning. Without explanation, Theragen states that Theragun products resemble firearms in appearance and that the products were “designed to elicit an image of a therapeutic firearm.”⁷ Putting aside the fact that “therapeutic firearms” are not a thing, Theragun products do not resemble firearms.⁸ Perhaps, Theragun products may be said to deliver percussive massage therapy, which may be broadly analogous to a handgun’s delivery of a bullet or a glue gun’s delivery of glue. But Theragen’s products deliver electrostimulatory therapy in the same way and for the same purposes.⁹ Thus, when examined as a whole, both marks simply suggest the delivery of therapy for muscle pain and injury.

Even if the marks convey somewhat different meanings, such distinction would avoid confusion “only where potential purchasers are aware of the one letter difference or where their recall of the mark previously encountered . . . is accurate.” *Floralife, Inc.*, 225 U.S.P.Q. at 686. “However, . . . the absence of mistake in perceiving a single letter difference or in perfectly recalling a mark . . . cannot be guaranteed. Indeed, they may be the exception rather than the rule in many marketing situations.” *Id.* Consumers are not likely to perfectly recall the spelling of THERAGUN or THERAGEN after encountering either in the market, increasing the potential for confusion, which cannot be avoided by any minor differences in meaning of the marks.

The parties’ marks are similar with respect to appearance, sound, and meaning and this factor weighs in favor a finding of likelihood of confusion.

⁷ *E.g.*, Applicant’s Brief, pp. 7-8, (20 TTABVUE 41-42).

⁸ *See, e.g.*, Opposer’s NOR, Exhs. 70, 73 (7 TTABVUE 265-67, 285-290).

⁹ Applicant’s Brief, pp. 8-9 (20 TTABVUE 14-15).

B. The Parties' Goods Are Closely Related

Theragen admits that both parties' goods are "used in the treatment of or therapy for muscle pain and injury" and that both parties' goods "provide therapy."¹⁰ Beyond that, Theragen does not address the relatedness of the goods set forth in the parties' registrations and applications. Instead, it attempts to avoid the clear similarities between these goods by focusing on evidence of how the marks are used, or will be used, in the "real world."¹¹ It is well settled, however, that the Board cannot consider such evidence in determining whether the parties' goods are related. *Octocom Sys., Inc.*, 16 U.S.P.Q.2d at 1787. Instead, 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." *Id.* This rule is unchanged "regardless of what the record may reveal as to the particular nature of an applicant's goods." *Id.*¹²

Theragen notes that its products will include neuromuscular electrical stimulation devices and transcutaneous electrical nerve stimulation devices, also referred to as "TENS" and "NMES."¹³ However, Theragen does not submit evidence about the nature of these electrostimulatory devices generally, or the typical channels of trade and consumers for such devices, but rather submits evidence about the specific types of electrostimulatory devices it intends to sell under the THERAGEN mark and the channels through which and the consumers to whom it intends to sell those goods.¹⁴ Theragen asserts that it has an electrostimulatory product that is undergoing FDA review, that such product will be only be available by prescription, that

¹⁰ Applicant's Brief, pp. 8-9 (20 TTABVUE 14-15).

¹¹ Applicant's Brief, pp. 9-11 (20 TTABVUE 15-17). It is irrelevant, for example, if Theragen's products resemble "guns" (they do not) or if Theragen's intended products will be "worn."

¹² See also, e.g., *Packard Press, Inc. v. Hewlett-Packard Co.*, 56 U.S.P.Q.2d 1351, 1355, 227 F.3d 1352 (Fed. Cir. 2000) (quoting *Octocom Sys., Inc.*, 16 U.S.P.Q.2d at 1787); *Bose Corp. v. QSC Audio Prod., Inc.*, 63 U.S.P.Q.2d 1303, 1310-11, 293 F.3d 1367 (Fed. Cir. 2002) (same); *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 110 U.S.P.Q.2d 1157, 1162, 746 F.3d 1317 (Fed. Cir. 2014) (same); *Longshore v. Retail Royalty Co.*, 589 F. Appx. 963, 966 (Fed. Cir. 2014) (same); *In re Louis Vuitton Malletier*, 777 F. Appx. 984, 990 (Fed. Cir. 2019) (same).

¹³ Declaration of J. Chris McAuliffe ("McAuliffe Decl."), ¶ 8, 13 (12 TTABVUE 3-4).

¹⁴ *Id.* at ¶¶ 8-17 (12 TTABVUE 2-5).

such product will be stationary on the body, that such product will not be handheld, and so on. The evidence of record, however, makes clear that electrostimulatory devices, including the TENS and NMES devices Theragen makes clear are covered by its applications, are widely available through normal retail channels without a prescription.¹⁵ Even if all Theragen's assertions are true, the limitations it claims are not incorporated into its applications, which cover not only the specific type of electrostimulatory device it claims it intends to offer, but all types of electrostimulatory devices, many of which are available to the general public at retail and without a prescription.

Thus, the Board must compare the goods identified in Theragen's applications and Theragen's registrations. Theragen's goods include "*massage apparatus; massage apparatus for massaging injured muscles; vibrating apparatus used to stimulate muscles and increase strength and physical performance for health and medical purposes; electric massage appliances, namely, electric vibrating massager; electric massage appliances, namely, electric vibrating massager.*" Theragen's goods are "*medical devices, namely, electrostimulatory devices for tissue, bone and/or joint treatment, medical treatment apparel, and a kit comprising an electrostimulatory device and medical treatment.*"

¹⁵ NOR, Exh. 53 (7 TTABVUE 122-126) (Compex offers for sale to the general public over the counter, including through its website at compex.com, COMPEX branded TENS muscle stimulation kit, including wearable TENS products of the type Theragen specifically claims it intends to sell); *Id.* at Exh. 54 (7 TTABVUE 129-130) (TENS muscle stimulators offered for sale to the general public over the counter through ireliev.com); *Id.* at Exh. 55 (7 TTABVUE 132) (TENS and NMES muscle stimulators offered for sale to the general public over the counter through rehabmart.com); *Id.* at Exh. 56 (7 TTABVUE 138) (electronic muscle stimulator offered for sale to the general public over the counter through scriphessco.com); *Id.* at Exh. 57 (7 TTABVUE 142-147) (TENS muscle stimulators advertised for sale to the general public over the counter through beurer.com, including wearable TENS products of the type Theragen specifically claims it intends to sell); *Id.* at Exh. 58 (7 TTABVUE 154-165) (PlayMakar offers for sale to the general public over the counter, including through its website at playmakar.com, PLAYMAKAR branded TENS muscle stimulation kit, including wearable TENS products of the type Theragen specifically claims it intends to sell); *Id.* at Exh. 59 (7 TTABVUE 168-178) (TENS muscle stimulators offered for sale to the general public over the counter through tenspros.com).

Additionally, Dr. Jason Wersland specifically testified in his rebuttal declaration that although "some electrostimulatory devices require a prescription, many are available over the counter without a prescription." Rebuttal Declaration of Dr. Jason Wersland ("Wersland Decl."), ¶ 11 (14 TTABVUE 4). Dr. Wersland also testified that "electrostimulatory devices can be used by individuals in their own homes . . .," as well as by "professional physical therapists and trainers." *Id.* at ¶ 10 (14 TTABVUE 4).

Goods are related if consumers may reasonably believe the goods emanate from the same source. *See In re Albert Trostel & Sons Co.*, 29 U.S.P.Q.2d 1783 (T.T.A.B. 1993). Common sense tells us that consumers may reasonably believe that a massage device and an electrostimulatory device, both “used in the treatment of or therapy for muscle pain and injury,” emanate from the same source. In addition to common sense, the evidence of record makes clear that the parties’ goods are offered for sale by the multiple companies under a single trademark.¹⁶ Common sense also tells us that such goods, which sold side by side on websites and which Theragen acknowledges are used for the same purposes, may be used in a complementary fashion as part of a single program for “the treatment of or therapy for muscle pain and injury.”¹⁷

Theragen argues that complementary goods are not related goods for likelihood of confusion purposes, and further that a finding that complementary goods are related would be “antithetical” to the few cases it relies on.¹⁸ This argument fails. In fact, “complementary use has long been recognized as a relevant consideration” and goods with complementary uses, which are often used together or purchased by the same purchasers for the same or related purposes have generally been found to be sufficiently related such that confusion would be likely if they are marketed under the same or similar marks. *E.g., Martin's Famous Pastry Shoppe, Inc.*, 223 U.S.P.Q. 1289, 1290, 748 F.2d 1565 (Fed. Cir. 1984) (bread and cheese complementary and “related” for likelihood of confusion purposes).¹⁹

¹⁶ NOR, Exh. 53 (7 TTABVUE 122-126) (Compex offers COMPEX branded TENS muscle stimulation kits, including wearable TENS products of the type Theragen specifically claims it intends to sell, as well as COMPEX branded handheld electronic percussive massage devices of the specific type that Theragen offers under its THERAGUN mark); *Id.* at Exh. 58 (7 TTABVUE 149-165) (PlayMakar offers PLAYMAKAR branded TENS muscle stimulation kits, including wearable TENS products of the type Theragen specifically claims it intends to sell, as well as PLAYMAKAR branded handheld electronic percussive massage devices of the specific type that Theragen offers under its THERAGUN mark).

¹⁷ Dr. Jason Wersland also specifically detailed that the products are used in the same ways, by the same users, and for the same purposes, and further testified that some “users may choose to use both Opposer’s massage products and an electrostimulatory device as part of their treatment, fitness, health, wellness, recover, or therapy plans.” Wersland Decl., ¶¶ 9-10, 12 (14 TTABVUE 4).

¹⁸ Applicant’s Brief, p. 10-11 (20 TTABVUE 15-16).

¹⁹ *See also, e.g., Polo Fashions, Inc. v. La Loren, Inc.*, 224 U.S.P.Q. 509, 511 (T.T.A.B. 1984) (finding bath sponges and personal products such as bath oil and soap to be closely related because they are

In fact, in Applicant’s Brief, just paragraphs before it claimed that finding complementary goods related would be antithetical to the cases it cited, Theragen cites one such case as finding goods unrelated because they were *not* “complementary items.”²⁰ In that case, in finding the men’s shoes and men’s underwear unrelated, recognizing that complementary items are typically found to be related, the Board reasoned that shoes and underwear were “not complementary or companion items, as are coast and boots, or athletic shoes and athletic clothing.” *In re British Bulldog, Ltd.*, 224 U.S.P.Q. 854, 856 (T.T.A.B. 1984).

In addition to the undisputed fact that both parties’ goods are used in “the treatment of or therapy for muscle pain and injury,” the evidence of record shows that there are at least 30, live, use-based federal trademark registrations that include both massage devices and electrostimulatory devices²¹ and that numerous companies are selling both massage devices and electrostimulatory devices under the same trademark.²² Use-based third-party registrations that incorporate both an applicant’s and a registrant’s goods are evidence that the goods are of a type that emanate from the same source. *In re Davey Prods. Pty Ltd.*, 92 U.S.P.Q.2d 1198, 1203 (T.T.A.B. 2009) (goods related where 21 third-party registrations and two web sites showed one mark used for both parties goods).²³

complementary goods that are likely to be purchased and used together by the same purchasers); *In re Sela Products, LLC*, 107 U.S.P.Q.2d 1580 (T.T.A.B. 2013) (surge protectors for audio and home theater equipment and wall mounts and brackets are complementary and, therefore, related); *In re Gina Davia*, 110 U.S.P.Q.2d 1810, (T.T.A.B. 2014) (agave sweeteners and pepper sauce have complementary uses and are related).

²⁰ Applicant’s Brief, p. 13 (20 TTABVUE 14).

²¹ NOR, Exhs. 18-52 (7 TTABVUE 51-120).

²² NOR, Exhs. 57-58 (7 TTABVUE 139-165).

²³ See also *In re Albert Trostel & Sons Co.*, 29 U.S.P.Q.2d at 1785-86 (“[T]hird-party registrations which individually cover a number of different items and which are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods and/or services are of a type which may emanate from a single source.); *In re Country Oven, Inc.*, 2019 U.S.P.Q.2d 443903, *8 (T.T.A.B. 2019) (“[T]hird-party registrations that cover goods and services from both the cited registration and an Applicant’s application are relevant to show that the goods and services are of a type that may emanate from a single source under one mark.”); *Shannon DeVivo v. Celeste Ortiz*, 2020 U.S.P.Q.2d 10153, 13 (T.T.A.B. 2020) (same).

Theragen admits that both parties' goods are "used in the treatment of or therapy for muscle pain and injury" and that both parties' goods "provide therapy."²⁴ It neither challenges nor contradicts Theragun's evidence of relatedness cited above. Theragen cannot rely on limitations that do not appear in its applications to avoid the clear similarities between the parties' goods. *Longshore*, 589 F. Appx. at 966 (refusing to read limitations into application and registration based on evidence of record). The parties' goods are closely related and this factor weighs in favor of a finding of likelihood of confusion.

C. The Consumers and Trade Channels for the Parties' Goods are Similar

When a registration and application do not "contain limitations describing a particular channel of trade or class of customer, the goods or services are assumed to travel in all normal channels of trade." *Packard Press, Inc.*, 56 U.S.P.Q.2d at 1355.²⁵ Where the parties' goods are related, both the trade channels and the purchasers of the parties' goods are presumed to be closely related as well. *Id.* Moreover, the evidence of record shows that the goods in Theragun's and Theragen's applications and registrations are sold through by the same companies, through the same stores, and through the same websites.²⁶

²⁴ Applicant's Brief, pp. 8-9 (20 TTABVUE 14-15).

²⁵ See also *Hewlett-Packard Co. v. Packard Press, Inc.*, 62 U.S.P.Q.2d 1001, 281 F.3d 1261, 1268 (Fed. Cir. 2002) ("[A]bsent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers."); *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 U.S.P.Q.2d 1905, 1908 (Fed. Cir. 2012) (same); n. 2, *supra*, and cases cited therein.

²⁶ NOR, Exh. 53 (7 TTABVUE 122-126) (Compex offers COMPEX branded TENS muscle stimulation kits, including wearable TENS products of the type Theragen specifically claims it intends to sell, as well as COMPEX branded handheld electronic percussive massage devices of the specific type that Theragun offers under its THERAGUN mark, including, without limitation, through its website at compex.com); *Id.* at Exh. 54 (7 TTABVUE 129-130) (TENS muscle stimulators and handheld percussive massage devices both offered for sale through ireliev.com); *Id.* at Exh. 55 (7 TTABVUE 132-33) (TENS and NMES muscle stimulators and handheld percussive massage devices both offered for sale through rehabmart.com); *Id.* at Exh. 56 (7 TTABVUE 137-38) (electronic muscle stimulator and handheld percussive massage devices both offered for sale through scriphessco.com); *Id.* at Exh. 57 (7 TTABVUE 140-147) (TENS muscle stimulators, including wearable TENS products of the type Theragen specifically claims it intends to sell, and handheld percussive massage devices both advertised for sale through beurer.com); *Id.* at Exh. (7 TTABVUE 149-165) (PlayMakar offers PLAYMAKAR branded TENS muscle stimulation kits, including wearable TENS products of the type Theragen specifically claims it intends to sell, as well as PLAYMAKAR branded handheld electronic percussive massage devices of the specific type that Theragun offers under its THERAGUN mark, including, without limitation, through its website at playmakar.com);

As discussed above, Theragen attempts to restrict the channels of trade and the relevant consumers for its goods by relying on limitations that are not present in its applications. Such limitations are not relevant and should not be considered by the Board. The cases cited by Theragen do not help its argument. In each such case, the differences in trade channels and consumers flowed from the goods as they were identified in the relevant applications and registrations. *See In re Fesco, Inc.*, 219 U.S.P.Q. 437 (T.T.A.B. 1983) (based on differences apparent in the goods as described in the application and registration, the Board concluded that applicant's goods would not likely be purchased or used by or otherwise come to the attention of those who sell or those who purchase registrant's goods); *Chase Brass and Copper Company, Inc.*, 199 U.S.P.Q. 243, 245 (T.T.A.B. 1978) (based on differences in types of goods described in the application and registration, the Board concluded that "the marks identifying the respective products of applicant and opposer would never be encountered by the same persons in an environment where a likelihood of confusion could occur.").

Here, the evidence clearly shows that electrostimulatory devices are available to the general public, through normal, unrestricted channels, and without a prescription.²⁷ Nonetheless, Theragen asks the Board to consider limitations on the trade channels and consumers that do not appear on the face of its applications nor flow logically from the identification of goods in its application.²⁸ Theragen's applications are not limited to goods sold by prescription only. Theragen's applications are not limited to goods distributed to or through doctors or other medical professionals. Thus, the Board cannot consider these limitations.

Thus, the parties' consumers and channels of trade are similar and this factor weighs in favor a finding of likelihood of confusion.

Id. at Exh. 59 (7 TTABVUE 168-182) (TENS muscle stimulators and handheld percussive massage devices both advertised for sale through tenspros.com).

²⁷ *See* n. 15, *supra*.

²⁸ Applicant's Brief, pp. 10-12 (20 TTABVUE 15-17).

D. THERAGUN Is a Strong Mark

1. There Is No Evidence that THERAGUN Is Entitled To Only a Narrow Scope of Protection

Applicant contends that THERAGUN is entitled only to a narrow scope of protection as a result of third-party registrations that also include the prefix “thera.” As discussed above in Section II.A.1, “[t]he probative value of third-party trademarks depends entirely upon their usage.” *Palm Bay Imports, Inc.*, 73 U.S.P.Q.2d at 1693.²⁹ Here, Theragen has introduced zero evidence regarding the use of third-party marks. The Board should “not assume any knowledge on the part of the purchasing public of mere registrations” or “that marks are in continuing use, so as to have had any effect on the mind of the purchasing public, merely because they have been registered.” *In re Helene Curtis Indus., Inc.*, 305 F.2d at 494.

Even if the third-party registrations submitted by Theragen were competent evidence (and they are not), an examination of the registrations submitted by Theragen shows that field is not nearly as crowded as Theragen suggests it is in its brief. Theragen claims it has submitted evidence of “65 coexisting federal registrations for THERA-formative marks in Class 10.”³⁰ In fact, however, the evidence of record shows only 50 such registrations, the rest of the evidence cited by Theragen refers either to pending applications or cancelled registrations,³¹ neither of which has any relevant evidentiary value. Of those 50 registrations, only 45 are based on used in commerce, and of those 45 registrations, only 18 include massagers, electrostimulatory or similar devices, or

²⁹ See also n. 2, *supra*, and cases cited therein.

³⁰ Applicant’s Brief, p. 13 (20 TTABVUE 18).

³¹ Applicant’s NOR, Exhs. 14, 23, 28-30, 35, 36, 38, 40, 41, 45-47, 52, 53, 55 (11 TTABVUE 59, 86-87, 100-106, 119, 122, 128-29, 134,137, 149-154, 168-69, 172, 178-79). Theragun also respectfully requests that the Board take judicial notice that, as reflected in the Trademark Office’s records, and as shown in the Trademark Electronic Search System (“TESS”) printouts attached hereto as Exhibits A and B, U.S. Reg. Nos. 1799243 and 4480701, Exhibits 14 and 15 to Applicant’s NOR, have been cancelled.

physical therapy or rehab apparatus.³² Again, as noted above, none of the registered marks are nearly as similar to THERAGUN as THERAGEN.

In short, Theragen's evidence falls far short of establishing that so many similar marks are used for similar goods that THERAGUN should be afforded only a narrow scope of protection. Even if, however, THERAGUN were entitled to only a narrow scope of protection, Theragen's suggestion that it could only prohibit identical marks for identical goods, is entirely inconsistent with the Lanham Act. The Lanham Act protects against the use of marks that are likely to cause confusion. There is no "per se" rule that confusion can arise with "weak marks" only when an identical mark is used. Here, whether regarded as strong or weak, whether entitled to a broad or narrow scope of protection, the protection of the Lanham Act would be sufficient to protect THERAGUN from the registration of the nearly identical mark THERAGEN for goods and services similar to Theragen's registered goods.

2. THERAGUN Is a Strong Mark

Theragen states that THERAGUN is not famous for likelihood of confusion purposes and concludes, therefore, that it must be considered "very weak."³³ However, mere sentences before announcing this conclusion, Theragen recognizes that, for likelihood of confusion purposes, fame "varies along a spectrum from very strong to very weak."³⁴ It is certainly not the case here that Theragen has submitted *no* evidence of the fame of its mark. Indeed, the record contains ample evidence of fame, including, information about Theragen's advertising expenditures, marketing, and "views" of advertising campaigns.³⁵ The foregoing evidence has been challenged but even if it is stricken (and it should not be), there is additional, unchallenged, evidence of fame in the record, as discussed below.

³² Applicant's NOR, Exhs. 1, 2, 5, 9, 11, 12, 19, 20, 43, 44, 48-51, 59, 64-66 (11 TTABVUE 21, 23, 33, 44, 50, 53, 74-75, 143, 146, 157-167, 189-90, 203-209).

³³ Applicant's Brief, p. 16 (20 TTABVUE 21).

³⁴ *Id.* (quoting *Palm Bay Imports, Inc.*, 73 U.S.P.Q.2d at 1694).

³⁵ Confidential Rebuttal Declaration of Kevin Tsao filed on November 2, 2020 ("Tsao Decl."), ¶¶ 2-3, 7 (16 TTABVUE 2-3).

“Fame for confusion purposes arises as long as a significant portion of the relevant consuming public . . . recognizes the mark as a source indicator.” *Palm Bay Imports, Inc.*, 73 U.S.P.Q.2d at 1694. Theragen acknowledges, but seeks to downplay, Theragun’s evidence: “[a]t best, these records show . . . that Opposer has received some favorable press (unclear if paid or unsolicited) limited to the field of percussive hand-held personal massagers.”³⁶ The issue is whether the relevant public recognizes the mark as a source indicator; there is no requirement that Theragun achieve that recognition through unpaid press and there is no requirement that Theragun achieve fame for an broad array of goods.

Here, the record contains evidence of favorable press, including in well-known outlets with extensive circulation, including *Vogue*, *TeenVogue*, *US Weekly*, *Shape*, *SELF*, *GQ*, and *Men’s Health*,” as well as evidence that Theragun is the market leader.³⁷ The record also contains evidence that famous people use and promote THERAGUN products, including numerous professional athletes (Marcus Peters, Cristiano Ronaldo, Rob Gronkowski, Julio Jones, and Kyrie Irving), Olympians (Kerri Walsh-Jennings), models (Ashley Graham), musical artists (Shakira, Adam Levine, Diddy, and DJ Khaled), and actors (Chelsea Handler, Gal Godot, Kevin Hart, Jamie Lynn Sigler, and Chris Hemsworth).³⁸ THERAGUN-branded products have been used during both the Super Bowl and the NBA Finals.³⁹

It is reasonable to conclude, based on this evidence, that a significant portion of the relevant consuming public recognize THERAGUN as a source indicator. Even if the Board concludes that the evidence falls short of establishing fame for likelihood of confusion purposes, the evidence of record clearly establishes that the mark is not weak. And again, even a narrow

³⁶ Applicant’s Brief, p. 15 (20 TTABVUE 20).

³⁷ NOR, Exhs. 60-77 (7 TTABVUE 183-325).

³⁸ NOR, Exhs. 61, 62, 64, 65-67, 69, 72, 74, 77 (7 TTABVUE 194-96, 201, 218, 222-23, 231, 249, 261, 278, 296-97, 316).

³⁹ NOR, Exhs. 61, 64, 65, 66, 67, 69, 74 (7 TTABVUE 194-96, 218, 222-23, 231, 249, 261, 297).

scope of protection would be sufficient to protect Theragun against the registration of the nearly identical mark THERAGEN for goods and services similar to Theragun's registered goods

At worst, the evidence establishes that the mark is neither particularly strong nor particularly weak. At worst, this factor is neutral.

E. There Is No Evidence that Consumers of Theragen's Good Are Sophisticated

Applicant argues that its target consumers, prescribing physicians, are too sophisticated to be confused by the similarities between THERAGUN and THERAGEN. Again, however, Applicant improperly asks the Board to consider only a small fraction of the ordinary consumers of its applied-for goods. Theragen presents no evidence – and does not even argue – that *all* electrostimulatory devices of the type in its applications are available by prescription only. Indeed, the evidence of record clearly shows that such goods are available through the same general retail channels as massage devices.⁴⁰ Instead, Theragen claims that its specific goods will be available by prescription only. The limitation does not exist in the applications and should not be considered by the Board.

Even if some of the consumers for the electrostimulatory devices in Theragen's applications are doctors, many others are not. Even if doctors are too sophisticated to be confused, a proposition that is far from settled, the same cannot be said for the other consumers.

At best, this factor weighs in favor of a finding of likelihood of confusion, owing to the availability of the parties products through general retail channels at a relatively low cost.⁴¹ At worst, this factor is neutral.

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⁴⁰ NOR, Exhs. 53-59 (7 TTABVUE 121-182).

⁴¹ NOR, Exhs. 53-59 (7 TTABVUE 121-182).

III. CONCLUSION

Theragun owns valid trademark rights in THERAGUN, and all of the relevant *DuPont* factors either weigh in favor of a finding of likelihood of confusion or are neutral. The Board should find that a likelihood of confusion exists, sustain Theragun's opposition, and refuse registration of THERAGEN.

Respectfully submitted,

Dated: February 16, 2021

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EXHIBIT A



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Word Mark THERA-BAND & BALL

Goods and Services (CANCELLED) IC 010. US 044. G & S: rubber sheeting used for medical purposes. FIRST USE: 19921101. FIRST USE IN COMMERCE: 19921223

Mark Drawing Code (3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design Search Code 01.15.25 - Coal; Dust; Light rays; Liquids, spilling; Pouring liquids; Sand; Spilling liquids
26.13.21 - Quadrilaterals that are completely or partially shaded

Serial Number 74357841

Filing Date February 11, 1993

Current Basis 1A

Original Filing Basis 1A

Published for Opposition July 27, 1993

Registration Number **1799243**

Registration Date October 19, 1993

Owner (REGISTRANT) HYGENIC CORPORATION, THE CORPORATION OHIO 1245 Home Avenue Akron OHIO 44310

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record Sylvia A. Petrosky

Prior Registrations 1063239

Description of Mark The mark is lined for the colors yellow, red, green, blue and grey.

Type of Mark TRADEMARK

Register PRINCIPAL

Live/Dead Indicator DEAD

Cancellation Date December 15, 2000

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EXHIBIT B



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THERA-SOM CAST

Word Mark	THERA-SOM CAST
Goods and Services	(CANCELLED) IC 010. US 026 039 044. G & S: Anti-snoring and sleep apnea appliance, namely a therapeutic mouthpiece for prevention of snoring. FIRST USE: 20130430. FIRST USE IN COMMERCE: 20130430
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	85970938
Filing Date	June 26, 2013
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	November 26, 2013
Registration Number	4480701
Registration Date	February 11, 2014
Owner	(REGISTRANT) Meade, Thomas INDIVIDUAL UNITED STATES 215 16th St. S.W. Albuquerque NEW MEXICO 87104
Attorney of Record	aoi nawashiro
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	DEAD
Cancellation Date	September 18, 2020

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CERTIFICATE OF SERVICE

It is hereby certified that on **February 16, 2021**, a copy of the foregoing REPLY BRIEF OF THERAGUN, INC. has been sent via email to Applicant's counsel of record as follows:

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Kerene Palmer