

This Opinion is Not a
Precedent of the TTAB

Mailed: November 17, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

Therabody, Inc., by change of name from *Theragun, Inc.*¹

v.

Shanghai Three Gun (Group) Co., Ltd.

—
Opposition No. 91264121
—

Diane C. Ragosa of Parker Ibrahim & Berg LLP,
for Therabody, Inc.²

John P. Murtaugh and Una L. Lauricia of Pearne & Gordon LLP,
for Shanghai Three Gun (Group) Co., Ltd.

¹ At footnote 1 of its brief (20 TTABVUE 2), Opposer states that it changed its name from Theragun, Inc. to Therabody, Inc., and that “[t]he change of name has been recorded with the United States Patent and Trademark Office.” Although Opposer did not specify where the name change is recorded, a review of Office records shows that the change of name was executed on October 1, 2021, and recorded in the Assignment Recordation Branch on March 25, 2022 at Reel/Frame 7671/0532. Opposer filed both non-confidential (20 TTABVUE) and confidential (21 TTABVUE) versions of its brief and footnote 1 is the same in each.

Citations to the record or briefs in this decision are to the publicly available documents on the Trademark Trial and Appeal Board Inquiry System (TTABVUE), the Board’s electronic docketing system. The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry, if applicable. All citations to documents contained in the TTABVUE database are to the downloadable .pdf versions of the documents in the USPTO TTABVUE Case Viewer.

² Rod S. Berman and Jessica Bromall Sparkman of Jeffer Mangels Butler & Mitchell, LLP represented Opposer prior to Opposer’s filing of its reply brief.

Before Taylor, Greenbaum and Hudis,
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Shanghai Three Gun (Group) Co., Ltd. (“Applicant”) seeks registration on the Principal Register of the stylized mark **THREEGUN** for the following goods:

Air cushions for medical purposes; Blankets, electric, for medical purposes; Clothing extension support devices for use during pregnancy for medical purposes; Corsets for medical purposes; Draw-sheets for sick beds; Electric acupuncture instruments; Feeding bottles; Heating cushions for medical purposes; Inflatable cushions for medical use; Masks for use by medical personnel; Massage apparatus; Orthopedic cushions; Physical exercise apparatus for medical purposes; Respiratory masks for medical purposes; Sanitary masks for medical purposes; Sterile sheets, surgical; Suture materials; Vibromassage apparatus; Clothing especially for operating rooms,” in Class 10.³

Therabody, Inc. (“Opposer”) opposes registration on the ground that Applicant’s mark, when used in connection with Applicant’s goods, is likely to cause confusion. Opposer alleges ownership and use of the mark THERAGUN (with and without other matter as set forth in the registrations listed below) for a variety of goods, including massage apparatus, since long prior to the March 12, 2020 filing date of Applicant’s application.⁴ Opposer, in its notice of opposition, pleads ownership of the following seven registrations, summarized below:

³ Application Serial No. 88832281 was filed on March 12, 2020, and is based upon Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

⁴ 1 TTABVUE.

| Registration No. | Mark | Goods ⁵ |
|-----------------------|--|--|
| 5213141 ⁶ | THERAGUN | A variety of massage apparatus, instruments and electric appliances, in Class 10; Hats; T-shirts; Baseball caps and a variety of athletic apparel, in Class 25 |
| 6081408 ⁷ | THERAGUN G3 | A variety of massage apparatus, instruments and electric appliances, in Class 10 |
| 6043891 ⁸ | THERAGUN G3PRO | A variety of massage apparatus, instruments and electric appliances, in Class 10 |
| 6043917 ⁹ | THERAGUN LIV | A variety of massage apparatus, instruments and electric appliances, in Class 10 |
| 6060204 ¹⁰ | THERAGUN NETWORK (Network disclaimed) | Affiliate marketing; Promoting the goods and services of others by arranging for businesses to affiliate their goods and services with the goods and services of third parties by means of sponsorship relationships, in Class 35 |
| 6030995 ¹¹ | THERAGUN RESET | Percussive therapy services in the nature of |

⁵ The goods are set forth with particularity later in this decision, where applicable.

⁶ Issued May 20, 2017.

⁷ Issued June 16, 2020.

⁸ Issued April 28, 2020.

⁹ Issued April 28, 2020.

¹⁰ Issued May 19, 2020.

¹¹ Issued April 7, 2020.

| Registration No. | Mark | Goods ⁵ |
|-----------------------|-----------|--|
| | | massage therapy using percussive technology; Salon and day spa services, namely, massage therapy; massage; massage therapy services; Bodywork therapy services, namely, massage therapy, in Class 44 |
| 4760327 ¹² | THERAGUNZ | Vibrating apparatus used to stimulate muscles and increase strength and physical performance for health and medical purposes, in Class 10 |

Applicant, in its answer, admits Opposer is the record owner of each of the pleaded registrations, but otherwise denies the salient allegations in the notice of opposition.¹³

Both Opposer and Applicant filed briefs. Opposer also filed a reply brief. However, Opposer’s reply brief does not include a certificate of service as required by Trademark Rule 2.119, 37 C.F.R. § 2.119. A review of the circumstances surrounding

¹² Issued June 23, 2015.

¹³ 4 TTABVUE. Applicant also raised two purported affirmative defenses, which are not true affirmative defenses. As to the first, the asserted defense of failure to state a claim is not a true affirmative defense because it asserts insufficiency of the pleading. *John W. Carson Found. v. Toilets.com, Inc.*, 94 USPQ2d 1942, 1949 (TTAB 2010). As to the second, Applicant improperly “reserves the right to assert additional affirmative defenses in the event that discovery indicates that such additional affirmative defenses are available.” 4 TTABVUE 4. The assertion of the right to put forward additional defenses is improper under the Federal Rules of Civil Procedure, inasmuch as it does not give Opposer fair notice of such defenses. See *Philanthropist.com, Inc. v. The Gen. Conf. Corp. of Seventh-Day Adventists*, 2021 USPQ2d 643, at *4 n.6 (TTAB 2021).

Opposer's filing of its reply brief show that Opposer's current (then new) counsel entered an appearance on July 1, 2022.¹⁴ That same day, Opposer's new counsel filed a motion, with Applicant's consent, for additional time to file Opposer's reply brief, which was granted on July 7, 2022.¹⁵ Consequently, Applicant's counsel knew to expect a reply brief which, along with a confidential version of the reply brief, was timely filed on July 11, 2022, albeit without the certificates of service.¹⁶

There is no indication Applicant's counsel made any inquiries regarding non-receipt of the reply brief, nor did Applicant move to strike it for any reason. In any event, Applicant is not prejudiced by this filing because there is nothing more Applicant could have filed in this case after the reply brief was filed. Under these circumstances, and because the reply brief serves as a roadmap for the Board to Opposer's arguments and evidence as they pertain to Applicant's brief on the case, to expedite matters, we exercise our discretion and consider Opposer's reply brief. *See Coffee Studio LLC v. Reign LLC*, 129 USPQ2d 1480, 1482 n.7 (TTAB 2019) (“[T]he Board may exercise its inherent authority under individual circumstances to consider a filing on the merits where service issues are present.”). We add that even if we had not considered the reply brief, our decision would be the same. *See generally*, TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) Section 113.02 (2022).

¹⁴ 24 TTABVUE.

¹⁵ 25 TTABVUE, 26 TTABVUE.

¹⁶ See 27 TTABVUE (confidential version), 28 TTABVUE.

Opposer must, within ten days of the mailing date of this decision, serve copies of both the confidential and redacted versions of its reply brief on counsel for Applicant and proof of such service with the Board.¹⁷ If Opposer fails to comply, the confidential version will be made public so that Applicant's proceeding records are complete.

I. Preliminary Issues

A. Opposer's Request the Board Take Judicial Notice of Office Records

Opposer, in its main brief, requests the Board take judicial notice of the fact that a search of the Office's Trademark Electronic Search System ("TESS") database for live, use-based, federal trademark registrations including both "massage apparatus" and "masks for use by medical personnel" returned 784 results.¹⁸ Opposer also requests the Board take judicial notice of printouts from the TESS database of 50 live, use-based trademark registrations, all of which include both masks and massage devices.¹⁹

Citing TBMP § 704.12(a), Opposer argues that consideration of the facts and registrations are appropriate subjects of judicial notice in that they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Opposer further explains that "[t]he foregoing facts and registrations are relevant in view of Applicant's motion to amend its application and limit its applied-for goods to clothing for operating rooms and masks, which motion

¹⁷ Opposer's redacted reply brief can be found at 28 TTABVUE.

¹⁸ 20 TTABVUE 15 (Opposer's brief, p. 10 n.26). The TESS results are appended as Ex. A to Opposer's brief.

¹⁹ *Id.* The printouts of the registrations are appended as Ex. B to Opposer's brief.

was not filed until after the close of Opposer's testimony period." Opposer's brief, p. 10 n.26.²⁰

While we appreciate that Opposer's evidentiary record may be adversely affected if Applicant's proposed amendment is accepted, given the timing of Applicant's submission (discussed in detail below), Opposer's request does not encompass facts or records of which the Board takes judicial notice. Notwithstanding that the accuracy of records residing in the TESS database of the United States Patent and Trademark Office cannot reasonably be questioned, it is well established that the Board does not take judicial notice of office records related to third-party registrations, and we do not take judicial notice of the late-filed third-party registrations here. *See e.g., Flame & Wax, Inc. v. Laguna Candles, LLC*, 2022 USPQ2d 714, at *31 n.57 (TTAB 2022) (citing *Cities Service Co. v. WMF of Am., Inc.*, 199 USPQ 493 (TTAB 1978) ("judicial notice of third-party registrations may not be taken where no copies thereof are submitted"); *In re Thomas Nelson, Inc.* 97 USPQ2d 1712, 1717 n.18 (TTAB 2011) ("[T]he Board's well-established practice is not to take judicial notice of third-party registrations....").

As to the TESS listing, even if it were properly of record, it is not competent evidence to demonstrate the relatedness of the respective goods. Mere listings of third-party registrations are not sufficient to make those registrations of record. *See e.g., Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 155 (TTAB 2012) (TESS listing has little, if any, probative value); *In re Jonathan Drew, Inc.*, 97 USPQ2d 1640, 1644

²⁰ *Id.*

n.11 (TTAB 2011); see also TBMP § 1208.02 and the authorities cited therein. While Opposer did submit 50 copies of the listed third-party registrations with its brief, they are manifestly untimely. A party may introduce testimony and evidence only during its assigned testimony period. Trademark Rule 2.121, 37 C.F.R. § 2.121 (assignment of times for taking testimony and presenting evidence). *See, e.g., Baseball Am. Inc. v. Powerplay Sports*, 71 USPQ2d 1844, 1846 n.8 (TTAB 2004) (documentary evidence submitted outside assigned testimony period given no consideration).

Accordingly, we give no further consideration to the TESS listing and the third-party registrations submitted as Exs. A and B to Opposer's brief.

B. Applicant's Motion to Amend

We next address Applicant's motion to amend the identification of goods in its application, filed November 11, 2021, nearly a month after the September 14, 2021 closing date of Opposer's testimony period in chief.²¹ By order issued November 24, 2022, the Board suspended this proceeding to allow Applicant time to obtain Opposer's consent to the amendment, failing which the proposed amendment would be deferred until final decision.²² When no response was received, this proceeding was resumed and consideration of the proposed amendment was deferred.

Turning then to the proposed amendment, Applicant seeks to amend its identification of goods from:

Air cushions for medical purposes; Blankets, electric, for
medical purposes; Clothing extension support devices for

²¹ 14 TTABVUE.

²² 16 TTABVUE.

use during pregnancy for medical purposes; Corsets for medical purposes; Draw-sheets for sick beds; Electric acupuncture instruments; Feeding bottles; Heating cushions for medical purposes; Inflatable cushions for medical use; Masks for use by medical personnel; Massage apparatus; Orthopedic cushions; Physical exercise apparatus for medical purposes; Respiratory masks for medical purposes; Sanitary masks for medical purposes; Sterile sheets, surgical; Suture materials; Vibromassage apparatus; Clothing especially for operating rooms, in Class 10

to:

Masks for use by medical personnel; Respiratory masks for medical purposes; Sanitary masks for medical purposes; Clothing especially for operating rooms, in Class 10.

Applicant argues that its proposed amendment falls under *Johnson & Johnson v. Striker Corp.*, 109 USPQ2d 1077 (TTAB 2013),²³ and urges that “[i]f the proposed

²³ In *Striker*, the Board set forth the following conditions for allowing an amendment of an opposed application:

- 1) the proposed amendment must serve to limit the broader identification of goods or services;
- 2) applicant must consent to entry of judgment on the grounds for opposition with respect to the broader identification of goods or services present at publication;
- 3) if the applicant wishes to avoid the possibility of a res judicata effect by the entry of judgment on the original identification, the applicant must make a prima facie showing that the proposed amendment serves to change the nature and character of the goods or services or restrict their channels of trade and customers so as to introduce a substantially different issue for trial; and
- 4) where required to support the basis of the subject application, any specimens of record must support the goods or services as amended; and applicant must then introduce evidence during its testimony period to prove use of its mark with the remaining goods or service prior to the relevant date as determined by the application’s filing basis.

amendment is granted immediately, the scope of discovery and presentation of evidence on opposer's Section 2(d) claim will be narrowed and simplified." Mot. to Amend, p. 4.²⁴

We agree with Applicant that its requested amendment comports with the first three *Striker* conditions and that the fourth is not applicable. However, unlike in *Striker* where the amendment was filed prior to the close of the discovery period, here, Applicant did not seek to amend its identification until after the close of Opposer's testimony period in chief.

Because Applicant failed to file its motion early enough to provide Opposer with sufficient notice of its proposed change before trial, as is apparent by Opposer's attempt to supplement its record with the untimely submissions appended to its brief, Applicant's motion to amend must be denied. *See, e.g., ProQuest Info. and Learning Co. v. Island*, 83 USPQ2d 1351, 1353-54 (TTAB 2007) (Board denied applicant's requests in his brief to narrow his identification of goods to avoid any likelihood of confusion); *Personnel Data Sys., Inc. v. Parameter Driven Software, Inc.*, 20 USPQ2d 1863 (TTAB 1991) (Board denied as untimely, respondent's motion to amend the identification of goods in its registration which request was filed with respondent's brief on the case); *Int'l Harvester Co. v. Int'l Tel. and Tel. Corp.*, 208 USPQ 940, 941 (TTAB 1980) (amendment to identification may be permitted if made before trial, if it serves to limit the scope of goods, and if applicant consents to judgment with respect

Striker, 109 USPQ2d at 1078-79.

²⁴ 14 TTABVUE 5.

to the broader identification of goods); *Gulf States Paper Corp. v. E-Z Por Corp.*, 157 USPQ 450 (TTAB 1968) (Board denied applicant's motion to amend the identification of goods filed after opposer had put on his case, noting that the timing would prejudice opposer). *See also* TMEP § 514.03, and the authorities cited therein.

Applicant's motion to amend the identification of goods therefore is denied, and this proceeding will go forward on the current identification of goods.

II. The Record

The record in this case consists of the pleadings and, by rule, the file of Applicant's application. Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1).

During its assigned testimony period, Opposer submitted the following:

- Opposer's Notice of Reliance (NOR) on: (1) TESS printouts showing the current status and title of Opposer's pleaded registrations (Exs. 1-7); (2) printouts from the TESS database showing the current status and title of five additional registrations for THERAGUN and THERAGUN- formative marks owned by Opposer²⁵ (Exs. 8-12); (3) Applicant's responses to Opposer's First set of

²⁵ The registrations include: Registration No. 6126360 (THERAGUN MINI); Registration No. 6126362 (THERAGUN PRO); Registration No. 6126363 (THERAGUN ELITE); Registration No. 6218258 (THERAGUN PRIME); and Registration No. 6206626 (THERAGUN). "While an unpleaded registration cannot be used as a basis for the opposition, it, like third-party registrations, may be considered for 'whatever probative value' it may lend to opposer's showing under the *du Pont* factors in its case in chief." *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031, 1035 (TTAB 2010). *See also* TBMP § 704.03(b)(1)(A) (2014) (distinguishing between a federal registration owned by the plaintiff in an opposition or cancellation proceeding and one pleaded by the plaintiff in its complaint)." *Fujifilm Sonosite, Inc. v. Sonoscape Co., Ltd.*, 111 USPQ2d 1234, 1236 (TTAB 2014). However, we give them little to no probative value as they (as opposed to evidence regarding the use of some of the subject marks) were not the focus of Opposer's arguments, save as to ownership.

Interrogatories and First Request for Production of Documents and Things²⁶ (Exs. 13-16); and (4) Printout of articles from websites and publications, including, e.g., Vogue, Sports Illustrated, Men's Health, Shape and Health (Exs. 17-34).

- The Testimony declaration of Kevin Tsao, Opposer's Sr. Vice-President of Digital, with Exs. 35-51.²⁷

During its assigned testimony period, Applicant submitted the following:

- Applicant's notice of reliance on: (1) a printout from the USPTO's Trademark Status & Document Retrieval (TSDR) database of Applicant's Registration



No. 2072348 for the design mark for various clothing items ('348 Registration) (Ex. 1); (2) specimens submitted to the Office in connection with the procurement and maintenance of Applicant's '348 registration (Ex. 2-4); (3) printouts of third-party registrations of GUN- formative marks from the TSDR database (Exs. 5-21); (4) a printout from amazon.com showing sales of

²⁶ 9 TTABVUE. Notably, responses to a request for production of documents introduced through a notice of reliance are admissible solely for purposes of showing that a party has stated that there are no responsive documents; documents produced in response to the requests are generally not admissible by notice of reliance alone. Trademark Rule 2.120(j)(3)(ii), 37 C.F.R. § 2.120(j)(3)(ii); *see also City Nat'l Bank v. OPGI Mgmt. GP Inc./Gestion OPGI Inc.*, 106 USPQ2d 1668, 1674 n.10 (TTAB 2013) (responses to document production requests are admissible solely for purposes of showing that a party has stated that there are no responsive documents); *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036 n.7 (TTAB 2012) (written responses to document requests indicating that no documents exist may be submitted by notice of reliance). Accordingly, we consider Applicant's responses to Opposer's document requests only to the extent that they state Applicant has no responsive documents.

²⁷ 10 TTABVUE (11 TTABVUE, confidential version).

Applicant's THREEGUN masks (Ex. 22); and (5) printouts from third-party websites purportedly "relevant to the strength of Applicant's THREEGUN mark" (Exs. 23-27).²⁸

- The testimony Declaration of Zhao Dandi, the General Manager of Shanghai Dragon Imp. & Exp. Co., Ltd., a subsidiary of Shanghai Dragon Corporation of which Applicant is also a subsidiary.²⁹

III. Entitlement to Statutory Cause of Action

Entitlement to a statutory cause of action "is an element of the plaintiff's case in every inter partes proceeding." *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (2021) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392, 109 USPQ2d 2061, 2067 n.4 (2014)).

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) a reasonable belief in damage proximately caused by the registration or continued registration of the mark. *Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388, at *1 (TTAB 2020) (citing *Corcamore*, 2020 USPQ2d 11277 at *4). *See also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111

²⁸ 18 TTABVUE.

²⁹ 19 TTABVUE.


USPQ2d 1058, 1062 (Fed. Cir. 2014); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Opposer's pleaded registrations for the THERAGUN marks have been made of record,³⁰ and because these registrations form the basis of Opposer's plausible likelihood of confusion claim, we find it has established a reasonable belief of damage that is proximately caused by the potential registration of Applicant's proposed mark. *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1032 (TTAB 2016) (pleaded registration demonstrated entitlement to bring a statutory cause of action); *Barbara's Bakery v. Landesman*, 82 USPQ2d 1283, 1285 (TTAB 2007) (pleaded registration of record and opposer's likelihood of confusion claim was plausible). The opposition therefore falls within the zone of Opposer's interest protected by Section 13 of the Trademark Act, 15 U.S.C. § 1063(a).

IV. Priority

In view of Opposer's submission into evidence of valid and subsisting registrations for its pleaded marks, and in the absence of any counterclaims to cancel those registrations,³¹ priority is not in issue with respect to the marks and the goods listed

³⁰ 9 TTABVUE 6, 9-10 (Opposer's NOR, Exs. 1-7).

³¹ Applicant's allegation of priority, based on its previously registered design mark (Registration No. 2072348) for various clothing items, or any common law use of the THREEGUNS mark, is an impermissible collateral attack with respect to Opposer's pleaded registrations in the absence of a timely filed counterclaim. Trademark Rule 2.106(b)(3)(ii), 37 C.F.R. § 2.106(b)(3)(ii) ("An attack on the validity of a registration pleaded by an opposer will not be heard unless a counterclaim or separate petition is filed to seek the cancellation of such registration."); *see also, e.g., Fort James Operating Co. v. Royal Paper Converting Inc.*, 

therein. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d. 1400, 182 USPQ 108, 110 (CCPA 1974).

V. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits the registration of a mark that

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

15 U.S.C. § 1052(d). “In opposition proceedings, the opposer has the burden of proving a likelihood of confusion by a preponderance of the evidence.” *Stratus Networks v. UBTA-UBET Commc’ns. Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, *3 (Fed. Cir. 2020) (citing *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000)).

83 USPQ2d 1624, 1626 n.1 (TTAB 2007) (absent a counterclaim, Board cannot consider arguments against the validity of a pleaded registration). Accordingly, we do not consider further Applicant’s arguments and evidence directed solely to Applicant’s claim of prior use. Applicant’s contention that THERAGUN is merely descriptive likewise is an impermissible collateral attack on Opposer’s pleaded registrations. We will, however, consider those arguments and supporting evidence to the extent they relate to Applicant’s arguments regarding the weakness of Opposer’s pleaded THERAGUN marks.

To the extent, Applicant intended its arguments to be in the nature of a prior registration or *Morehouse* defense, see *Morehouse Mfg. Corp. v. J. Strickland & Co.*, 407 F.2d 881, 166 USPQ 715 (CCPA 1969), such defense was not pleaded nor is it available. See *id.* at 717 (“the opposer cannot be damaged, within the meaning of section 13 of the statute, by the issuance to the applicant of a second registration where applicant already has an existing registration of the same mark for the same goods”). Here, both Applicant’s mark and goods differ from those in the prior registration, so the *Morehouse* defense is inapplicable even if it was timely asserted (which it was not).

Our analysis under Section 2(d) is based on all of the probative evidence of record relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). “In discharging this duty, the thirteen *DuPont* factors ‘must be 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) and *DuPont*, 177 USPQ at 567). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks v. UBTA-UBET Commc’ns*, 2020 USPQ2d 10341, at *3 (citing *Dixie Rests.*, 41 USPQ2d at 1406-07). “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. *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 Int’l v. Kappa Books, Inc.*, 64 USPQ2d at

1380). We discuss below these and other factors for which there is either evidence or argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019) (Board considers each DuPont factor for which there is evidence and argument).

While we consider all of Opposer's pleaded registrations, for the sake of judicial economy, we confine our analysis to the THERAGUN mark in Opposer's pleaded Registration No. 5213141 and the goods identified therein because the parties primarily directed their arguments and evidence to the mark and goods in that registration. In addition, the THERAGUN mark includes less points of difference between it and Applicant's mark than Opposer's other pleaded marks. If we find a likelihood of confusion as to this mark, we need not find it as to the others; conversely, if we do not find a likelihood of confusion as to this mark, we would not find it as to the others. *See Fiserv, Inc. v. Elec. Transaction Sys. Corp.*, 113 USPQ2d 1913, 1917 (TTAB 2015); *In re Max Cap. Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. Similarity/Dissimilarity of the Goods, Trade Channels and Classes of Consumers

We turn first to the *DuPont* factor involving consideration of the "similarity or dissimilarity and nature of the goods ... as described in an application or registration." *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Under this *DuPont* factor, we need not find similarity as to each and every product listed in Applicant's identification of goods. It is sufficient for a refusal based on likelihood of confusion

that relatedness is established for any item encompassed by the identification of goods in a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *i.am.symbolic*, 116 USPQ2d at 1409; *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014). For ease of reference, we list the respective goods below (emphasis added).

Applicant's goods:

Air cushions for medical purposes; Blankets, electric, for medical purposes; Clothing extension support devices for use during pregnancy for medical purposes; Corsets for medical purposes; Draw-sheets for sick beds; Electric acupuncture instruments; Feeding bottles; Heating cushions for medical purposes; Inflatable cushions for medical use; Masks for use by medical personnel; **Massage apparatus**; Orthopedic cushions; Physical exercise apparatus for medical purposes; Respiratory masks for medical purposes; Sanitary masks for medical purposes; Sterile sheets, surgical; Suture materials; **Vibromassage apparatus**; Clothing especially for operating rooms (Class 10); and

Opposer's goods:

Massage apparatus; Massage apparatus and instruments; Massage apparatus for massaging injured muscles; Massaging apparatus for personal use; 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; Foot massage apparatus (Class 10).³²

³² Opposer's registration additionally includes goods in Class 25, namely, "Hats; T-shirts; Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; Baseball caps and hats; Short-sleeved or long-sleeved t-shirts."

We find the parties' goods in-part identical in that they both include "massage apparatus" and legally identical as to Applicant's "vibromassage apparatus," because Opposer's broadly worded "massage apparatus" encompasses Applicant's more narrowly identified "vibromassage apparatus." *See In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1518 (TTAB 2016) ("Inasmuch as Registrant's goods are encompassed within the scope of Applicant's goods, the respective goods are legally identical in part."); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) ("Applicant's broadly worded identification of 'furniture' necessarily encompasses Registrant's narrowly identified 'residential and commercial furniture.>"). Because Applicant's and Opposer's goods are identical to the extent noted above, "there is no need for us to further consider the relatedness of the goods." *In re FabFitFun*, 127 USPQ2d 1670, 1672 (TTAB 2018).

In addition, because Applicant's and Opposer's goods are in-part identical, we presume that the channels of trade and classes of purchasers are the same for those goods. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (identical goods are presumed to travel in same channels of trade to same class of purchasers) (*cited in Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) ("With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and 'presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods...."). Therefore, the channels of trade and classes of purchasers overlap.

We accordingly find the *DuPont* factors concerning the relatedness of the goods, trade channels and classes of purchasers favor a finding of likelihood of confusion.

B. Purchaser Sophistication and Consumer Care

Applicant argues that “Opposer’s goods are relatively ‘expensive’ as compared to Applicant’s masks and protective clothing, thereby making confusion less likely. Purchasers of Applicant’s massage gun devices, which are generally priced between \$200 and \$600 for one product, are likely to give careful consideration to such products as they are generally purchased infrequently.” Applicant’s brief, p. 19.³³ Applicant’s argument stems from its mistaken assumption that its untimely-filed motion to amend its application would be granted. Because it was not, Applicant’s goods also include massage apparatus. While we have no pricing information regarding Applicant’s massage apparatus, as there has been no demonstrated use in the United States, the record nonetheless shows the prices of various massage devices ranging between \$120 and \$600.

Because neither Opposer’s nor Applicant’s identification of goods contains limitations as to classes of purchasers or price of products, we must consider that purchasers may include ordinary consumers who may purchase lesser expensive models. Moreover, precedent requires that we base our decision on the least sophisticated potential purchasers. *Stone Lion*, 110 USPQ2d at 1163-64 (recognizing

³³ 22 TTABVUE 20.

Board precedent requiring consideration of the “least sophisticated consumer in the class”).

We therefore find the *DuPont* factor regarding purchaser sophistication and care neutral in our analysis.

C. Lack of Actual Consumer Confusion

We next consider the *DuPont* factor concerning the nature and extent of any actual confusion and the related *DuPont* factor, the extent of the opportunity for actual confusion.

Applicant, in its brief, maintains that despite coexisting in the market place for approximately 8 years,³⁴ “Opposer has not offered one instance of actual confusion” Applicant’s brief, p. 22³⁵ and, in addition, Applicant’s declarant, Mr. Dandi, testified that to his knowledge “there has been no actual consumer confusion regarding the THREEGUN brand and the THERAGUN brand. Dandi decl. ¶ 15.³⁶

The absence of any reported instances of confusion, however, is meaningful only if the record indicates appreciable and continuous use by Applicant of its mark for a significant period of time in the same markets as those served by Opposer under its mark. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB

³⁴ Applicant’s argument focuses on Applicant’s use of the THREEGUN mark in connection with clothing. However, our likelihood of confusion analysis focuses on the goods as originally identified in Applicant’s involved application, and in particular, Applicant’s identified massage apparatus and vibromassage apparatus. The only “clothing items” identified in the application are for medical purposes, i.e., “clothing extension support devices for use during pregnancy,” “corsets” and “clothing especially for operating rooms.”

³⁵ 22 TTABVUE 23.

³⁶ 19 TTABVUE 3.

2010), *aff'd*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Put another way, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *Barbara's Bakery v. Landesman*, 82 USPQ2d at 1287 (the probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred); *Red Carpet Corp. v. Johnstown Am. Enters. Inc.*, 7 USPQ2d 1404, 1406-1407 (TTAB 1988); *Central Soya Co., Inc. v. N. Am. Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981) (“[T]he absence of actual confusion over a reasonable period of time might well suggest that the likelihood of confusion is only a remote possibility with little probability of occurring”). Here, Mr. Dandi testified that Applicant has not exported any “massage apparatus, vibromassage apparatus, or physical exercise apparatus” or “any non-textile products” to the United States in connection with the THREEGUN trademark. Dandi decl. at ¶¶ 13 and 14.³⁷ (19 TTABVUE 3). Accordingly, there has been no opportunity for actual, or potential, confusion to occur. As such, we find these *DuPont* factors (absence of actual confusion and opportunity for such confusion to have occurred) to be neutral in our analysis.

³⁷ 19 TTABVUE 3.

D. The Marks

1. Strength of the Pleaded Mark

Opposer maintains that its THERAGUN mark “is quite strong and deserving of a wide scope of protection.” Opposer’s brief, p. 12.³⁸

The strength of a mark rests on the extent to which “a significant portion of the relevant consuming public . . . recognizes the mark as a source indicator.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (citing *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)). In determining the strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition. *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014); *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010).

a. Inherent or Conceptual Strength

To determine the conceptual strength of Opposer’s THERAGUN mark, we evaluate where they lie “along the generic-descriptive-suggestive-arbitrary (or fanciful) continuum...” *In re Davia*, 110 USPQ2d 1810, 1815 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019). Because Opposer’s mark is registered on the Principal Register, with no claim of acquired distinctiveness under Section 2(f), we presume it is inherently distinctive, i.e., that it is at worst suggestive of the goods. 15

³⁸ 20 TTABVUE 17.

U.S.C. § 1057(b) (registration is “prima facie evidence of the validity of the registered mark”); *In re Fiesta Palms, LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) (when mark is registered on the Principal Register, “we must assume that it is at least suggestive”).

Even so and contrary to Opposer’s contention, evidence that a mark, or an element of a mark, was adopted or at some time appropriated by many different third-party registrants may undermine the common element’s conceptual or inherent strength as an indicator of a single source. *Jack Wolfskin Austrang Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ... that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.’”) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (the extent of third-party use or registrations may indicate that a term carries a suggestive or descriptive connotation and is weak for that reason)); *see also Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1173 (TTAB 2011) (third-party registrations indicate term CLASSIC has suggestive meaning as applied to tobacco products).


Applicant submitted 17 use-based, third-party registrations for GUN-formative marks,³⁹ arguing “that the THERAGUN mark has coexisted with many of the same or similar products sold in the same or similar stores proves that Opposer’s rights are


³⁹ 18 TTABVUE 30-86 (Applicant’s NOR, Exhs. 5-21).

narrowly defined and strongly suggests that using a different mark with the same “gun” suffix for different products is not likely to lead to confusion.” Applicant’s brief, p. 20.⁴⁰ The registration information highlighted in Applicant’s brief is noted in the table below:

| Registration No. | Mark | Goods |
|------------------|-----------|--|
| 5768183 | RXGUN | Electrical stimulation apparatus for muscles for rehabilitative and pain management purposes; Massage apparatus; Massage apparatus and instruments; Massage apparatus for massaging muscles; Massaging apparatus for personal use; Vibrating apparatus used to stimulate muscles and increase strength and physical performance for health and medical purposes; among others. |
| 5875922 | BFGUN | Electric handheld muscle massager |
| 5886760 | MUSCLEGUN | Massage apparatus; massage apparatus and instruments; massage apparatus for massaging injured muscles; massaging apparatus for personal use; vibrating apparatus used to stimulate muscles and increase strength and physical performance |
| 5931798 | ECOGUN | Massage apparatus; Massage apparatus and instruments; among others |

⁴⁰ 22 TTABVUE 21. Although Applicant contends that the “[t]he number and nature of similar marks in use on similar goods, strongly favors Applicant,” Applicant’s brief, p. 20 (22 TTABVUE 21), Applicant did not submit any evidence of third-party use evidence.

| Registration No. | Mark | Goods |
|------------------|--|---|
| 5972074 |  | Massage apparatus; Massage apparatus and instruments; Electric massage apparatus for household use; Electric massage appliances, namely, electric vibrating massager |
| 5997055 | POWERGUN | Electric massage appliances, namely, electric vibrating massager; Foot massage apparatus; Massage apparatus; Massage apparatus and instruments; Massaging apparatus for personal use; Vibrating apparatus used to stimulate muscles and increase strength and physical performance for health and medical purposes |
| 6071108 | PHYSIO GUN (Gun disclaimed) | Massage apparatus; Massage apparatus; Massage apparatus and instruments; Massage apparatus for massaging neck, shoulder, back, legs, and other general body parts; Massaging apparatus for personal use; Electric massage apparatus for household use; Electric massage appliances, namely, electric vibrating massager |
| 6085382 | KRAFTGUN | Electric massage appliances, namely, electric vibrating massager; Foot massage apparatus; Massage apparatus; Massage apparatus and instruments; Massage apparatus for massaging injured muscles; Massaging apparatus for personal use; Vibrating apparatus used to stimulate muscles and increase strength and physical |

| Registration No. | Mark | Goods |
|------------------|---|---|
| | | performance for health and medical purposes |
| 6096246 | DAGUN | Facial toning machines for cosmetic use; Massage apparatus; Massage apparatus; Massaging apparatus for personal use; Vibromassage apparatus; Electric massage appliances, namely, electric vibrating massager |
| 6101879 | CROSSGUN | Massage apparatus; Medical apparatus and instruments for treating osteoarthritis and osteoporosis; Vibromassage apparatus; among others |
| 6106473 | FLEXGUN | Massage apparatus; Massage apparatus for massaging percussion, massage gun; Massaging apparatus for personal use; Foot massage apparatus |
| 6117627 | CHAMPIONGUN | Massage apparatus |
| 6335145 |  | Massage apparatus |
| 6351920 | HAPPYGUN | Massage apparatus; Massage apparatus and instruments; Massage apparatus for massaging muscles; Massaging apparatus for personal use |
| 6383299 | ACCUGUN | Massage apparatus |
| 6508542 | REVITAGUN | Massage apparatus |
| 6578580 | MASSAGUN | Massage apparatus; medical apparatus and instruments for use in surgery; vibromassage apparatus; moxibustion apparatus; electric acupuncture |

| Registration No. | Mark | Goods |
|------------------|------|--|
| | | instruments; gloves for massage; teething rings; abdominal belts |

Opposer contends Applicant’s argument that the term “gun” is weak should fail because Applicant did not provide evidence showing use by third parties of the term “gun” associated with the same goods as those of Opposer. We find Opposer’s contention unavailing. As noted, “third party registrations are relevant to prove that some segment of the composite marks which both contesting parties use has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation*, 115 USPQ2d at 1675 (quoting 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:90 (4th ed. 2015)). Here, the 17 third-party registrations Applicant made of record demonstrate that the term “gun” forms a part of numerous registered marks, in a manner used to describe certain types of massage apparatus, including those of Opposer.

Other parts of the record corroborate that the term “gun” often is used to describe certain types of massage apparatus. For example, an article by Bryan Hood for the *Robb Report* titled “The Best Massage Guns for Your Workout” discusses “Four massage guns to help take your workout to the next level,” and includes Opposer’s “Theragun G3 Percussive Therapy Device,” WuBeFine Massage Gun and Vybe V2

Percussion Massage Gun.⁴¹ Another article from cnet.com discusses the best massage gun(s) for 2021⁴² as does an article from wired.com.⁴³ In fact, Opposer in its brief states “[i]n 2015, Opposer introduced its ... THERAGUN massage device, jumpstarting a wave of similar massage guns into the market.” Opposer’s brief, p. 1 and 11.⁴⁴

The third-party registration and use evidence thus confirm the highly suggestive, if not descriptive, meaning of “gun” in the massage apparatus industry. We accordingly find that the term GUN is weak and diluted for massage apparatus.

The record also shows that the THERA portion of Opposer’s THERAGUN mark may be perceived by consumers as a shortened form of the word “therapy.” For example, a Therabody Instagram excerpt highlights a quote from Dr. J Wersland, Therabody founder, which states: “Your body has adaptive ways to hide stress and that’s why percussive therapy and massage therapy are so powerful.”⁴⁵ Another example from an article featuring the THERAGUN mini massager entitled “Theragun just rolled out an affordable, quiet mini massager” (<https://www.fastcompany.com>) expounds: “The new Theragun models feature other upgrades as well – including varied speed control, wireless charging capabilities, seven massage head attachments, two times battery life of prior modes, and the

⁴¹ 10 TTABVUE 64-65.

⁴² *Id.* at 138.

⁴³ *Id.* at 149.

⁴⁴ 20 TTABVUE 6 and 16 (citing 9 TTABVUE 155 (Opposer’s NOR., Exh. 24)).

⁴⁵ 10 TTABVUE 20. (Tsao decl., ex. 36).

proprietary Percussive Therapy tech. Percussive Therapy is a scientifically calibrated combination of depth, speed, and force that allows Theragun massages to reach 60% deeper than consumer-grade vibration massagers.”⁴⁶ As a final example, we note that the THERAGUN G3 massage apparatus has been categorized by the Robb Report (<https://robbreport.com>) “LIFESTYL / PRODUCT RECOMMENDATION” section as a “Percussive Therapy Device.”⁴⁷

In addition to the third-party registrations, we consider the third party uses Applicant made of record as showing the public’s understanding of the term “gun” often being used to describe certain types of massage apparatus, and the term “thera” as being perceived by consumers as a shortened form of the word “therapy.” *See In re Gen’l Foods Corp.*, 177 USPQ 403, 404 (TTAB 1973) (from the material made of record, the term “TREAT” or “TREATS” in Applicant’s PUDDING TREATS mark was shown as having been widely used in the sale and advertising of foods and in articles pertaining to food products in a descriptive manner, and extensively used in conjunction with general food designations to indicate a particular type of “treat”).

In view thereof, Opposer’s mark THERAGUN, as a whole, is somewhat suggestive of the identified massage apparatus.

b. Commercial Strength

We next analyze the commercial strength of Opposer’s THERAGUN mark(s). A commercially strong or famous mark is one that has extensive public recognition and

⁴⁶ *Id.* at 37 (Tsao decl., ex. 38).

⁴⁷ *Id.* at 62. (Tsao decl., ex. 40).

renown. *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002). “Fame of an opposer’s mark, if it exists, plays a ‘dominant role in the process of balancing the *DuPont* factors.” *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000)).

In the likelihood of confusion analysis, fame varies along a spectrum from very strong to very weak. *Joseph Phelps Vineyards*, 122 USPQ2d at 1734. Because of the extreme deference that is accorded to 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, it is the duty of the party asserting that its mark is famous to clearly prove it. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012); *Lacoste Alligator S.A. v. Maxoly Inc.*, 91 USPQ2d 1594, 1597 (TTAB 2009).

Commercial strength or fame of a mark for likelihood of confusion purposes “may be measured indirectly by the volume of sales and advertising expenditures in connection with the [goods or services] sold [or provided] under the mark, and other factors such as length of time of use of the mark; widespread critical assessments; notice by independent sources of the [goods and services] identified by the mark []; and the general reputation of the [goods and services].” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1056 (TTAB 2017); *see also Bose* 63 USPQ2d at 1305-06. Raw numbers alone may be misleading, however. Thus, some context in which to place raw statistics may be necessary, for example, market share or sales or

advertising figures for comparable types of goods and services. *Id.* at 1309. Other contextual evidence probative of the renown of a mark may include the following:

- extent of catalog and direct mail advertising, email blasts, customer calls, and use of social media platforms, such as Twitter, Instagram, Pinterest, and Facebook, identifying the number of followers;
- the number of consumers that Opposer solicits through its advertising throughout the year;
- local, regional, and national radio and television advertising campaigns, freestanding print campaigns, and mentions in national publications;
- unsolicited media attention; and
- product placement in television and in movies.

Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co., 908 F.3d 1315, 128 USPQ2d 1691-91 (Fed. Cir. 2018).

To demonstrate the commercial strength of its THERAGUN mark(s), Opposer relies on internet evidence submitted with its notice of reliance, and the declaration testimony of its Senior Vice-President of Digital, Kevin Tsao and accompanying exhibits. In his declaration, Mr. Tsao testifies that:

- Opposer is “a leader” in the massage gun market, with eight retail and service locations in the United States⁴⁸;
- Opposer advertises and promotes its THERAGUN mark for massage devices, including through its own presence on various social media platforms, including Facebook where it has more than 96,000 followers, and Instagram, where it has more than 639,000 followers⁴⁹;

⁴⁸ 10 TTABVUE 2 (Tsao decl. ¶ 2).

⁴⁹ 10 TTABVUE 2 (Tsao decl. ¶ 2, exs. 35 and 36).

- Opposer purchases advertising on various online platforms, including Facebook, Google, Amazon, LinkedIn, and Twitter, with most advertising featuring the THERAGUN mark⁵⁰;
- Opposer’s advertising figures for its THERAGUN branded products are confidential, but have steadily increased from 2018 through June 2021⁵¹;
- Opposer and its THERAGUN mark and products have been featured in various publications and on several websites, including Wired.com, the Chicago Tribune, The Strategist website, HealthLine.com⁵²;
- Opposer, and its THERAGUN branded devices have been the recipient of various industry accolades and design awards. By way of example: “Opposer’s THERAGUN product was named Golf Digest’s article ‘Best Fitness Equipment for Golfers’”⁵³; the THERAGUN device was named in Self Magazine’s article “The 23 Best New Trackers, Gym Bags, Accessories, and Workout Tools of 2019”⁵⁴; The THERAGUN G3Pro devices is an A’ Design Award and Competition Winner in the Digital and Electronic Devices Design Category, 2018-19⁵⁵; and
- Opposer’s THERAGUN device won Gold at the New York Design Awards in 2019.⁵⁶

In addition to the uses highlighted in the Tsao declaration, Applicant adduced evidence that THERAGUN branded massage devices have been used by many athletes and celebrities, including by Atlanta Falcons player Julio Jones during Super

⁵⁰ 10 TTABVUE 2 (Tsao decl. ¶ 3).

⁵¹ 11 TTABVUE (Tsao confidential decl.).

⁵² 10 TTABVUE 5, 6, and 149-198 (Tsao decl. ¶¶ 18-21, exs. 46-49). We give no consideration to the testimony and evidence regarding the review of THERAGUN devices in Glamour UK, because we are unable to ascertain whether it was viewed by U.S. consumers.

⁵³ 10 TTABVUE 4 and 45-60 (Tsao decl. ¶ 12, ex. 39).

⁵⁴ *Id.* at 5 and 95-96 (Tsao decl. ¶ 14, ex. 41).

⁵⁵ *Id.* at 5 and 123-125 (Tsao decl. ¶ 16, ex. 43).

⁵⁶ *Id.* at 5 and 128-132 (Tsao decl. ¶ 17, ex. 44).

Bowl LI and by NBA player Kyrie Irving during the 2017 NBA Finals, and other athletes and celebrities, including by way of example, Marvin Jones, Ashley Graham, Kevin Hart, Marcus Peter, Kerri Walsh-Jennings and Chris Hemsworth.⁵⁷

Opposer's THERAGUN branded massage devices also have been the subject of numerous write-ups and reviews in, for example, Vogue, TeenVogue, US Weekly, Shape, SELF, GQ, and Men's Health, including articles titled "7 Gadgets Star Athletes Can't Live Without," "All About the TheraGun, the Self-Massage Device That's Taking Over Instagram," "Meet the Theragun, the NBA's Secret Sideline Weapon," "Why Celebrities and Athletes are Going Gaga for this Massage Gadget," and "The Celeb-Favorite Massage Tool Taking Over the Fitness World," "Why Celebs Are Obsessed With Theragun – and Why You Will Be Too."⁵⁸

We find some deficiencies in Opposer's evidence that preclude us from a finding of commercial strength or fame. Particularly, Opposer provided no sales information, and the advertising information provided by Opposer's witness does not specify the subject marks, and lacks context as to how Opposer's advertising measures compare with other massage product companies, making the information less probative. "Raw numbers of ... advertising expenses may have sufficed in the past to prove fame of a mark, but raw numbers alone in today's world may be misleading." *Bose*, 63 USPQ2d at 1309; *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1408 (TTAB

⁵⁷ 20 TTABVUE 17; 9 TTABVUE 101, 123-29, 137-38, 155, 163, 167-68, 184, 202-03, 221-22 (NOR. Exs. 18, p. 2; 19, p.2; 21 pp. 1-4; 22, pp. 1-2; 23, pp. 3-4; 24, p. 2; 25, p. 1; 26, pp. 1-2; 29, p.1 and 31, pp. 1-2).

⁵⁸ 20 TTABVUE 16-17; 9 TTABVUE 89-232 (NOR, exs. 17-34).

2009) (“[T]he problem that we have in assessing the effectiveness of the advertising expenditures is that there is no testimony or evidence regarding whether opposer’s advertising expenditures are large or small vis-à-vis other comparable medical products.”). *See also Omaha Steaks*, 128 USPQ2d at 1690 (contextual evidence needed “to arrive at a proper understanding of whether customers would recognize the mark”).

Similarly, Opposer provided limited evidence relating to the extent of consumer exposure to its social media platforms. With regard to its Instagram presence, it only provided the number of followers, but no evidence of other analytics or metrics, the specific time periods that Opposer used that social media accounts, or that the number of followers were limited to U.S. consumers. With regard to its presence on Facebook (in addition to number of followers), and on Google, Amazon, LinkedIn, and Twitter, Opposer, for the six-month period from January 1, 2021 through June 30, 2021, provided (under seal) only the total numbers of “impressions” and “clicks to the THERAGUN website” from those platforms.⁵⁹ Opposer, did not indicate whether the impressions were discrete or were made by the same individuals visiting the site on multiple occasions, or whether the visits were only from consumers located in the United States. Again, the lack of specifics makes this information less probative.

Overall, the evidence presented by Opposer regarding the commercial strength of its THERAGUN mark does not convince us that it is so commercially strong or famous such that it is entitled to a wide latitude of protection. Nonetheless, based on

⁵⁹ 11 TTABVUE (Tsao confidential decl.).

Opposer's advertising presence across multiple social media platforms and the unsolicited exposure in the written press and online, as well as the various industry accolades, we find that Opposer has established that its pleaded registered THERAGUN mark has garnered some renown, which is not offset by its somewhat suggestive nature.

Accordingly, we find Opposer's THERAGUN mark is entitled to a slightly broader scope of protection than that to which marks with inherently distinctive terms are entitled.

2. Similarity or Dissimilarity of the Marks

We now consider "the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay*, 73 USPQ2d at 1692 (citing *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. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d at 1812), *aff'd*, 777 Fed. Appx. 516 (Fed. Cir. 2019); *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).

"The proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.'" *Cai v. Diamond Hong*, 127 USPQ2d at 1801 (quoting *Coach Servs.*, 101 USPQ2d at 1721 (Fed. Cir. 2012)). 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). Here, the average customer is someone who buys massage apparatus, including for personal use. Above, we found that this group includes ordinary consumers exercising no more than ordinary care in their purchasing decisions.

In comparing the marks, we are mindful that where, as here, the goods are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs.*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Prod. Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

We compare Applicant's stylized **THREEGUN** mark with Opposer's pleaded standard character mark THERAGUN. Opposer argues that the marks are similar in sight, sound and meaning and that the stylization of Applicant's mark does not distinguish it. As to sight, Applicant particularly argues that the marks are identical except that the third and fourth letters are transposed and the fifth letter in Applicant's mark is an "e" rather than an "a." A determination of likelihood of confusion, however, is not made on a purely mechanical basis, counting the number

of words, syllables or even letters that are similar or different. *See In re John Scarne Games, Inc.*, 120 USPQ 315, 316 (TTAB 1959) (“Purchasers of game boards do not engage in trademark syllable counting[;] they are governed by general impressions made by appearance or sound, or both.”). While the marks are both eight letters in length and begin with the letters “th” and end with the suggestive word “gun,” it is the difference in the middle letters, which comprise the first term or portion in each, that is key in distinguishing one mark from the other. Principally, because Applicant’s mark begins with the clearly recognizable English word “three” and Opposer’s mark begins with what is likely to be recognized by consumers as a shorted form of the word “therapy,” given that Applicant’s devices are touted and recognized as “percussive therapy devices,” the marks are more dissimilar than similar in appearance.

Moreover, this distinction in the first term or portion of each mark is important since “it is often the first part of a mark which is 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 also Palm Bay*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark). So long as we “analyze[] the marks as a whole[, i]t is not improper for the Board to determine that, ‘for rational reasons,’ ... [we] give ‘more or less weight ... to a particular feature of the mark[s]’ provided that ... [our] ultimate conclusion regarding ... likelihood of confusion ‘rests on [a] consideration of the marks in their entireties.’” *Quiktrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 2021 USPQ2d 35,

*2-3 (Fed. Cir. 2021) (citing *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1354 (Fed. Cir. 2000) and *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)).

We have not relied on the stylization of Applicant's mark in our finding that the marks are dissimilar in appearance. Opposer's pleaded mark is a standard character mark, and is not limited to any special stylization or colors, so it could be displayed in a font style and color similar to Applicant's mark. *See* Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a) ("Standard character" marks are registered "without claim to any particular font style, size, or color."); *see also* *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) ("[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display."). However, because the uppercase-block font adopted by Applicant is not very unique, it does not create a unique commercial impression apart from the words themselves so, even if adopted by Registrant, it is unlikely to be recognized as a source indicator.

As to sound, Opposer contends that because the marks are similar in structure and length, i.e., starting with the letters 'TH' and ending with the same word 'GUN' and with two of the remaining letters being 'R' and 'E,' "these same components result in similar, though not exact, pronunciations." Opposer's reply brief, p. 5.⁶⁰ We disagree. Applicant's and Opposer's marks obviously end with the same word, GUN, and accordingly sound alike in that respect. However, the first term or portion of each mark – THREE in Applicant's mark and THERA in Opposer's mark – is likely to be

⁶⁰ 28 TTABVUE 10.

perceived and pronounced differently by consumers. Consumers are likely to pronounce Applicant's THREEGUN mark with two syllables, the first containing the long e vowel sound, and Opposer's THERAGUN mark with three syllables, the first containing the short e vowel sound and the second syllable containing the schwa,⁶¹ or "uh" sound. We thus find the marks, as a whole, aurally dissimilar.

Turning then to connotation, we begin our analysis by taking judicial notice of the definition of the word "three," (thrē) defined in part as "something having three units or members."⁶² We also repeat that the "thera" portion of Opposer's mark is likely to be perceived by consumers as an abbreviation or shortened form of the word "therapy," (ther-ə-pē) defined in MERRIAM-WEBSTER DICTIONARY as "therapeutic medical treatment of impairment, injury, disease, or disorder."⁶³

We are not persuaded by Opposer's argument that Applicant's THREEGUN mark and Opposer's THERAGUN mark have similar connotations because they are so similar in appearance and pronunciation. For the reasons just explained, we find the marks dissimilar in appearance and sound. Also, While the THERA portion of Opposer's mark may not be an "actual word[] in any known language," Applicant's Reply brief, p. 5, the words that comprise Applicant's compound mark THREEGUN,

⁶¹ We take judicial notice of the definition of "schwa," defined in MERRIAM-WEBSTER Dictionary in relevant part as: "an unstressed mid-central vowel (such as the usual sound of the first and last vowel of the English word *America*)." www.merriam-webster.com, last visited November 10, 2022. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

⁶² www.merriam-webster.com, last visited November 8, 2022.

⁶³ www.merriam-webster.com, last visited November 10, 2022

THREE and GUN, as well as the GUN portion of Opposer's THERAGUN mark, obviously are words in the English language with known meanings. The absence of a space between the terms in the marks is an inconsequential difference. *See Seaguard Corp. v. Seaward Int'l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEAGUARD and SEAGUARD "are, in contemplation of law, identical"). Considering the plain meanings of the words and terms that comprise the two marks, even when viewed against the backdrop of identical massage apparatus, would likely be perceived by consumers as conveying different connotations and commercial impressions. Applicant's THREEGUN mark is likely to be perceived by consumers as conveying the meaning of multiple guns or multiple gun-type massage devices, while Opposer's THERAGUN mark is likely to be perceived as conveying the meaning of a therapeutic massage device. These distinctly different connotations and commercial impressions clearly distinguish the two marks. *See e.g., Inter-state Oil Co., Inc. v. Questor Corp.*, 209 USPQ 583 (TTAB 1980) (applicant's mark GOERLICH and shield design found to convey a dissimilar commercial impression from opposer's INTERSTATE OIL and shield design mark); *Clayton Mark & Co. v. Keystone Brass and Rubber Co.*, 119 USPQ 265 (TTAB 1958) (applicant's mark SUMARK found to convey a distinctly different commercial impression than opposer's trademark MARK).

In sum, despite the slightly broader scope of protection to which Opposer's THERAGUN mark is entitled, when considered in their entirety, we find that Applicant's mark THREEGUN and Opposer's mark THERAGUN differ in sight, sound, meaning and overall commercial impression.

Accordingly, the first *DuPont* factor, the similarity of the marks, weighs heavily against a finding of likelihood of confusion.

C. Conclusion

Any of the *DuPont* factors may play a dominant role in the likelihood of confusion analysis. Indeed, in some cases, a single factor (such as the differences in the marks) may be dispositive. *Odom's Tenn. Pride Sausage, Inc. v. FF Acquisition, LLC*, 600 F.3d 1343, 93 USPQ2d 2030, 2032 (Fed. Cir. 2010) (“[A] single *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks.”); *Kellogg Co. v. Pack'em Enters Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991). We find that to be the case here.

Notwithstanding that Opposer's THERAGUN mark has some renown for massage apparatus, the in-part identical goods and their presumed overlapping channels of trade, we find, on balance, the marks are simply too dissimilar for confusion to arise. While there is some similarity in appearance, they are more dissimilar than similar, sound nothing alike, and convey different meanings and commercial impressions. Confusion is therefore unlikely. *See e.g., Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1461 (Fed. Cir. 1998) (affirming Board dismissal of opposition based on dissimilarity of the marks CRISTAL and CRYSTAL CREEK); *Kellogg Co. v. Pack'em*, 21 USPQ2d at 1142 (affirming Board dismissal of opposition based on dissimilarity of the marks FROOTEE ICE and elephant design and FRUIT LOOPS); *Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 9 USPQ2d 1736, 1739-40 (Fed. Cir. 1989) (affirming Board dismissal of opposition based on

dissimilarity of the marks PECAN SANDIES and PECAN SHORTEES in commercial impression); *cf. Stouffer Corp. v. Health Valley Natural Foods Inc.*, 1 USPQ2d 1900, 1906 (TTAB 1986), *aff'd*, 831 F.2d 306 (Fed. Cir 1987) (“while the fame of opposer’s mark and the identity of the parties’ goods and their channels of trade tend to favor opposer’s case, we are not persuaded that these circumstances are sufficient to refuse registration to applicant in view of our finding that LEAN CUISINE and LEAN LIVING, applied to the goods herein are not confusingly similar in sound, appearance or commercial impression”).

Although Opposer has proved its entitlement to a statutory cause of action and priority by a preponderance of the evidence, it failed to prove likelihood of confusion, a key element of its Section 2(d) claim.

Decision: The opposition on the ground of likelihood of confusion under Trademark Act Section 2(d) is dismissed.