

**This Opinion is Not a
Precedent of the TTAB**

Mailed: May 31, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Rational Intellectual Holdings Ltd.

v.

NSUS Group Inc.
—

Opposition No. 91268260
—

Michelle Mancino Marsh, Ross Q. Panko and Grace E. Ha of ArentFox Schiff LLP,
for Rational Intellectual Holdings Ltd.

Richard L. Byrne, Cecilia R. Dickson and Christopher P. Sherwin of The Webb Law
Firm,
for NSUS Group Inc.

—
Before Taylor, Hudis and Johnson,
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

NSUS Group Inc. (“Applicant”) seeks registration on the Principal Register of the
following word-and-design mark:



for:

Downloadable computer game software via a global computer network and wireless devices, namely, downloadable poker game software; Downloadable electronic game programs via the internet and wireless devices, namely, downloadable poker game software; Downloadable and recorded interactive game software, namely, interactive poker game software; Downloadable and recorded computer game software for use on mobile and cellular phones, namely, poker game software; Downloadable and recorded interactive multimedia game software for playing computer games, namely, poker games; Downloadable and recorded virtual reality game software, namely, virtual reality poker game software; Earsets, namely, wireless ear buds, ear phones and headphones; Computer game cartridges for use with electronic games apparatus, in International Class 9.

Providing amusement facilities in the nature of gaming centers for playing computer games; Providing on-line computer games; Providing amusement arcade services; Providing recreation facilities; Electronic games services provided by means of the internet; Provision of information relating to electronic computer games provided via the Internet; Entertainment services, namely, providing online electronic games, in International Class 41.

Design and development of computer game software; Maintenance of computer software; Updating of computer software; Rental of computer software; Installation of computer software; Programming of computer software for others; Creation and maintenance of websites for others; Development of interactive multimedia computer software; Providing user authentication services using biometric hardware and software technology for secure entry and exit door access to Internet-based computer search engine software platforms for searching on-line content; Providing internet security programs, namely, providing temporary use of on-line non-downloadable computer software enabling users to create firewalls for data and internet connection security purposes, in International Class 42.¹

¹ Application Serial No. 88815904 was filed on February 29, 2020, based upon Applicant's allegation of a bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

The Application contains the following color claim: "The color(s) silver, gold, gray, brown, yellow and black is/are claimed as a feature of the mark." The Application also provides the following description of the mark:

The mark consists of the stylized wording "SPIN & GOLD" with the word "SPIN" therein in the colors silver and gray, and the word "GOLD" therein in

In its Notice of Opposition,² Rational Intellectual Holdings Ltd. (“Opposer”) opposes registration of Applicant’s SPIN & GOLD and Design mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as applied to the goods and services identified in the Application, so resembles Opposer’s word-and-design mark:



registered on the Principal Register in connection with:

On-line entertainment in the nature of games of skill, card games, poker and gaming contests and poker and gaming competitions; providing information and non-downloadable electronic newsletters in the field of games of skill, card games, contests and competitions; providing on-line video games in connection with games of skill, card games, contests and competitions; on-line entertainment services featuring interactive multi-player games of skill, card games, poker and gaming contests and poker and gaming competitions; organization of on-line games of skill,

the colors gold and brown. The “&” symbol appears in the colors gold and brown within an overall triangular shape featuring a curved top resembling a scale. The triangular shape resembling a scale appears in the colors black and brown outlined in yellow and features a curved brown line at the very top in addition to an interior curved gray line having a small, downward pointing triangular shape in the center also in the color gray. The bottom point of the larger triangular shape resembling a scale appears cracked as if it has fallen on, and broken through, two gold bars upon which it rests. The two gold bars rest upon three additional gold bars. The gold bars feature the obscured wording “Fine Gold” stacked above “999.9” followed by the stacked wording “New WT 1kg”.

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

card games, poker and gaming contests and poker and gaming competitions, in International Class 41,³

as to be likely to cause confusion, mistake, or to deceive. Opposer also asserts common law use of its SPIN & GO and Design mark for the above-noted services since 2014.

Applicant denied the salient allegations of the Notice of Opposition in its Answer, and also asserted several affirmative defenses.⁴ Applicant's first affirmative defense of failure to state a claim upon which relief can be granted is not a true affirmative defense. *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *4 n.5 (TTAB 2021) (citing *U.S. Olympic Comm. v. Tempting Brands Neth. B.V.*, 2021 USPQ2d 164, at *4 (TTAB 2021)). Applicant also asserted a second affirmative defense of unclean hands that was "not pursued at trial" and thus is "considered waived and ... given no further consideration." *Rsch. in Motion Ltd. v. Defining Presence Mktg. Grp. Inc.*, 102 USPQ2d 1187, 1190 (TTAB 2012).

Applicant's third and fourth affirmative defenses are mere amplifications of Respondent's denials to Opposer's priority and likelihood of confusion claim, and will be considered in that fashion. *Mars Generation, Inc. v. Carson*, 2021 USPQ2d 1057,

³ U.S. Registration No. 5891571 was issued on October 22, 2019.

The Registration contains the following color claim: "The color(s) grey, white, red, orange, yellow and black is/are claimed as a feature of the mark." The Registration also provides the following description of the mark:

The mark consists of the stylized wording "SPIN & GO" with the letters fading along a gray to white to gray continuum, and having gray background shading. The wording is superimposed over a stylized cyclone design comprised of varying shades of red, orange and yellow with a black center. The "&" is located on the black center. The mark in its entirety appears on a transparent background.

⁴ Answer, 5 TTABVUE.

at *3-4 (TTAB 2021). Such amplifications are not (and should not be pled as) separate “defenses,” and we do not treat them as such here. *Illyrian Import, Inc. v. ADOL Sh.p.k.*, 2022 USPQ2d 292, at *5 (TTAB 2022) (citing *Sabhnani*, 2021 USPQ2d 1241, at *4 n. 5). Applicant’s attempt to reserve the right to add defenses is improper under the Federal Rules of Civil Procedure, because that would not give Opposer fair notice of such defenses. *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *6 (TTAB 2022) (citing *Philanthropist.com, Inc. v. Gen. Conf. Corp. of Seventh-Day Adventists*, 2021 USPQ2d 643, at *4 n.6 (TTAB 2021), *aff’d without op.*, No. 21-2208 (Fed. Cir. Aug. 8, 2022)).

The case is fully briefed. Opposer bears the burden of proving its Trademark Act Section 2(d) claim by a preponderance of the evidence. *Sabhnani*, 2021 USPQ2d 1241, at *16. Having considered the evidentiary record, the parties’ arguments and applicable authorities, as explained below, we find that Opposer has not carried this burden, and dismiss the Opposition.

I. The Evidentiary Record

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant’s involved application. In addition, the parties introduced the following evidence:

A. Opposer’s Evidence

- Testimony Declaration of Daniel Troake, Opposer’s trademark attorney in London, UK, with an exhibit [12 TTABVUE 2-7].
- Testimony Declaration of Severin Rasset (“Rasset Decl.”), Managing Director of The Stars Group, the parent company of Opposer, with exhibits [12 TTABVUE 8-94].

- Testimony Declaration of Duncan Hall (“Hall Decl.”), Records Request Processor at the Internet Archive, with an exhibit [12 TTABVUE 95-160].
- Opposer’s First Notice of Reliance on Registrations (“ONOR1”), with an exhibit [13 TTABVUE 9-14].
- Opposer’s Second Notice of Reliance on Discovery Responses (“ONOR2”), with exhibits [13 TTABVUE 15-35].

B. Applicant’s Evidence

- Testimony Declaration of Applicant’s Chief Executive Officer, Michael Kim (“Kim Decl.”), with exhibits [14 TTABVUE 4-59].

II. The Parties

Opposer asserts it has continuously used the SPIN & GO and Design mark in the United States since 2014 in connection with online “sit and go” poker tournaments. These are fast-paced versions of an online poker tournament having no set starting time. They start only when players register for the tournament, and have randomly determined prize pools that are “winner take all.” The “turbo” or “hyperturbo” structure of these tournaments, for the most part, contain levels that last approximately two to five minutes.⁵

Applicant states it has continuously advertised and promoted its products and services in connection with the SPIN & GO and Design mark in international markets via email, internet websites, and social media (e.g., Twitter, YouTube) since February 2020. Applicant has not yet undertaken any advertising or marketing efforts to promote any goods or services under its mark in the United States.⁶

⁵ Rasset Decl., 12 TTABVUE 10, ¶¶ 11-14.

⁶ Applicant’s Int. Ans. Nos. 23-24, ONOR2, 13 TTABVUE 23; Applicant’s Production Resp. No. 15, ONOR2, 13 TTABVUE 33.

According to a lengthy gambling blog made of record by Applicant, the parties are direct competitors in the online gambling market; with Opposer being the established “player” and Applicant being the up-and-comer.⁷

III. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action, formerly referred to as “standing” by the Federal Circuit and the Board, is an element of the plaintiff’s case in every inter partes case. *See 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); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 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 of the mark. *Corcamore*, 2020 USPQ2d 11277, at *4 (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067-70 (2014)); *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 2022 USPQ2d 602, at *2 (Fed. Cir. 2022); *Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388, at *1 (TTAB 2020).

Stated another way, a plaintiff is entitled to bring a statutory cause of action by demonstrating a real interest in the proceeding and a reasonable belief of damage.

⁷ “PokerStars vs GGPoker - PokerStars vs GGPoker - Which Is Better For You?”, CASINO.ORG (blog), July 31, 2020, Kim Decl., 14 TTABVUE 33-59.

Australian Therapeutic, 2020 USPQ2d 10837, at *3; *Empresa Cubana*, 111 USPQ2d at 1062. There is “no meaningful, substantive difference between the analytical frameworks expressed in *Lexmark* and *Empresa Cubana*.” *Corcamore*, 2020 USPQ2d 11277, at *4. Thus, “a party that demonstrates a real interest in [oppos]ing a trademark under [Trademark Act Section 13, 15 U.S.C.] § 106[3] has demonstrated an interest falling within the zone of interests protected by [the Trademark Act] Similarly, a party that demonstrates a reasonable belief of damage by the registration of a trademark demonstrates proximate causation within the context of § 106[3].” 2020 USPQ2d 11277, at *7.

Opposer established its entitlement to bring and maintain the present opposition by: (1) its assertion with proof of a claim of priority and likelihood of confusion that is not wholly without merit, *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982); (2) making of record its valid and subsisting registration for the SPIN & GO and Design mark⁸ on which Opposer bases its Trademark Act Section 2(d) claim, *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); and (3) providing proof of its asserted prior use of what Opposer claims is a confusingly similar mark to Applicant’s mark in

⁸ See TESS and TSDR abstract records of Opposer’s Service Mark Registration No. 5891571 for the SPIN & GO and Design mark at Rasset Decl., 12 TTABVUE 14-20; see also the same TESS abstract record of Registration No. 5891571 at ONOR1, 13 TTABVUE 12-14. Opposer thus “elected to file duplicative evidence by different methods of introduction; for example, once by Notice of Reliance and again by way of an exhibit to a testimony declaration The Board views the practice of introducing cumulative evidence at trial with disfavor. *Made in Nature*, 2022 USPQ2d 557, at *12-13.

connection with competitive services.⁹ *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *4 (TTAB 2019) (standing established by testimony with exhibits of earlier use of confusingly similar mark).

IV. Priority

Because Opposer relies on its asserted SPIN & GO and Design registration that has been made of record, and Applicant did not challenge this registration by way of a cancellation counterclaim, Opposer's priority is not at issue with respect to the mark and services identified in its registration. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

V. Likelihood of Confusion

Trademark Act Section 2(d) 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.

Our analysis is based on all of the probative evidence of record. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*” — noting the factors to be considered). In making our determination, we consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir.

⁹ See Rasset Decl., 12 TTABVUE 9-11, 21-69, ¶¶ 8, 11-15, and Exh. 2.

2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source and to protect trademark owners from damage caused by the registration of similar marks for related goods or services that are likely to cause confusion. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). We discuss below these factors, and the other *DuPont* factors for which there is evidence and argument.

A. The Similarity or Dissimilarity of Opposer’s Services vs. Applicant’s Goods and Services

We now turn to the comparison of the goods and services at issue, the second *DuPont* factor. In making our determination regarding the similarity of the goods and services, we must look to how they are identified in the opposed Application and Opposer’s Registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*,

746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“[T]he question of registrability of an applicant’s mark must be decided on the basis of the identification of goods [or services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods [or services], the particular channels of trade or the class of purchasers to which the sales of goods [or services] are directed.”)); *see also Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods [or services]”).

Further, “the goods and/or services of the parties need not be similar or competitive, or even offered through the same channels of trade to support a holding of likelihood of confusion.” *Weider Publ’ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1356 (TTAB 2014). “It is sufficient that the respective goods [or services] are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods [or services] are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer [or other source].” *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

Opposer argues that Applicant’s goods and services, and Opposer’s services, “are closely similar or related.”¹⁰ Applicant does not discuss at all in its brief whether the

¹⁰ Opposer’s Brief, 15 TTABVUE 16-18.

respective goods and services of the parties are related, and thus appears to have conceded the point. *See Textron Inc. v. Lawn King, Inc.*, 215 USPQ 340, 343 (TTAB 1982) (“There is no question that the contemporaneous use of the mark ‘LAWN KING’ on the parties’ respective goods and services is likely to cause confusion, mistake and deception of purchasers. Applicant appears to concede this point, as the issue is not even discussed in its brief.”).

Over and above this apparent concession, some of the services identified in Class 41 of the opposed Application are identical to, or (at the very least) are encompassed by, the Class 41 services identified in Opposer’s registration.¹¹ It is sufficient for a finding of likelihood of confusion as to a particular class if relatedness is established for any item of identified goods within that class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). Moreover, relatedness can be found based on the descriptions in the application and registration without resort to additional evidence. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (“While additional evidence, such as whether a single company sells the goods ... of both parties, if presented, is relevant to a relatedness analysis ..., the important evidence already before [the Board comprises the identifications of goods in] the ... application and [cited] registrations.”).

¹¹ Compare, for example: “on-line entertainment in the nature of games of skill, card games, poker and gaming contests and poker and gaming competitions;” “providing on-line video games in connection with games of skill, card games, contests and competitions;” and “on-line entertainment services featuring interactive multi-player games of skill, card games, poker and gaming contests and poker and gaming competitions” in Class 41 of Reg. No. 5891571 with “Providing on-line computer games;” “Electronic games services provided by means of the internet;” and “Entertainment services, namely, providing online electronic games” in Class 41 of Appln. Ser. No. 88815904.

It further is settled that likelihood of confusion may result if the same or similar marks are used for goods (here, downloadable software), on the one hand, and for services involving those goods, on the other (here, on-line computer games and electronic games services). *See, e.g., In re Hyper Shoppes (Ohio) Inc.*, 837 F. 2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988) (involving general merchandise stores and furniture; “applicant’s ‘general merchandise store services’ would include the sale of furniture. ... What else it sells is irrelevant; there is overlap.”) and *Safety-Klean Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 186 USPQ 476, 479-80 (CCPA 1975) (finding as being related the opposer’s hand tools and the applicant’s leasing services for the periodic maintenance and servicing of apparatus for cleaning mechanical parts). Applicant’s Class 9 downloadable computer game and poker game software may be provided in connection with the rendering of Applicant’s Class 41 on-line computer games and electronic games services provided by means of the internet, and therefore are complementary and related. As Applicant’s witness Mr. Kim stated in his declaration, “a consumer must download separate programs or applications provided by the different platforms to access each of Applicant’s and Opposer’s games.”¹²

Equally, Applicant’s Class 42 design and development of computer game software, maintenance of computer software, updating of computer software, rental of computer software, and programming of computer software for others, also may be provided in connection with the rendering of Applicant’s Class 41 services. Thus we

¹² Kim Decl., 14 TTABVUE 8, ¶ 7.

further find the respective Class 41 and 42 services of the parties complementary and related for purposes of our likelihood of confusion analysis on the face of the corresponding identifications. *See In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1500 (TTAB 2010) (“Here, based on the identifications themselves, we find that applicant offers a ... [software feature] that is complementary in function and purpose to the ... services offered by registrant.”).

We already found above that some of Applicant’s Class 41 services are identical to, or are encompassed by, Opposer’s Class 41 services. We therefore find that Applicant’s identified goods and services in Classes 9, 41 and 42, and Opposer’s Class 41 services, are identical in part, and otherwise complementary and inherently related. The second *DuPont* factor weighs in favor of a finding that confusion is likely.

B. Similarity or Dissimilarity of the Parties’ Trade Channels, Classes of Consumers, Purchasing Conditions and Consumer Sophistication

The third *DuPont* factor assesses the similarity or dissimilarity of the parties’ established, likely-to-continue trade channels. *DuPont*, 177 USPQ at 567. Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *Id.* We observe there are no trade channel or class-of-consumer restrictions in Opposer’s Registration or the opposed Application.

As we noted above, the Class 41 services goods identified in Opposer’s Registration and the opposed Application are identical in part. “[A]bsent restrictions in the application and registration, [identical 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,

101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *Double Coin Holdings, Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *6 (TTAB 2019) (same).

The Class 9 goods and Class 42 services in the opposed Application are not identical in any respect to Opposer's Class 41 services. However, because there are no limitations as to channels of trade or target purchasers in Opposer's Registration or the Application, it is presumed that the respective goods and services would move in all normal channels of trade, and that they are available to all usual purchasers for these goods and services. *See Citigroup*, 98 USPQ2d at 1261 (Fed. Cir. 2011); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *Paula Payne Prods.*, 177 USPQ at 77.

As discussed above, the lengthy gambling blog made of record by Applicant demonstrates that the parties are direct competitors in the online gambling market.¹³ Also, the parties both promote their online gambling services via YouTube and Twitter.¹⁴ There is thus proof in the record that the trade channels for the goods and services identified in Opposer's registration and the opposed Application overlap, and that these goods and services are directed to the same class of consumers — potential online gamblers. We find the parties' trade channels and classes of purchasers for some of the services are presumed to be identical; otherwise, for the complimentary and related goods and services, there is proof they overlap.

¹³ "PokerStars vs GGPoker - PokerStars vs GGPoker - Which Is Better For You?", CASINO.ORG (blog), July 31, 2020, Kim Decl., 14 TTABVUE 33-59.

¹⁴ Rasset Decl., 12 TTABVUE 74-79, Exh. 4; Int. Ans. No. 24, ONOR2, 13 TTABVUE 23.

Further, both parties' respective gaming services are inexpensive.¹⁵ For example, the cost to play, or "buy in" to, Opposer's SPIN & GO game ranges from \$1-\$25.¹⁶ The opposed Application does not limit the price of Applicant's contemplated online-gaming goods and services, and the typical buy in for Applicant's SPIN & GOLD games ranges from \$0.25-\$10 to play (although Applicant in 2022 did offer a new buy in for \$200).¹⁷ The low cost of the parties' respective goods and services weighs in favor of finding a likelihood of confusion.

"When ... [goods or services] are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care." *Recot, Inc. v. Becton*, 214F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *see also UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1885 (TTAB 2011) ("The prices of the parties' respective goods and services are not high and, thus, we find that the relevant purchasers ... would use nothing more than ordinary care in making their purchasing decisions."). In its brief, Applicant acknowledges Opposer's assertion "that the relevant consumers will confuse the two marks because 'both parties' gaming services are inexpensive'[,]"¹⁸ but does not contest this point with argument or contrary evidence.

¹⁵ See Rasset Decl., 12 TTABVUE 10-11, 21, 89, ¶¶ 15, 22 and Exhs. 2, 5; Kim Decl., 14 TTABVUE 7, 46-47, ¶ 7 and Exh. 5.

¹⁶ Rasset Decl., 12 TTABVUE 10, 21, 89, ¶¶ 15, 22 and Exhs. 2, 5.

¹⁷ See Kim Decl., 14 TTABVUE 7, 19, ¶ 7 & Exh. 3.

¹⁸ Applicant's Brief, 16 TTABVUE 9.

Because Registrant's identified services in its registration, and Applicant's identified goods and services in its Application, do not include any restrictions or limitations as to channels of trade or classes of consumers, the prospective purchasers for the parties' identified goods and services include a variety of consumers, including consumers that do not have significant knowledge or experience with online gambling. *See Stone Lion Cap. Partners*, 110 USPQ2d at 1163-64 (recognizing Board precedent requiring consideration of the "least sophisticated consumer in the class"); *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (finding that all purchasers of wine may not be discriminating because while some may have preferred brands, "there are just as likely to be purchasers who delight in trying new taste treats.").

We find the third and fourth *DuPont* factors, trade channels, classes of consumers, purchasing conditions and consumer sophistication, all weigh in favor of a finding that confusion is likely.

C. Strength of Opposer's Mark

Before we evaluate the similarity or dissimilarity of the parties' marks, we first consider the strength of Opposer's asserted mark. The fifth *DuPont* factor enables Opposer to prove that its pleaded marks are entitled to an expanded scope of protection by adducing evidence of "[t]he fame of the prior mark (sales, advertising, length of use);" the sixth *DuPont* factor allows Applicant to contract that scope of protection by adducing evidence of "[t]he number and nature of similar marks

in use on similar goods.” *DuPont*, 177 USPQ at 567 (cited in *Sock It To Me, Inc. v. Aiping Fan*, 2020 USPQ2d 10611, at *8 (TTAB 2020)).

The strength of Opposer’s mark affects the scope of protection to which it is entitled. *Made in Nature*, 2022 USPQ2d 557, at *20. Thus, we consider the conceptual strength of Opposer’s mark based on the nature of the mark itself, and we consider its commercial strength based on marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength....”).

1. Conceptual Strength

As Opposer’s SPIN & GO and Design mark is registered on the Principal Register without a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f), it is presumed to be inherently distinctive for the services recited in that registration. *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006). Challenging the inherent strength of Opposer’s mark, Applicant states that:

The literal elements of the SPIN & GO [m]ark are weak. The word “spin” of the mark is highly suggestive Games of poker and alike operate primarily upon luck. Likewise, iconic slot machines and roulette games specifically are based on spinning wheels. Hence, the word “spin” in the context of these marks is highly suggestive of the game of gambling or poker.

* * *

Furthermore, the literal element “go” is weak. Opposer acknowledges that the “go” portion of the literal element is merely descriptive of the services provided. On pages 12 and 13 of the Opposer’s brief, Opposer states, “the record underscores that ... [Applicant] provides or intends to provide the same type of online poker-gaming goods and services as

[Opposer], namely, ‘sit-and-go’ poker games.” See Opposer’s Trial Brief pp. 12-13.

* * *

Opposer further states, “in both games, players compete against other players for a random prize between 2x and 12,000x times the amount that a player pays to play (the ‘buy in’).” See *id.* at 13. Opposer generally describes the nature of a poker game, which is a sit-and-go game. Hence, as Opposer acknowledges, “go” is merely descriptive, or at least highly suggestive, of the poker games provided under the SPIN & GO Mark.¹⁹

The words “spin” and “go” are common terms in the English language. However, in making the above arguments, Applicant failed to introduce the most fundamental type of relevant proof: dictionary definitions. That is, however, something we can reference. The Board may take judicial notice of dictionary definitions, including those from online sources when the definitions themselves are derived from dictionaries that exist in printed form or have regular fixed editions. See *McGowen Precision Barrels, LLC v. Proof Rsch., Inc.*, 2021 USPQ2d 559, at *24 n.93 (TTAB 2021). There are many dictionary definitions of “spin,” the most relevant of which²⁰ we find to be:

Spin (as an intransitive verb): to revolve rapidly, gyrate; to move swiftly especially on or as if on wheels or in a vehicle; (as a transitive verb): to cause to whirl; impart spin to.²¹

Similarly, there are many dictionary definitions of “go,” the most relevant of which we find to be:

¹⁹ Applicant’s Brief, 16 TTABVUE 12, 14, 15.

²⁰ We find the “verb” definitions of the terms “spin” and “go” to be more relevant than the “noun” definitions, because Opposer’s mark is read as a set of commands rather than the subjects or objects of designated action.

²¹ Definitions of “spin” from MERRIAM-WEBSTER online (<https://www.merriam-webster.com/dictionary/spin>, last visited May 19, 2023).

Go (as an intransitive verb): to move on a course, proceed; to move out of or away from a place expressed or implied, leave, depart; (as a transitive verb): to proceed along or according to, follow; to travel through or along, traverse.²²

Comparing these dictionary definitions of the literal elements (“spin” and “go”) of Opposer’s mark to the evidence of record, we find wanting Applicant’s argument that the individual elements of Opposer’s SPIN & GO and Design mark are conceptually weak, or that the mark as a whole is inherently weak. For this exercise, we reviewed (1) the explanation of Opposer’s Mr. Rasset as to how SPIN & GO online poker games are played,²³ (2) current and historical screen captures of Opposer’s online gambling websites,²⁴ (3) Opposer’s SPIN & GO Twitter and YouTube pages,²⁵ and (4) articles as well as online blogs discussing Opposer’s SPIN & GO poker tournaments.²⁶ None of these evidentiary sources discuss how the act of “spinning” is involved in Opposer’s SPIN & GO branded online poker gaming. From our review of the record, “go” (as used in the context of Opposer’s services) could have one of several meanings; for example: it is a player’s turn to “go” by entering a poker round, or by taking digital

²² Definitions of “go” from MERRIAM-WEBSTER online (<https://www.merriam-webster.com/dictionary/go>, last visited May 19, 2023).

²³ Rasset Decl., 12 TTABVUE 10, ¶ 13. In its Brief, citing to this same testimony, Opposer says that its mark “evokes a ‘spin-the-wheel’-like game of chance played at a fast pace.” 15 TTABVUE 20. This statement in Opposer’s Brief, but not actually stated in Mr. Rasset’s Declaration, intimates that at least an element of Opposer’s mark has a suggestive-like quality.

²⁴ Rasset Decl., 12 TTABVUE 21-69, Exh. 2; Hall Decl., 12 TTABVUE 98-160 and 13 TTABVUE 2-8, Exh. A. The exhibits attached to the Rasset and Hall declarations comprise a preferred approach (but not the only approach) for introducing historical captures of a party’s websites from the Wayback Machine of the Internet Archive (archive.org), as discussed in *Spiritline Cruises LLC v. Tour Mgmt. Svcs., Inc.*, 2020 USPQ2d 48324, at *3-4 (TTAB 2020).

²⁵ Rasset Decl., 12 TTABVUE 74-79, Exh. 4.

²⁶ Rasset Decl., 12 TTABVUE 80-94, Exh. 5; Kim Decl., 14 TTABVUE 33-59, Exh. 5.

player cards into the person's hand, or by turning over the digital cards in a player's hand, or by taking one's winnings or losses and exiting the game (as in, to "go away").

On the spectrum of distinctiveness (arbitrary, fanciful, suggestive, descriptive, generic), "if a mark requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods [or services], then the mark is suggestive." *In re MBNA Am. Bank, N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003). Based on our review of the record, consistent with the registration of Opposer's mark on the Principal register without a claim of acquired distinctiveness, Opposer's mark at a minimum is suggestive and not inherently weak as Applicant claims. "Suggestive ... marks are deemed inherently distinctive and are entitled to registration as such" *Id.*

As an additional challenge to the inherent strength of Opposer's mark, Applicant states that:

The word "spin" [within Opposer's] mark is ... in common use by many others in the field of gambling and gaming. Provided below [in chart form] is a list of co-existing marks containing the term "spin". ... Furthermore, the literal element "go" is weak. ... Provided below [again, in chart form] is a list of marks containing "go" denoting "sit-and-go" type games.²⁷

Reviewing Applicant's arguments in context, what Applicant meant in its brief was not that the terms "spin" and "go" have been the subjects of extensive third-party use, but rather of third-party registrations. "Third-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term

²⁷ Applicant's Brief, 16 TTABVUE 12-15. The list of third-party registrations of marks containing the term "spin" is repeated at Kim Decl., 14 TTABVUE 6-7.

is commonly registered for similar goods or services.” *Made in Nature*, 2022 USPQ2d 557, at *24; *see also Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915 , 189 USPQ 693, 694 (CCPA 1976) (third-party registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”). However, Applicant did not properly make of record any of the third-party registrations listed in its trial brief or in the Kim Declaration. Additionally, in neither list of third-party registrations did Applicant recite the goods or services with which the marks were registered.

A party that wishes to make third-party registrations of record may do so by filing, during its testimony period, plain copies of the registrations, printouts or copies of information about the registrations from the USPTO’s electronic database records, together with a notice of reliance thereon specifying the registrations and indicating generally their relevance and associating them with one or more issues in the case, or by introducing copies of them as exhibits to testimony, or by stipulation of the parties. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 704.03(b)(1)(B) (2022). Applicant did not take advantage of any of these methods.

Because Applicant did not properly make any of the cited third-party “spin” or “go” registrations of record, we give these registration lists no consideration. *See, e.g., Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012) (Applicant’s listing of third-party registered marks downloaded from the USPTO’s TESS database does not make the registrations listed therein of record); *Jansen Enters., Inc. v. Rind*, 85 USPQ2d 1104, 1110 (TTAB 2007) (“Respondent’s mere reference in his brief to ...

[third-party] registrations did not suffice to make them of record. In order to introduce the third-party registrations, respondent should have submitted copies of the registrations.”). Consequently, Applicant’s claim that Opposer’s registered SPIN & GO and Design mark is weak, or that any of its literal elements are weak, due to numerous third-party registrations of “spin” or “go” marks is without evidentiary support.

We therefore find that Opposer’s mark is inherently distinctive.

2. Commercial Strength

We now turn to Opposer’s arguments and evidence that its SPIN & GO and Design mark has acquired commercial strength and is well-known (even implying that it is famous) through use and recognition in the marketplace.²⁸ Likelihood of confusion fame (or strength) varies along a spectrum from very strong marks to very weak marks. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017). A famous mark is commercially strong and has extensive public recognition and renown. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Kenner Parker Toys Inc. v. Rose Art Indus. Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). A mark is considered “famous” for likelihood of confusion purposes when “a significant portion of the relevant consuming public ... recognizes the mark as a source indicator.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005). Such a mark “casts a long shadow which

²⁸ Opposer’s Brief, 15 TTABVUE 15 TTABVUE 19-21.

competitors must avoid.” *Bridgestone Ams. Tire Operations LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1063 (Fed. Cir. 2012) (quoting *Kenner Parker Toys*, 22 USPQ2d at 1456).

Because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, 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) (citing *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007)).

Fame (for likelihood of confusion purposes) may be measured indirectly by the volume of sales and advertising expenditures in connection with the services sold 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 services identified by the mark; and the general reputation of the services. *Weider Publ'ns*, 109 USPQ2d at 1354; *see also Bose*, 63 USPQ2d at 1308 (recognizing indirect evidence as appropriate proof of strength). Raw numbers alone may be misleading, however. Thus, some context in which to place raw statistics may be helpful, for example, market share or sales or advertising figures for comparable types of goods. *Bose*, 63 USPQ2d at 1309.

On the other hand, the U.S. Court of Appeals for the Federal Circuit clarified in *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1681, 1690-91 (Fed. Cir. 2018), that market share evidence is not a sine qua non to

place advertising and sales figures in context. Rather, sufficient contextual evidence consists of a showing of the type and extent of advertising and promotions a party uses to demonstrate that the consuming public has been regularly exposed to its marks on a nationwide scale. *Id.*

As noted, Opposer has been using the SPIN & GO and Design mark in U.S. commerce since 2014. Opposer began its operations in the U.S. under the mark with one website, expanding to four websites by 2021.²⁹ Opposer provided its annual U.S. revenues from the operation of SPIN & GO online poker games from 2016-2021.³⁰ Opposer's year-over-year revenues during this period have been erratic (in a wide-swinging up-and-down pattern), and substantial but not stellar. Only in 2021 did Opposer's U.S. revenues exceed \$1 million. Opposer did not provide any listing or documentation of its advertising and promotional expenditures, but did provide data that it has been the leader in the sit-and-go gambling market from 2019-2021 (although Opposer appears to have been losing market share during this period to Applicant as the up-and-coming rival).³¹

Opposer also points to its YouTube channel, which had 1.33 million subscribers as of the end of 2016, and this same number of subscribers again toward the end of 2021.³² It is unclear how we should interpret this data, given that Opposer only

²⁹ Rasset Decl., 12 TTABVUE 10-11, 21-69, ¶¶ 11-15, Exh. 2; Hall Decl. 12 TTABVUE 96, 98-160, ¶¶ 5-6, Exh. A.

³⁰ Rasset Decl., 12 TTABVUE 11, ¶ 17.

³¹ Rasset Decl., 12 TTABVUE 11, 70-73, ¶ 17, Exh. 3.

³² Opposer's Brief, 15 TTABVUE 9, 20; Rasset Decl., 12 TTABVUE 12, 74-79, ¶ 21, Exh. 4.

provided webpage screen captures of its YouTube channel at two points in time, with no screen captures provided for the interim years of 2017-2020. Additionally, the reliability of this information is somewhat tainted in that the captured YouTube pages five years apart show that Opposer had the identical number of subscribers to its YouTube channel – suggesting that the subscriber number may have been static (that is, entered manually once in 2016 with no actual subscriber counter set within the underlying HTML code of the page).

Opposer also says that its SPIN & GO games have been the subject of numerous independent articles and reports in the media.³³ The record supports this contention.³⁴ However, the probative value of this evidence is tempered by the fact that the articles and reports on which Opposer relies are confined to the gambling trade, and we have no idea of the extent of their readership (that is, the number of subscribers). These articles and reports made of record did not appear in newspapers, magazines, news media sites of general circulation or distribution.

Applicant argues that Opposer’s SPIN & GO mark is weak due to common third-party use of “spin” and “go” marks in the gaming industry.³⁵ “However, Applicant did not submit any evidence of relevant third-party marks or trade names **used** in connection with ... [goods or services] that are identical or similar to,

³³ Opposer’s Brief, 15 TTABVUE 9, 20; Rasset Decl., 12 TTABVUE 12, 80-94, ¶ 22, Exh. 5; Kim Decl., 14 TTABVUE 33-59, Exh. 5.

³⁴ Rasset Decl., 12 TTABVUE 80-94, Exh. 5; Kim Decl., 14 TTABVUE 33-59, Exh. 5.

³⁵ Applicant’s Brief, 16 TTABVUE 12-15.

or competitive with, Opposer's identified ... [services]." *Made in Nature*, 2022 USPQ2d 557, at *34. We therefore do not consider this argument further.

Reviewing as a whole the evidence pertaining to commercial strength, we find that Opposer's SPIN & GO and Design mark is not famous or even well-known. On the "spectrum from very strong ... to very weak[.]" *Joseph Phelps Vineyards*, 122 USPQ2d at 1734, we find Opposer's mark to be of modest commercial strength.

3. Summary as to the Strength of Opposer's Mark

Having considered the record in its entirety and the arguments of the parties, we find that, conceptually, Opposer's SPIN & GO and Design mark is inherently distinctive, and not conceptually weak as Applicant claims. We further find that Opposer's mark is of moderate commercial strength for Opposer's identified services. Accordingly, we give Opposer's mark the scope of protection due an inherently distinctive mark.

D. The Similarity or Dissimilarity of the Parties' Marks

We now consider the similarity or dissimilarity of the parties' marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imps.*, 73 USPQ2d at 1691 (quoting *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*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019), "but does not **necessarily** do so." *Sure-Fit Prods. Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 117 USPQ 295, 297 (CCPA 1958) (emphasis original). In this connection, by "commercial impression" we mean "what the probable impact will be

on the ordinary purchaser in the market place” *T. W. Samuels Distillery, Inc. v. Schenley Distillers, Inc.*, 458 F.2d 1403, 173 USPQ 690, 691 (CCPA 1972).

“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.” *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (quoting *Coach Servs.*, 101 USPQ2d at 1721 (internal quotation marks omitted)). The focus is on the recollection of the average purchaser — here a potential online poker player — who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); *see also In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (“marks must be considered in light of the fallibility of memory and not on the basis of side-by-side comparison”) (cleaned up; citation omitted).

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 entirety.’” *Quiktrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 2021 USPQ2d 35, at *2-3 (Fed. Cir. 2021) (quoting *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1357 (Fed. Cir. 2000) and *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985)). In this connection, it is important to remember that no element of the parties’ marks

can be ignored, including their design elements. *See Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 181 USPQ 272, 276 (CCPA 1974) (finding that the design portion of the challenged mark, which included a distinctive blue ribbon, created a different commercial impression than the prior mark and that the design portion could not be ignored since the marks must be considered in their entirety).

Notably, we also must compare the marks as they appear in the drawings, and not on any surrounding material that may have additional wording or information. *Sabhnani*, 2021 USPQ2d 1241, at *28 n. 22 (citing *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018)). The parties' marks, as shown in Opposer's registration and Applicant's application, appear as follows:



In analyzing the similarities and dissimilarities in the marks, we therefore do not consider any of the material surrounding the parties' marks as used on their respective websites or social media pages.³⁶

On the other hand, we do recognize (as we found above) that the goods and services involved here are identical or otherwise related. In such circumstances, “the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century*

³⁶ *See, e.g.*, Rasset Decl., 12 TTABVUE 21-69, 74-79, Exhs. 2, 4; Hall Decl., 12 TTABVUE 98-160, Exh. A; Kim Decl., 14 TTABVUE 11-24, Exhs. 2-3.

21 Real Est. Corp. v. Century Life of Am., 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Opposer argues that “the beginning portions of the literal elements of the marks are identical, namely, both marks consist of two words beginning with the identical phrase ‘SPIN &’ (with identical use of the ampersand character). This fact may enhance the likelihood of confusion since identical initial words are ‘particularly significant because consumers typically notice those words first[,]’” citing *In re Detroit Athletic Co.*, 903 F.3d 1297, 1303-04 (Fed. Cir. 2018).³⁷ That is, “the first of the literal terms in ... [a] mark typically ... [are] the one[s] which create[] the strongest impression. (citations omitted). However, this is not always the case” *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *32-33 (TTAB 2023). Applicant argues that Opposer’s analysis impermissibly dissects the literal elements of the respective mark from one another; concentrating on the identical “SPIN &” portions of the marks without acknowledging the differences in meaning and overall commercial impression between the terms “GO” and “GOLD.”³⁸ Here, we find that, in each mark, the terms “SPIN,” “GO” and “GOLD” (as applicable) are of equal prominence and relative importance.

More specifically, Applicant argues:

The Opposer states that the only difference is the addition of “-ld” in Applicant’s mark in comparison to the SPIN & GO Mark. ... Opposer does not, however, mention the commercial impression the additional “-ld” creates. The additional “-ld” spells out the single word “gold”, which inherently has a different commercial impression than “go.” The term

³⁷ Opposer’s Brief, 15 TTABVUE 14.

³⁸ Applicant’s Brief 16 TTABVUE 8.

“gold” gives the impression of money or currency, while the term “go” gives the impression of leaving or exiting from a location.³⁹

We find merit to this argument. Consumers can differentiate between marks having familiar dictionary meanings that are different from each other. *See, e.g., R. J. Reynolds Tobacco Co. v. Am. Brands, Inc.*, 493 F.2d 1235, 181 USPQ 459, 462 (CCPA 1974) (finding no likelihood of confusion between the marks ADVANCE and VANTAGE, both used for cigarettes, in that the marks were everyday words with distinct differences in meaning, sound, appearance and differing commercial impressions.).

Opposer further argues that “[t]he accompanying design elements [within the parties’ marks] do nothing to dispel the likelihood of confusion given ... [the] close similarity of the literal elements[.]” citing *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1381 (Fed. Cir. 2002) (“This court agrees with the Board that the words dominate and that the addition of the puzzle design does not diminish the substantial identity of the marks in their entireties.”).⁴⁰ However, *Herbko* is factually distinguishable from the proceeding before us – as the literal portion of the parties’ marks in *Herbko* (CROSSWORD COMPANION) was identical – and here the parties’ marks differ by their respective uses of the term “go” versus the word “gold.”

³⁹ Applicant’s Brief, 16 TTABVUE 8. In this connection, the term “gold” is defined in MERRIAM-WEBSTER as “a yellow metallic element that occurs naturally in pure form and is used especially in coins, ... [as in] gold coins; a gold piece; money.” (<https://www.merriam-webster.com/dictionary/gold> last visited May 25, 2023). We take judicial notice of this definition. *See McGowen Precision Barrels*, 2021 USPQ2d 559, at *24 n.93.

⁴⁰ Opposer’s Brief, 15 TTABVUE 14.

As a counterpoint, Applicant argues that:

Opposer fails to establish a likelihood of confusion between the SPIN & GOLD Mark and the SPIN & GO Mark because it does not consider the two marks as a whole. ... Opposer ignores all of the claimed design elements of the two respective marks when comparing the two marks. ... Opposer simply dismisses the design elements, thereby failing to consider the marks as a whole⁴¹

In retort, Opposer argues that “although composite marks are considered in their entirety, the literal elements of such marks are considered dominant, and thus are given more weight than the design elements in the confusion analysis[,]” citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) and *L.C. Licensing, Inc. v. Cary Berman*, 86 USPQ2d 1883, 1887 (TTAB 2008).⁴² While this is true as a general matter, we need to focus our attention on the word-and-design marks involved in this case.

The principle that a comparison of word-and-design marks must be done carefully was cogently explained by the U.S. Court of Appeals for the Federal Circuit in *In re Coors Brewing Co.*, 343 F.3d 1340, 1344, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003), wherein the court stated:

Although we uphold the Board’s finding that the two marks are generally similar, principally because they both use the term “Blue Moon,” we note that **similarity is not a binary factor but is a matter of degree**. Because there are significant differences in the design of the two marks, the finding of similarity [of the literal elements] is a less important factor in establishing a likelihood of confusion than it would be if the two marks had been identical in design or nearly indistinguishable to a casual observer. (Emphasis added).

⁴¹ Applicant’s Brief, 16 TTABVUE 8.

⁴² Opposer’s Reply Brief, 17 TTABVUE 9.

As noted in the footnotes above (at the beginning of this decision),⁴³ the design element incorporated into Opposer's registered SPIN & GO and Design mark is described in the Registration as "a stylized cyclone design comprised of varying shades of red, orange and yellow with a black center[;]" whereas, the design elements incorporated into Applicant's applied-for SPIN & GOLD and Design mark are described in the Application as "an overall triangular shape featuring a curved top resembling a scale" with "the bottom point of the larger triangular shape resembling a scale [that] appears cracked as if it has fallen on, and broken through, two gold bars upon which it rests. The two gold bars rest upon three additional gold bars."

Taking into account Opposer's mark as a whole, the cyclone design emphasizes the literal "SPIN" portion of the mark. The overall commercial impression of Opposer's mark is that the player should enter Opposer's fast-paced (whirling, spinning) online poker game, take a turn playing, and leave with the player's winnings (or losses). Considering Applicant's mark as a whole, the scale and gold bars design emphasizes the literal "GOLD" portion of the mark. The overall commercial impression of Applicant's mark is that the player should enter Applicant's online poker game and earn so much "gold" by playing so as to break the scales that weigh the player's winnings.

Comparing the two marks in their entirety, consistent with the teachings of *In re Coors*, while they share the terms "SPIN &," that is where the similarity ends. The differences in "GO" vs. "GOLD," and disparities between a cyclone design vs. a scale

⁴³ See footnotes 1 and 3 above.

and gold bars design, lead us to an overall finding that the marks are too different in appearance, sound, meaning and commercial impression, the first *DuPont* factor, for confusion to be likely.

E. Absence of Actual Confusion

The seventh *DuPont* factor is the “nature and extent of any actual confusion, while the eighth *DuPont* factor considers the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567. Applicant argues:

Applicant is aware of no actual confusion in the relevant market that has been established between the SPIN & GO Mark and the SPIN & GOLD Mark. Currently, the Spin & Gold poker game is provided by five different websites (ggpoker.com, ggpoker.eu, ggpoker.co.uk, ggpoker.nl, and ggpoker.be) in all countries except respective blocked jurisdictions, and the main target countries are the United Kingdom, Canada, Brazil, Germany, Netherlands, Malta, Austria, Poland, Croatia, Finland, Hungary, Ireland, Liechtenstein, and Luxembourg. At this time (as of December 2022), Applicant has not heard of or been notified of any consumer complaints, industry statements, press articles, web postings, or similar events that identify that the SPIN & GOLD Mark and respective poker game has been confused with the SPIN & GO Mark and respective poker game.⁴⁴

Opposer responds:

[Applicant] ... argues that there is no likelihood of confusion because “Applicant is aware of no actual confusion in the relevant market that has been established between the SPIN & GO Mark and the SPIN & GOLD Mark.” ... However, [Applicant]’s argument fails because for the absence of actual confusion to be relevant, [Applicant] ... must submit evidence showing the extent to which the United States public has been exposed to [Applicant]’s mark during the alleged period of coexistence. Here, [Applicant] ... has provided no such evidence. Quite the opposite, [Applicant]’s SPIN & GOLD application was filed on an intent-to-use

⁴⁴ Applicant’s Brief, 16 TTABVUE 10. *See also* Kim Decl., 14 TTABVUE 8, ¶ 8 (Without any additional facts, stating: “Applicant is not aware of any instances of actual confusion between the ‘SPIN & GOLD’ and ‘SPIN & GO’ marks.”).

basis, and it has produced no evidence in discovery nor submitted any evidence that it actually uses the mark in the United States, let alone evidence of the extent to which U.S. consumers have been exposed to the mark. Instead, [Applicant] ... merely asserts that the SPIN & GOLD Mark is used in several countries other than the United States. ... Accordingly, the alleged absence of actual confusion is irrelevant and does not favor [Applicant].⁴⁵

On these points – the presence or absence of actual confusion including the opportunity for such confusion to occur – we note the opposed Application is based on intent-to-use with no Statement of Use (in commerce with or within the U.S.) having yet been filed. Applicant has yet to advertise or promote its SPIN & GOLD branded services in the U.S.⁴⁶ The only evidence that Applicant’s SPIN & GOLD and Design mark has been used is outside the U.S.⁴⁷ Applicant says it has been aware that Opposer has used its SPIN & GO and Design mark outside the U.S.,⁴⁸ but the only evidence made of record demonstrates that Opposer’s use of the SPIN & GO and Design mark has been confined to the U.S.⁴⁹ The absence of actual confusion in this case therefore is understandable.

⁴⁵ Opposer’s Reply Brief, 17 TTABVUE 14-15.

⁴⁶ Int. Ans. No. 23, ONOR2, 13 TTABVUE 23.

⁴⁷ Int. Ans. No. 24, Production Resp. No. 15, ONOR2, 13 TTABVUE 23, 33. Where the defending party “has introduced no evidence showing the nature and extent of its use of the mark sought to be registered in United States commerce, we have no basis whatsoever on which to infer that the absence of evidence of actual confusion has probative value in determining that confusion is unlikely.” *Edison Bros. Stores, Inc. v. Brutting E.B. Sport-Int’l GmbH*, 230 USPQ 530, 534 (TTAB 1986).

⁴⁸ Int. Ans. No. 8, ONOR2, 13 TTABVUE 21.

⁴⁹ Rasset Dec., 12 TTABVUE 10-12, 21-79, ¶¶ 11-22, Exhs. 2-4; Hall Decl., 12 TTABVUE 95-96, 98-160, ¶¶ 2-6, Exh. A. Theoretically, of course, Opposer’s SPIN & GO and Design branded online poker services are available to users throughout the globe, over the Internet.

“The absence of any reported instances of confusion 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 marks.” *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff’d*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *Gillette Can. Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *Barbara’s Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007).

The absence of any reported instances of confusion therefore is not meaningful in this case. The record does not demonstrate appreciable and continuous use by Applicant of its SPIN & GOLD and Design mark for a significant period of time in the same markets as those served by Opposer under its SPIN & GO and Design mark, *Citigroup*, 94 USPQ2d at 1660; *Gillette Can.*, 23 USPQ2d at 1774, such that there would have been a reasonable opportunity for confusion to have occurred. *Barbara’s Bakery*, 82 USPQ2d at 1287.

In any event, evidence of actual confusion is not required to prove a likelihood of confusion. *See Herbko*, 64 USPQ2d at 1380; *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 395-96 (Fed. Cir. 1983). We therefore find the seventh and eighth *DuPont* factors, the presence or absence of actual confusion under appropriate circumstances, to be neutral in our likelihood of confusion analysis. *Made in Nature*, 2022 USPQ2d 557, at *56-57 (where circumstances demonstrating the

parties' overlapping uses of their marks in the same markets are lacking the absence of actual confusion is a neutral factor).

F. Weighing the Likelihood of Confusion Factors

Weighing the *DuPont* factors for which there has been evidence and argument in this proceeding, *In re Charger Ventures LLC*, 65 F.4th 1375, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023), we find the parties' respective goods and services are identical in part and otherwise complementary, similar and related. The parties' trade channels and target consumers overlap. A consumer taking advantage of the parties' respective goods and services involves inexpensive purchases (or "buy ins"), tending to demonstrate impulse buying and a lesser standard of purchasing care. Opposer's mark is inherently distinctive and of moderate commercial strength. These are all factors weighing in favor of a finding that confusion is likely. The absence of actual confusion is a neutral factor in this proceeding.

However, 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."); *see also 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 all of the other *DuPont* factors favor Opposer, we find, on balance, the marks are simply too dissimilar for confusion to arise. While there is

some overlap (the presence of the terms “SPIN &”, overall the marks are more dissimilar than similar, look and sound different, and convey very 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 Nat. 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”).

Due to the differences in the marks as the controlling *DuPont* factor, we find that confusion between Applicant’s mark as applied to its goods and services is not likely with respect to Opposer’s mark as applied to its services.

Decision:

The Opposition is dismissed.