THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: January 30, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Jackson Family Farms, LLC
v.
Dylan Fairweather

Opposition No. 91291000

J. Scott Gerien, Joy L. Durand, and Allison N. Berk, of Dickenson, Peatman & Fogarty for:
Jackson Family Farms, LLC.

Ian K. Boyd and Andrew M. Levad, of Sideman & Bancroft LLP for:
Dylan Fairweather.

Before Wellington, Elgin, and Stanley,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Dylan Fairweather ("Applicant") seeks registration on the Principal Register for the standard character mark GOLD PALM for "alcoholic beverages containing wine; aperitifs with a wine base; low alcohol wine; wine-based beverages; wine; wines and liqueurs; wines and sparkling wines," in Class 33.[1]

[1] Application Serial No. 98004039, filed on May 19, 2023, based on Applicant's allegation of a bona fide intent to use the mark in commerce, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Jackson Family Farms, LLC ("Opposer) opposes registration of Applicant's mark under Trademark Act ("the Act") Section 2(d), 15 U.S.C. § 1052(d), alleging likelihood of confusion based on its two pleaded registrations for the mark, SILVER PALM (in standard characters) for "wine"[2] and "alcoholic beverages except beers,"[3] both in Class 33.

Applicant denies the salient allegations of the Notice of Opposition in its Answer.[4]

The proceeding has been fully briefed.

I. The Record and Evidentiary Issues

The record comprises the pleadings, the file of the involved application under Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b). The parties submitted evidence during their assigned trial periods.

The Board has carefully reviewed all evidentiary submissions, and presumes the parties' familiarity therewith. Relevant evidence is discussed only where necessary throughout this opinion. *See QuikTrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 1036 (Fed. Cir. 2021) (Board not obliged to expressly discuss every piece of evidence); *In re Miracle Tuesday LLC*, 695 F.3d 1339, 1348 (Fed. Cir. 2012) ("[T]he mere fact

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[2] Reg. No. 3392494 ("Reg. '494") issued on March 4, 2008 on the Principal Register, and has been renewed.

[3] Reg. No. 4257569 ("Reg. '569") issued on December 11, 2012 on the Principal Register, and has been renewed.

[4] 6 TTABVUE. Applicant also asserted, as "affirmative defenses," what are essentially arguments as to why he believes there is no likelihood of confusion. 6 TTABVUE 4-5. In any event, Applicant did not pursue any putative affirmative defense. *Keystone Consol. Indus. v. Franklin Inv. Corp.*, No. 92066927, 2024 TTAB LEXIS 290, at *2 n.10 ("Affirmative defenses that were asserted in an answer but then not pursued at trial may be deemed impliedly waived, while affirmative defenses that were never asserted may be deemed forfeited.").

that the Board did not recite all of the evidence it considered does not mean the evidence was not, in fact, reviewed."); *Plant Genetic Sys., N.V. v. DeKalb Genetics Corp.*, 315 F.3d 1335, 1343 (Fed.Cir.2003) ("We presume that a fact finder reviews all the evidence presented unless he explicitly expresses otherwise.").

Opposer objects to Applicant's submission of an evidentiary exhibit to his trial brief—a copy of Opposer's responses to Applicant's requests for admissions.[5] Opposer argues that this submission, along with any of Applicant's arguments in reliance thereupon, should not be considered because the admissions were not submitted during Applicant's trial period.

Under Trademark Rule 2.121, "[n]o testimony shall be taken or evidence presented except during the times assigned, unless by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board." 37 C.F.R. § 2.121. *See Hole In 1 Drinks, Inc. v. Lajtay*, No. 92065860, 2020 TTAB LEXIS 9, at *4 ("a party may introduce testimony and evidence only during its assigned testimony period") (citation omitted). *See also* Trademark Rule 2.123(k), 37 C.F.R. § 2.123(k) ("Evidence not obtained and filed in compliance with these sections will not be considered.").

Because Opposer's responses to Applicant's admission requests were not timely filed, we sustain the objection and the responses, as well as any argument relying solely on them, are not considered.

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[5] 18 TTABVUE 7-8 (Opposer's objection); 17 TTABVUE 59-65 ("Exhibit 1" to Applicant's brief).

II. Opposer's Statutory Entitlement to Bring the Opposition

A plaintiff may oppose registration of a mark where such opposition is within the zone of interests protected by the statute and the plaintiff has a reasonable belief in damage that would be proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020). Effectively, this is the same as showing a real interest in the proceeding and a reasonable belief of damage. *Id.* Opposer's ownership of its pleaded registrations for the mark SILVER PALM, and submission of copies showing their current status and title,[6] support a plausible likelihood of confusion claim against the involved application, and show its real interest in this proceeding and a reasonable basis for its belief of damage. *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 1377 (Fed. Cir. 2012).

Opposer has established its statutory entitlement to bring this opposition.[7]

III. Priority

Opposer's pleaded registrations are of record showing active status and Opposer's ownership, and Applicant has not filed any counterclaims to cancel the registrations. Accordingly, priority is not at issue with respect to the marks and goods covered by the registrations. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1402 (CCPA 1974); *Nkanginieme v. Appleton*, No. 91256464, 2023 TTAB LEXIS 64, at *11-12 ("unless there is a counterclaim against the opposer's pleaded and proven registration[s], priority is not at issue in a likelihood of confusion dispute").

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[6] 9 TTABVUE 19-26 (Not. Of Reliance Exs. 1-2).

[7] We also note that Applicant, in its brief, does not contest Opposer's entitlement to the cause of action.

IV. Likelihood of Confusion

Section 2(d) of the Act prohibits 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). The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as "*DuPont* factors"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003).

A likelihood of confusion analysis often particularly focuses on the similarities between the marks and between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (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 consider each *DuPont* factor for which there is evidence and argument. *See, e.g.*, *In re Guild Mortgage Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019). Opposer ultimately bears the burden of proving its claim of likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 951 (Fed. Cir. 2000).

A. Identical Goods; Channels of Trade and Classes of Consumers

We first consider the "similarity or dissimilarity and nature of the goods or services"; "[t]he similarity or dissimilarity of established, likely-to-continue trade channels" for the goods; and the classes of consumers to which the goods are marketed. *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1320 (Fed. Cir. 2014) (quoting *DuPont*, 476 F.2d at 1361).

Here, both the application and Reg. '494 list "wine" in the identifications of goods and, thus, are in-part identical. In addition, Reg. '569 covers "alcoholic beverages except beers" and this is broad enough to encompass all of the goods listed in the application, particularly Applicant's "alcoholic beverages containing wine," making these goods legally identical. *See In re St. Julian Wine Co.*, No. 87834973, 2020 TTAB LEXIS 196; *In re Info. Builders Inc.*, No. 87753964, 2020 TTAB LEXIS 20 (finding services legally identical in part where registrant's services encompassed by applicant's services); *In re Country Oven, Inc.*, No. 87354443, 2019 TTAB LEXIS 381 (quoting *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, No. 94002242, 2015 TTAB LEXIS 176 (where the identification of services is broad, the Board "presume[s] that the services encompass all services of the type identified")).

Because neither Opposer nor Applicant have limited their channels of trade or classes of consumers for their goods, as identified, we must presume that the legally identical goods will be offered in the same trade channels to the same classes of consumers. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1308 (Fed. Cir. 2018) (when there are no restrictions on channels of trade or classes of consumers in the

identifications of an application or registration, it is presumed that the goods are sold in "all normal trade channels to all the normal classes of purchasers").

In view of the above, the second and third *DuPont* factors weigh heavily in favor of finding a likelihood of confusion.

B. Similarity of the Marks SILVER PALM and GOLD PALM

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Opposer's and Applicant's marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 476 F.2d at 1361.

"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." *i.am.symbolic*, 866 F.3d at 1323 (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012) (internal quotation marks omitted)). The focus is on the recollection of the average purchaser, bearing in mind that it is not perfect and consumers may retain a general rather than a specific impression of trademarks. *See In re St. Helena Hosp.*, 774 F.3d 747, 751 (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); *see also, Mini Melts, Inc. v. Reckitt Benckiser LLC*, No. 91173963, 2016 TTAB LEXIS 151, at *14; *In re Mr. Recipe, LLC*, No. 86040643, 2016 TTAB LEXIS 80, at *18.

Here, on their face, the obvious similarities between Opposer's SILVER PALM mark and Applicant's GOLD PALM mark are that they share the same secondary term and are preceded by a word representing a color or type of precious metal. In contrast, the key difference between the marks is that they begin with different words that are different in appearance and sound.

In terms of meaning or connotation, Opposer points out that "the term 'palm' is a noun and is defined as 'trees, shrubs, or vines with usually a simple stem and a terminal crown of large pinnate or fan-shaped leaves.'"[8] Opposer further argues that the initial terms in the marks, SILVER and GOLD, are "less distinctive" because they are "merely serving as an adjective to modify or describe the second term, PALM."[9] And, when each viewed in their entireties, the marks convey a similar meaning in that Opposer's mark evokes a silver or silver-colored palm tree and Applicant's mark evokes a gold or gold-colored palm tree. In support, Opposer points to the parties' own commercial use of their marks in this manner by displaying the marks in conjunction with such silver or gold palm tree designs.[10]

Opposer further asserts that despite the parties' use of "gold" and "silver," terms that appear and sound differently, they may actually increase the likelihood of confusion because "consumers who are familiar with Opposer's SILVER PALM mark and recognize the differences in the SILVER PALM and GOLD PALM marks, will

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[8] 14 TTABVUE 22, referencing definition submitted (at 9 TTABVUE 53).

[9] 14 TTABVUE 22.

[10] 14 TTABVUE 22-23.

mistakenly believe that Applicant's GOLD PALM mark is a variation of Opposer's mark that Opposer has adopted for use on a higher quality product line extension of its SILVER PALM wine."[11] In support, Opposer submitted evidence showing that the tiered system for value, medals or prizes—Gold (first), Silver (second) and Bronze (third)—is used in various contexts.[12] Indeed, it is common knowledge that this is the tiered system for medal awards given out in the Olympic Games.

Opposer specifically relies on evidence showing this tiered system is frequently applied in the context of wine, including quality awards from competitions, brand labelling, and wine purchasing clubs. For example, in an online article "Inside The Secretive World of Wine Competitions," a wine competition manager explains:[13]

> "In our competitions, the judges can award a double gold medal to exceptional wines, which means the wine is rated between 95 and 100 points. The judges (who judge collaboratively in small groups of 3 or 4) discuss and come to consensus on the final point score," explains Debra.
>
> She adds that a regular gold medal can receive 90 to 94 points, meaning that it is a very high quality wine; while Silver medals are scored in the 80s, and mean that the wine is of good to very good quality. A Bronze medal means the wine is solid with no flaws, but is not scored. Wines that receive no awards may have a flaw, or lack balance in some way.

Screenshots from retail and winemakers' websites demonstrate how the same winemaker may tout their wine as "gold" and "silver" for purposes of representing certain qualities; for example:[14]

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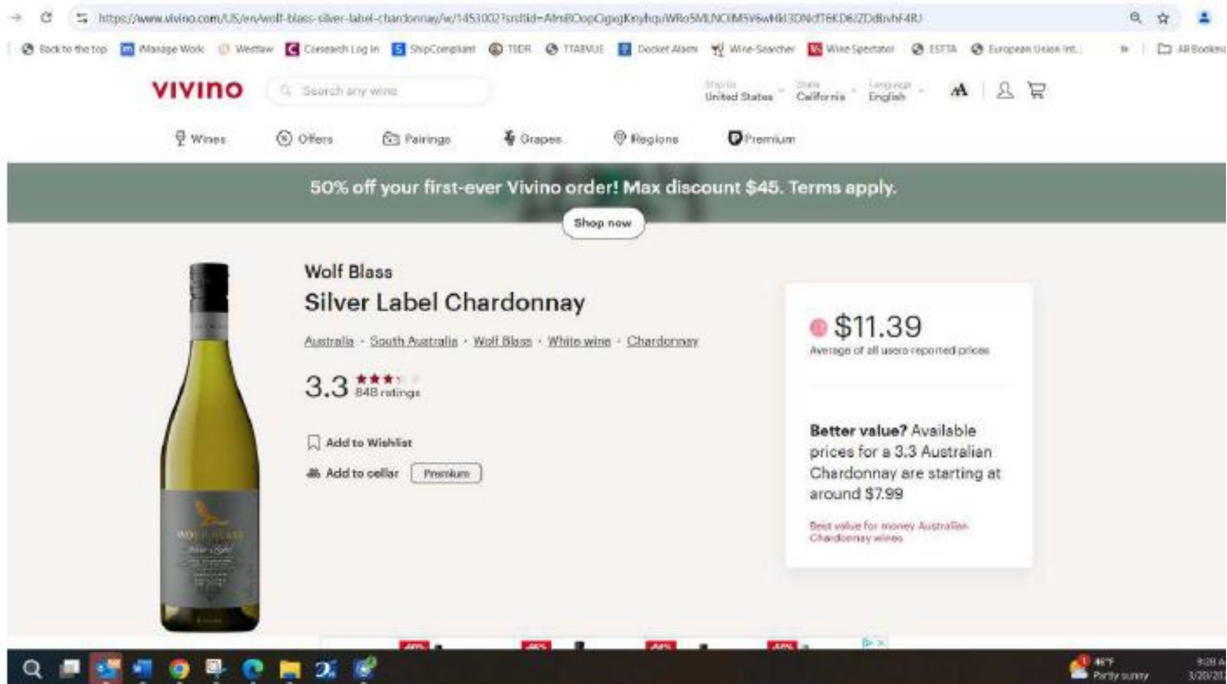
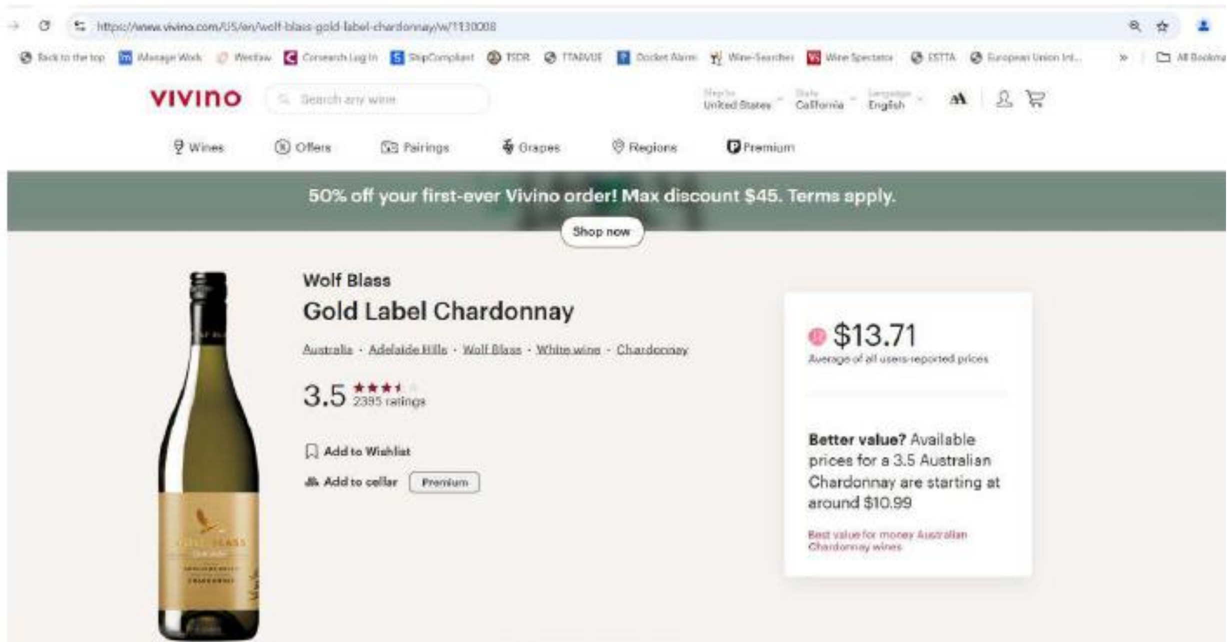
[11] 14 TTABVUE 25.

[12] 9 TTABVUE (Not. of Reliance Exs. 11-64).

[13] 9 TTABVUE 61-62 (Not. of Reliance Ex. 11).

[14] 9 TTABVUE 135 (Not. of Reliance Ex. 25).





In response to Opposer's evidence, Applicant asserts any such evidence of tiered system in connection with wine has "nothing to do with confusion between wine

brands or consumer perception as to source of a wine product."[15] Applicant argues that evidence of "wine competitions and wineries offering gold and silver medals and gold- and silver-tiered labels or memberships … merely evince[s] ornamental or informational use, not source-identifying branding."[16] Applicant asserts that "[i]t is too far a reach for Opposer to argue that the mere existence of an awards or tier system (generally present in all industries) means that consumers will confuse Applicant's wine and Opposer's wine as emanating from the same source, particularly given the enormous volume of other wine brands with a similar naming scheme also on the market."[17]

In terms of similarity and the meanings or connotations conveyed by the parties' marks, the record offers some credence to Opposer's argument that the tiering system, in general and particularly as used in the context of wine, helps bring the marks together. That is, should consumers be familiar with Opposer's SILVER PALM wine and then encounter Applicant's GOLD PALM wine, it is likely these consumers may attribute the initial terms in each mark as merely indicating a quality or status for a series of wines emanating from the same source or the same line of wines from the same winemaker. In other words, the evidence demonstrates that it would be reasonable for the consumers to mistakenly believe that the Opposer's SILVER PALM wine is second, or has different qualities, in a line of PALM wines that includes

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[15] 17 TTABVUE 49.

[16] 17 TTABVUE 50.

[17] 17 TTABVUE 50. Here, Applicant cites to decisions generally involving weakness of marks based on extensive third-party use of the same or similar marks. We address the weakness argument in the subsequent section of this decision.

Applicant's GOLD PALM wine. Indeed, because the parties' respective marks are in standard-character format, they could be displayed in any lettering style, color or font, and Opposer could display its mark in a font similar to Applicant's mark, or vice versa, thereby heightening the likelihood of confusion. *See Nike, Inc. v. Bauman-Buffone*, No. 91234556, 2019 TTAB LEXIS 65, at *18 ("The stylization of Applicant's mark is essentially irrelevant, because Opposer's mark is registered in standard characters and typed forms, and could be displayed in any font or size, including in a manner similar to Applicant's [mark].") (internal citation omitted); *In re Aquitaine Wine USA, LLC*, No. 86928469, 2018 TTAB LEXIS 108, at *13 ("Since Registrant's mark is a standard character mark, [it] may be presented in any font style, size or color, including the same font, size and color as the literal portions of Applicant's mark.").[18]

In sum, while there are visual and aural differences between the parties' marks, we find Applicant's GOLD PALM and Opposer's SILVER PALM marks are similar in appearance and sound. The marks are also likely to project similar commercial

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[18] In making our determination that the parties' use of GOLD and SILVER preceding the same term PALM supports a finding of similar connotations, we also considered Applicant's evidence: screenshots from third-party websites showing two examples of what appear to be unrelated third parties using the terms GOLD and SILVER preceding the same term on wine. These two examples are: (1) one website showing use of the mark GOLD COAST on wine and another showing use of SILVER COAST on wine (at 10 TTABVUE 1095-1099); and (2) one website showing use of SILVER LEAF on wine and another website showing use of GOLDEN LEAVES on wine (at 10 TTABVUE 1130-1135). However, these two examples, while probative, are not so persuasive to outweigh Opposer's evidence showing how consumers are likely to perceive the use of GOLD and SILVER preceding the same term as conveying similar connotations when used in connection with wine.

impressions and connotations. The marks are overall more similar than not, and this factor also weighs in favor of finding a likelihood of confusion.

C. Strength or Weakness of Opposer's SILVER PALM Mark

As discussed, *supra*, the "similarity of the marks" factor weighs in support of the conclusion that confusion is likely. However, the weight we give that factor may depend on other relevant factors that come into play; particularly, when supported, the strength or weakness of Opposer's mark may impact the weight given to the similarity of the marks.

"Two of the *DuPont* factors (the fifth and sixth) consider strength." *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023).). "The fifth factor, '[t]he fame of the prior mark (sales, advertising, length of use),' . . . is a measure of the mark's strength in the marketplace." *Id.* (quoting *DuPont*, 476 F.2d at 1361 and citing *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 1325 (Fed. Cir. 2017)). The sixth factor, "'[t]he number and nature of similar marks in use on similar goods' . . . is a measure of the extent to which other marks weaken the assessed mark." *Id.* (quoting *DuPont*, 476 F.2d at 1361 and citing *Palm Bay Imps., Inc. v. Veuve Cliquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1373 (Fed. Cir. 2005)).

1. The Fifth *DuPont* Factor

The fifth *DuPont* factor enables a plaintiff to prove that its pleaded mark is entitled to an expanded scope of protection by adducing evidence of "[t]he fame of the prior mark (sales, advertising, length of use)." *DuPont*, 476 F.2d at 1361. The

determination of strength "is not a binary factor," but involves placement of the mark along a spectrum. *In re Coors Brewing Co.*, 343 F.3d 1340, 1345 (Fed. Cir. 2003).

Commercial strength, or fame, may be measured by consumer polls, "by the volume of sales and advertising expenditures of the [goods and/or services] traveling under the mark, and by the length of time those indicia of commercial awareness have been evident." *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1319 (Fed. Cir. 2018) (quoting *Bose Corp. v. QSC Audio Prods.*, 293 F.3d 1367, 1371 (Fed. Cir. 2002) (internal citations omitted)). Commercial strength may also be measured by "widespread critical assessments; notice by independent sources of the goods or services identified by the marks; the general reputation of the goods or services; and social media presence." *See Heil Co. v. Tripleye GmbH*, No. 91277359, 2024 TTAB LEXIS 494, at *51.

Opposer asserts that its SILVER PALM mark "has achieved moderate commercial strength," pointing to its sales, advertising, social media exposure, and the length of time of use of the mark on wine.[19] Opposer submitted the testimony of Katy Stambaugh, Vice President and Legal Counsel for Jackson Family Wines, Inc. ("JFW"), Opposer's licensee responsible "for the production, sale and distribution of wine pursuant to a written license agreement … [including] all production, marketing and sale of SILVER PALM products and JFW maintains all records for these activities related to the SILVER PALM brand."[20] Ms. Stambaugh testified:

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[19] 14 TTABVUE 19-20.

[20] 13 TTABVUE 4 (Stambaugh Dec. ¶ 5).

- "The SILVER PALM mark has been used on and in association with wine for sale in the United States since July 23, 2007."[21]

- "From July 2020 through June 2024, JFW sold over [#] liters of SILVER PALM branded wine, with a 750ml per bottle equivalent of [#] bottles, which generated over [#] million in gross sales."[22]

- "Opposer has advertised its SILVER PALM wine in magazines, at trade shows, on the internet, in retail outlets and through social media outlets like X (formerly known as Twitter), Instagram and Facebook."[23]

- "Opposer's SILVER PALM wine is sold in all fifty (50) states and the District of Columbia by thirty-one (31) distributors. SILVER PALM wine is sold through all outlets where alcohol beverage products are sold. Retail outlets where the SILVER PALM wine is sold include liquor stores, such as Total Wine & More, and supermarkets such as Harris Teeter and Food Lion. On-premise outlets where the SILVER PALM wine is sold include bars and restaurants such as Mastros and Ruth's Chris Steak House."[24]

Opposer has been recently successful with its SILVER PALM mark on wine. The wine is sold across the country in some well-known retail establishments. However, the sales figures are only for the years 2020-2024 and, while impressive on their face, there is little other evidence from which we can determine their relative significance. "Raw numbers of product sales and 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." *Keystone Consol. Indus., Inc. v. Franklin Inv. Corp.,* No. 92066927, 2024 TTAB Lexis , at *16 (quoting *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367,

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[21] 13 TTABVUE 4 (Stambaugh Dec. ¶ 6).

[22] 13 TTABVUE 4 (Stambaugh Dec. ¶ 12); the hashtag "#" replaces figures that are designated "confidential" and redacted in the public version of the testimonial declaration. An unredacted copy of the declaration is at 8 TTABVUE.

[23] 13 TTABVUE 4 (Stambaugh Dec. ¶ 13).

[24] 13 TTABVUE 4-5 (Stambaugh Dec. ¶ 14).

1375 (Fed. Cir. 2002)). We further note that Stambaugh did not testify regarding Opposer's advertising and promotional expenditures.

In sum, Opposer's evidence shows its SILVER PALM mark has enjoyed recent success, but the record is not so persuasive to move the commercial strength dial in a meaningful manner. Accordingly, the fifth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

2. The Sixth *DuPont* Factor

The sixth *DuPont* factor allows an applicant to contract that scope of protection of Opposer's mark by adducing evidence of "[t]he number and nature of similar marks in use on similar goods." *DuPont*, 476 F.2d at 1361. As the Federal Circuit has explained, "[t]here are two prongs of analysis for a mark's strength under the sixth factor: conceptual strength and commercial strength." *Spireon*, 71 F.4th at 1362 (citation omitted). "Conceptual strength is a measure of a mark's distinctiveness . . . and distinctiveness is often classified in categories of generally increasing distinctiveness[:] … (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful." *Id.* (citations omitted). "Distinctiveness is relevant to a mark's overall strength in the likelihood of confusion analysis." *Id.* (citation omitted). "Commercial strength, on the other hand, is 'the marketplace recognition value of the mark.'" *Id.* at 1363 (quoting 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. 2023)).

At the outset, and in terms of conceptual strength, we point out that "[b]ecause 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." *See Heil Co. v. Tripleye GmbH*, No. 91277359, 2024 TTAB LEXIS 494, at *18 (citing 15 U.S.C. § 1057(b)).

Nevertheless, Applicant may show that the "existence of third-party registrations on similar goods can bear on a mark's conceptual strength." *Spireon*, 71 F.4th at 1363 (citing *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015)). In this regard, Applicant argues that "[t]he pervasive use of comparable marks on wine products here impacts the analysis of every factor, and is dispositive that confusion is not likely."[25] In support, Applicant introduced twelve third-party registrations for marks containing the term PALM, or derivation thereof, in connection with wine.[26] These are:

1. PALM COAST (Reg. No. 4728561);
2.

(Reg. No. 3685004);
3. PALM BAY INTERNATIONAL (Reg. No. 7797183);
4. KING PALM (Reg. No. 6689289);
5. PALM READER WINES (Reg. No. 5398017);

[25] 17 TTABVUE 37.

[26] 10 TTABVUE 594-652.

6. Palmera (Reg. No. 2960735 -- CANCELLED);[27]

7.

(Reg. No. 5829706);[28]

8. LA PALMA (Reg. No. 2239109);

9.

(Reg. No. 3489411);[29]

10. THREE PALMS VINEYARD (Reg. No. 4936048);

11. NOVAPALMA MAIA (Reg. No. 7683303); and

12.

(Reg. No. 5243409).[30]

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[27] Cancelled on December 19, 2025 under Section 8 of the Act.

[28] Full (stylized) wording in mark is: PALM PAR L'ESCARELLE.

[29] Full (stylized) wording in mark is: LA PALMA RESERVA.

[30] Full (stylized) wording in mark is: AKÈNTA CANTINA SANTA MARIA LA PALMA ALGHERO.

In reviewing the above third-party registrations, we initially note that the stylized PALMERA registration (number 6) has been cancelled.[31] "The existence of a cancelled registration … does not establish that Opposer's mark is weak." *Bond v. Taylor*, No. 91213606, 2016 TTAB LEXIS 218, at *17. In addition, as Opposer points out, the NOVAPALMA MAIA registration (number 11) was registered under Section 66(a) of the Act without a claim of use of the mark in commerce.[32] This registration thus has no probative value for purposes of demonstrating weakness. *Made in Nature, LLC v. Pharmavite LLC*, No. 91223352, 2022 TTAB LEXIS 251, at *30-31.

Also, the PALM BAY INTERNATIONAL formative registrations (numbers 2 and 3) are owned by a single entity, as are the LA PALMA formative registrations (numbers 8 and 9). Thus, we are left with ten third-party registrations relevant to the question of weakness of the shared term PALM in connection with wine, and these are owned by eight different entities.

While each of the ten third-party registrations are for marks containing the term PALM or form thereof, several also either contain additional matter that diminishes the importance of the term, by itself, or the term is used to convey a commercial impression very different from the parties' marks. For example, the PALM COAST (number 1) and the PALM BAY INTERNATIONAL formative marks (numbers 2 and

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[31] See Note 27.

[32] Section 66(a) of the Act, 15 U.S.C. § 1141f(a), essentially provides for registration of a mark based on an international registration and provides for extension of protection to the U.S. These registrants are initially not required to prove use of the mark in commerce.

3) strongly suggest the name of a geographical location. The PALM READER WINES mark (number 5), as Opposer points out and we agree, "gives the impression of a person interpreting a person's palm."[33] Finally, in the last listed registered mark (number 12), it is the term AKÈNTA that appears in a more prominent, larger font and the term PALMA is integrated with the rest of the significantly smaller wording.

We do not discount the relevancy of the third-party registrations for marks containing the term PALM; however, they are few in number and for the aforementioned reasons they are not very persuasive in terms of diminishing the conceptual strength of Opposer's mark. Applicant also did not introduce evidence showing that these third-party registered marks, or any other marks containing the term PALM, are actually used in commerce on wine. In other words, we cannot glean from the evidence before us that consumers are accustomed to encountering marks containing the term PALM in connection with wine. We thus cannot find any commercial weakness. Indeed, in terms of showing that Opposer's SILVER PALM mark or that the shared term PALM itself is weak, the record before us falls into a category often characterized as being a "far cry" from the type and amount of evidence deemed significant or meaningful in other cases. *See, e.g., In re Embiid*, No. 88202890, 2021 TTAB LEXIS 168, at *52 (finding three examples to be "a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant" by the Federal Circuit in *Jack Wolfskin Ausrustung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed. Cir.

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[33] 18 TTABVUE 14.

2015) and *Juice Generation*, 794 F.3d 1334), quoting *In re Inn at St. John's, LLC*, No. 87075988, 2018 TTAB LEXIS 170, at *12.[34]

Applicant also submitted copies of sixty-two third-party registrations for marks containing the term GOLD,[35] and fifty-one third-party registrations for marks containing the term SILVER,[36] all in connection with wine. Applicant also introduced screenshots from third-party websites showing use of GOLD- and SILVER- formative marks in connection with wine.[37] However, to the extent this evidence is relevant for purposes of establishing weakness, this would tend to favor a finding that confusion is likely. In other words, the relevance of such evidence undercuts Applicant's argument that GOLD and SILVER are the dominant elements of, respectively, Applicant's and Opposer's marks. In other words, should consumers be accustomed

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[34] Applicant attempts to lump all of the third-party registrations and website evidence it submitted in arguing that the record before us far exceeds that in *Jack Wolfskin* and other cases. 17 TTABVUE 41 ("And beyond even the 12 third-party registrations in *Pure & Simple* and 87 third-party registrations in *Jack Wolfskin* that the Federal Circuit held to constitute "substantial" and "extensive" evidence that confusion is not likely, Applicant has provided 205 third-party registrations supporting its position, as well as 53 common law uses.") However, as made clear *supra*, there are only ten third-party registrations relevant to the question of weakness of the shared term PALM in connection with wine. The other third-party registrations and use evidence, as also discussed herein, play no meaningful role in demonstrating that Opposer's mark is weak nor help show that confusion is not likely in this case.

We also point out that the *Pure & Simple* decision, to which Applicant refers, did not issue as precedential. *Pure & Simple Concepts, Inc. IHW Mgmt.*, 857 Fed. Appx. 652 (Fed. Cir. 2021) (unpublished). "Although parties may cite to non-precedential decisions, the Board does not encourage the practice." *In re Morrison & Foerster LLP*, No. 85263950, 2014 TTAB LEXIS 100, at *14 n.6. In any event, in *Pure & Simple*, the Board relied on seventy-four third-party registrations comprised of the shared term as well as twelve examples of advertised use to find the term conceptually and commercially weak, which is not the case here.

[35] 10 TTABVUE 17-330.

[36] 10 TTABVUE 331-588.

[37] 10 TTABVUE 1095-1179.

to encountering marks that begin with SILVER or GOLD in connection with wine, they are likely focus on other elements in the mark for purposes of identifying the source of the wine. In this case, the only other element in the parties' marks is the shared word, PALM.

Applicant also puts forth a "branding (or naming) convention" argument as to why it believes consumers are not likely to be confused between the parties' marks. That is, Applicant asserts that a "branding convention" exists in connection with wine because "the wine industry is awash in brand names that follow the familiar and non-distinctive [COLOR]+[OBJECT] pattern like GOLD PALM and SILVER PALM."[38] As a result of this "branding convention," Applicant states that "[t]he reality is that wine consumers are constantly exposed to these naming conventions from unrelated parties and are well-practiced at telling them apart."[39] In support, Applicant submitted:

- eighty third-party registrations for "[color]+[object]" format marks consisting of a on wine;[40]
- Screenshots from fifty-four third-party websites showing use of "[color]+[object]" formatted marks in connection with wine.[41]

[38] 17 TTABVUE 23.

[39] 17 TTABVUE 7.

[40] 10 TTABVUE 3-1042 (Ex. A).

[41] 10 TTABVUE 1043-1182 (Ex. B).

In particular and within this evidence, Applicant asserts that there “a branding convention of a color plus a type of flora,”[42] pointing to the following:[43]

- four third-party registrations or third-party uses for marks having a [color]-OAK format;
- three third-party registrations for marks having a [color]-VINE format;
- two third-party registrations for marks having a [color]-WILLOW format;
- two third-party registrations for marks having a [color]-LILY format;
- three third-party website uses for marks having a [color]-LEAF format;
- six third-party website uses for marks having a [color]-ROSE format; and
- two third-party website uses for marks having a [color]-BLOSSOM format.

As Opposer points out, Applicant “cites no applicable authority to support his ‘naming convention’ argument.”[44] Opposer further notes that the cases that Applicant seems to rely upon for its “branding convention” argument do not involve discussions of weakness based on a ‘branding convention,’ but rather on the alleged weakness of common element or term within two marks. That is, as to the unpublished *Pure & Simple* decision (see Note 34) that Applicant cites frequently, that case involved the marks INDUSTRY and BLUE INDUSTRY, and it was the shared term INDUSTRY that was the focus of weakness evidence. Similarly, in *Jack Wolfskin*, the involved marks were KELME (stylized with a paw print design) and “nonhuman paw print,”

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[42] 17 TTABVUE 23.

[43] The other “[color]+[object]” marks for which Applicant submitted third-party registrations or website screenshots include “objects” such as: -ROCK, -STONE, -CLIFF, -MOUNTAIN, -VALLEY, -HILL, -RIDGE, -COAST, -STAG, etc.

[44] 18 TTABVUE 10.

and the Federal Circuit, in reversing a Board decision, found the marks' dissimilarity "confirmed by the considerable evidence of third-party registration and usage of marks in commerce that depict paw prints on clothing." 797 F.3d at 1374.

Here, PALM is the common element of the parties' marks that makes them similar. The "[color]+[object]" convention evidence Applicant submitted lacks probative value for purposes of demonstrating weakness because none of the marks referenced include the term PALM.

After reviewing Applicant's evidence in its entirety, we do not agree with Applicant's assessment that there is an "overwhelming proliferation of comparable marks on wine products" and certainly disagree with the conclusion that the evidence "forecloses any likelihood of confusion here."[45] Rather, there are few third-party registrations for marks containing the term PALM on wine and several of those use the term in a very different manner from Applicant's and Opposer's marks. The "[color]+[object]" evidence has little to no relevance; here, we are focused on any possible weakness in connection with the shared element, PALM, that is the key to bringing Applicant's GOLD PALM mark and Opposer's SILVER PALM mark together.

In sum, Opposer's SILVER PALM mark is inherently distinctive. The few third-party registrations also containing the term PALM for wine make no meaningful impact in terms of weakness or on our evaluation of the marks' similarity.

[45] 17 TTABVUE 27.

Accordingly, the fifth *DuPont* factor is neutral.[46]

D. Level of Purchasing Care

Under the fourth *DuPont* factor, we consider "[t]he conditions under which … sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing." *DuPont*, 476 F.2d at 1361. As a general matter, "we must make our determination based on the least sophisticated consumer." *In re Guild Mortg. Co.*, No. 86709944, 2020 TTAB LEXIS 17, at *17 (citing *Stone Lion*, 746 F.3d at 1325); *In re FCA US LLC*, No. 85650654, 2018 TTAB LEXIS 116, at *29.

Applicant concedes that "it is not disputed that … many of the[parties'] consumers are not particularly sophisticated."[47] In addition, because there are no price restrictions in the parties' identifications of goods, we must contemplate their wine can be sold at all price points. *See In re Bercut-Vandervoort & Co.*, 1986 TTAB LEXIS 124, at *6-7 (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the identifications).[48] In other words, we must consider the parties' goods to include "less expensive wine sold to ordinary consumers through liquor stores, grocery stores, supermarkets, drug stores and the like." *Bercut-Vandervoort*, 1986 TTAB LEXIS 124,

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[46] We hasten to add, however, that even if Applicant's evidence were sufficient to establish some conceptual weakness in Opposer's mark, it would result in the fifth *DuPont* factor only weighing slightly in favor of Applicant, and our ultimate decision on likelihood of confusion would be the same.

[47] 17 TTABVUE 56.

[48] In any event, the record establishes the parties' wine do not actually have significantly high price points—"average" price of Applicant's GOLD PALM wine is $14.99 (11 TTABVUE; Fairweather Dec. ¶ 4), and the "MSRP" for Opposer's SILVER PALM wine is $19 per bottle (8 TTABVUE; Stambaugh Dec. ¶ 8).

at *7. Under such circumstances, consumers are prone to making 'impulse purchasing' decisions. *See Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000) ("When products 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.").

The fourth *DuPont* factor is neutral.

E. Other Neutral Factors: Concurrent Use Without Evidence of Confusion – No Bad Faith – De Minimis Potential Confusion

The seventh and eighth *DuPont* factors involve, respectively, any instances of actual confusion and the extent of the opportunity for actual confusion. *See DuPont*, 476 F.2d at 1361. These "factors are interrelated; the absence of evidence of actual confusion, under the seventh *DuPont* factor, by itself is entitled to little weight in our likelihood of confusion analysis unless there also is evidence, under the eighth *DuPont* factor, that there has been a significant opportunity for actual confusion to have occurred." *Keystone Consol. Indus.*, No. 92066927, 2024 TTAB LEXIS 290, at *75-76 (citations omitted). Put differently, 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 and its mark. *Barbara's Bakery, Inc. v. Landesman*, No. 91157982, 2007 TTAB LEXIS 9, at *14.

In this case, Applicant argues that "[d]espite both parties[ ] using the mark in at least New York, Maine, New Hampshire, Connecticut, Rhode Island, Massachusetts, South Carolina, and Florida, and in Internet commerce generally for at least two

years, there has been no actual confusion of any kind."[49] In support, Applicant testified that he has "utilized a sales manager on the ground in the U.S. for over 2 years now, building pre-sales prior to the launch of the GOLD PALM wine products, incurring over $200,000 in expenses" and the "[t]otal marketing/promotional investment in the GOLD PALM brand over the past two years in the U.S. exceeds $400,000."[50] Also, in addition to testifying that his wines are "available" in the above-mentioned states, he avers that "[m]ultiple distribution deals have been entered into in the United States regarding the GOLD PALM products, with five different U.S. distributors currently distributing the GOLD PALM wines."[51]

However, Applicant's testimony lacks sufficient information for us to gauge whether a meaningful opportunity for actual confusion existed in the relatively short period of two years. Specifically, he does not testify how many bottles of GOLD PALM wine have been sold in the U.S. or whether there has been an actual overlap of distributors, retail outlets, or advertisement channels for the parties' wine. We cannot conclude that the "circumstances have been such that [actual confusion] could be expected to have happened." *Gillette Canada Inc. v. Ranir Corp.*, No. 91082769, 1992 TTAB LEXIS 24, at *19. Accordingly, the seventh and eighth *DuPont* factors are neutral.

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[49] 17 TTABVUE 54.

[50] 11 TTABVUE (Fairweather Dec. ¶ 2).

[51] 11 TTABVUE (Fairweather Dec. ¶¶ 3-4).

Applicant also argues that the ninth and thirteenth *DuPont* factors weigh in his favor because, respectively, "Opposer does not use SILVER PALM on a wide variety of goods, even further reducing the likelihood of confusion"[52] and "Applicant did not adopt GOLD PALM with any intent to confuse."[53] However, these are factors that, based on the evidence, the Board may weigh in favor of finding a likelihood of confusion; otherwise, they are deemed neutral in our likelihood of confusion analysis.

Put simply, the ninth *DuPont* factor considers "[t]he variety of goods on which a mark is or is not used (house mark, 'family' mark, product mark)," *DuPont*, 476 F.2d at 1361, and is relevant when the parties' goods may not be obviously related. *See generally Monster Energy v. Lo*, 2023 TTAB LEXIS 14, at *54-55. In this case, given the identity of the parties' identified goods, "we find it unnecessary to rely on this factor." *Made in Nature, LLC v. Pharmavite LLC*, 2022 TTAB LEXIS 228, at * 75. It is therefore neutral.

Similarly, while evidence of a junior party's bad faith adoption of a mark typically weighs in favor of a likelihood of confusion, the converse is not true. *Eveready Battery Co. v. Green Planet, Inc.*, No. 91180015, 2009 TTAB LEXIS 490, at *16. Accordingly, the thirteenth *DuPont* factor does not weigh in Applicant's favor simply because he has adopted the GOLD PALM mark in good faith.

Finally, Applicant urges the twelfth *DuPont* factor "favors Applicant, especially in the absence of substantial evidence establishing that multiple brand owners offer

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[52] 17 TTABVUE 54.

[53] 17 TTABVUE 55.

their respective wines under differing, but commonly owned, trademarks utilizing the same object and differing colors."[54] Applicant is simply reiterating the weakness and "brand convention" arguments, previously addressed under the sixth *DuPont* factor and our finding as to that factor stands on its own. The twelfth *DuPont* therefore is neutral.

F. Conclusion: Balancing of Factors

We must "weigh the *DuPont* factors used in [our] analysis and explain the results of that weighing." *In re Charger Ventures LLC*, 64 F.4th 1375, 1383-84 (Fed. Cir. 2023). "In any given case, different *DuPont* factors may play a dominant role," and the "weight given to each factor depends on the circumstances of each case." *Id.* (citation omitted).

Applicant's and Opposer's goods are the same—wine. These goods will be offered in the same trade channels to the same classes of consumers. These factors weigh heavily in favor of finding confusion likely. In addition, we find Applicant's mark, GOLD PALM, is overall similar to Opposer's mark, SILVER PALM, in appearance and sound, and these marks may convey similar commercial impressions. There are no factors that weigh against finding a likelihood of confusion and, with respect to the other factors argued, we find them neutral in our analysis.

On balance, we have no difficulty concluding that there is a likelihood of confusion between Applicant's mark, GOLD PALM, and Opposer's registered mark, SILVER PALM.

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[54] 17 TTABVUE 55.

Decision: The Notice of Opposition is sustained under Section 2(d) of the Act.