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Mailed: December 30, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re O&R Franchise Group LLC

Serial No. 98134084

Laura Beléndez Ferrero of Beléndez Law Offices,
for O&R Franchise Group LLC.

Joey Zawacki, Trademark Examining Attorney,
Susan Hayash, Managing Attorney, Law Office 123.

Before Wellington, English, and Casagrande,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

O&R Franchise Group LLC ("Applicant") seeks registration on the Principal Register of the mark:

for "providing of food and drink via a mobile truck; restaurant services," in International Class 43.[1] The word MARGARITAS has been disclaimed. The application also contains the following translation statement: "The English translation of LA PACHANGA MARGARITAS Y FIESTA in the mark is THE PARTY MARGARITAS AND PARTY."

The Trademark Examining Attorney refused registration of Applicant's mark under Trademark Act ("the Act") Section 2(d), 15 U.S.C. § 1052(d), on the ground of likelihood of confusion based on the registered mark PACHANGA MEXICAN GRILL (in standard characters with a disclaimer of MEXICAN GRILL) for "restaurant services," in Class 43.[2] The registration also contains the following translation statement: "The English translation of PACHANGA is 'lively party.'"

After the Examining Attorney made the refusal final, Applicant requested reconsideration and filed an appeal. The Examining Attorney denied the request for reconsideration and the appeal resumed. Both Applicant and the Examining Attorney filed briefs. For the reasons explained below, we affirm the refusal.

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[1] Application Serial No. 98134084, filed August 15, 2023, based on Applicant's allegation of first use of the mark anywhere and in commerce on July 16, 2021, under Trademark Act Section 1(a), 15 U.S.C. § 1051(a).

The mark is described in the application as "consist[ing] of the following: a drawing of a stylized donkey's head with white eyes and black pupils, fur of alternating ruffles in the colors orange, light orange, green, pink, light blue and blue, a pink tongue sticking out and white teeth with a black mouth. The words 'LA PACHANGA' in stylized black characters appear to the right of the donkey and the wording 'MARGARITAS Y FIESTA' in black appears below the words 'LA PACHANGA'. The donkey head and its features are outlined in black. The colors are claimed as a feature of the mark."

[2] Registration No. 2873389 issued on the Principal Register on August 17, 2004; twice renewed.

I. Applicant's Proposed Amendment to Recitation of Services

As a preliminary matter, we address Applicant's proposed amendment to the application's recitation of services, raised for the first time in Applicant's appeal brief and without a request to remand.[3] Applicant seeks to have the amendment entered "should the Board find the current identification of goods contributes to a likelihood of confusion."[4]

Applicant's proposed amendment should have been filed as a separate document with a request to remand to the Examining Attorney for consideration, not "in the alternative" at the end of its appeal brief. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1205.01(b) (2025); *see also In re Hollywood Lawyers Online*, No. 85662420, 2014 TTAB LEXIS 167, at *25 ("If applicant had wanted to have the amendment to the identification considered in the alternative, it should have made that request during examination"); *In re Major League Umpires*, No. 75154506, 2001 TTAB LEXIS 515, at *2 ("If applicant had wished to amend the identification in this manner, the proper procedure was to file a request for remand.").

Here, even if we were to construe the request as a request for remand, we would deny it because we do not find "good cause" for remand. Trademark Rule 2.142(d); TBMP § 1207.02. Moreover, as explained more fully *infra* and in the Examining

[3] 6 TTABVUE 23-24. Citations in this opinion adhere to the guidance in the TBMP § 101.03. The TTABVUE citations in this opinion refer to the Board's docket system. The number preceding the TTABVUE designation is the docket entry number and any numbers following indicate the page numbers within the docket entry.

[4] 6 TTABVUE 23.

Attorney's brief,[5] the proposed amendment is futile because the proposed recitation of services remains encompassed by, and thus legally identical to, Registrant's recitation of services.[6]

II. Likelihood of Confusion

Section 2(d) of the Act, in relevant part, prohibits registration of a mark that "so resembles a mark registered in the Patent and Trademark Office … as to be likely, when used on or in connection with the [services] of the applicant, to cause confusion." 15 U.S.C. § 1052(d). To determine whether confusion is likely, we analyze all probative evidence relevant to the factors set out in *In re E. I. du Pont de Nemours & Co.,* 476 F.2d 1357, 1361 (CCPA 1973) ("*DuPont*"). *See In re Majestic Distilling Co.,* 315 F.3d 1311, 1315 (Fed. Cir. 2003).

In every Section 2(d) case, two key *DuPont* factors are the similarity or dissimilarity of the marks and the relatedness of the respective goods or services, because the "fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976). Here, we have considered each *DuPont* factor that is relevant and for

[5] 8 TTABVUE 14-15.

[6] Applicant's proposed amended recitation of services reads:

"Providing of food and drink via a mobile truck; Restaurant **services featuring live entertainment; Restaurant services offering seated food and drink operations primarily focused on live entertainment**; Restaurant **and bar** services **featuring a venue for live entertainment in the nature of live performances by musicians, groups, and DJs**."

The wording in **bold** designates language not contained in the original recitation of services.

which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

Varying weight 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, 1356 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 1206 (Fed. Cir. 1993) ("[T]he various evidentiary factors may play more or less weighty roles in any particular determination."). Ultimately, however, "[e]ach case must be decided on its own facts and the differences are often subtle ones." *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 1199 (CCPA 1973).

A. Alleged Weakness of Term PACHANGA

Before evaluating the similarity of the marks, we begin by addressing Applicant's assertion that the shared term in the marks, PACHANGA, is "widely used in the food and restaurant industry" and thus "weak and entitled to very narrow scope of protection."[7]

Under the sixth *DuPont* factor, we consider "[t]he number and nature of similar marks in use on similar goods [or services]." *DuPont*, 476 F.2d at 1361. Thus, Applicant in this case may adduce such probative evidence and demonstrate that a cited mark, or element thereof, has less source-identifying significance. "Evidence of third-party use of similar marks on similar goods [or services] is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection." *Apex Bank v. CC Serve Corp.*, 156 F.4th 1230, 1235 (Fed. Cir. 2025) (quoting *Palm Bay*

[7] 6 TTABVUE 11-12.

Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772, 396 F.3d 1369, 1373 (Fed. Cir. 2005)). "When a field is crowded with similar marks, the theory is that customers will be more adept at distinguishing marks from each other and are less likely to be confused by similar marks." *Id.* (citing *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338 (Fed. Cir. 2015)). In other words, sufficient probative evidence of third-party use may indicate that consumers are conditioned to distinguish between marks based on otherwise less meaningful differences between the marks. The third-party use evidence, as well as third-party registrations, may also show that a term has a "normally understood and well-recognized descriptive or suggestive meaning." *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1363 (Fed. Cir. 2023) (citations omitted; internal quotation marks omitted) and thus 'can bear on a mark's conceptual strength." *Id.*

In support of its weakness argument, Applicant submitted the following during prosecution:

- 4 third-party registrations for marks incorporating the term PACHANGA for food or beverage goods;[8]
- Screen captures from 7 third-party websites showing use of PACHANGA in marks in connection with restaurant services;[9]
- 10 third-party registrations for marks incorporating the term PARTY in connection with food and restaurant services.[10]

At the outset, we point out that PACHANGA means "a (lively) party" in Spanish

[8] July 23, 2024 Response to Office Action.

[9] July 23, 2024 Response to Office Action.

[10] July 23, 2024 Response to Office Action.

and thus, in the context of restaurant services and to the extent that consumers are aware of this meaning, it evokes a festive dining atmosphere. The third-party registrations and uses for PACHANGA-formative marks confirm this suggestive connotation in connection with restaurant services and other goods.[11] The third-party registrations for PARTY-formative marks also help corroborate this meaning.[12] Nevertheless, to the extent that Applicant seeks to rely on the third-party

[11] None of the third-party registrations for PACHANGA-formative marks are for restaurant services, but cover goods, e.g., as beer, wine, and chips. When assessing the effect of third-party marks and registrations on the strength of a cited registration, the Federal Circuit has noted that the question generally concerns only those third-party marks that are within the universe circumscribed by the parties' goods or services. *See, e.g.*, *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1325 (Fed. Cir. 2018) ("[T]he real world segment of the public is limited to the market or universe necessary to circumscribe purchasers or users of products or services like those being offered by the parties under a common mark. Such limits are important to the rationale underlying this factor. Only if other offerings under the common mark are also directed to that relevant public is it reasonable to infer that they may have become conditioned to draw fine lines between sources of related goods or services." (citing *Nat'l Cable Tel. Ass'n v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1579 (Fed. Cir. 1991)) (internal quotation marks omitted). Here, both marks are for restaurant services, so we are concerned only with restaurant services. To consider Applicant's citation of third-party marks for goods such as beer, wine, chips to bear on how consumers perceive marks in connection with restaurant services, there must be evidence that consumers view those goods to be related or similar to restaurant services. And, as the Examining Attorney points out (at 8 TTABVUE 10-11), a finding of relatedness generally is unwarranted as between food or drink items and restaurant services absent "something more" than the mere fact that the food or beverage products are served in restaurants. *See, e.g.*, *In re Coors Brewing Co.*, 343 F.3d 1340, 1345 (Fed. Cir. 2003). That "something more" evidence is lacking in the record here.

[12] Applicant argues these are relevant because, if we apply the doctrine of foreign equivalents, PACHANGA is "the Spanish equivalent of PARTY and [thus is] similarly weak." 6 TTABVUE 14. "Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine genericness, descriptiveness, as well as similarity of connotation in order to ascertain confusing similarity with English word marks." *Palm Bay Imps.*, 396 F.3d at 1377. Applicant does not cite to any authority to support the application of the doctrine of foreign equivalents in the manner it seeks, i.e., for purposes of using third-party registrations containing the English equivalent of an allegedly weak foreign term. In this case, as mentioned above, the term PACHANGA means "party" in English and we agree that, to the extent consumers are aware of this meaning, the PARTY registrations help corroborate the suggestive meaning of PACHANGA.

registrations for purposes of showing marketplace weakness, we point out that they are not actually "evidence of third-party use of the registered marks in the marketplace, for purposes of the sixth *du Pont* factor." *In re Davey Prods. Pty Ltd.*, No. 77029776, 2009 TTAB LEXIS 524, at *22 (citation omitted).

We are also mindful that the cited mark is registered on the Principal Register without a claim of acquired distinctiveness and thus the non-disclaimed term PACHANGA is inherently distinctive. *Tea Bd. of India v. Republic of Tea, Inc.*, No. 91118587, 2006 TTAB LEXIS 330, at *62 (a "mark that is registered on the Principal Register is entitled to all Section 7(b) [of the Act] presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods"). Applicant does not, indeed cannot, claim the term is descriptive as that would constitute an impermissible attack on the cited registration. *See Sage Therapeutics, Inc. v. SageForth Psychological Servs., LLC*, No. 91270181, 2024 TTAB LEXIS 139, at *27-28 ("Applicant's third-party evidence may be relevant to show where, within the range of inherently distinctive marks, the SAGE CENTRAL mark belongs, but we cannot find the mark merely descriptive given its [a Principal Register] registration [without a claim of acquired distinctiveness].") Nonetheless, we may consider whether the cited mark is "weak as a source indicator" in the course of the *DuPont* analysis. *In re Fat Boys Water Sports LLC*, No. 86490930, 2016 TTAB LEXIS 150, at *23.

In terms of marketplace or commercial weakness, when there exists extensive

evidence of third-party use of similar marks for related goods or services, this is generally probative in terms of demonstrating such weakness. *See, e.g.*, *Jack Wolfskin Ausrustung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed. Cir. 2015); *Juice Generation,* 794 F.3d at 1339. Here, however, Applicant's submission of screen captures from 7 third-party websites advertising restaurant services under PACHANGA-formative marks is not so plentiful to make a meaningful impact in terms of demonstrating commercial weakness. *In re Embiid*, No. 88202890, 2021 TTAB LEXIS 168, at *52 (TTAB 2021) (three examples "is a 'far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant in both' *Jack Wolfskin* and *Juice Generation*.") (internal quotation omitted). In addition, there is no evidence showing the extent of public exposure to these marketplace uses. *See Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1338 (Fed. Cir. 2001) ("As the Board recognized, the record includes no evidence about the extent of [the third-party] uses. The probative value of this evidence is thus minimal."). And, again, unlike the records in *Jack Wolfskin* and *Juice Generation* involving combinations of plentiful relevant third-party uses and registrations, the record in this appeal is void of third-party registrations for marks containing the term PACHANGA in connection with restaurant services and only 7 third-party uses.

In sum, we are not strongly persuaded by Applicant's evidence and ultimately disagree with Applicant's contention that the term PACHANGA is so weak in connection with restaurant services that the cited registered mark is only entitled to

a narrow scope of protection. Rather, we find the term PACHANGA to be somewhat conceptually weak in that it is plainly suggestive in connection with restaurant services. But the fact that it is suggestive does not mean its scope of protection shrinks substantially. *See In re Great Lakes Canning, Inc.*, No. 73365360, 1985 TTAB LEXIS 75, at *7 ("[T]he fact that a mark may be somewhat suggestive does not mean that it is a 'weak' mark entitled to a limited scope of protection.").

Accordingly, the sixth *DuPont* factor weighs somewhat against likelihood of confusion.

B. Comparison of the Marks

We turn now to the first *DuPont* factor, which focuses on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. *See Palm Bay*, 396 F.3d at 1371 (quoting *DuPont*, 476 F.2d at 1361). Similarity as to any one of these elements may be sufficient to support a finding that the marks are confusingly similar. *See Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 732 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion."); *accord In re Inn at St. John's, LLC*, No. 87075988, 2018 TTAB LEXIS 170, at *13, *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019).

Applicant's mark, 

, and the cited mark, PACHANGA MEXICAN GRILL, are quite similar in appearance and sound because

the dominant element of the each mark is the term PACHANGA. That is, although the stylized and colorful donkey's head appears first and is prominent in Applicant's mark, consumers are more likely to focus on and remember the large wording appearing to the right – LA PACHANGA, which as mentioned translates to "the party."

Generally, and here being no exception, "[i]n the case of a composite mark containing both words and a design, 'the verbal portion of the mark is the one most likely to indicate the origin of the goods [or services] to which it is affixed.'" *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (quoting *CBS, Inc. v. Morrow*, 708 F.2d 1579, 1581-82 (Fed. Cir. 1983)). "[T]he verbal portion of a word and design mark likely will be the dominant portion" because it "likely will appear alone when used in text and will be spoken when requested by consumers." *Viterra*, 671 F.3d at 1366; *see also L.C. Licensing, Inc. v. Berman*, No. 91162330, 2008 TTAB LEXIS 756, at *9 ("[I]t is well settled that if a mark comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods."). In other words, consumers referring to Applicant's restaurant are likely to refer to it as "La Pachanga," without attempting to describe the donkey head element.

We do not ignore the additional wording in Applicant's mark. Applicant argues the addition "LA," immediately preceding PACHANGA in its mark, has significance in terms of distinguishing the mark from the cited PACHANGA MEXICAN GRILL mark. We disagree. The term LA, meaning "the" in Spanish, has minimal

distinguishing effect; rather, it actually modifies and thus emphasizes the noun PACHANGA that follows. *In re Central Soya Co.*, Serial No. 204098, 1984 TTAB LEXIS 202, at *6 ("The Spanish article "La," which means "The," cannot be said to have any distinguishing effect.") (citation omitted).

As to the other additional wording in Applicant's mark, MARGARITAS Y FIESTA, this appears secondary in a much smaller font below LA PACHANGA. The disclaimed term MARGARITAS has very little source-identifying significance because it is a frequently-ordered drink in restaurants. *See, e.g.*, *In re Detroit Ath. Co.*, 903 F.3d 1297, 1305 (Fed. Cir. 2018) (disclaimers of merely descriptive terms "constitute rational reasons for giving those terms less weight in the analysis.") (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407 (Fed. Cir. 1997) (finding DELTA the dominant part of the mark THE DELTA CAFE, in part because the generic word "café" was disclaimed)).

The term PACHANGA is also the dominant element of the registered mark PACHANGA MEXICAN GRILL. The disclaimed wording MEXICAN GRILL is merely descriptive of a cuisine and type of restaurant services and has little, if any, significance in terms of distinguishing this mark from others. *Detroit Athletic*, 903 F.3d at 1305.

In terms of meaning and in the context of restaurant services, both marks are suggestive of a festive Mexican-themed or cuisine establishment. Again, the dominant element of PACHANGA may be translated as a "(lively) party." Applicant's colorfully-ruffled donkey head is also reminiscent of a pinata, and the wording

"margaritas y fiesta" further reinforces this theme. Similarly, the additional wording "Mexican grill" in the cited mark in conjunction with PACHANGA invokes the idea of a casual or lively Mexican cuisine restaurant.

In sum, we conclude that the marks are overall very similar. Consumers are likely to call for the respective services by using the nearly identical terms LA PACHANGA or PACHANGA. The marks also have similar connotations and convey similar commercial impressions. Accordingly, the first *DuPont* factor weighs in favor of a conclusion that confusion is likely.

C. Identity of the Services and Channels of Trade

We turn now to the second and third *DuPont* factors, which concern the relatedness of the services and the channels of trade for the services. *DuPont*, 476 F.2d at 1361. In this analysis, we must consider the services as they are identified in Applicant's application and the cited registration. *See Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.,* 918 F.2d 937, 942 (Fed. Cir. 1990)). Further, it is sufficient for a finding of likelihood of confusion as to a class of services in the application if relatedness is established for any one of the recited services within the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981).

Here, Applicant's services include "restaurant services," which are identical to the Registrant's services.

As to the channels of trade, we must presume that these identical restaurant services will the same and will be offered to the same classes of consumers. *Viterra Inc.*, 671 F.3d 1362 (even though there was no evidence regarding channels of trade

and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *see also Genesco Inc. v. Martz*, No. 91121296, 2003 TTAB LEXIS 123, at *28 ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade.").

Finally, as noted above, we point out that even if we were to entertain Applicant's proposed amendment to the recitation of services—which seeks to modify "restaurant services" by adding phrases such as "featuring live entertainment" and "offering seated food and drink operations primarily focused on live entertainment"—it would not overcome the identity of the services or their presumed trade channels. We must give full sweep to the recitations of services in both the application and cited registration and, if one's services encompasses some or all of the other's services, they are deemed legally identical. *See S.W. Mgmt., Inc. v. Ocinomled, Ltd.*, No. 94002242, 2015 TTAB LEXIS 176, at *60-61 (where the goods or services in an application or registration are broadly described, they are deemed to encompass all the goods or services of the nature and type described therein) (citation omitted), *aff'd mem.*, 652 F. App'x 971 (Fed. Cir. 2016); *In re Hughes Furniture Indus., Inc.*, No. 85627379, 2015 TTAB LEXIS 65, at 77 ("Applicant's broadly worded identification of 'furniture' necessarily encompasses Registrant's narrowly identified 'residential and commercial furniture.'"). The cited registration identifies "restaurant services" with no limitations or restrictions. Thus, we agree with the Examining Attorney that, even

as proposed by the amendment, Applicant's services "would otherwise remain[ ] encompassed by the Registrant's identification."[13]

D. Applicant's Reliance on the 'Absence of Actual Confusion'

Under the seventh and eighth *DuPont* factors, we consider the nature and extent of actual confusion, if any, in light of the length of time and conditions under which there has been contemporaneous use of the subject marks. *DuPont*, 476 F.2d at 1361.

Applicant argues:[14]

> Here, both Applicant and the Registrant have been operating in the marketplace under their respective marks for over four (4) years. This is confirmed by the information publicly available in the USPTO's records: Applicant filed its use-based application in connection with its existing restaurant operations, and the Cited Registration claims first use dates well prior to the Office Action refusal. Despite this prolonged period of coexistence, there is no record evidence—either in the Cited Registration's file history or in public-facing litigation records—of any instances of consumer confusion, complaints, or enforcement efforts between the parties. …
>
> Accordingly, the lack of actual confusion during this multi-year period of coexistence strongly supports reversal of the refusal under this DuPont factor.

Applicant's "uncorroborated statements of no known instances of actual confusion are of little evidentiary value." *Majestic Distilling*, 315 F.3d at 1317 ("lack of evidence of actual confusion carries little weight, especially in an ex parte context") (citation

[13] 8 TTABVUE 15. We are further cognizant that the Examining Attorney also rejected Applicant's proposed amendment as impermissibly expanding the scope of the services; and that "the amended identification should not be considered as operative." *Id.*, citing 37 C.F.R. § 2.71(a); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) §1402.07(d). Because we are not considering the amendment, *supra*, we need not consider the expansion of scope issue.

[14] 6 TTABVUE 21-22.

omitted).[15] Additionally, given the ex parte context, "there has been no opportunity to hear from Registrant about whether it is aware of any reported instances of confusion." *In re Guild Mortg. Co.*, No. 86709944, 2020 TTAB LEXIS 17, at *23 (TTAB 2020). Accordingly, we find these factors neutral.

III. Conclusion

The first *DuPont* factor favors a finding of a likelihood of confusion because Applicant's mark, 

, viewed in its entirety, is similar to the cited mark, PACHANGA MEXICAN GRILL. In addition, the second and third *DuPont* factors strongly support a finding that confusion is likely because the involved restaurant services are identical and their channels of trade are also presumed to be the same.

Though the shared term, PACHANGA, is plainly suggestive and thus has some conceptual weakness and a minimal showing of third-party use, which tend to favor a finding that confusion is not likely, this is far outweighed by the other aforementioned factors. We thus conclude on this record that Applicant's mark is likely to cause confusion with the registered mark.

[15] We note as well that this argument is simply attorney argument, unsupported by any declaration or other evidence in the record. *See, e.g.*, *Icon Health and Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1043 (Fed. Cir. 2017) ("Attorney argument is not evidence.") (citation omitted); *In re Simulations Publ'ns, Inc.*, 521 F.2d 797, 798 (CCPA 1975) ("Statements in a brief cannot take the place of evidence.") (citation omitted).

Decision: The refusal under Trademark Act Section 2(d) to register Applicant's mark is affirmed.