

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: May 7, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Candy Dynamics, Inc.
v.
Aurox Distributors LLC
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Opposition No. 91292159
—

William A. McKenna of Woodard, Emhardt, Henry, Reeves & Wagner, LLP,
for Candy Dynamics, Inc.

Rexford Brabson and Jorge M. Franco of T-Rex Law, P.C.,
for Aurox Distributors LLC.

—
Before Lykos, Lebow, and Allard,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:

Aurox Distributors LLC (“Applicant”) seeks registration on the Principal Register of the composite word and design mark shown below (SOUR disclaimed) for “Candies; Candy,” in International Class 30:¹

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¹ Application Serial No. 98137395 was filed on August 17, 2023, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce. The mark is described as “consist[ing] of a stylized face of a sour candy with watery eyes and a tongue sticking out with a spark at the end of



Candy Dynamics, Inc. (“Opposer”) opposes registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the basis of priority and likelihood of confusion with its registered marks listed below:

-  for “Candy,” in International Class 30;²

the tongue with the text ‘SOUR CITY’ underneath the tongue.” Color is not claimed as a feature of the mark.

² 1 TTABVUE 4 (para. 4). Reg. No. 7287357, issued on January 23, 2024. The mark is described as “consist[ing] of a mushroom cloud shaped character having bloodshot eyes licking a rolling liquid candy product.” Color is not claimed as a feature of the mark. 9 TTABVUE 46-48.

Opposer includes various hyperlinks in its Notice of Opposition. *See, e.g.*, 1 TTABVUE 5 (paras. 8, 9). However, allegations made in Opposer’s Notice of Opposition are not evidence on Opposer’s behalf. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (an assertion of a fact in a brief “is not evidence under any of the relevant rules”); *Baseball Am., Inc. v. Powerplay Sports, Ltd.*, No. 91120166, 2004 TTAB LEXIS 443, at *6 n.6 (TTAB 2004) (“[T]he factual allegations made in the pleadings are not evidence of the matters alleged, except insofar as they might be deemed to be admissions against interest.”). Moreover, even assuming evidence could be made of record via a notice of opposition, providing only a hyperlink to Internet materials is insufficient to make such materials of record. Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2) (“Internet materials may be admitted into evidence under a notice of reliance in accordance with paragraph (g) of this section, in the same manner as a printed publication in general circulation, so long as the date the internet materials were accessed and their source (*e.g.*, URL) are provided.”).

Citations to the record and briefs reference TTABVUE, the Board’s online docket system. Before the TTABVUE designation is the docket entry number; after this designation are the page references or paragraph numbers, as applicable.



- for “Candy,” in International Class 30;³ and



- for “candy,” in International Class 30.⁴

Opposer also claims prior common law rights in the same marks for the same goods.⁵

In its Answer, Applicant denies the salient allegations of the Notice of Opposition and asserts two affirmative defenses.⁶ The first (denying any likelihood of confusion)

³ 1 TTABVUE 4 (para. 4). Reg. No. 7427309, issued on June 25, 2024. The mark is described as “consist[ing] of mushroom cloud shaped character having bloodshot eyes.” Color is not claimed as a feature of the mark. 9 TTABVUE 52-54. At the time the Notice of Opposition was filed, this mark was not yet registered, so Opposer pleaded ownership of its then-pending application Ser. No. 98035207. 1 TTABVUE 4 (para. 4). Opposer subsequently made of record under its notice of reliance a TSDR printout of the resulting registration (Reg. No. 7427309). 9 TTABVUE 52-54. The pleading of an application is viewed as providing sufficient notice to the defendant of the plaintiff’s intention to rely on any registration that issues from the pleaded application. *See United Global Media Grp., Inc. v. Tseng*, No. 91200786, 2014 TTAB LEXIS 348, at *3 n.3 (TTAB 2014) (opposer that pleads ownership of the underlying applications in the notice of opposition may make the registrations which issue during the opposition of record without having to amend the notice of opposition to assert reliance on the registrations); *UMG Recordings, Inc. v. O’Rourke*, No. 91178937, 2009 TTAB LEXIS 533, at *11 n.12 (TTAB 2009) (opposer that pleads ownership of application would have to make any subsequently issued registration of record but would not have to amend notice of opposition prior to doing so).

For ease of reference, we refer to Opposer’s pleaded application together with its pleaded registrations collectively as “Opposer’s pleaded registrations.”

⁴ 1 TTABVUE 4 (para. 5). Reg. No. 2599426, issued on July 23, 2002; renewed. 9 TTABVUE 40-42.

⁵ 1 TTABVUE 4-5 (paras. 6-7).

⁶ 7 TTABVUE.

and the second (alleging lack of knowledge and willful intent) are amplifications of Applicant's denials, not true affirmative defenses, and are treated as such. *Mars Generation, Inc. v. Carson*, No. 91224726, 2021 TTAB LEXIS 386, at *4 .

Both Applicant and Opposer submitted evidence during their assigned trial periods, but only Opposer filed a brief.⁷ Because Opposer bears the burden of proof, Applicant has no obligation to submit evidence or a brief, and we do not construe its decision not to file a brief as a concession of the case. *See* Trademark Rule 2.128(a)(1), 37 C.F.R. § 2.128(a)(1); *Yazhong Investing Ltd. v. Multi-Media Tech. Ventures, Ltd.*, No. 92056548, 2018 TTAB LEXIS 168, at *12 n.13 (TTAB 2018); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 801.02(b) (2025) ("The filing of a brief on the case is optional, not mandatory, for a party in the position of defendant.").

For the reasons explained below, we dismiss the opposition.

I. Record

The record consists of the pleadings,⁸ and, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), the file history of the involved application.⁹ In addition, the record includes the following evidence introduced by the parties.

⁷ 9, 10, 11 TTABVUE.

⁸ Opposer asserts in its brief that the record includes its "Notice of Opposition and Exhibits as pleadings[.]" 11 TTABVUE 9, but, to be clear, there are no exhibits attached to the Notice of Opposition.

⁹ Both Opposer and Applicant made of record copies of documents from the file history of the involved application. Because the file history of the involved application is automatically of record, it was unnecessary for either party to make these documents of record under a notice of reliance.

Opposer introduced:

- a notice of reliance on (1) TSDR printouts of Opposer's pleaded registrations; and (2) website printouts.¹⁰

Applicant introduced:

- a notice of reliance on (1) copies of the certificates of registration of third-party marks; and (2) website printouts.¹¹

II. Entitlement to a Statutory Cause of Action

Applicant did not file a brief, and thus has not disputed Opposer's entitlement to a statutory cause of action; regardless, it is a necessary element of the plaintiff's case in every inter partes proceeding. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1302-07 (Fed. Cir. 2020). 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. *See Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 1070 (Fed. Cir. 2022); *Corcamore*, 978 F.3d at 1303.

Opposer has properly made of record TSDR printouts of its pleaded registrations showing their current status and title.¹² This evidence establishes Opposer's entitlement to a statutory cause of action. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945 (Fed. Cir. 2000) (registration establishes "standing"); *Monster Energy Co. v. Lo*, No. 91225050, 2023 TTAB LEXIS 14, at *15-16 (TTAB 2023) (pleaded

¹⁰ 9 TTABVUE.

¹¹ 10 TTABVUE.

¹² 9 TTABVUE 40-54.

registrations establish entitlement to oppose on the ground of priority and likelihood of confusion).

III. Priority and Likelihood of Confusion

We turn now to Opposer's claim of likelihood of confusion. To prevail, Opposer must prove both priority and likelihood of confusion. *Barbara's Bakery, Inc. v. Landesman*, No. 91157982, 2007 TTAB LEXIS 9, at *6 (TTAB 2007). We consider each element in turn.

A. Priority

Because Opposer's pleaded registrations are of record and Applicant has not counterclaimed to cancel any of them, Opposer's priority is not at issue as to these registered marks and the goods identified in the registrations. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1400-01 (CCPA 1974); *Nkanginieme v. Appleton*, No. 91256464, 2023 TTAB LEXIS 64 (TTAB 2023).

B. Likelihood of Confusion

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 1361 (CCPA 1973) ("*DuPont*"); *see also 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, 1355 (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.”). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances.” *Stratus Networks, Inc. v. UBT-UBET Commc’ns Inc.*, 955 F.3d 994, 998 (Fed. Cir. 2020). “Any single factor may control a particular case.” *Id.*

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, 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 discuss these factors and others for which there is evidence and argument.

We previously determined that Opposer established priority based on its pleaded registrations. However, we focus our likelihood of confusion analysis, as Opposer



does, on only one of the registered marks: (Reg. No. 7287357)

(“Compared Mark” or “Compared Registration”).¹³ In its brief, Opposer uses this mark as the basis of its comparison of the parties’ marks under the first *DuPont* factor.¹⁴ We agree with Opposer that this mark has the most points in common with Applicant’s involved mark; accordingly, we thus need not consider whether there is a likelihood of confusion between Applicant’s mark and Opposer’s other pleaded

¹³ 11 TTABVUE 17.

¹⁴ 11 TTABVUE 17-19.

registered marks. *See Heil Co. v. Tripleye GmbH*, No. 91277359, 2024 TTAB LEXIS 494, at *45-46 (TTAB 2024) (focusing the likelihood of confusion analysis on two of Opposer's four pleaded registered marks); *In re Max Cap. Grp. Ltd.*, 2010 TTAB LEXIS 1, at *19-20 (TTAB 2010).

1. Similarity or Dissimilarity and Nature of the Parties' Goods, Established, Likely-to-Continue Channels of Trade, and Classes of Consumers

We turn first to the second and third *DuPont* factors, which assess the similarity or dissimilarity of the parties' goods, their channels of trade and classes of purchasers. *DuPont*, 476 F.2d at 1361. Our determination must be based on the identifications of goods in the Compared Registration and the involved application. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1322-23 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.").

When considering the second and third factors, recall that Opposer's Compared Registration identifies "candy." Applicant's involved application identifies "candies; candy." Inasmuch as Applicant's identified "candies" is the plural of "candy," and both parties identify "candy," the goods are identical.

Because Applicant's goods and the goods identified in Opposer's Compared Registration are identical, we must presume that these goods move in the same

channels of trade and are available to the same classes of customers. *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (finding Board entitled to rely on this presumption); *see also Heil Co.*, 2024 TTAB LEXIS 494, at *87-88 (“Because the International Class 9 goods in Applicant’s application and Opposer’s [registration] are in-part identical, we must presume that the channels of trade and classes of purchasers are the same for such goods.”).

The second and third *DuPont* factors weigh in favor of a finding of likelihood of confusion.

2. The Conditions Under Which Sales Are Made, i.e. “Impulse” vs. Careful, Sophisticated Purchasing

The fourth *DuPont* factor considers the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ v. careful, sophisticated purchasing.” *DuPont*, 476 F.2d at 1361. Purchaser sophistication or degree of care may tend to minimize likelihood of confusion; conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1376 (Fed. Cir. 2005). Precedent requires that we base our decision on the least sophisticated potential purchasers. *Stone Lion*, 746 F.3d at 1325.

Because both parties identify “candy,” which is unrestricted as to classes of purchasers, the nature and type of candy, and its pricing, we can assume that it is offered not only to sophisticated buyers but also to the general public, and includes both expensive and inexpensive candy. Indeed, the broadly identified word “candy” includes any type of candy, including candy sold generally to consumers with

sophisticated palates, i.e., gourmet chocolates, as well as inexpensive candy items that may be purchased by members of the general public on impulse. Keeping in mind that Board precedent requires us to consider the “least sophisticated consumer in the class,” *Stone Lion*, 746 F.3d at 1325, and that the consumers here include members of the general public, we find that the fourth *DuPont* factor also weighs in favor of finding a likelihood of confusion. *Heil Co.*, 2024 TTAB LEXIS 494, at *88 (fourth factor weighs in favor of confusion where goods were identical).

3. Strength of Opposer’s Compared Mark

“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 *DuPont* factor enables Opposer 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),” whereas 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.” *Made in Nature, LLC v. Pharmavite LLC*, No. 91223352, 2022 TTAB LEXIS 228, at *23 24 (TTAB 2022) (quoting *DuPont*, 476 F.2d at 1361).

“[T]he strength of a mark is not a binary factor[]” and “varies along a spectrum from very strong to very weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1340 (Fed. Cir. 2015) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 1345 (Fed. Cir. 2003)). Opposer argues that its mark is “famous”¹⁵ and for that reason it should be considered to be on the strong end of the spectrum. We also consider

¹⁵ 11 TTABVUE 22.

evidence of third-party uses and third-party registrations proffered by Applicant to show that “consumers are accustomed to distinguishing between multiple ‘sour-themed’ brands.”¹⁶

a. Commercial Strength of the Compared Mark

In considering commercial strength, we assess the extent to which the relevant public recognizes a mark as denoting a single source. *See, e.g., Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 1324-1325 (Fed. Cir. 2017); *accord Palm Bay Imps.*, 396 F.3d at 1375 (fame for confusion purposes arises as long as a significant portion of the relevant consuming public recognizes the mark as a source indicator). Commercial strength, or fame, “may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the goods 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., Inc.*, 293 F.3d 1367, 1371 (Fed. Cir. 2002)).

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.*, 2024 TTAB LEXIS 494, at *50-51. If proven, fame plays a “dominant role in the process of balancing the *DuPont* factors.” *Palm Bay Imps.*, 396 F.3d at 1374 (quoting *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1327 (Fed. Cir. 2000)). “Because of the

¹⁶ 10 TTABVUE 3.

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.” *Made in Nature*, 2022 TTAB LEXIS 228, at *35-36.

Opposer argues that its mark is famous based on sales of its identified goods since 2001 and its “viral social media [posts] and licensing of the marks for other consumer products.”¹⁷ To support its argument of longtime use, Opposer relies solely on the dates of use set out in the TSDR printouts of its pleaded registrations.¹⁸ However, it is well-settled that the allegation of the dates of use listed in the registrations is not evidence of use. Trademark Rule 2.122(b)(2) (“The allegation in . . . a registration [] of a date of use is not evidence on behalf of the . . . registrant. . . .”). Rather, “a date of use of a mark must be established by competent evidence.” *Id.* Without testimony from a witness based on personal knowledge, Opposer has failed to so establish its date of use.

To support its argument that its mark is famous, Opposer relies on two third-party articles: one discusses Opposer’s licensing efforts and the other consists of a printout of a YouTube.com page showing a screen capture of a video with the caption “Slime lickers selling out due to TikTok fame.”¹⁹ To the extent that Opposer offers this evidence to show unsolicited media attention and/or consumer exposure to the

¹⁷ 11 TTABVUE 22 (citing 9 TTABVUE 38-54 (Exhibits 2-4), and 70-82 (Exhibits 8-9)).

¹⁸ 11 TTABVUE 22 (citing 9 TTABVUE 38-54 (Exhibits 2-4)).

¹⁹ 11 TTABVUE 22 (citing 9 TTABVUE 70-82 (Exhibits 8-9)).

Compared Mark, this evidence offered under a notice of reliance is proper and can be considered for what it shows on its face. However, even considering it, two unsolicited media pieces by third-parties, without more, is insufficient to find that the Compared Mark is commercially strong and entitled to a broad scope of protection.

Moreover, even considering this evidence for what it shows on its face, it has little probative value because the Compared Mark is not shown in either exhibit, so this evidence does not establish on its face that consumers have been exposed to the Compared Mark. We acknowledge that the licensing article mentions the “Toxic Waste brand,” but it is not clear which, if any, of the pleaded marks, is encompassed by this designation.

To the extent that Opposer offers this same evidence for the truth of the matter asserted in the articles, rather than what they show on their face, this evidence constitutes improper hearsay. For example, this evidence is not proper to show, as Opposer argues, that Opposer’s mark is the subject of a “viral social media post” or widespread “licensing of the mark for other consumer products.”²⁰ *See, e.g., Hangzhou Mengku Tech. Co., Ltd. v. Shanghai Zhenglang Tech. Co., Ltd.*, No. 91272143, 2024 TTAB LEXIS 575, at *9 (TTAB 2024) (“The Internet materials are self-authenticating and will be considered for what they show on their face; we do not consider these Internet materials for the truth of any assertion contained therein.”); *WeaponX Performance Prods. v. Weapon X Motorsports, Inc.*, No. 91221553, 2018 TTAB LEXIS 72, at *18-19 (TTAB 2018); *see also* TBMP § 704.08(b) (“[Internet documents] can be

²⁰ 11 TTABVUE 22.

used to demonstrate what the documents show on their face and may not be used to demonstrate the truth of what has been printed because they constitute hearsay.”) and cases cited therein.

Opposer offers no other evidence of the type that we generally see to support a claim that a mark is commercially strong. For example, Opposer failed to introduce evidence such as (1) its volume of annual sales of candy offered under the Compared Mark in the United States; (2) advertising expenditures for candy offered under the Compared Mark; and (3) samples of advertising together with evidence of widespread geographical reach of such advertising. *See e.g., Omaha Steaks*, 908 F.3d at 1319-20 (fame of OMAHA STEAKS mark supported by advertising expenditures of \$45 million in 2011 and over \$50 million in 2012 and 2013); *Bose Corp.*, 293 F.3d at 1372 (fame of ACOUSTIC WAVE mark supported by \$50 million in annual sales and \$5 million in annual advertising expenditures over the 17 years of use of the mark prior to 2002). We would also expect to see some form of context for this information, such as market share. *Omaha Steaks*, 908 F.3d at 1320 (“Market share is but one way of contextualizing ad expenditures or sales figures.”).

Because Opposer has failed to establish that its mark falls on the higher end of the spectrum of commercial strength, the fifth factor is neutral.

b. Number and Nature of Similar Marks in Use on Similar Goods

Applicant seeks to diminish the scope of protection for Opposer’s Compared Mark by introducing evidence to show that “these depictions and/or images [of faces] are a

commonly registered term” and that “consumers are accustomed to distinguishing between multiple ‘sour-themed’ brands.”²¹

Applicant made of record both evidence of third-party use and registrations of various design marks for a range of goods and services. “Evidence of third-party use of similar marks on similar goods 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 Imps.*, 396 F.3d at 1373). “The purpose of introducing evidence of third-party use is to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different [such] marks on the bases of minute distinctions.” *Omaha Steaks*, 908 F.3d at 1324. Such evidence tends to indicate a lack of commercial strength, while third-party registration evidence without proof of use may bear on conceptual weakness if a term is commonly registered for similar goods. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed. Cir. 2015).

Inasmuch as there is no evidence that the third-party marks are used with goods or services related to the goods at issue, i.e., “candy,” we confine our analysis to those goods that are identical to those identified by the parties. As a result, we disregard many of the third-party registrations, such as those that identify: “chili seasoning” (Reg. No. 7510531);²² “ice cream shop services in the nature of a restaurant” (Reg. No.

²¹ 10 TTABVUE 3.

²² 10 TTABVUE 22-24.

6313427);²³ “frozen confections” (Reg. No. 3854,863);²⁴ “cocoa” (Reg. No. 6717051);²⁵ “coffee” (Reg. No. 6831239);²⁶ “popcorn” (Reg. No. 6,999,995);²⁷ “sandwiches” (Reg. No. 7272820);²⁸ and “pancakes” (Reg. No. 7282259).²⁹

Focusing on those registrations that identify “candy,” the marks of these remaining third-party registrations include additional matter or have a different overall commercial impression, rendering them less similar to Opposer’s Compared Mark than Applicant’s mark. *See e.g., Made in Nature*, 2022 TTAB LEXIS 228, at *29-30. We thus afford many of Applicant’s third-party registrations, such as those shown below, low probative value:



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²³ 10 TTABVUE 25-26.

²⁴ 10 TTABVUE 27.

²⁵ 10 TTABVUE 28-29.

²⁶ 10 TTABVUE 30-31 (black and white image), 34-35 (color mark).

²⁷ 10 TTABVUE 34-35; *see also* 10 TTABVUE 60-61.

²⁸ 10 TTABVUE 38.

²⁹ 10 TTABVUE 54-55.

³⁰ 10 TTABVUE 14.



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³¹ 10 TTABVUE 20-21. Variations of this mark, all of which we consider to be dissimilar, appear at 10 TTABVUE 36-37, 58-59.

³² 10 TTABVUE 40-51.

³³ 10 TTABVUE 52-53.



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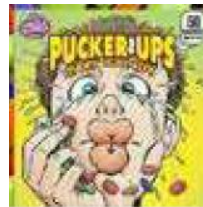
We now turn to the remaining evidence of third-party marks. While these marks are used with candy, the marks are also of low probative value because we find the images of these third-party marks to be less similar to Opposer's Compared Mark than Applicant's. Examples include:



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³⁴ 10 TTABVUE 56-57. Registrant also owns variations of this mark, including an angry apple, angry mango, and angry lemon, all of which are dissimilar. 10 TTABVUE 62-67.

³⁵ 10 TTABVUE 92.

³⁶ 10 TTABVUE 99.

³⁷ 10 TTABVUE 105.

³⁸ 10 TTABVUE 109.

³⁹ 10 TTABVUE 116.

⁴⁰ 10 TTABVUE 117.

Additionally, the images consisting of characters with extended tongues and animated fruit having exaggerated expressions available for licensing from Adobe.com and Shutterstock.com, for example, are not trademarks but rather available for use or licensing by others for any number of reasons. These images have a different overall commercial impression and as a result are less similar to Opposer's Compared Mark than Applicant's mark, reducing their probative value. *See e.g., Made in Nature*, 2022 TTAB LEXIS 228, at *29-30.

In short, considering Applicant's evidence of third-party use and registration it succeeds in persuading us that various individual elements of the Compared Mark, i.e., a character with a rounded head, wide eyes and an outstretched tongue, are common tropes in connection with candy and related goods and services. However, showing that these individual visual elements are commonly used does not establish the weakness of the Compared Mark, where overall the marks look quite different than Opposer's registered mark.

c. Conclusion as to Strength or Weakness of Opposer's Compared Mark

Considering the fifth and sixth *DuPont* factors, because we find Opposer's Compared Mark to be of average commercial strength for candy, and because Applicant was not successful in diminishing the strength of Opposer's Compared Mark, we find that Opposer's Compared Mark is entitled to the ordinary scope of protection to which inherently distinctive marks are entitled. *See Bell's Brewery, Inc. v. Innovation Brewing*, 2017 TTAB LEXIS 452, at *20 (TTAB 2017) (citing *Joseph*

Phelps Vineyards, 857 F.3d at 1325 (stating that likelihood of confusion fame varies along a spectrum from very strong to very weak)).

4. Similarity or Dissimilarity of the Parties' Marks

We now turn to the first *DuPont* factor, which assesses the similarity or dissimilarity of the marks. *DuPont*, 476 F.2d at 1361. We consider “the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Viterra*, 671 F.3d at 1362 (quoting *DuPont*, 476 F.2d at 1361). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Inn at St. John's, LLC*, No. 87075988, 2018 TTAB LEXIS 170, at *13 (TTAB 2018), *aff'd per curiam*, 777 F. App'x 516 (Fed. Cir. 2019) (quoting *In re Davia*, No. 85497617, 2014 TTAB LEXIS 214, at *4 (TTAB 2014)).

The proper test “is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong*, 901 F.3d at 1373 (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012)). “[S]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014) (quoting *Coors Brewing*, 343 F.3d at 1344).

When marks appear on identical goods, the degree of similarity between the parties' marks necessary to support a conclusion of likely confusion declines. *Bridgestone Ams. Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 1337 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entirety, the analysis cannot be predicated on dissecting the marks into their various components. Nonetheless, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985) (“[T]here is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety.”); *see also Stone Lion*, 746 F.3d at 1322. The focus is on the recollection of the average purchaser, who normally “retains a general rather than a specific impression of marks.” *In re i.am.symbolic, llc*, No. 85916778, 2018 TTAB LEXIS 281, at *11 (TTAB 2018).

Recall that Applicant seeks to register the composite word and design mark



, while Opposer's Compared Mark consists solely of the design



In marks “consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods.” *Sabhnani v. Mirage Brands, LLC*, No. 92068086, 2021 TTAB LEXIS 464, at *39-40 (TTAB 2021) (quoting *In re Aquitaine Wine USA, LLC*, No. 86928469, 2018 TTAB LEXIS 108, at *6 (TTAB 2018)); *Viterra*, 671 F.3d at 1366 (“[T]he verbal portion of the mark is the

one most likely to indicate the origin of the goods to which it is affixed.” (quoting *CBS, Inc. v. Morrow*, 708 F.2d 1579, 1582 (Fed. Cir. 1983)).

We see no reason to deviate from this general proposition here. While we acknowledge that Applicant’s mark includes a large design element, we find that the literal elements SOUR CITY to be its dominant element. Moreover, the exaggerated expression on the character’s face, i.e., its wide-eyes and outstretched tongue, suggests it has just eaten something extremely sour. Thus, the image reinforces the literal elements of the mark and, for that reason, further supports our finding that the literal elements SOUR CITY are the dominant portion of Applicant’s mark. This is so, despite the fact that, as Opposer argues, the image is larger in size compared to the size of the literal elements.⁴¹

The fact that Applicant has disclaimed the term SOUR does not preclude us from finding the literal elements SOUR CITY dominant, contrary to Opposer’s argument.⁴² *See, e.g., Viterra*, 671 F.3d at 1366-67 (“Although Viterra is correct that the registrant disclaimed exclusive rights to the term ‘-Seed’, we previously have found that the dominant portion of a composite word and design mark is the literal portion, even where the literal portion has been disclaimed.”); *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 1570-71 (Fed. Cir. 1983) (affirming that the term GIANT was the dominant portion of a mark consisting of the words GIANT

⁴¹ 11 TTABVUE 18.

⁴² 11 TTABVUE 19.

HAMBURGERS with a large background design, even though the applicant disclaimed the terms GIANT HAMBURGERS).

Inasmuch as Opposer's Compared Mark consists solely of a design, literal elements are completely absent from it. Thus, comparing Opposer's Compared Mark for similarity in sight and sound to the dominant element of Applicant's mark, i.e., the literal elements SOUR CITY, we find that the marks share no common literal elements and are dissimilar in sight and sound.

Opposer argues that the parties' marks are similar in commercial impression "given the dramatic visual similarities between the overall marks, the fact that Applicant's mark included the word 'sour' when Opposer's products sold in conjunction with Opposer's mark are sour candy products, and the appearances of prominent but very unique features such as a cloud shaped head, bloodshot eyes of different sizes and a tongue fully extended from the same part of each character's mouth."⁴³ We disagree. As an initial matter, we take judicial notice that the term "city" means "a thing, event, or situation that is strongly characterized by a specified quintessential feature or quality."⁴⁴ The dictionary's examples include "The movie was shoot-out **city**[" and "Getting lost in the maze was panic **city**."⁴⁵ With this in mind, SOUR CITY for candy connotes candy that is extremely sour. In contrast,

⁴³ 11 TTABVUE 19.

⁴⁴ MERRIAM-WEBSTER DICTIONARY, accessed on April 29, 2026. <https://www.merriam-webster.com/dictionary/city?src=search-dict-hed>. *Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, No. 91263919, 2022 TTAB LEXIS 383, at *41 (TTAB 2022) (taking judicial notice of dictionary definition).

⁴⁵ MERRIAM-WEBSTER DICTIONARY, accessed on April 29, 2026 (emphasis in original). <https://www.merriam-webster.com/dictionary/city?src=search-dict-hed>.

Opposer's mark, depicting a mushroom cloud shaped character licking a rolling liquid candy product, connotes candy having an extremely strong flavor, i.e., akin to something "nuclear" in one's mouth, such as spicy, but nothing suggests that the taste is that of sour. When comparing the marks in their entireties, nothing in Applicant's mark suggests that the character has tasted something toxic; rather, the literal elements SOUR CITY suggest the character has eaten something sour. This is in contrast to Opposer's Compared Mark: the mushroom cloud image and the resulting toxic connotation is completely missing from Applicant's mark. As a result, the marks when considered in their entireties are different in connotation and commercial impression.

When comparing the parties' marks in their entireties, we agree with Opposer that the parties' design portions share some general, thematic similarities, i.e., each character has (i) a sort of rounded head; (ii) bloodshot eyes, with the right eye slightly larger than the left; and (iii) a fully extended tongue extending from the left-center of their mouth.⁴⁶ However, the record shows that the shared elements of a character with a rounded head, wide-eyes and outstretched tongue are relatively weak,⁴⁷ and not "unique" as Opposer argues.⁴⁸ Moreover, the presence of the wording SOUR CITY in the Applicant's mark suffices to distinguish the marks aurally and further distinguishes them visually.

⁴⁶ 11 TTABVUE 17-18.

⁴⁷ See discussion *supra* Section II(B)(3).

⁴⁸ 11 TTABVUE 19.

The first *DuPont* factor weighs against a likelihood of confusion.

5. Actual Confusion or Its Absence

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 concurrent use of the subject marks. *DuPont*, 476 F.2d at 1361.

The filing basis for the involved application is based on intent to use and no amendment to allege use has been filed. Given the lack of testimony in the record of concurrent use of the parties' marks, there has been no opportunity for actual confusion to have occurred. *See Cunningham*, 222 F.3d at 949 (affirming finding that “[the Board] could not conclude there had even been an opportunity for actual confusion”); *Heil Co.*, 2024 TTAB LEXIS 494, at *93.

Accordingly, the seventh and eighth *DuPont* factors are neutral.

6. Other *DuPont* Factors

In addition to the *DuPont* factors discussed above, Opposer briefly discusses the ninth, tenth, and thirteenth factors but concludes that they are either irrelevant or neutral.⁴⁹ We agree. Opposer argues without evidence that the twelfth factor weighs in favor of a likelihood of confusion because of the high degree of similarity of the marks.⁵⁰ Inasmuch as Opposer under the twelfth factor merely summarily repeats its arguments previously discussed under the first *DuPont* factor, we disregard them and consider this factor neutral as well.

⁴⁹ 11 TTABVUE 23-24.

⁵⁰ 11 TTABVUE 24

7. Weighing of the *DuPont* Factors

The final step in analyzing likelihood of confusion is to weigh the *DuPont* factors for which there has been evidence and argument; “explain the results of that weighing;” and “the weight [we] assigned to the relevant factors.” *In re Charger Ventures LLC*, 64 F.4th 1375, 1384 (Fed. Cir. 2023). “No mechanical rule determines likelihood of confusion, and each case requires weighing of the facts and circumstances of the particular mark.” *In re Mighty Leaf Tea*, 601 F.3d 1342, 1346 (Fed. Cir. 2010).

Because the goods are identical, the second and third *DuPont* factors (similarity of the goods and similarity of the trade channels, respectively) weigh heavily in support of a finding that confusion is likely. The fourth *DuPont* factor (purchasing conditions) also favors a likelihood of confusion. The fifth, sixth, seventh and eighth *DuPont* factors (fame, number and nature of similar marks in use on similar goods, nature and extent of actual confusion and conditions under which there has been concurrent use without evidence of actual confusion, respectively) are neutral. The other factors (the ninth, tenth, twelfth, and thirteenth factors) are either neutral or irrelevant. However, the critical first *DuPont* factor (similarity or dissimilarity of the marks) weighs against a likelihood of confusion.

Any of the *DuPont* factors may play a dominant role. *DuPont*, 476 F.2d at 1361-62. In some cases, even a single factor may be dispositive. *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 333 (Fed. Cir. 1991). We find that the dissimilarity of the marks in sound, appearance, connotation, and commercial impression to be pivotal here and that it outweighs the other *DuPont* factors. The respective marks

overall are so dissimilar that even when used on identical goods in overlapping trade channels, consumers likely would not be confused into believing that they emanate from the same source. We therefore conclude that confusion is unlikely as to Applicant's identified goods.

IV. Decision

The opposition to registration of the mark is dismissed.