

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 18, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Arkansas State University
v.
Chattanooga Professional Soccer Management LLC

Opposition No. 91253165

Paige Mills and Katherine Todd of Bass Berry & Sims PLC
for Arkansas State University.

Mary Frances Love of Muncy Geissler Olds & Lowe PC
for Chattanooga Professional Soccer Management LLC.

Before Kuhlke, Larkin and Casagrande,
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, Chattanooga Professional Soccer Management LLC, seeks registration of CHATTANOOGA RED WOLVES SC¹ in standard characters and the following



design with wording ² for:

Clothing, namely, t-shirts, shirts, sports jerseys, polo shirts, sweaters, cardigans, singlets, suits, vests, warm-up tops, warm-up suits, pants, trousers, shorts, warm-up pants, uniforms, jackets, parkas, coats, hosiery, socks, gloves, scarves, shawls, belts, ties, wrist bands, aprons, footwear; headwear, namely, hats, caps, beanies, visors, ear muffs, bandanas, head bands (International Class 25) and;

Entertainment services, namely, organizing, conducting, and staging sporting events in the nature of professional soccer events, professional soccer matches, and professional soccer exhibition games; Entertainment services, namely, organizing and conducting professional soccer games and events rendered live and recorded for the purpose of distribution through broadcast media via the Internet, television, radio and mobile communication devices; Providing online, non-downloadable audio clips, video clips, musical videos, film clips and multimedia audio-visual materials featuring professional soccer events and performances; rental of films via Internet; Providing sports information via Internet, television, radio, and mobile communication devices; Providing online, non-downloadable audio clips, video clips, and musical clips featuring professional soccer events and performances; Providing online, non-downloadable film clips and multimedia materials featuring professional soccer events; television entertainment in the nature of ongoing television programs in the field of sports and sports entertainment; providing ongoing television programs in

¹ Serial No. 88117505, filed September 14, 2018, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

² Serial No. 88196890, filed November 16, 2018, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

the nature of news shows, web television talk shows, news casts, documentaries, and reality based television programs (International Class 41).

Opposer, Arkansas State University, has opposed registration of Applicant's marks on the ground that, as intended to be used in connection with Applicant's goods and services, the marks so resemble Opposer's previously used and registered RED



WOLVES and marks for, various clothing items, educational services, and entertainment services, including organizing and conducting sporting events, as to be likely to cause confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).³ By its answer, Applicant denies the salient allegations.⁴

I. Preliminary Matters

Before addressing the merits of the case, we consider two motions deferred for consideration at final decision.

A. Motion to Amend

On December 31, 2022, the Board deferred consideration of Applicant's motion to amend its identification of goods, filed on June 29, 2022, after the close of the trial period and prior to briefing. Applicant seeks to amend its identification of goods and services by limiting them all by the phrase "relating to a professional soccer team." We first deny the motion to amend as untimely. *Monster Energy Co. v. Lo*, 2023

³ Notice of Opposition, 1 TTABVUE. Opposer also pleaded the less similar standard character mark RED WOLF for clothing, educational and entertainment services.

⁴ Answer, 18 TTABVUE.

USPQ2d 87, at *8-9 (TTAB 2023) (denying motion to amend application to restrict services filed concurrently with applicant's trial brief), *civil action filed*, No. 5:23-cv-00549-GW-PVC (C.D. Cal. Mar. 28, 2023); *Personnel Data Sys., Inc. v. Parameter Driven Software, Inc.*, 20 USPQ2d 1863, 1865 (TTAB 1991) (denying defendant's motion to restrict identification of goods in involved registration filed with brief on case); *Peopleware Sys., Inc. v. Peopleware, Inc.*, 226 USPQ 320, 321 n.2 (TTAB 1985) (same). We also deny the motion on substantive grounds because the proposed restriction does not avoid a likelihood of confusion in view of the broad language in the asserted registration which would encompass Applicant's goods and services even as amended to restrict them to "relating to a professional soccer team." *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1898 (TTAB 2006) (applicant's offer to amend its identification of goods given no further consideration because it would not overcome the likelihood of confusion).

B. Motion to Strike

On December 31, 2022, the Board deferred in part and denied in part Applicant's motion to strike certain of Opposer's evidence. The Board denied the motion to strike the Rebuttal Testimony Declaration of Brad Phelps and deferred consideration of the motion to strike Opposer's evidence submitted under Notice of Reliance in docket entry No. 31 TTABVUE. The motion to strike these exhibits is based on untimeliness and failure to serve them on Applicant. Opposer did not list these exhibits in its recitation of the record in its main brief or refer to them or to the motion to strike in

its main and rebuttal briefs. In view thereof, we view these exhibits as withdrawn and the motion to strike is moot.

II. RECORD

The record includes the pleadings and, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), the files of the applications subject to the notice of opposition. In addition, the record includes:

- Opposer's testimony declarations of Tom Bowen, Opposer's Vice Chancellor for Intercollegiate Athletics (Bowen Decl.), with exhibits,⁵ Sarah Munoz, Opposer's Associate Athletic Director of Marketing and Fan Engagement (Munoz Decl.);⁶ Bill Smith, Opposer's Chief Communications Officer, with exhibits (Smith Decl.);⁷ Mark Reeves, Opposer's Director of Publications and Creative Services (Reeves Decl.);⁸
- Opposer's rebuttal testimony declaration of Brad Phelps, Opposer's General Counsel, (Phelps Decl.);⁹
- Opposer's Notices of Reliance on several documents, including all exhibits referenced in the testimony declarations, and printouts from Applicant's websites and social media;¹⁰

⁵ 23 TTABVUE.

⁶ 24 TTABVUE.

⁷ 25 TTABVUE.

⁸ 26 TTABVUE.

⁹ 40 TTABVUE.

¹⁰ 27-30, 39 TTABVUE. The better practice is to attach exhibits introduced by testimony under the declaration to the declaration rather than by cross referencing to documents attached to a notice of reliance.

- Applicant's testimony declaration of Jared Fields, Applicant's General Counsel (Fields Decl.) with exhibits;¹¹
- Applicant's Notices of Reliance on various documents, including Opposer's discovery responses, official records in the form of third-party registrations, and printouts from third-party websites and social media.¹²

III. ENTITLEMENT TO A STATUTORY CAUSE OF ACTION

Opposer's entitlement to a statutory cause of action must be proven by the plaintiff in every inter partes case. *See Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067 n.4 (2014)). A party in the position of plaintiff may oppose registration of a mark where such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and the party 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, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020).

Opposer has proven it owns the pleaded registrations listed above and they are in good standing. In view thereof, Opposer's entitlement to a statutory cause of action to oppose registration of Applicant's marks is established. *Cunningham v. Laser Golf*, 55 USPQ2d at 1844 (pleaded registrations "suffice to establish ... direct commercial interest"; a belief in likely damage can be shown by establishing a direct commercial

¹¹ 35 TTABVUE (public); 34 TTABVUE (confidential).

¹² 32, 33, 36 TTABVUE.

interest); *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *7 (TTAB 2022) (pleaded registrations demonstrated entitlement to bring a statutory cause of action); *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *6 (TTAB 2020) (pleaded registrations establish statutory entitlement to bring opposition).

IV. SECTION 2(d) CLAIM

Section 2(d) of the Trademark Act prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d). To prevail on its Section 2(d) claim, Opposer must prove, by a preponderance of the evidence, that it is entitled to invoke the statutory cause of action it filed, has priority with respect to its registered RED WOLVES marks vis-à-

vis Applicant’s marks CHATTANOOGA RED WOLVES SC and , and that Applicant’s use of its marks in connection with the goods and services identified in its application is likely to cause confusion, mistake, or deception as to the source or sponsorship of those goods and services. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000).

Opposer’s pleaded Registrations are summarized below:¹³

¹³ Smith Decl. ¶¶ 11-13, 25 TTABVUE 4-5, Opp. Notice of Reliance Exhs. 51-53, 27 TTABVUE 297- 651.

- Registration Nos. 3796310, issued June 1, 2010 renewed, and 3677815, issued September 1, 2009, renewed, for the standard character mark RED WOLVES for clothing, namely, children's and infants' cloth bibs; footwear; headgear, namely, hats and caps; infant and toddler one piece clothing; jerseys; moisture-wicking sports pants; moisture-wicking sports shirts; sport coats; sport shirts; sports jackets; sports jerseys; sports pants; and tops (International Class 25); and educational services, namely, providing courses of instruction at the university level; and entertainment services, namely, organizing and conducting sporting events, sports and athletic competitions, and cultural events (International Class 41);

- Registration No. 3596375, issued March 24, 2009,



renewed, for the mark  for Headgear, namely, hats, caps; Infant and toddler one piece clothing; Jerseys; Moisture-wicking sports shirts; Sport coats; Sport shirts; Sports jackets; Sports jerseys; Sports pants; Tops (International Class 25) and; Educational services, namely, providing courses of instruction at the university level; and entertainment services, namely, organizing and conducting sporting events, sports and athletic competitions, and cultural events (International Class 41).

A. Priority

Because the pleaded registrations are not the subject of counterclaims, priority is not in issue with respect to the marks, and goods and services in the registrations.

See Empresa Cubana Del Tabaco v. Gen. Cigar Co., 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982);

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

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, 177 USPQ 563 (CCPA 1973) (*DuPont*). See, e.g., *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019) (Board considers each *DuPont* relevant factor for which there is evidence and argument). Two key considerations are the similarities between the marks and the similarities between the goods and services. *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976); see also *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1340, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

While we consider all of the pleaded registrations, we focus our analysis on Opposer's mark RED WOLVES in standard characters in Registration Nos. 3796310 (clothing goods) and 3677815 (organizing and conducting sporting events) because the standard character mark is closer in similarity to Applicant's marks than the other pleaded marks and the identified goods and services are, in part, identical, legally identical and otherwise closely related to the goods and services identified in

the application. If we do not find a likelihood of confusion with respect to the RED WOLVES word mark in these Registrations and the identified goods and services, then there would necessarily be no likelihood of confusion with the marks and goods and services in Opposer's other registrations. *See In re Max Cap. Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

1. Relatedness of the Goods and Services, Channels of Trade, and Conditions of Sale

We must make our determinations under these factors based on the goods and services as they are recited in the registrations and application. *See Octocom Sys. Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (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."); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *see also Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (Board must "give full sweep" to an identification of goods regardless of registrant's actual business).

Opposer's goods and services and Applicant's goods and services are in part identical (footwear, hats and caps) or legally identical (Applicant -- t-shirts, shirts, sports jerseys, polo shirts, warm-up tops, pants, warm-up pants, jackets, coats, organizing and conducting professional soccer games and events) (Opposer -- jerseys, sports pants, sport coats, sport shirts, sports jackets, sports jerseys, sports pants,

tops, organizing and conducting sporting events, sports and athletic competitions). It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods or services within a particular class in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014). Although Applicant's identification limits its services to "professional soccer" (and its proposed amendment would limit the goods to "relating to professional soccer"), Opposer's identifications are not limited and as such encompass "professional soccer."

Applicant argues that despite the absence of a limitation in the identification, Opposer is precluded from engaging in activities relating to professional sports. Even if we consider Opposer's identifications inherently limited because Opposer is a university, we find professional and college sports to be related. Opposer's status as a university does not prevent Opposer from participating in games with a professional team, as Applicant itself has done with other college teams. *See* Opp. Notice of Reliance Exh. 22, 27 TTABVUE 160-162 (printout from Applicant's website promoting a match between Applicant's team and the University of Kentucky).

The record shows that consumers may be exposed to a professional team engaging in non-professional sports activities such as 1) hosting NCAA tournaments, 2) maintaining and running affiliate teams and camps to develop future athletes (collegiate or professional), and 3) holding friendly games between professional and college teams. Opp. Notice of Reliance Exhs. 23, 27, 32-40, 27 TTABVUE 163-165,

189, 205-235 (printout from Applicant’s website showing hosting of the collegiate soccer national championship tournament for NCAA Division II, promoting its camp for college players, and promoting its affiliate teams); Bowen Decl. ¶¶ 54-71, 23 TTABVUE 16-19 (testimony about the RED WOLVES Academy and affiliate teams). There are several examples of how Applicant interfaces with college level soccer. In one example below, Applicant promotes the “college commitments” of players from its Red Wolves Academy moving on to collegiate play.¹⁴



We find that the identified services are related with respect to “professional soccer” and “collegiate soccer” for purposes of likely confusion. *See Recot, Inc. v.*

¹⁴ Opp. Notice of Reliance, Exh. 28, 27 TTABVUE 192.

Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis.”); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *5 (TTAB 2020); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984)). The goods or services of the applicant and the registrant need only be related in some manner and/or the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (citing *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Finally, Applicant points to five sets of third-party registrations that include the same word (WOLFPACK, TIMBERWOLVES, WOLVES, EAGLES, BUCCANEERS) for the proposition that “intercollegiate or professional restrictions have been sufficient to permit co-existence for wolves and other analogous registrations involving eagles and buccaneers.”¹⁵ This evidence has little probative value. “The Board must decide each case on its own merits. Even if some prior registrations had some characteristics similar to [the] application, the PTO’s allowance of such prior registrations does not bind the Board” *In re Nett Designs, Inc.*, 236 F.3d 1339, 57

¹⁵ Applicant also presents this argument under the thirteenth *DuPont* factor “any other established fact probative of the effect of use.” For the same reasons discussed above, we find this evidence does not weigh in favor of Applicant under the thirteenth factor.

USPQ2d 1564, 1566 (Fed. Cir. 2001). We further note that, for the most part, they also include other elements in the marks that may have also let them co-exist on the register. *See, e.g., Curtice-Burns, Inc. v. Nw. Sanitation Prods., Inc.*, 530 F.2d 1396, 189 USPQ 138, 141 (CCPA 1976) (“Each case must be decided on its own facts and the differences are often subtle ones.”) (citation omitted). Because each case must be decided independently, we must consider the evidence submitted in this case pointing to the overlap in professional and collegiate soccer, and these “paired” registrations are insufficient to overcome Opposer’s evidence. Thus, even if not legally identical, the goods and services are still related.

Further, where, as here, the goods and services are identical and legally identical and there are no limitations as to channels of trade or classes of purchasers in either the application or Opposer’s registration, we must presume that Applicant’s and Opposer’s goods and services will be sold in the same channels of trade and will be bought by the same classes of purchasers. *See Viterra*, 101 USPQ2d at 1908; *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). In addition, the record shows an overlap in trade channels for the goods and services. For example, both parties target their services to the same consumers, soccer and sports fans, and advertise on social media. In one example “a Google search for ‘RED WOLVES ACADEMY’ leads consumers to the Instagram accounts of both Opposer and Applicant.” Opp. Brief, 52 TTABVUE 21; Bowen Decl. ¶ 45, 23 TTABVUE 12. In addition, both parties seek and receive sponsorships from the same third-party

companies such as Puma, Adidas and Coca-Cola. Munoz Decl. ¶ 65, 24 TTABVUE 15; Opp. Notice of Reliance Exhs. 24, 45, 27 TTABVUE 169-183, 257.

We consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing,” *DuPont*, 177 USPQ at 567, also based on the identifications of goods and services in the pleaded registrations and subject application, as that determines the scope of the benefit of registration. *Stone Lion Cap.*, 110 USPQ2d at 1162 (quoting *Octocom*, 16 USPQ2d at 1787).

The identifications include all goods of the type identified, without limitation as to their nature or price. *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013). Thus, the identified goods are presumed to include clothing products that are relatively inexpensive. *In re Joel Embiid*, 2021 USPQ2d 577 (TTAB 2021) (“[S]horts, shirts, and sweatshirts ... are purchased or used in some form by virtually everyone”). “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.” *Recot Inc.*, 54 USPQ2d at 1899, *cited in In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1673 (TTAB 2018). Even if some of the parties’ more knowledgeable consumers may be more careful in their purchase, neither the registrations nor the applications contain limitations on the classes of customers. We therefore must not limit our consideration of this factor to the more sophisticated purchasers within the classes of potential customers. *See Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1027 (TTAB 2009), *citing Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301,

1306 (TTAB 2004). Because the buyers to whom sales are made are all general consumers, and the goods at issue include relatively low-priced products, the goods are subject to a lower level of purchaser care. *See Bd. of Regents, Univ. of Tex. Sys. v. S. Ill. Miners, LLC*, 110 USPQ2d 1182, 1193 (TTAB 2014) (“[P]urchasers of collegiate and professional sports teams’ merchandise include relatives or friends of the fan who are purchasing the goods as gifts, new or casual fans nationwide who are likely to purchase a school’s or professional team’s athletic merchandise when the team wins a national championship or otherwise becomes especially well-known on a national level, and those with no affinity to the school or professional team, who purchase the parties’ Class 25 merchandise for other personal reasons, such as simply liking the way it looks.”).

With regard to the services, there would be more care in view of the nature of the services – consumers would be looking for specific team games but this does not preclude consumers from believing there is a sponsorship relationship. *In re Save Venice N.Y., Inc.*, 259 F.3d 1346, 59 USPQ2d 1778, 1784 (Fed. Cir. 2001) (“The related goods test measures whether a reasonably prudent consumer would believe that non-competitive but related goods sold under similar marks derive from the same source, or are affiliated with, connected with, or sponsored by the same trademark owner”); *Hilson Rsch., Inc. v. Soc’y for Human Res. Mgmt.*, 27 USPQ2d 1423, 1429 (TTAB 1993) (“[a]lthough confusion, mistake or deception about source or origin is the usual issue posed under Section 2(d), any confusion made likely by a junior user’s mark is cause for refusal; likelihood of confusion encompasses confusion of sponsorship,

affiliation or connection.”); *Fed. Bureau of Investigation v. Societe: “M. Bril & Co.”*, 172 USPQ 310, 315 (TTAB 1971) (under Section 2(d) party must show purchasing public would mistakenly assume that the applicant’s goods or services originate with, are sponsored by, or are in some way associated with it”).

Except for the factor of conditions of sale, which is neutral with regard to the services, these *DuPont* factors weigh in favor of finding a likelihood of confusion.

2. Strength/Weakness of the Mark RED WOLVES

“In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition.” *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017) (citing *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014)); *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”); 2 J. Thomas McCarthy, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 11:83 (5th ed. Sept. 2022 update) (“The first enquiry is for conceptual strength and focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another’s use.”). 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);” the sixth *DuPont* factor allows Applicant to

contract that scope of protection by adducing evidence of “[t]he number and nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567; *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, *21 (TTAB 2022).

Opposer has not asserted that its mark is famous or commercially strong under the fifth *DuPont* factor. However, as Opposer states, because it is the owner of a mark registered on the Principal Register, it is entitled to a statutory presumption that the marks are valid and distinctive. 15 U.S.C. § 1057(b).

In support of its position that RED WOLVES is weak in connection with the relevant goods and services, Applicant points to several third-party registrations for WOLF/WOLVES-formative marks set forth below:¹⁶

Registration No.	Mark	Goods/Services
3772470		... clothing, conducting intercollegiate athletic competitions...
2314903		Professional hockey contests

¹⁶ App. Notice of Reliance Exh. 4, 32 TTABVUE 87-127.

4893824		...clothing, arranging and conducting athletic and sports events...
4849881		...organizing and conducting competitions in the field of high school athletics ...
1773038		Conducting and promoting professional basketball competitions...
5667152		...conducting and arranging ... basketball games ...
5778015		...organization and provision of soccer matches...
2607497		Clothing ... arranging and conducting athletic events...

Third-party registrations alone do not demonstrate “market context” or “make[] clear that consumers are accustomed to distinguishing between”¹⁷ marks because they are not evidence of the extent of use in the marketplace. *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269-70 (CCPA 1973); *In re i.am.symbolic*, 123 USPQ2d at 1751; *In re Morinaga Nyugyo K. K.*, 120 USPQ2d 1738, 1745 (TTAB 2016) (“[T]hird-party registrations standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences.”).¹⁸

Third-party registrations, however, are “relevant to the conceptual strength of a mark because they ‘show the sense in which a mark is used in ordinary parlance,’ that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak [.]’” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (quoting *Juice Generation, Inc. v. GS Enters., LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015)); see also *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006) (“[T]hird-party registrations

¹⁷ Appeal Brief, 6 TTABVue 12-13.

¹⁸ Applicant also highlights eight uses of RED WOLVES by high schools as a school mascot. However, these uses by high schools, which by their nature typically are highly localized and obscure, are not likely to lessen Opposer’s mark’s strength nationally. This is reflected in the record showing minimal examples of local coverage. App. Notice of Reliance Exh. 5, 32 TTABVue 317-356.

can be used in the manner of a dictionary definition to illustrate how a term is perceived in the trade or industry”).

Except for Reg. No. 3772470, the third-party registrations of record here have no probative value with respect to the mark and shared element at issue, RED WOLVES. All but one are for other WOLF or WOLVES combinations. At most, they simply reflect that the various types of WOLVES are animals registered as sports mascots. *Cf. Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284-85 (Fed. Cir. 1984) (“Applicant introduced evidence of eight third-party registrations for tea which contain the word ‘SPICE’, five of which are shown to be in use. None of these marks has a ‘SPICE (place)’ format or conveys a commercial impression similar to that projected by the SPICE ISLANDS mark, and these third-party registrations are of significantly greater difference from SPICE VALLEY and SPICE ISLANDS than either of these two marks from each other.”). The only one for the shared element RED WOLVES is owned by The Trustees of Indiana University. The record here reflects that Opposer entered into a consent agreement with the owner that outlines terms and conditions to avoid confusion. *See* App. Notice of Reliance Exh. 3, 32 TTABVue 55-57. If anything, this suggests to us that Opposer understands that another entity’s use of a mark containing RED WOLVES for similar goods and services presents a different situation than that presented by other WOLF-formative marks. And this co-existence agreement with a third party does not prohibit Opposer from proving likelihood of confusion between its and Applicant’s marks. *Anthony’s Pizza & Pasta Int’l, Inc. v. Anthony’s Pizza*

Holding Co., 95 USPQ2d 1271, 1282 (TTAB 2009), *aff'd*, 415 F. App'x 222 (Fed. Cir. 2010). In fact, Opposer actively polices its RED WOLVES marks. Munoz Decl. ¶ 26, 24 TTABVUE 8; Smith Decl. ¶¶ 51-55, 65-66, 25 TTABVUE 12-13, 15; Opp. Notice of Reliance Exhs. 93-94, 98, 28 TTABVUE 653-696, 761-840.

This record does not show weakness that would contract the scope of protection to be given the registered mark. In view thereof, Opposer's mark is accorded the normal scope of protection for an arbitrary registered mark. *Bell's Brewery*, 125 USPQ2d at 1347.

3. Similarity of the Marks

Considering the similarity or dissimilarity of the parties' marks, we compare them in their entireties in terms of appearance, sound, connotation and commercial impression. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018); *see also Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 525 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.") (citation omitted). "The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties."

Coach Servs., 101 USPQ2d at 1721 (quotation omitted). The marks must be considered in their entirety, but “in articulating reasons for reaching a conclusion on the issue of confusion, 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 consideration of the marks in their entirety.” *In re Detroit Athletic*, 128 USPQ2d at 1051 (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)).



Applicant’s marks CHATANOOGA RED WOLVES SC and  encompass the entirety of Opposer’s mark RED WOLVES. *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *6-7 (TTAB 2019) (“likelihood of confusion often has been found where the entirety of one mark is incorporated within another”) (quoting *Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1660 (TTAB 2014)); *Stone Lion*, 110 USPQ2d at 1161 (affirming decision where TTAB found that applicant’s mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION, and that the noun LION was the dominant part of both parties’ marks).

The shared term RED WOLVES has the same connotation and commercial impression in the respective marks. In an attempt to distinguish the marks, Applicant argues that RED WOLVES has a special relationship and meaning for Chattanooga in view of the conservation work done there for red wolves. However, Opposer has the same claim regarding red wolves conservation work done in

Arkansas. *See* Fields Decl. ¶ 26, 35 TTABVUE 9 (“[Red wolves] have a unique presence in Chattanooga, which has rallied around not only saving the red wolves but creating an environment for the animals to thrive.”); Smith Decl. ¶ 29, 25 TTABVUE 8 (“Opposer is leading a campaign to build the American Red Wolf Conservation and Research Center in Jonesboro, Arkansas, where Opposer is located.”). The addition of the word CHATTANOOGA in Applicant’s marks adds another layer of meaning, but it serves to modify the term RED WOLVES by geographically describing the location of the team. It is undisputed that SC in Applicant’s mark is the acronym for “soccer club.” Both of these terms are disclaimed apart from the marks as shown. Although there is no mechanical test to select a “dominant” element of a compound word mark, consumers would be more likely to perceive a fanciful or arbitrary term, rather than a descriptive or generic term, as the source-indicating feature of the mark. *See, e.g., In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (affirming TTAB’s finding that “DELTA,” not the disclaimed generic term “CAFE,” is the dominant portion of the mark THE DELTA CAFE); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (finding that “BINION’S,” not the disclaimed descriptive wording “ROADHOUSE,” is the dominant portion of the mark BINION’S ROADHOUSE). Applicant argues that the addition of CHATTANOOGA and SC identify “the trademark[s] as related to professional soccer and ... identifies the goods and services as originating from Chattanooga” and “play an important role in the overall commercial impressions of the respective marks.” App. Brief, 53 TTABVUE 29. However, as discussed above, even considering Opposer’s mark as limited to

collegiate athletics, the goods and services are still sufficiently related to create likely confusion. The addition of the place and description as a club does not obviate confusion as to affiliation or sponsorship. *Cf. Bd. of Regents, Univ. of Tex. Sys.*, 110 USPQ2d at 1188.

The depiction of a red wolf in Applicant's design mark simply emphasizes the meaning and commercial impression of the mark RED WOLVES. In addition, words are normally given greater weight because they would be used by consumers to call for the goods or services. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 2 USPQ2d 1553, 1554 (TTAB 1987). *See also Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); *Giant Food, Inc. v. Nation's Food Serv., Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). We find that to be the case here. The wording dominates over the design, which simply reinforces the impression of the dominant literal element, RED WOLVES.

Here, the dominant part of Applicant's marks is identical to Opposer's mark. Where the dominant portion of both marks is the same, then the marks may be confusingly similar notwithstanding peripheral differences. *See, e.g., In re Detroit Athletic*, 128 USPQ2d at 1049 (affirming TTAB's finding that the marks DETROIT ATHLETIC CO. and DETROIT ATHLETIC CLUB are nearly identical in terms of sound, appearance and commercial impression, and noting that, while "the words 'Co.' and 'Club' technically differentiate the marks, those words do little to alleviate

the confusion that is likely to ensue”). Overall we find the similarities outweigh the dissimilarities.

In particular here, where the “marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines,” *Century 21 Real Est. Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992) (citations omitted). The similarity of the marks weighs in favor of finding likely confusion.

4. Actual Confusion/Potential Confusion

Applicant argues the seventh, eighth and twelfth *DuPont* factors weigh in its favor. Applicant asserts that it has used the marks for over four years beginning on February 24, 2019. App. Brief 41; Fields Decl. ¶¶ 36-39, 35 TTABVUE 11. Further, Applicant submits that Opposer admits it is unaware of any instances of likelihood of confusion. App. Notice of Reliance Exh. 1, 32 TTABVUE 26 (Response to Request for Admission No. 1). In addition, Applicant contends that “both Opposer and Applicant market and sell their goods and services to customers in the states of Arkansas and Tennessee, as well as other Southeastern States.” App. Brief, 53 TTABVUE 42 (quoting Opp. Brief 52 TTABVUE 49-50).

While this record allows for some inference of sales in overlapping markets to the extent they play games and sell merchandise in similar geographic regions during their respective seasons, the record does not provide sufficient context from which we may conclude that meaningful opportunities for confusion existed. *In re Guild Mort. Co.*, 2020 USPQ2d 10279, *6-7 (TTAB 2020). *See, e.g.*, Smith Decl. ¶¶ 10-33, 23

TTABVUE 4-9; Opp. Notice of Reliance Exhs. 1-13, 27 TTABVUE 3-104 (map of Opposer's alumni nationwide, article about Opposer playing in the Sun Belt Conference, NCAA web page showing Sun Belt Conference, Opposer's web page showing geographic diversity of students, Sun Belt Conference web page listing schools, Wikipedia excerpt describing geographic scope of Sun Belt Conference which does not currently include Tennessee schools).

Finally, Applicant argues that “the extent of potential confusion is de minimus” because Opposer is prohibited from engaging in services or goods that relate to professional soccer. As discussed above, whether or not Opposer may not engage in professional sports, does not remove the possible confusion due to affiliation or sponsorship. With regard to the assertions in the brief that Applicant has never had a vendor of consumer products confuse their account with Opposer's account, these attorney statements are not supported by evidence. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence” (quoting *Enzo Biochem, Inc., v. Gen-Probe Inc.*, 424 F.2d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

We find that the factors addressing the length of time of concurrent use and actual confusion or lack thereof are neutral.

4. Balancing of the Factors

We have considered all of the evidence pertaining to the relevant *DuPont* factors, as well as the parties' arguments. In balancing the relevant factors, given the identical and closely related goods and services and trade channels, and the similarity of the marks, we find likely confusion.

V. Conclusion

In view of the above, Opposer has established its claims under Section 2(d) of the Trademark Act.

Decision: The opposition is sustained.