This Opinion Is Not a Precedent of the TTAB

Hearing: March 28, 2024 Mailed: July 25, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

———

Trademark Trial and Appeal Board

———

Ideal Sciences, Inc.
v.
Nimble Wireless Inc.

———

Opposition No. 91273845

Joshua D. Mertzlufft, of Mertzlufft Law PLLC, for Ideal Sciences, Inc.[1]

Kevin Haynie of YourTrademarkAttorney.com, for Nimble Wireless Inc.

———

Before Lynch, Thurmon and Elgin, Administrative Trademark Judges.

Opinion by Thurmon, Administrative Trademark Judge:

Nimble Wireless Inc. ("Applicant") seeks registration on the Principal Register of the standard character mark TEMPCUBE for the goods listed below in International Class 9:[2]

[1] When the Notice of Opposition was filed, Ideal Sciences, Inc. was represented by Jesse L. London of Miller IP Law. During the trial process, and just before Opposer's Rebuttal Period opened, Mr. Mertzlufft replaced Opposer's prior counsel.

[2] Application Serial No. 90342178 was filed November 25, 2020 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.

> Food safety monitoring devices, namely, wireless and smart thermometers, hygrometers and alarms; Electronic monitors to collect operational data and settings, including temperature data and settings, from HVAC equipment to ensure proper functioning; Electronic devices for animal locating and tracking programmed to use global positioning systems (GPS) and cellular communications; Electronic devices for locating and tracking RV Motorhomes, Trailers using temperature and humidity monitors; Electronic devices for locating and tracking server rooms, green house, freezer and cold rooms using temperature and humidity sensors; Electronic devices used to locate lost articles employing the global positioning system or cellular communication networks; Environmental monitoring system comprised of meters and sensors that measure pressure, humidity, temperature and includes alarm and reporting functions; Wireless remote temperature and humidity monitors for building maintenance.

Ideal Sciences, Inc. ("Opposer"), opposes registration under Section 2(d) based on its alleged common law priority in the mark TEMP STICK for wireless temperature and humidity monitoring devices, and its claim that Applicant's use of its TEMPCUBE mark is likely to cause confusion with Opposer's mark.[3]

Applicant denies the salient allegations in the Notice of Opposition. The case is fully briefed and a hearing was held on March 28, 2024 on the campus of Southern University Law Center, in Baton Rouge, Louisiana.[4] We deny the opposition. Opposer has failed to establish that confusion is likely. We do not reach the question of priority, as Opposer cannot prevail without proving a likelihood of confusion.

[3] 1 TTABVUE (Notice of Opposition). When we cite to the record, we refer to TTABVUE, the Board's docketing system, by docket entry and page number of the downloaded document (e.g., 18 TTABVUE 14).

[4] The Board extends its appreciation to both parties and their counsel for agreeing to appear in Baton Rouge, Louisiana for the event at the Law Center.

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's application. In addition, Opposer submitted the following evidence during its Trial Period:

- Testimonial Declaration of Ian Campbell, the Director of Opposer, with exhibits;[5]
- Opposer's First Notice of Reliance on USPTO records, Internet materials and dictionary definitions;[6] and,
- Opposer's Second Notice of Reliance on Discovery Responses of the Applicant.[7]

Opposer submitted the following evidence during its Rebuttal Period:

- Opposer's Third Notice of Reliance on additional Internet materials;[8] and,
- Opposer's Fourth Notice of Reliance, also for Internet materials.[9]

The materials submitted by Opposer as rebuttal evidence (its Third and Fourth Notices of Reliance) go to Opposer's case-in-chief. All of the evidence submitted with these so-called rebuttal Notices goes to the likelihood of confusion issue, and it is Opposer's burden to prove that confusion is likely. However, Applicant did not object

[5] 8 (confidential)/9 (public) TTABVUE.

[6] 12 TTABVUE.

[7] 17 TTABVUE. The Notice of Reliance provides two exhibits, one with Answers to Interrogatories and the second with Responses to Requests for Production. Opposer initially submitted this evidence, and a third exhibit with a declaration of its counsel. 10 TTABVUE. Applicant moved to strike the declaration and exhibits, 13 TTABVUE, and the Board granted the motion as to the third exhibit (a document produced during discovery) and construed the filing as a Notice of Reliance. 16 TTABVUE. Opposer opted to resubmit the two allowed exhibits as a Notice of Reliance. 17 TTABVUE.

[8] 24 TTABVUE.

[9] 23 TTABVUE.

to it, so we will allow it into the record. The evidence is cumulative of other evidence already in the record, and for that reason, adds little, if anything, to the record.

Applicant submitted the following evidence:

- Applicant's First Notice of Reliance on dictionary definitions;[10]
- Applicant's Second Notice of Reliance on third-party trademark registrations;[11]
- Applicant's Third Notice of Reliance on Internet evidence of third-party trademark uses of "temp";[12] and,
- Applicant's Fourth Notice of Reliance on Internet evidence of third-party descriptive uses of "temp".[13]

II. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action must be established in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020). A party in the position of plaintiff may oppose an application where such opposition is within the zone of interests protected by the statute and the opposer must have a reasonable belief in damage that is proximately caused by registration of the mark. *See Peterson v. Awshucks SC, LLC*, 2020 USPQ2d 11526, at *6 (TTAB 2020) (citing *Corcamore*, 2020 USPQ2d 11277, at *6-7); *see also 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,*

[10] 18 TTABVUE.

[11] 19 TTABVUE.

[12] 20 TTABVUE.

[13] 21 TTABVUE.

Inc., 572 U.S. 118, 109 USPQ2d 2061, 2067 n.4 (2014)); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014).

Opposer submitted status and ownership evidence for two applications it filed to register the TEMP STICK mark with the Notice of Opposition.[14] *See Toufigh v. Persona Parfum Inc.*, 95 USPQ2d 1872, 1874 (TTAB 2010) (because plaintiff made of record its pending application, entitlement established "by virtue of the fact that both parties' marks are identical, and their goods are at least arguably related . . . evidence of [ ] a refusal is not a requirement to establish standing"); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) ("We regard the desire for a registration with its attendant statutory advantages as a legitimate commercial interest."). One of the applications (the '971 application) issued as a registration during the pendency of this proceeding. *See Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, n.19 (TTAB 2014) (taking judicial notice of changes in status and title of registrations properly introduced during trial).

The record also shows that Opposer is using the TEMP STICK mark and its likelihood of confusion allegations are plausible. Under these circumstances, Opposer has an entitlement to bring this action. Opposer is not a mere intermeddler. *See, e.g., Australian Therapeutic*, 2020 USPQ2d 10837, at *3.

[14] 1 TTABVUE 12-13 (Serial No. 90376971), 14-15 (Serial No. 87676856); 12 TTABVUE 6-9 (TSDR record for the '971 application).

III. Law and Analysis – Section 2(d)

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits registration of a mark that "[c]onsists of or comprises a mark which so resembles a mark registered in the Patent or 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 [or services] of the applicant, to cause confusion, or to cause mistake, or to deceive." There are, therefore, two elements to Opposer's Section 2(d) claim: 1) Opposer must establish priority; and 2) Opposer must establish that confusion is likely. *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2-3 (TTAB 2020).

As noted above and discussed below, for purposes of administrative efficiency, we need not address priority in this case because even assuming Opposer had proven priority, it has not established likelihood of confusion.

A. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.,* 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont* factors"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1260 (Fed. Cir. 2011) ("Not all of the *DuPont* factors are necessarily 'relevant or of equal weight in a given case, and any one of the factors may control a particular case.'"); *In re Shell Oil Co.*, 992 F.2d 1204, 1209, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) ("[T]he various evidentiary factors may play more or less weighty roles in any particular determination."). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

We begin our likelihood of confusion analysis with an evaluation of the strength of Opposer's TEMP STICK mark.

1. Strength or Weakness of the TEMP STICK Mark

Under the fifth and sixth *DuPont* factors, "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)."). The market

strength "of a mark 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." *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002). Conversely, the scope of protection may be contracted by adducing evidence of "the number and nature of similar marks in use on similar goods." *DuPont*, 177 USPQ at 567.

a. Conceptual Strength

"In general, trademarks are assessed according to a scale formulated by Judge Friendly in *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 10-11 (2d Cir. 1976), which evaluates whether word marks are 'arbitrary' or 'fanciful,' 'suggestive,' 'descriptive,' or 'generic.' Word marks that are arbitrary, fanciful, or suggestive are inherently distinctive." *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1684 (Fed. Cir. 2010). "Descriptive marks that acquire secondary meaning may also qualify for protection under Section 2(f), while generic marks generally cannot qualify for trademark protection at all." *Id.*

Applicant argues that because Opposer relied on a claim of acquired distinctiveness in connection with its prosecution of the '971 application, Opposer has conceded that its TEMP STICK mark is merely descriptive, and therefore weak.[15] Opposer argues its TEMP STICK mark is inherently distinctive and contends that its '971 application is effectively a "third-party application" because the registration

[15] 28 (confidential)/29 (public) TTABVUE 9-10.

that resulted from it is not in evidence.[16] As noted above, we have considered the registration of the TEMP STICK mark as a change in the status of the application in evidence, as the registration issued during the pendency of this proceeding. In any event, the distinctiveness of Opposer's mark is a key question before us, and this evidence bears on whether the TEMP STICK mark is descriptive, and therefore weak.

"A term is deemed to be merely descriptive of goods or services … if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services." *In re Zuma Array Ltd.*, 2022 USPQ2d 736, at *5 (TTAB 2022) (internal quotations and citations omitted). "A mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods." *Id.* (quoting *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987)).

"Whether a mark is merely descriptive is evaluated in relation to the particular goods …, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use," *In re Fallon*, 2020 USPQ2d 11249, at *7 (TTAB 2020) (quoting *Chamber of Com.*, 102 USPQ2d at 1219), and "not in the abstract or on the basis of guesswork." *Id.* (quoting *Fat Boys*, 118 USPQ2d at 1513) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). "We ask whether

[16] 30 (confidential)/31 (public) TTABVUE 11-12.

someone who knows what the goods and services are will understand the mark to convey information about them." *Id.* (quoting *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018)).

"Whether a mark is merely descriptive or not is determined from the viewpoint of the relevant purchasing public." *Zuma Array*, 2022 USPQ2d 736, at *8 (quoting *In re Omniome, Inc.*, 2020 USPQ2d 3222, at *5 (TTAB 2020)). The record evidence discussed below shows that the relevant purchasers of Opposer's TEMP STICK goods are ordinary consumers who are interested in remote temperature and humidity monitoring.

"Evidence of the public's understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers[,] and other publications." *Id.* (quoting *Fallon*, 2020 USPQ2d 11249, at *7). "These sources may include [w]ebsites, publications and use in labels, packages, or in advertising materials directed to the goods." *Id.* (quoting *Fallon*, 2020 USPQ2d 11249, at *7-8 (internal quotation omitted)).

The evidence of record amply demonstrates that Opposer's TEMP STICK mark is descriptive. The mark means a "temperature stick" and Opposer's product is a temperature monitor in a stick-like shape. We are "required to examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive." *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.,* 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012). Generally, if the individual

components of a mark retain their descriptive meaning in relation to the goods and/or services, the combination results in a composite mark that is itself descriptive. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1516 (TTAB 2016) (citing *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB 2002)).

Moreover, while this mark likely acquired distinctiveness prior to the trial in this matter, that does not alter the descriptive nature of the mark, which renders the mark conceptually weak. We turn now to the evidence that leads us to this conclusion.

Applicant argues that the word "temp" is common within the market for temperature sensing and monitoring devices.[17] Applicant also argues that Opposer conceded its TEMP STICK mark is merely descriptive by filing its own application under Section 2(f) of the Act, namely by claiming the mark, as a whole, had acquired distinctiveness.[18] We address these points separately below.

First, Applicant is correct that reliance on Section 2(f) as a basis for registration (as Opposer conceded was asserted in its application for TEMP STICK) constitutes an admission the applied-for mark is not inherently distinctive. *See, e.g., Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1044-45 (Fed. Cir. 2018) ("because TCCC seeks registration of its ZERO-containing marks under Section 2(f) of the Lanham Act, TCCC has conceded that ZERO is not *inherently* distinctive in association with the genus of goods at issue—soft drinks, energy drinks, and sports drinks"); *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001,

[17] 28 (confidential)/29 (public) TTABVUE 15-16.

[18] *Id.*

1005 (Fed. Cir. 1988) ("Where, as here, an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the *statute* accepts a lack of inherent distinctiveness as an established fact.").

Opposer did not put its registration into evidence and argues that the '971 application underlying the registration is a "third-party application that Opposer has not relied on" in this case. Even if this is true, the '971 application was for registration of the TEMP STICK mark for the same goods for which Opposer claims common law rights in this proceeding and is relevant. As our primary reviewing court has explained, "it is confusing and inaccurate to refer to two separate marks—a registered mark and a common-law mark. Rather, there is a single mark, as to which different rights attach from the common law and from federal registration." *Converse, Inc. v. Int'l Trade Comm'n*, 909 F.3d 1110, 128 USPQ2d 1538, 1542 (Fed. Cir. 2018). The same mark cannot be descriptive in one procedural context—that is, seeking registration—and inherently distinctive in another. It is but one trademark.

There is no dispute that Opposer filed the application and is the owner of the registration that issued from that application. Opposer's argument now that its TEMP STICK mark is inherently distinctive is an attempt to have it both ways. In order to obtain a registration of its mark, Opposer admitted to the USPTO that the mark was not inherently distinctive and relied upon a claim of acquired distinctiveness as to the mark as a whole. But now, in an effort to block Applicant from obtaining a registration, Opposer claims—again to the USPTO—that the same

mark was inherently distinctive from the start.[19] Because Opposer claims common law rights in the same mark for the same goods identified in its registration, we hold that Opposer's reliance on Section 2(f) in its application is strong evidence the TEMP STICK mark is merely descriptive, and thus, not inherently distinctive. Because Opposer's registration is not in the record, we will not deem this matter admitted, but we will treat the filing and prosecution by Opposer of an application with a claim under Section 2(f) as evidence the TEMP STICK mark is descriptive.

Applicant also presented evidence of over eighty third-party use-based registrations that include the term "TEMP" and identify temperature sensing or monitoring goods.[20] When properly made of record, third-party registrations may be relevant, in the manner of dictionary definitions, "to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak." *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015); s*ee also Jack Wolfskin Ausrustung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976) (even if "there is no evidence of actual use" of "third-party registrations," such registrations "may be given some weight to show the meaning of a mark in the same way that

[19] 25 (confidential)/26 (public) TTABVUE 35 (arguing that only "non-token—though not necessarily large—use" need be shown for priority); 30 (confidential)/31 (public) TTABVUE 14 (arguing the TEMP STICK mark "is on its face an incongruity and is therefore inherently distinctive").

[20] 19 TTABVUE.

dictionaries are used"). "[E]vidence of third-party registrations is relevant to 'show the sense in which . . . a mark is used in ordinary parlance.'" *In re Guild Mortg. Co*., 2020 USPQ2d 10279, at *3 (TTAB 2020).

Applicant's third-party evidence is highly probative and stands unrebutted by Opposer.[21] This evidence shows that many parties have long registered marks with TEMP as part of the marks for temperature sensing and monitoring goods and services. We consider the following use-based registered marks:

Mark	**Registration No.**	**Year of Registration**	**Goods (excerpts)**
VISU-TEMP	1051775	1976	Mixing valves with integral thermometer[22]
TRU TEMP	2296594	1999	Nonmedical thermometers[23]
DIGI-TEMP	1012824	1975	Digital thermometers[24]
TELATEMP	1611116	1990	Various temperature measuring goods[25]
TEMP TRAC	1707966	1992	Medical temperature monitors[26]

[21] Opposer argues the third-party registration evidence does not show use of the marks. 30 (confidential)/31 (public) TTABVUE 19. While true, this argument ignores the cases cited above which make clear that such evidence may be probative of the significance of certain terms within a particular market segment. Opposer also argued that its product is more similar to the Applicant's goods than to many of the goods identified in the third-party registrations. *Id.* at 20-21. Many of the third-party registrations identify thermometers. Opposer's product is a thermometer, of sorts, as the temperature sensor (the TEMP STICK) measures temperature and the device transmits that measurement, via a wireless signal, to a cell phone app that displays the temperature and humidity. *Id.* Because thermometers and remote temperature sensors like the TEMP STICK product all measure temperature, the examples of TEMP in the registered marks are relevant.

[22] 19 TTABVUE at 304-06.

[23] *Id.* at 275-84.

[24] *Id.* at 42-50.

[25] *Id.* at 134-36.

[26] *Id.* at 147-48.

TEMP-SEEKER	1956387	1996	Electronic digital thermometers[27]
SURETEMP	1934067	1995	Medical thermometers[28]
TEMP.PLUS	1276851	1984	Measuring instrument for temperature and pulse[29]
TempTestr	1757576	1993	Scientific and laboratory instruments for measuring temperature[30]

These nine marks have been registered for at least 25 years.[31] This evidence supports the inference that the term "TEMP" has been recognized as an abbreviation for temperature for many years within the market for thermometers and other temperature sensing or monitoring devices. This term was weakened long before Opposer first used its TEMP STICK mark, whether that use was in 2015 or 2016.

In addition to the nine registrations noted above, we consider the following additional use-based registrations that take a form similar to Opposer's TEMP STICK mark, namely TEMP followed by a single word, with or without a space.

[27] *Id.* at 158-60.

[28] *Id.* at 124-30.

[29] *Id.* at 173-80.

[30] *Id.* at 238-51.

[31] Some later-issued registrations allege first use dates as early as 1917. *Id.* at 210-218 (TEMPRITE mark). *See also id.* at 285-93 (TRUTEMP mark, alleging first use in 1966); *id.* at 156-57 (TEMP PLATE mark, alleging first use in 1959). Each registration identifies thermometers or a temperature sensor.

Mark	Registration No.	Goods
TEMP TRACK	6366452	Temperature and location monitoring services[32]
TEMP-CHEX	6903662	Thermometers[33]
TEMP-SITTER	4752037	Various medical instruments, including thermometers[34]
	3248388	Thermometers for food service[35]
TEMPATCH	5189864	Various medical instruments, including thermometers[36]
TEMPAWARE	2898211	Computer software and hardware for monitoring temperature[37]
TEMPCHECKIN	6565152	Temperature sensors[38]
TEMPEVENT	5402543	Downloadable mobile app for monitoring temperature sensors[39]
TEMPMINDER	5379369	Nonmedical thermometers[40]
TEMPPRO	6981039	Thermometers[41]
TEMPSCAN	5443537	Animal temperature measuring system[42]

[32] *Id.* at 149-50. This mark is registered on the Supplemental Register. It identifies services, rather than goods, but the services are similar to the temperature monitoring provided by Opposer's TEMP STICK product.

[33] *Id.* at 151-55. The mark is registered based on a claim of acquired distinctiveness.

[34] *Id.* at 161-63.

[35] *Id.* at 164-66. The words "TEMP" and "TAKER" are disclaimed.

[36] *Id.* at 183-84.

[37] *Id.* at 185-87.

[38] *Id.* at 188-92.

[39] *Id.* at 199-201.

[40] *Id.* at 204-06.

[41] *Id.* at 207-09.

[42] *Id.* at 219-21.

TEMPSEN	5327360	Various instruments, including thermometers[43]
TEMPSENSOR	6126646	Nonmedical thermometers[44]
TEMPSTAT	3584703	Liquid crystal mat thermometers[45]
TEMPTALE	1745097	Monitors for temperature, pressure, acceleration and humidity[46]
TEMPTIME	5491398	Temperature sensors[47]
TEMPTOUCH	5375210	Instruments for monitoring temperature and other parameters[48]
TEMPTRAQ	4766108	Medical temperature sensors[49]
TEMPTRIP	6062896	Temperature monitoring services[50]
TEMPTROL	2778542	Measuring instruments for controlling temperature[51]
TEMPWATCH	1138625	Temperature monitoring apparatus[52]

The table above shows an additional twenty-one marks, for temperature-related goods or services, that feature TEMP in the same general manner as seen in Opposer's TEMP STICK mark. Seven of the entries in the first table also take this form, bringing the total to twenty-eight registered marks for similar goods or services

[43] *Id.* at 222-23.

[44] *Id.* at 224-26. This mark is registered on the Supplemental Register.

[45] *Id.* at 227-29.

[46] *Id.* at 230-34.

[47] *Id.* at 252-55.

[48] *Id.* at 256-57.

[49] *Id.* at 258-62. This mark is registered on the Supplemental Register.

[50] *Id.* at 263-65. The mark is registered based on a claim of acquired distinctiveness.

[51] *Id.* at 266-68.

[52] *Id.* at 269-70.

and in a form very similar to that of Opposer's TEMP STICK mark. This field is crowded.

Indeed, the third-party registration evidence as a whole is strong. The eighty-four registrations identified by Applicant are probative, as each registration involves similar goods or services and use of TEMP in the mark. This evidence shows that consumers must attribute very little, if any, source-identifying role to the term TEMP when used in marks for temperature sensing or monitoring goods or services. By way of comparison, in *Juice Generation*, there were at least twenty-six relevant third-party uses or registrations of record, *Juice Gen.*, 115 USPQ2d at 1672 n.1, and in *Jack Wolfskin*, there were at least fourteen, *Jack Wolfskin*, 116 USPQ2d at 1136 n.2. The eighty-four relevant registrations in the record of this case are compelling evidence that TEMP is shorthand for temperature when used in marks for temperature sensing or monitoring goods or services.

The evidence further shows that very small differences in these marks are sufficient to distinguish the marks in the marketplace, a point we return to below when we consider the similarity of the marks. With consumers accustomed to seeing so many TEMP variants, only nearly identical marks are likely to cause confusion within this market.

Finally, we note that many of the third-party registrations listed above use TEMP plus another term that is also at least somewhat descriptive of the goods or services. Consider the following examples:

- ACCURATETEMP for "downloadable software in the nature of a mobile application for calculating and displaying vehicle tire pressure and

temperature; Tire pressure gauges; Automatic indicators of low pressure in tires; Vehicle safety equipment, namely, electronic tire pressure monitors" in International Class 9.

- AUTOTEMP for "apparatus for measuring and/or indicating temperatures" in International Class 9.

- BABYTEMP for "thermometers for medical purposes; thermometers for medical use; clinical thermometers; ear thermometers; fever thermometers; infrared thermometers for medical purposes" in International Class 9.

- CHECKTEMP for "laboratory equipment and supplies, namely, thermometers" in International Class 9.

- DISHTEMP for "food safety monitoring devices, namely, plate simulator in the nature of a thermometer used as a dishwasher temperature tester" in International Class 9.

- FASTEMP for "electronic thermometers for medical use" in International Class 10.

- 

for "infrared thermometers, not for medical purposes" in International Class 9.

- FRESHTEMP for "environmental monitoring systems comprised of temperature sensors, data recorders and cellular gateways, all for use in collecting, measuring, analyzing, and reporting on the performance of refrigeration and cold-chain distribution systems and providing alerts of triggering events, all via a computer network; downloadable computer software app used to allow users to interface with environmental monitoring systems and to receive alerts" in International Class 9.

- VET-TEMP for "thermometers for veterinary use" in International Class 10.

Several of the third-party marks listed in the preceding tables share this common attribute, making it clear that within this market segment, it is a common practice

to use TEMP (meaning temperature) plus some other word that describes some other characteristic of the goods or services.

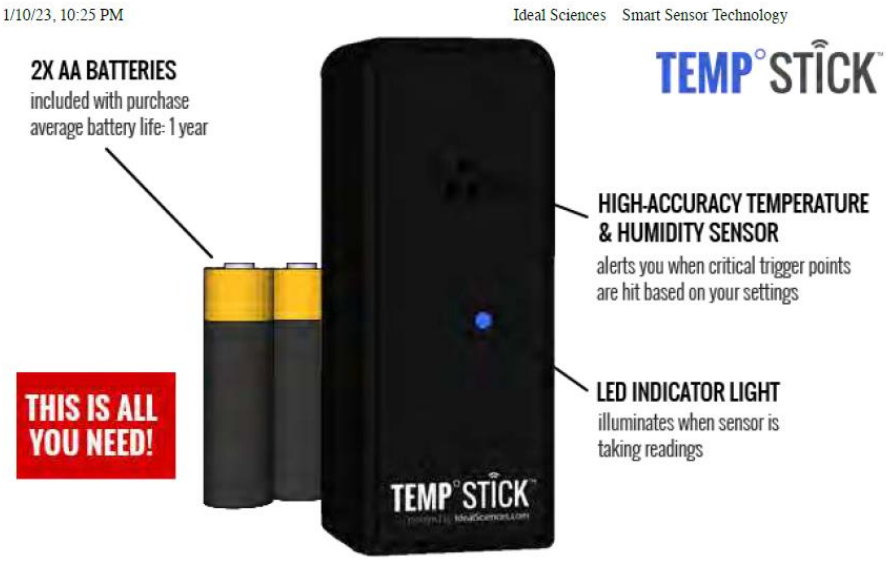
Applicant also submitted evidence from the Internet showing twenty-six third-party uses of TEMP in marks for temperature sensing or monitoring goods or services.[53] Upon close examination, it appears that almost all these third parties are listed as owners of third-party registrations Applicant submitted.[54] This evidence provides additional weight to the overlapping marks because the Internet evidence shows the marks are in use.

The remaining part of Opposer's mark—the word "STICK"—is descriptive of the general shape of Opposer's product. Opposer's evidence shows definitions of the word "stick" that include: "a long slender piece of wood or metal," "any of various implements resembling a stick in shape, origin, or use: such as … the gearshift lever of an automobile," and "something prepared (as by cutting, molding, or rolling) in a relatively long and slender often cylindrical form: a stick of candy [or] a stick of butter."[55] The word stick, when used with a stand-alone temperature monitoring device is descriptive if the device has a slender, elongated shape. That is the configuration of Opposer's product, as shown below.

[53] 20 TTABVUE 4-32.

[54] For example, the DishTemp product seen in the Internet evidence, 20 TTABVUE 6, appears to correspond to the registered DISHTEMP mark, 19 TTABVUE 51-53. Similar correlations were found between almost all the marks seen in the Internet evidence.

[55] 12 TTABVUE 44-45.



56

The two batteries shown beside the product provide helpful context and confirm the slender, elongated shape of Opposer's TEMP STICK product.[57] We find the word "stick" is descriptive of the geometric shape of the product. And, Opposer has not advanced any other derivation of, or connotation for, the term "stick" as used in its mark.

A recent precedent of this Board provides a good example of a mark found merely descriptive because it described the shape of the goods. *In re Sheet Pile, LLC*, 2024 TTAB LEXIS (Ser. No. 97010763) 111 (TTAB 2024). The mark in that case was ZPILE for sheet piling, which are "interlocking, shaped sections of steel that are used to create structures like retaining walls and cofferdams." *Id.* at *10. The evidence

[56] 8 (confidential)/9 (public) TTABVUE 120 (image is from Opposer's website).

[57] Indeed, evidence submitted by Opposer, and not objected to by Applicant, shows the TEMP STICK product with dimensions 3.5 x 1.5 x 1.25 inches, which is consistent with the image above. 9 TTABVUE 61. The product is longer than it is wide, which is what we mean by a slender, elongated shape.

showed that certain types of sheet piles are cut in a pattern that creates a cross-section that roughly resembles the letter "Z" and that such piles are commonly referred to as Z-shaped piles, showing that the mark ZPILE "immediately describes for construction project designers and construction companies a feature or characteristic of the goods, namely, that they are or pertain to the well-known 'Z' shape of sheet pile." *Id.* at *13. In the present case, Opposer's TEMP STICK mark immediately describes a temperature monitoring device in a stick shape.

Opposer also submitted evidence showing Amazon's Fire Stick and Fire Cube products, arguing Amazon's product is offered "in both a 'stick' and a 'cube' form."[58] While made for a different purpose, this argument is also an implicit admission of consumer familiarity with a "stick form" for such goods. Indeed, a comparison of Amazon's Fire Stick shows that it too has a slender, elongated shape, as the image below shows.



[59]

Opposer's TEMP STICK has a similar shape, as seen below.

[58] 25 (confidential)/26 (public) TTABVUE 31.

[59] 11 TTABVUE 38.



60

Opposer's TEMP STICK product is somewhat slender and elongated, as are the Fire Stick products. The word "stick" describes a general shape when used with goods of this type.

We find the mark TEMP STICK, taken as a whole, is merely descriptive of a temperature sensor in a slender and elongated shape. Opposer's product is in a "stick" shape, and therefore, the mark describes both the general shape of the product and what it does. Consumers familiar with Opposer's goods would readily connect the TEMP STICK mark to the nature of the goods.[61] The mark is conceptually weak and this fact reduces the scope of protection to which it is entitled.

Opposer argues that its TEMP STICK mark is incongruous and that "it would be an absurdity to describe the TEMP STICK Product … as a 'temperature stick" given the plain meaning of these terms—this is a clear incongruity."[62] We disagree. The evidence shows that TEMP means temperature and that STICK is used to identify a

[60] *Id.* at 123 (from Opposer's website).

[61] While we do not rely solely on the Section 2(f) claim Opposer made to obtain registration of its TEMP STICK mark, we do find that claim is consistent with the evidence of record.

[62] 25 (confidential)/25 (public) TTABVUE 46.

somewhat elongated and slender item. The combination of terms retains the descriptive significance of its components, and does not create a new, non-descriptive meaning. Opposer offers no evidence in support of its incongruity argument, and attorney argument is no substitute for record evidence. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)); *Martahus v. Video Duplication Servs. Inc.*, 3 F.3d 417, 27 USPQ2d 1846, 1849 (Fed. Cir. 1993) ("[M]ere attorney arguments unsubstantiated by record evidence are suspect at best.").

b. Market Strength

According to the Federal Circuit, a mark has market strength where "a significant portion of the relevant consuming public … recognizes the mark as a source indicator." *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (citing *Palm Bay Imps.*, 73 USPQ2d at 1694). Opposer argues its "TEMP STICK trademark is commercially strong, but offers minimal evidence to support this assertion.[63] For purposes of a likelihood of confusion analysis, our inquiry focuses on "a mark's renown within a specific product market [as] the proper standard." *Joseph Phelps Vineyards,* 122 USPQ2d at 1734.

Opposer's evidence of market strength is thin. Ian Campbell, Opposer's Director, testified:

> Temp Stick was developed in early 2015 and our first product using the TEMP STICK mark was sold at our early

[63] 25 (confidential)/26 (public) TTABVUE 47.

> version of a website at idealsciences.com which was later to be moved to tempstick.com and upgraded when the domain name became available sometime in 2016. True and correct copy of a first sale via the tempstick.com domain on July 13, 2016 is attached as Exhibit C.[64]

The invoice identified by Mr. Campbell is the only documentary evidence in the record of a sale of Opposer's TEMP STICK product. Mr. Campbell testifies to general sales levels—for example, "Over $xxx in 2015"—but provides no details.[65] Opposer did not submit any advertising, other than social media and Opposer's website, and its claimed advertising expenses are not large.[66] We have, therefore, very limited evidence about the sales and advertising of Opposer's TEMP STICK product. Given the crowded field of TEMP variant marks within this market segment, considerable advertising and promotion would be needed for Opposer's TEMP STICK mark to break through all the background noise. The thin record before us falls far short of establishing market strength.

Opposer notes that its product has been included in product reviews, and was selected the best overall product in a review published in January, 2023.[67] We agree that this review shows some market presence for Opposer's TEMP STICK product. But even a prominent mention in a single review is not enough to show market strength. For one thing, we have no evidence about the distribution of this review,

---

[64] 8 (confidential)/9 (public) TTABVUE 4.

[65] *Id.* at 5-6. The sales figures are redacted from the public version of Opposer's evidence.

[66] *Id.* at 5. These figures are also marked Confidential, but they reflect a very modest amount spent on advertising since 2015.

[67] 25 (confidential)/26 (public) TTABVUE 47 (brief); 8 (confidential)/9 (public) TTABVUE 7 (testimony), 55-91 (article).

and no basis to determine how many consumers read the review, or how the products were selected. We lack the contextual evidence needed to determine the probative value of this evidence.[68]

This is indicative of the shortcoming in Opposer's market strength evidence overall. Opposer provides general sales figures, but we have no evidence about the size of this market and whether Opposer's sales are substantial within this market. Opposer's advertising figures are not large, and we also lack comparative data. There is no context, and no corroboration, for the sales and promotion testimony Mr. Campbell provided. We find the TEMP STICK mark has little market strength. We note, too, that all the marketing materials in evidence (the product review, social media and Opposer's website) are recent, most dating only from 2023. There is no direct evidence of consumer awareness and no circumstantial evidence from earlier in time. The most we could say on this record is that Opposer's TEMP STICK product appears to have received some positive mention in Internet product reviews during 2023. That is not enough to show market strength.

To summarize, we find the TEMP STICK mark is descriptive of Opposer's goods and thus weak. We further find that the field of TEMP-variant marks for temperature sensing and monitoring goods and services is crowded, and that consumers are accustomed to relying on small differences to distinguish marks within this market

[68] Mr. Campbell identified three other websites that purportedly reviewed the TEMP STICK product, but the exhibit to his declaration provides only one such review, namely the product review noted above and found on the Weather Station Advisor website (www.weatherstationadvisor.com).

segment. Finally, we find the TEMP STICK mark lacks market strength. For all these reasons, *DuPont* factors five and six weigh heavily against a finding that confusion is likely.

2. Similarity of the Marks

We consider the marks in their entireties as to appearance, sound, connotation and commercial impression. *See, e.g., Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (citing *DuPont*, 177 USPQ at 567). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d, 1810, 1812 (TTAB 2014)), *aff'd per curiam*, 777 F. App'x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (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. Inc. v. Triumph Learning, LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). 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*, 127 USPQ2d 1627, 1630 (TTAB 2018).

Applicant's mark is TEMPCUBE, consisting of TEMP, the significance of which is discussed above, combined with CUBE, the name of the geographic shape of the

goods. It is a temperature monitoring device in a cube shape. As Opposer points out, the two marks take very similar form. However, both marks are conceptually weak and exist within an extremely crowded field of TEMP variant marks, making the similarities between the marks much less significant. Given the record of third-party registrations, the same degree of similarity between the two marks in this dispute exists among a lot of other trademarks for temperature sensing or monitoring goods or services.

For example, the coexistence of the following registered marks, all for thermometers or other temperature sensing devices, suggests the small differences relied on by consumers to distinguish among TEMP marks in this field:

- TEMPRITE
- TRUTEMP
- TEMPTRAQ
- TEMPTRAC
- TEMPTRACK

We could go on and on. There are eighty-four TEMP variant registered marks in the record, all for similar goods or services. Many of the registrations issued decades ago. Given the extreme dilution of the term TEMP and the shape-descriptiveness of "stick" and "cube," we find the marks are not similar enough to make confusion likely. In other markets, equally similar marks might lead to confusion. But given what we have seen of the market for temperature sensing and monitoring goods and services, more similarity is needed to create a real risk of consumer confusion. If consumers

can distinguish between TEMP TRAQ, TEMP TRAC and TEMPTRACK for nearly identical goods, we are confident they can distinguish TEMP STICK and TEMPCUBE, as well.

The TEMP element of the marks is not distinctive in this market segment.[69] That leaves consumers to focus more on the STICK and CUBE elements of the marks. These words are not similar, except that both identify a shape or configuration of the goods. Considering the limited scope of protection to which Opposer's mark is entitled, the marks at issue do not look or sound alike, and differ in connotation and commercial impression. The marks in their entireties lack the degree of similarity needed to make confusion likely in this market segment. The first *DuPont* factor weighs against a finding that confusion is likely.

3. Similarity of the Goods, Trade Channels and Classes of Customers

> 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 the sales of goods are directed.

[69] This Board often finds the first element of a mark is likely to be noticed and remembered more by consumers. *See In re Denisi*, 225 USPQ 624, 624 (TTAB 1985); *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding "the identity of the marks' two initial words is particularly significant because consumers typically notice those words first"); *Palm Bay Imps*., 73 USPQ2d at 1692; *Presto Prods., Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"). Given that TEMP is so widely used in marks for goods in this market segment, consumers have no choice but to look to other elements of the marks to serve as source identifiers. Every case turns on its own facts.

Octocom Sys., Inc. v. Hous. Comput. Servs. Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); s*ee also Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP,* 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014).[70]

There is no dispute that the parties sell essentially identical goods: wireless temperature sensors that work with cell phone apps to allow remote monitoring. Applicant made no arguments to the contrary. In addition, the parties sell their goods through Amazon, and there is evidence showing that both products may appear in close proximity when searching for a wireless temperature sensor or monitor on Amazon.[71] The evidence also shows that Opposer sells its product through its own website, a trade channel that does not overlap.[72] Despite that, we find there is overlap in the trade channels that will place the parties' goods in close proximity as consumers search for these types of goods.[73]

The goods would be purchased by ordinary members of the public, and are priced at about $100-$150, a level that likely causes most consumers to exercise some care. Our standards, however, allow for the least sophisticated consumer, and there is no evidence to show how much care the least sophisticated ordinary member of the

[70] We address the second, third and fourth *DuPont* factors in the same section because these factors focus on the goods identified in the Application.

[71] 25 (confidential)/26 (public) TTABVUE 44 (showing an Amazon search result featuring both products); 8 (confidential)/9 (public) TTABVUE 22-28

[72] 11 TTABVUE 3-10 (Opposer's TEMP STICK website).

[73] Opposer asserts "that a search for 'temp stick' on Amazon yielded both Applicant's and Opposer's goods *side-by-side*." *Id.* While this type of search result does present some risk of confusion, it is not evidence of confusion. Indeed, consumers select from competing products seen side-by-side (either electronically on the Internet or in brick-and-mortar stores) every day.

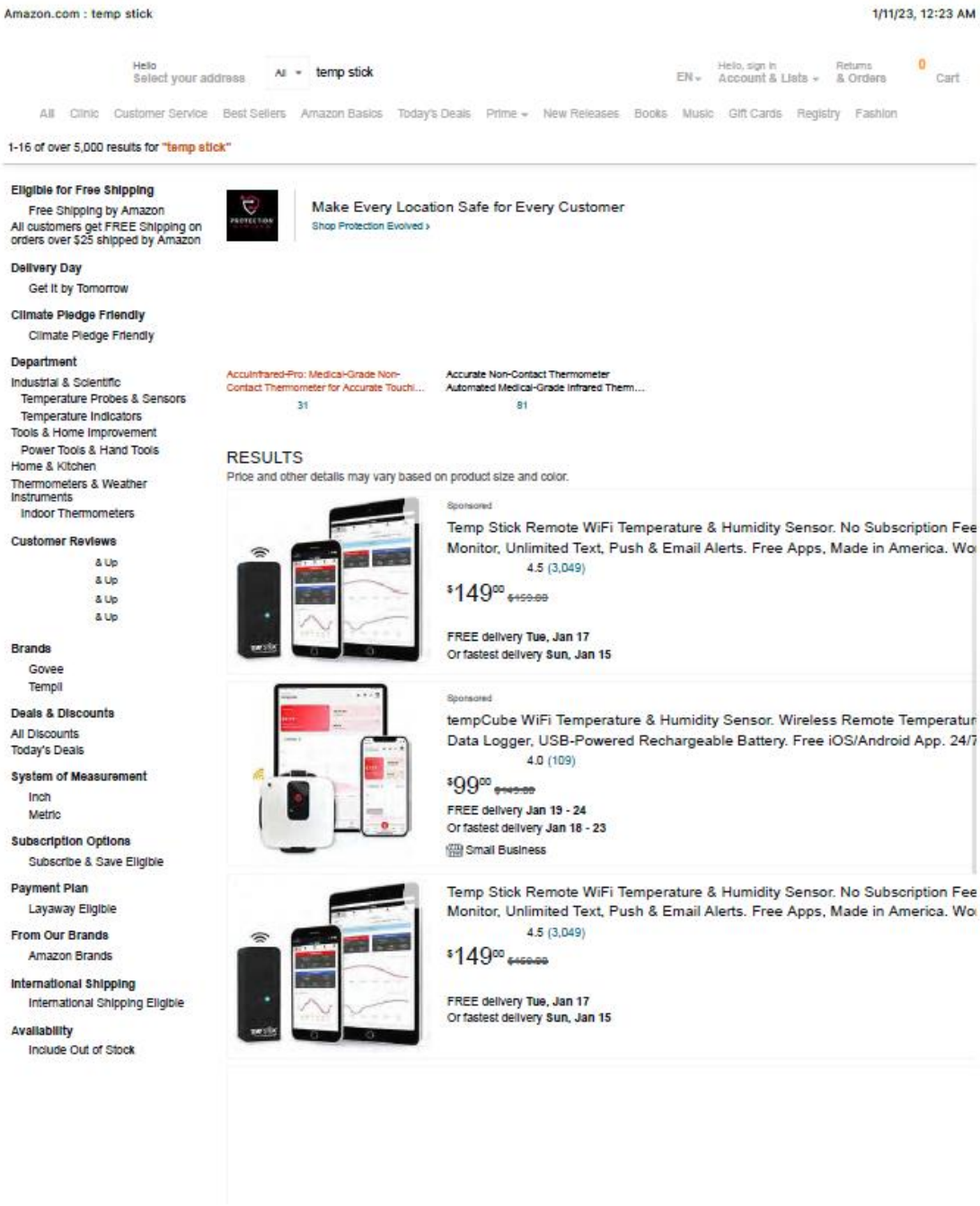
public would exercise when selecting these types of products. We find the customer care factor is neutral.

To summarize, the goods are essentially identical and the trade channels overlap. The second and third *DuPont* factors, therefore, push the balance toward a likelihood of confusion. The customer care factor is neutral.

4. Other *DuPont* Factors

Opposer argues, under the twelfth *DuPont* factor, that it has evidence of instances of potential confusion.[74] These instances are situations where Opposer's TEMP STICK product appears near or next to a listing for Applicant's TEMPCUBE product, like the following Amazon results:

[74] 30 (confidential)/31 (public) TTABVUE 22.



[75]

The rest of the search results show several other products, but this evidence does show the parties' goods listed in close proximity. This evidence shows that conditions have existed, at least on Amazon, in which confusion could occur. In other words, with

[75] 8 (confidential)/9 (public) TTABVUE 22.

this type of search result happening on Amazon, if confusion were likely, there is a fair chance it would have happened by now. And yet, Opposer submitted only evidence of "potential confusion," not actual confusion, as it acknowledged in its rebuttal brief.[76] If anything, the lack of actual confusion after the goods have been in direct competition suggests that confusion is not likely, under the eighth *DuPont* factor. Applicant made no such argument, and Opposer's evidence showing the goods in close proximity is not quantified in any way, and does not constitute actual confusion. For these reasons, we find the twelfth *DuPont* factor is neutral.

5. Conclusion – Confusion Is Not Likely

Our evaluation of the relevant *DuPont* factors indicates, on the one hand, that the goods are essentially identical and move through some of the same trade channels. These factors make confusion more likely. On the other hand, the TEMP STICK mark is weak and the field of TEMP variant marks is crowded, significantly limiting the scope of protection to which Opposer's mark is entitled. Overall, we find the weakness of Opposer's TEMP STICK mark weighs most heavily in this case. There are other marks, with at least as many points of similarity, coexisting in this market segment. The marks at issue here are not similar enough to render confusion likely, particularly given the weakness of Opposer's mark. The remaining *DuPont* factors are neutral. Balancing the factors, there is not enough similarity between these marks, given the specific facts before us, to make confusion likely. Opposer has not proven, by a preponderance of the evidence, that confusion is likely.

[76] *Id.*

IV. Conclusion

Opposer has the burden of proving a likelihood of confusion. It failed to carry that burden, and its Section 2(d) claim, therefore, must be denied.

Decision: The opposition to registration of Applicant's TEMPCUBE mark is **denied.** The Application shall proceed to publication.