

THIS OPINION
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THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

U.S. Marine Corps

v.

Peter J. Healy

Opposition No. 91215087

Phillip Greene, Esq.,
for the U.S. Marine Corps.

Peter J. Healy, pro se.

Before Quinn, Mermelstein and Lykos,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Peter J. Healy (“Applicant”) has filed an application to register the mark **Marine One Down**¹ in standard characters for “Computer game software for personal computers and home video game consoles; Computer game software for use

¹ As a standard character mark, Applicant’s mark is not limited to any font or form of display and could be used, were a registration obtained, in all uppercase letters, i.e., the form in which Opposer’s marks, discussed *infra*, are registered. Likewise, Opposer’s marks, also not limited to any font or form, also could be used in mixed upper and lower case form. See Trademark Rule 2.52, 37 C.F.R. § 2.52.

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with personal computers, home video game consoles used with televisions and arcade-based video game consoles; Downloadable multimedia file containing artwork, text, audio, video, games, and Internet Web links relating to fictional adventure entertainment; Interactive video game programs; Video game cartridges; Video game cartridges and discs; Video game discs; Video game software” in International Class 9.²

The U.S. Marine Corps (“Opposer”) opposes registration of Applicant’s mark on the grounds of (1) likelihood of confusion with Opposer’s registered and previously-used marks, under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d); (2) likelihood of dilution under Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c); (3) false suggestion of a connection under Section 2(a) of the Trademark Act, 15 U.S.C. § 1152(a); (4) deceptiveness under Section 2(a) of the Trademark Act, 15 U.S.C. § 1152(a); (5) deceptive misdescriptiveness under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1); and (6) misrepresentation of source under Section 14(3) of the Trademark Act, 15 U.S.C. § 1064(3). Opposer also alleges that Applicant has violated 10 U.S.C. § 7881 (“Unauthorized use of Marine Corps insignia.”) (hereinafter may be referenced as the “Marine Statute”) and 32 C.F.R. § 765.14³ (“Unofficial use of the seal, emblem, names, or initials of the Marine Corps.”) (hereinafter may be referenced as the “Marine Regulation”), which are the federal statutory and regulatory provisions governing civilian permission to use the

² Application Serial No. 85936128, filed May 18, 2013 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use the mark in commerce.

³ Opposer also alleges that Applicant has violated SECNAV Instruction 5030.7 issued by the Department of Defense.

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“names” of the U.S. Marine Corps. We construe these allegations regarding the Marine Statute and Marine Regulation as a seventh claim, and as one asserting that Applicant lacks a bona fide intent to lawfully use the mark in commerce under Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127.⁴

In the notice of opposition, Opposer asserts “rights in 49 registered U.S. trademarks, as shown in the list found at Appendix A to the notice of opposition. These registrations, and other common law marks based on and/or containing the term MARINE, are herein referred to as the ‘Marine Corps Marks.’” Notice of Opposition ¶ 1; 1 TTABVue 5. We refer to the name Marine Corps, and the registered marks MARINE ONE and MARINES, specifically, as needed, based on the claim being discussed. The registered marks include the following, which as discussed *infra*, were properly made of record:

Reg. No. 4612650 for the mark MARINE ONE (standard characters) on the Principal Register for “cups and mugs” in International Class 21;⁵

⁴ Insofar as the involved application is not based on an allegation of use of the mark in commerce, a claim of unlawful use in commerce would be premature, but a claim that the stated intent to use cannot involve lawful use may be pursued against an intent to use application. *See* Trademark Manual of Examining Procedure (“TMEP”) § 907 (Jan. 2017) (“For applications based on Trademark Act Sections 1(b), 44, or 66(a), if the record indicates that the mark or the identified goods or services are unlawful, actual lawful use in commerce is not possible. Thus, a refusal under Trademark Act Sections 1 and 45 is also appropriate for these non-use-based applications, because the applicant does not have a bona fide intent to lawfully use the mark in commerce. *See* 15 U.S.C. §§ 1051 and 1127.” (emphasis added)).

On August 18, 2015, the Board denied Opposer’s motion to amend its pleading to add an additional claim of lack of a bona fide intent to use the applied-for mark in commerce under Trademark Act Section 1(b). *See* 9, 18 TTABVue. This claim is distinct from Opposer’s asserted claim that Applicant lacks a bona fide intent to lawfully use the mark in commerce under Trademark Act Sections 1 and 45.

⁵ Registered September 30, 2014, alleging April 3, 2010 as the date of first use anywhere and in commerce.

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Reg. No. 4619908 for the mark MARINE ONE (standard characters) on the Principal Register for “occasion cards; picture cards; postage stamps; postcards and greeting cards; posters” in International Class 16;⁶

Reg. No. 4698140 for the mark MARINE ONE (standard characters) on the Principal Register for “neckwear and shirts” in International Class 25;⁷

Reg. No. 4556045 for the mark MARINES (standard characters) on the Principal Register for “toy airplanes” in International Class 28;⁸ and

Reg. No. 4337441 for the mark MARINES (standard characters) on the Principal Register for “action target games; action-type target games; airsoft guns for recreational purposes; firearm targets; target games; targets” in International Class 28.⁹

Applicant, in his answer, denied the salient allegations in the notice of opposition and asserted various affirmative defenses, including that Opposer lacks standing to bring the asserted claims and that Opposer’s claims “have the intent and purpose of restraint and suppression of speech content in violation of Applicant’s statutory and constitutional rights.”¹⁰ Affirmative Defense Nos. 2 and 7; 4 TTABVue 5.

⁶ Registered October 14, 2014, alleging April 4, 2009 as the date of first use anywhere and in commerce.

⁷ Registered March 10, 2015, alleging May 10, 2011 as the date of first use anywhere and in commerce.

⁸ Registered June 24, 2014, alleging December 31, 1999 as the date of first use anywhere and in commerce.

⁹ Registered May 21, 2013, alleging October 17, 2011, as the date of first use anywhere and in commerce.

¹⁰ With his answer, Applicant objected to the notice of opposition on the ground that it “interjects miscellaneous compound rhetorical narrative, in no fewer than four unnumbered paragraphs expressly numerated as ‘1’ and ‘2.’” We agree that the complaint does not comply with Fed. R. Civ. P. 8(a) and Fed. R. Civ. P. 10(b), made applicable in Board proceedings by Trademark Rule 2.119(a), and which state in relevant part that a pleading must include “a short and plain statement of the claim” and that “[a] party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances.” Nonetheless, because Applicant did not file a motion to strike or motion for more definite statement during the interlocutory phase of this proceeding, Opposer’s notice of opposition remains the operative complaint.

Furthermore, Applicant's affirmative defenses, which were neither pursued during the trial of this proceeding, nor argued in his brief, are deemed waived. *See Alcatraz Media v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 n.6 (TTAB 2013), *aff'd mem.*, 565 Fed. Appx. 900 (Fed. Cir. 2014).

I. *The Record*

The record consists of the pleadings and Applicant's application file (*see* Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b)).¹¹ Opposer did not take any testimony but filed the following materials under notice of reliance:

Printouts obtained from the USPTO Trademark Electronic Search System ("TESS") database showing the current status of and title to Opposer's pleaded Reg. Nos. 4612650, 4619908, 4698140, 4556045 and 4337441 for the marks MARINE ONE and MARINE;¹²

Applicant's answers to Opposer's first set of interrogatories and document production requests;¹³ and

Examples of merchandise bearing the MARINE ONE mark from www.zazzle.com.¹⁴

¹¹ In its appeal brief, Opposer states that the Letter of Protest Memorandum ("Memo") from the Trademarks Office of Deputy Commissioner dated June 6, 2013 is part of the evidentiary record. Neither party relied upon any of the materials submitted in connection therewith. That being said, we have reviewed the materials and none would have changed the outcome of this case.

¹² Numerous other pleaded registrations were made of record as well.

¹³ To the extent the responses pertain to Applicant's purported lack of a bona fide intent to use the mark in commerce, they too are irrelevant, since addition of that claim has been denied.

¹⁴ Opposer also filed screenshots of Applicant's Twitter account pages and domain names from registrars such as Network Solutions and Go Daddy, under notice of reliance. These are irrelevant to the grounds for opposition before us. According to the notice of reliance, Opposer submitted this evidence in support of the claim it unsuccessfully attempted to add to the notice of opposition — that Applicant lacked a bona fide intent to use the applied-for mark in commerce under Trademark Act Section 1(b). And even if we had considered this evidence, it would not have changed the outcome of this case.

Applicant neither submitted evidence nor took testimony during his assigned trial period. Nonetheless, Opposer, as plaintiff in this proceeding, bears the burden of establishing its standing and proving its claims.

Both Opposer and Applicant submitted briefs. However, in reaching our decision, we have not considered any statements made by either party in their briefs that are unsupported by evidence properly in the record. *See, e.g., Saul Zaentz Co. v. Bumb*, 95 USPQ2d 1723, 1725 n.7 (TTAB 2010). *See also* Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 704.06(b) (Jan. 2017).

Before addressing the substantive matters before us, we make the following comment. Applicant devotes much of his brief to arguing that Opposer, in bringing the instant action, seeks to suppress Applicant’s First Amendment rights “to market, with the benefit of trademark protection, a product in the creative entertainment arts” Applicant’s Brief, p. 2; 20 TTABVUE 3. The Board is an administrative tribunal empowered to determine only the right to register a mark. TBMP § 102.01 (citing Trademark Act Section 17, 15 U.S.C. § 1067; Trademark Act

In addition, Opposer’s submission under notice of reliance of its own responses to Applicant’s document production requests (consisting of photos of examples of merchandise bearing the MARINE ONE mark such as apparel, posters and mugs) was improper and has not been considered. *See* Trademark Rules 2.122(e) and 2.120(j)(3)(ii); 37 C.F.R. § 2.122(e) and 37 C.F.R. § 2.120(j)(3)(ii). Such materials do not fall under the category of “printed publications” or “official documents,” and, as a general rule, material produced in responses to an adversary’s document requests are not to be introduced by the responding party. To make these materials of record, Opposer should have taken the testimony of a witness with sufficient knowledge to authenticate the materials, and then submit the matter as an exhibit to the testimony deposition. *See generally* TBMP § 704.11.

Opposer’s submission of its own answers to Applicant’s interrogatories was also improper for the same reason. *See* Trademark Rule 2.120(j)(5); 37 C.F.R. § 2.120(j)(5). Ordinarily, an answer to an interrogatory, or an admission to a request for admission, may be submitted and made part of the record by only the inquiring party; none of the exceptions to this rule apply here. *Id.*

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Section 18, 15 U.S.C. § 1068; Trademark Act Section 20, 15 U.S.C. § 1070; Trademark Act Section 24, 15 U.S.C. § 1092; *Conolty v. Conolty O'Connor NYC LLC*, 111 USPQ2d 1302, 1309 (TTAB 2014); *Blackhorse v. Pro-Football, Inc.*, 111 USPQ2d 1080, 1082-83 (TTAB 2014). As such, the Board has no authority to determine whether Opposer has violated Applicant's First Amendment rights. *See In re District of Columbia*, 101 USPQ2d 1588, 1602 (TTAB 2012) (no authority to declare provisions of the Trademark Act unconstitutional), *aff'd sub nom. In re City of Houston*, 731 F.3d 1326, 108 USPQ2d 1226 (Fed. Cir. 2013); *Blackhorse v. Pro-Football Inc.*, 98 USPQ2d at 1638 (citing TBMP § 102.01) (no authority to rule on the constitutionality of the Trademark Act on its face or as applied). For this reason, we have not considered Applicant's arguments regarding this issue.

II. Standing

The first substantive issue before us is standing. Standing is a threshold issue that must be proved by the plaintiff in every *inter partes* case. *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). *See also Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) ("The facts regarding standing ... must be affirmatively proved. Accordingly, [plaintiff] is not entitled to standing solely because of the allegations in its [pleading]."). Our primary reviewing court, the U.S. Court of Appeals for the Federal Circuit, has enunciated a liberal threshold for determining standing, namely that a plaintiff must demonstrate that it possesses a "real interest" in a proceeding beyond that of a mere intermeddler, and "a reasonable

basis for his belief of damage.” *See Empresa Cubana Del Tabaco*, 111 USPQ2d at 1062 (citing *Ritchie v. Simpson*, 170 F.3d 1902, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999)). A “real interest” is a “direct and personal stake” in the outcome of the proceeding. *Ritchie v. Simpson*, 50 USPQ2d at 1026.

Because Opposer has properly made of record the registrations for the mark MARINE ONE and others noted above, Opposer has established its standing. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); and *Lipton Indus., Inc.*, 213 USPQ at 189.

III. *Substantive Claims*

Opposer in its trial brief argued all seven of the substantive claims pleaded as grounds for opposing Applicant’s applied-for mark. Opposer, as the plaintiff in this proceeding, bears the burden of proving each of its claims by a preponderance of the evidence. However, as explained further below, arguments are not evidence and the evidence that is properly of record is insufficient to carry Opposer’s burden of proof for any of the available claims.

A. Priority and Likelihood of Confusion under Section 2(d)

We begin with Opposer’s Section 2(d) claim. In its brief, Opposer focused on its three registrations for the mark MARINE ONE for the goods listed as “cups and mugs” in International Class 21, “occasion cards; picture cards; postage stamps; postcards and greeting cards; posters” in International Class 16 and “neckwear and shirts” in International Class 25. For the sake of completeness, in analyzing Opposer’s Section 2(d) claim, we have also considered Opposer’s two registrations

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for the mark MARINES for “toy airplanes” and “action target games; action-type target games; airsoft guns for recreational purposes; firearm targets; target games; targets,” which have been properly made of record. In our view, these five registrations for the two marks, coupled with their corresponding identified goods, are most likely to support a likelihood of confusion claim. If Opposer could prevail on its Section 2(d) claim on these registrations, then consideration of others would be unnecessary; and if Opposer could not, then consideration of other less relevant registrations would not assist Opposer. *See, e.g., In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

Priority is not in issue in view of Opposer’s ownership of valid and subsisting registrations for the marks MARINE ONE and MARINES and goods identified therein. *See King Candy, Inc. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). However, Opposer has failed to prove by a preponderance of the evidence likelihood of confusion between any of the registered marks and goods and Applicant’s mark and goods.

As often stated, we base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont*”). *See also, In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “Not all of the *du Pont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). For example, the

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Board may “focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.” *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (citation omitted).

We agree with Opposer that its registered mark MARINE ONE is highly similar in appearance, sound, connotation and commercial impression to Applicant’s mark **Marine One Down**, insofar as Applicant’s mark includes the entirety of Opposer’s mark MARINE ONE as the initial portion. *See Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered”). The addition of the term DOWN to Applicant’s mark does little, if any, to obviate this similarity, given that the connotation of “down” in this context refers to the aircraft “Marine One” transporting the President of the United States as being brought “down” by some weaponry or some other means. Opposer’s other mark, MARINES, while not as close in appearance, sound, connotation and commercial impression as MARINE ONE, is similar insofar as it designates the branch of the U.S. armed forces which operates the aircraft known as “Marine One.” The first *du Pont* factor therefore weighs in favor of finding a likelihood of confusion.

Opposer, however, has failed to introduce any evidence to prove relatedness of the goods — a critical factor in the likelihood of confusion analysis. This second *du Pont* factor involves a comparison of the goods identified in Applicant’s application vis-à-vis the goods identified in Opposer’s pleaded registrations. *See Stone Lion*

Capital Partners, LP v. Lion Capital LLP, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also*, *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). In some cases, the Board is able, in the absence of evidence, to make an affirmative finding that the involved goods are related based solely on the goods as described in the involved application and registration. *See, e.g., Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1438 (TTAB 2014) (goods in part are legally identical because the broadly identified “jewelry” encompasses within its scope all of the specific jewelry items described in the application). Such is not the case here. The burden is on Opposer to introduce evidence that the goods are related given that we cannot draw any inferences of relatedness based on the identifications themselves. Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used together; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant’s goods and the goods listed in Opposer’s registrations. *See, e.g., L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1140 (TTAB 2012).

Despite Opposer’s apparent belief in the ready availability of the types of evidence discussed above, which could have been submitted under notice of reliance without the need to take testimony depositions, Opposer submitted no such evidence to establish that any of the Class 16, 21 and 25 goods identified in the

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above registrations for the mark MARINE ONE are related to Applicant's Class 9 goods. Nor is such evidence suitable matter for judicial notice. The International Class 28 goods identified in connection with Opposer's registered MARINES mark consisting of "toy airplanes" and "action target games; action-type target games; airsoft guns for recreational purposes; firearm targets; target games; targets" arguably are similar to Applicant's goods, insofar as they all constitute games. That being said, we cannot find that these goods are inherently related in the absence of corroborating evidence. For example, in *Harry Winston, supra*, the Board was able to find that the goods were in part legally identical based on the identifications set forth in the involved application and registration. Such is not the case here.

Opposer states in its brief that "while it has not yet licensed a video game, per se, it has an active presence in videos, movies, DVDs, CDs, apps and other media very similar to what Applicant proposes to do." Opposer's Brief, p. 6; 19 TTABVue 10. Again, the record lacks any evidence to support these assertions. *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1339 (Fed. Cir. 2004) ("Statements of counsel . . . are not evidence."); *Martahus v. Video Duplication Servs. Inc.*, 3 F.3d 417, 27 USPQ2d 1846, 1849 (Fed. Cir. 1993) ("mere attorney arguments unsubstantiated by record evidence are suspect at best"). Thus, based on the record before us, the critical *du Pont* factor regarding the relatedness of the goods weighs against a finding of likelihood of confusion.

Opposer argues that a majority of the other *du Pont* factors weigh in its favor.¹⁵ With regard to the *du Pont* factor of fame, Opposer contends that it operates “a world-renowned helicopter squadron (HMX-1), which when the President of the United States (POTUS) is onboard as a passenger, is known worldwide as ‘Marine One.’” Opposer’s Brief, p. 3; 19 TTABVUE 7. Opposer further asserts that the “mark MARINE ONE has attained a degree of acclaim, fame and reputation over the past five decades, and that through its authorized licensees, sales of merchandise have been strong for many years.” Opposer’s Brief, p. 6; 19 TTABVUE 10.

The *du Pont* factor of the fame of an opposer’s mark, if it exists, plays a dominant role in a likelihood of confusion analysis. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) (quoting *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000)). *See also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Fame for likelihood of confusion purposes arises when a “significant portion of the relevant consuming public ... recognizes the mark as a source indicator.” *Palm Bay Imps.*, 73 USPQ2d at 1694. The existence and degree of fame may be measured indirectly by the volume of sales and advertising expenditures of the goods sold under the mark, for example, and other factors such as length of use of the mark; widespread critical assessments; notice by independent sources of the products identified by the marks; and the general reputation of the

¹⁵ To the extent, if any, Opposer is arguing that a majority of *du Pont* factors favor a likelihood of confusion, we disagree. The *du Pont* factors are not necessarily of equal weight in the final analysis.

products or services. *Bose Corp.*, 63 USPQ2d at 1308. Because of the wide latitude of legal protection a famous mark receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting fame to clearly prove it. *Id.* at 1305. *See also Lacoste Alligator S.A. v. Maxoly Inc.*, 91 USPQ2d 1594, 1597 (TTAB 2009); *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007).

Opposer's evidence falls short of establishing Opposer's MARINE ONE mark as famous for likelihood of confusion purposes. Other than counsel's assertions in Opposer's brief, we have no objective evidence showing the fame of Opposer's MARINE ONE mark *for the goods identified in Opposer's pleaded registrations*.¹⁶ Notably, Opposer failed to submit specific evidence regarding U.S. annual sales by dollar amount and volume or advertising expenditures under Opposer's MARINE ONE marks for the goods identified therein, evidence typically submitted by plaintiffs seeking to prove fame under Trademark Act Section 2(d). The vague assertion of "strong" sales for decades in the absence of documentary evidence or corroborating testimony, is insufficient. And Opposer's thin evidence of licensing and merchandising to third parties, with no specifics, does little to advance Opposer's case. Thus, on the record before us, we cannot find Opposer's mark

¹⁶ In the context of a Section 2(d) claim, the general or overall fame of a term is not dispositive; rather fame must be proven in connection with both the term used as a mark or part of a mark in connection with the identified goods. *See Weider Publ'ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1354-55 (TTAB 2014). The issue at hand is not the renown of Opposer per se.

MARINE ONE or MARINES to be famous for the goods identified in Opposer's registrations and therefore deem this *du Pont* factor as neutral.

Likewise, with regard to other *du Pont* factors such as the conditions under which the goods are likely to be purchased (*e.g.*, whether on impulse or after careful consideration, as well as the degree, if any, of sophistication of the consumers) and the right to exclude others, Opposer argues that

...patriotism is at an all-time high, with 'Support Our Troops,' 'Support Wounded Warriors,' 'Honor Our Veterans,' and a multitude of similar tributes occurring on a regular basis (during sporting events, movies, commercials, and other forms of expression). As such ... a video game that relies so strongly on [Opposer's] famous Presidential helicopter program ... would lead purchasers of both stripes, impulse and careful, to believe that the product was in some way connected to [Opposer].

Opposer's Brief, p. 6; 19 TTABVUE 10. In the absence of any restrictions in the identifications, we must assume that the goods identified in Opposer's registrations encompass all goods of the type identified (including, *e.g.*, cups, mugs, posters, shirts, toy airplanes, action target games) and may be sold at a low price, purchased on impulse, or otherwise traded under conditions not conducive to careful purchasing decisions or to purchasers unlikely to exercise care. *See In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981) (citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958)). We therefore deem these factors as weighing in favor of a likelihood of confusion.

We have considered all of the evidence made of record and arguments. On balance, while the *du Pont* factors of the similarity of the marks and possible low cost and impulse purchasing weigh in Opposer's favor, given the lack of evidence

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showing the relatedness of the goods, we simply cannot find on the record before us a likelihood of confusion. Perhaps on a stronger record, our determination would have been different. Opposer in bringing this proceeding bears the burden of proof, and we cannot consider arguments devoid of evidentiary support. Accordingly, Opposer's Section 2(d) claim is dismissed.

B. Likelihood of Dilution by Blurring

The Trademark Act provides a cause of action for the dilution of famous marks. *See* Sections 13 and 43(c) of the Trademark Act, 15 U.S.C. §§ 1063 and 1125(c). Opposer contends that Applicant's applied-for mark is likely to dilute the distinctiveness of Opposer's MARINE and MARINE ONE marks. The Trademark Act defines dilution by blurring as follows:

“[D]ilution by blurring” is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.

Section 43(c)(2)(B) of the Trademark Act, 15 U.S.C. § 1125(c)(2)(B). “Dilution diminishes the ‘selling power that a distinctive mark or name with favorable associations has engendered for a product in the mind of the consuming public.’” *Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164, 1182 (TTAB 2001) (internal citation omitted). In oppositions to intent-to-use applications filed under Trademark Act Section 1(b), the Board applies the following three-prong test for dilution by blurring:

Whether Opposer's mark is famous¹⁷ and distinctive;¹⁸

¹⁷ Under § 1125(c)(2)(A), a mark is “famous” for dilution purposes —

Whether Opposer's mark became famous prior to applicant's filing date; and

Whether Applicant's mark is likely to cause dilution by blurring the distinctiveness of Opposer's mark.

See e.g., Nat'l Pork Bd. v. Supreme Lobster and Seafood Co., 96 USPQ2d 1479, 1494-95 (TTAB 2010). Where, as here, a mark is not proven famous for purposes of likelihood of confusion under Section 2(d), it cannot meet the higher threshold for fame required for dilution by blurring. *See Coach Services Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721; *Midwestern Pet Foods Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1439 (Fed. Cir. 2012); *ProMark Brands Inc. v. GFA Brands, Inc.*, 668 F.3d 1356, 114 USPQ2d 1232, 1250 (TTAB 2015).

In view thereof, we find that Opposer has not carried its burden of proof as to this critical element of its dilution by blurring claim. Opposer's dilution claim is therefore dismissed.

... if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner. In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including the following:

- (i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.
- (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark.
- (iii) The extent of actual recognition of the mark.
- (iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

¹⁸ “[A] mark must be not only famous, but also so distinctive that the public would associate the term with the owner of the famous mark even when it encounters the term apart from the owner's goods or services, i.e., devoid of its trademark context.” *Toro*, 61 USPQ2d at 1177 (citing H.R. REP. No. 104-374, at 3 (1995) (“the mark signifies something unique, singular, or particular”). *See also Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1723-24 (Fed. Cir. 2012).

C. Lack of Bona Fide Intent to Lawfully Use the Mark in Commerce

Next, we consider Opposer's construed claim that Applicant lacks a bona fide intent to lawfully use the applied-for mark in commerce. Applicant relies on federal statute 10 U.S.C. § 7881, "Unauthorized use of Marine Corps insignia," which governs, among other things, civilian use of the "names" of the Marine Corps as well as 32 C.F.R. § 765.14 "Unofficial use of the seal, emblem, names, or initials of the Marine Corps," the regulation promulgated by the U.S. Department of Defense to implement the Marine Statute.

Opposer argues that Applicant's applied-for mark violates the statute and regulation insofar as its mark implies "an official or unofficial connection between the Marine Corps and the consumer goods to be offered by the Applicant, gives the impression that the Marine Corps selectively benefits the goods of the Applicant, and would be inimical to the health, safety, welfare or morale of the members of the Marine Corps, to the extent to which it compromises the strength and effectiveness of the Marine Corps licensing program, and harmful to its Marine Corps brand." Opposer's Brief, p. 13; 19 TTABVue 17.

The unlawful use in commerce doctrine is derived from Section 45 of the Trademark Act, 15 U.S.C. § 1127, which defines "commerce" as "all commerce which may lawfully be regulated by Congress." Thus, in order to obtain a federal registration, use of a mark in commerce or, if applicable, its intended use, must be lawful. *In re JJ206, LLC*, 120 USPQ2d 1568, 1569 (TTAB 2016); *In re Midwest Tennis & Track Co.*, 29 USPQ2d 1386 n.2 (TTAB 1993) (citing *Clorox Co. v. Armour-*

Dial, Inc., 214 USPQ 850, 851 (TTAB 1982)). *See also Gray v. Daffy Dan's Bargaintown*, 823 F.2d 522, 3 USPQ2d 1306, 1308 (Fed. Cir. 1987). Here, the involved application was filed under Trademark Act Section 1(b) based on Applicant's stated bona fide intent to use the mark **Marine One Down** in commerce in connection with the identified goods. Given these circumstances, the issue before us is whether Applicant prospectively has the requisite bona fide intent to lawfully use his applied-for mark in commerce for the goods identified therein. *See In re JJ206, LLC*, 120 USPQ2d at 1569. *Cf. John W. Carson Found. v. Toilets.com, Inc.*, 94 USPQ2d 1942, 1947-48 (TTAB 2010) (Board found applicant lacked a bona fide intent to use its mark in commerce where a court enjoined applicant from making the use required to obtain its federal trademark registration; "as a matter of law, applicant cannot make lawful use of its mark in commerce.").

As both the Marine Statute and Marine Regulation make clear, civilian users like Applicant must obtain written permission to use the "names" of the Marine Corps with one exception – the regulation provides a "safe harbor" provision obviating the need for written permission so long as the following disclaimer is prominently displayed: "Neither the United States Marine Corps nor any other component of the Department of Defense has approved, endorsed, or authorized this product (or promotion, or service, or activity) as an integral part of the use of imitation." 32 C.F.R. § 765.14(c)(3). The Marine Regulation defines "prominent display" as "one located on the same page as the first use of the insignia, prominent in that use, and printed in letters at least one half the size and density of the

insignia.” Hence, Applicant could in theory use his mark with the above disclaimer without obtaining permission from Opposer. Because the involved application was filed on an intent-to-use basis, there are no specimens, meaning that we are unable to ascertain whether Applicant’s use of the mark is or will be accompanied by the disclaimer. Opposer took no testimony from Applicant in order to ascertain whether Applicant intended to avail himself of the “safe harbor” provision. We do not have any other evidence in the record such as interrogatory responses regarding how Applicant intends to display and use his mark, and in particular, whether Applicant does or does not intend to use his mark with the above disclaimer prominently displayed next to it.

Thus, based on the record before us, we find that Opposer has not met its burden of proving by clear and convincing evidence, or even the lesser standard of preponderance of the evidence, that Applicant’s intended use would violate the Marine Statute or Marine Regulation. *General Mills Inc. v. Health Valley Foods*, 24 USPQ2d 1270, 1274 (TTAB 1992). Accordingly, we dismiss Opposer’s claim that Applicant lacks a bona fide intent to lawfully use the applied-for mark in commerce.

D. False Suggestion of a Connection under Section 2(a)

Section 2(a) of the Trademark Act prohibits the registration of a mark that consists of or comprises matter that may falsely suggest a connection with “persons, living or dead, institutions, beliefs, or national symbols ...” 15 U.S.C. § 1052(a). The U.S. government, as well as government agencies and instrumentalities are considered juristic persons or institutions within the meaning of the statute. *Id.*;

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Section 45 of the Trademark Act, 15 U.S.C. § 1127. *See In re Peter S. Herrick P.A.*, 91 USPQ2d 1505, 1506-08 (TTAB 2009) (“Institutions, as used in Section 2(a), include government agencies.”); *U.S. Navy v. United States Manufacturing Co.*, 2 USPQ2d 1254, 1257 (TTAB 1987) (“the Navy is a juristic person within the meaning of Section 45 of the Act and the Marine Corps might be *argued* to be an institution”); *In re Cotter & Co.*, 228 USPQ 202, 204-05 (TTAB 1985) (finding the United States Military Academy is an institution and West Point or Westpoint “has come to be solely associated with and points uniquely to the United States Military Academy”); *NASA v. Record Chem. Co.*, 185 USPQ 563, 565-66 (TTAB 1975) (finding the National Aeronautics and Space Administration (NASA) is a juristic person and institution). Thus, the common names, acronyms and initialisms for the government or its agencies or instrumentalities can be relevant to false suggestion of connection claims.

To establish that a proposed mark falsely suggests a connection with a person or an institution, it must be shown that:

The mark is the same as, or a close approximation of, the name or identity previously used by another person or institution;

The mark would be recognized as such, in that it points uniquely and unmistakably to that person or institution;

The person or institution named by the mark is not connected with the activities performed by the applicant under the mark; and

The fame or reputation of the person or institution is such that, when the mark is used with the applicant’s goods or services, a connection with the person or institution would be presumed.

Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co., 703 F.2d 1372, 217 USPQ 505, 508-10 (Fed. Cir. 1983) (providing foundational principles for the current four-part test used to determine the existence of a false connection). *See also Association Pour La Defense et la Promotion de L'Oeuvre de Marc Chagall dite Comite Marc Chagall v. Bondarchuk*, 82 USPQ2d 1838, 1842 (TTAB 2007); *In re Cotter & Co.*, 228 USPQ at 204; *Buffett v. Chi-Chi's, Inc.*, 226 USPQ 428, 429 (TTAB 1985).

*Whether Applicant's mark **Marine One Down** is the same as or a close approximation of the name or identity of the U.S. Marine Corps?*

Opposer states in a conclusory fashion in its brief that Applicant's mark **Marine One Down** "is the same as, or a close approximation of, the name or identity previously (and continuously used) the Opposer, the USMC, for several decades." Opposer's Brief, p. 9; 19 TTABVUE 13. Contrary to Opposer's assertion, the record does not show that Applicant's mark is the "same" as Opposer's "name or identity." Opposer has introduced no evidence that Applicant's mark closely approximates Opposer's "name or identity," whether in full or abbreviated form (for example, "United States Marine Corps", "U.S. Marine Corps", "USMC" or "Marines").¹⁹

¹⁹ Alternatively, to the extent, if any, Opposer is arguing that Applicant's mark falsely suggests a connection with Opposer's helicopter carrying POTUS as an "institution," there is nothing in the record to show that Opposer has "previously used" the term "Marine One" to denote such a helicopter. Our determination may have been different based on a developed record.

Because Opposer has failed to prove the first element, its false suggestion claim under Section 2(a) necessarily fails. However, for sake of completeness, we analyze the remaining elements of the test.

*Whether Applicant's mark **Marine One Down** points uniquely and unmistakably to Opposer (the U.S. Marine Corps)?*

Opposer asserts that Applicant's mark "points uniquely and unmistakably to Opposer, the USMC..." noting that in fiscal year 2015, the United States Marine Corps Licensing Office collected over \$2.5 million in royalties from licensing merchandise to unrelated entities. Opposer's Brief, p. 9; 19 TTABVue 13. Opposer also maintains that "a likelihood of a false connection" is "very high" given the "sheer size" of its licensing program. *Id.* None of Opposer's contentions are supported by record evidence.²⁰ In addition, "Section 2(a) is distinctly different from Section 2(d), 15 U.S.C. § 1052(d), for which the relevant test is likelihood of confusion." TMEP § 1203.03. In *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co., supra*, the U.S. Court of Appeals for the Federal Circuit explained a critical distinction between claims of false suggestion of a connection under Section 2(a) and likelihood of confusion under Section 2(d):

A reading of the legislative history with respect to what became §2(a) shows that the drafters were concerned with protecting the name of an individual or institution which was not a technical "trademark" or "trade name" upon which an objection could be made under §2(d). ...

²⁰ Likewise, the record is devoid of evidence that Applicant's mark points uniquely and unmistakably to POTUS's Marine One helicopter.

Id. at 508-09 (citing Hearings on H.R. 4744 before the Subcomm. on Trade-Marks of the House Comm. on Patents, 76th Cong., 1st Sess. 18 (1939)).²¹ Opposer fails to prove the second element as well.

*Whether the U.S. Marine Corps is connected with the goods that are or will be sold under Applicant's **Marine One Down** mark?*

It is undisputed that Opposer has no connection with the goods Applicant intends to sell under its applied-for mark. This part of the test is therefore satisfied.

*Whether the U.S. Marine Corps' name or identity is of sufficient fame or reputation that when Applicant's mark **Marine One Down** is used on Applicant's goods, a connection with the U.S. Marine Corps would be presumed?*

As to the final element of the test, the record is devoid of evidence that the United States Marine Corps' "name or identity" is of sufficient fame or reputation that when Applicant's mark **Marine One Down** is applied to Applicant's "Computer game software for personal computers and home video game consoles; Computer game software for use with personal computers, home video game consoles used with televisions and arcade-based video game consoles; Downloadable multimedia file containing artwork, text, audio, video, games, and Internet Web links relating to fictional adventure entertainment; Interactive video game programs; Video game cartridges; Video game cartridges and discs; Video game discs; Video game software," a connection with United States Marine Corps' would be presumed. When analyzing the fourth prong, special considerations are made with regard to governmental entities through the case law. In the *ex parte* context,

²¹ Opposer has submitted no evidence showing that Applicant's mark points uniquely and unmistakably to the "institution" of the Marine One carrying POTUS.

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registration must be refused if the nature of the mark and the nature of the goods or services is such that a United States government agency or instrumentality would be presumed to be the source or sponsor of the applicant's goods or services. *See e.g., In re Peter S. Herrick, P.A.*, 91 USPQ2d 1505, 1507-08 (TTAB 2009) (finding that the only meaning of the words "U.S. Customs Service" is to identify the government agency, and that a connection between applicant's attorney services and the activities performed by the United States Customs and Border Protection would be presumed). The record must include evidence showing that the designation in the mark refers to the agency or instrumentality and that the goods or services are such that a connection with that agency or instrumentality would be presumed, particularly when it is not readily apparent that the wording or acronym in the mark refers to the agency or instrumentality. *See, e.g., In re Mohawk Air Serv. Inc.*, 196 USPQ 851, 855 (TTAB 1977) (holding MOHAWK 298, for airplanes, to not falsely suggest a connection with the U.S. Army and the Army's use of the term "Mohawk" to identify one of its airplanes, since there was no evidence of record that the Army continuously used the term since 1958, that the public was aware of such use, or that the public would associate "Mohawk" named airplanes with the U.S. Army).

We find instructive here, in the *inter partes* context of this case, the guidance provided in Section 1203.03(c)(ii) of the TMEP regarding *ex parte* consideration of questions regarding registration of matter that may falsely suggest a connection with a United States government agency or instrumentality:

[T]he identified goods or services must be scrutinized in the context of the current marketplace to determine whether they are of the type to be offered by United States government agencies and instrumentalities. For instance, if the evidence supports a finding that it is commonplace for government agencies to sell or license the sale of consumer merchandise featuring agency names or acronyms, such as clothing, toys, key chains, and calendars, a false connection with a government agency would be presumed if that agency name or acronym is used in connection with those goods and, therefore, the mark should be refused registration under § 2(a).

The above guidance in the TMEP is stated to pertain to the fourth prong of the Section 2(a) false suggestion of a connection test, which prong covers both the fame of the person or institution, *and* the use of a mark for goods or services not from that person or institution which would nonetheless result in a connection being made to the person or institution. These two aspects are interrelated. Considering both aspects of the fourth prong, we find first that Opposer has failed to show by a preponderance of the evidence that the fame or reputation of the U.S. Marine Corps and its Marine One POTUS helicopter squadron is such that, when the mark **Marine One Down** is used to identify Applicant's goods that a connection with Opposer would be presumed. We find second that there is no evidence in the record that it is commonplace for government agencies generally, or the Marine Corps specifically, to sell or license the sale of goods of the type of Applicant's Class 9 goods. Nor do we have evidence that Opposer itself sells or licenses the sales of these products under the MARINE ONE mark. We only have Opposer's vague statement in its brief that its trademark licensing office generated over \$2.5 million in royalties in fiscal year 2015. Opposer's Brief, p. 9; 19 TTABVue 13. Thus, Opposer has not established that a false connection with the Marine

Corps or its helicopter squadron would be presumed if **Marine One Down** is used in connection with Applicant's identified goods.²² See, e.g., *NASA v. Record Chem. Co. Inc.*, 185 USPQ 563, 568 (TTAB 1975) (dismissing opposition to registrations of APOLLO 8 for moth preventatives and mothproofing agent-air freshener because, while NASA is a juristic person and prior user of the terms APOLLO and APOLLO 8 for its space missions, it is unlikely that the average purchaser of applicant's goods would assume NASA to be source or sponsorship of the goods or mistakenly believe that the goods are of NASA space exploration technology). Compare *In re Cotter & Co.*, 228 USPQ at 205 (Board found that "the goods sold by applicant under the WESTPOINT designation, namely, shotguns and various rifles, are goods of a type that customers would associate with a military post or reservation" and as such "purchasers of firearms sold under the mark would be misled by use of said mark into making a false assumption of a connection in the nature of sponsorship, approval, support or the like with the *United States Military Academy*." (emphasis in original) with *U.S. Navy v. United States Manufacturing Co.*, 2 USPQ2d 1254, 1260 (TTAB 1987) ("we see no reasonable basis for concluding that ordinary consumers would think that elastic braces for tennis elbows or sprained ankles have any connection whatsoever with the Marine Corps").

In view of the foregoing, Opposer's false suggestion of a connection claim under Trademark Act Section 2(a) is dismissed for lack of proof.

²² We would reach the same result with regard to the "institution" of the Marine One helicopter transporting POTUS, given the lack of evidence in the record before us.

E. Deceptiveness Under Trademark Act Section 2(a)

Section 2(a) of the Trademark Act also provides an absolute bar to the registration of deceptive matter on either the Principal Register or the Supplemental Register. A deceptive mark may be comprised of: (1) a single deceptive term; (2) a deceptive term embedded in a composite mark that includes additional non-deceptive wording or design elements, *see In re White Jasmine LLC*, 106 USPQ2d 1385, 1391 (TTAB 2013); (3) a term or a portion of a term that alludes to a deceptive quality, characteristic, function, composition, or use, *see Am. Speech-Language-Hearing Ass'n v. Nat'l Hearing Aid Soc'y*, 224 USPQ 798, 808 (TTAB 1984); (4) the phonetic equivalent of a deceptive term, *see In re Organik Techs., Inc.*, 41 USPQ2d 1690, 1694 (TTAB 1997); *Tanners' Council of Am., Inc. v. Samsonite Corp.*, 204 USPQ 150, 154 (TTAB 1979); or (5) the foreign equivalent of any of the above, *see, e.g., Palm Bay Imps.*, 73 USPQ2d at 1696. The Court of Appeals for the Federal Circuit has articulated the following test for whether a mark consists of or comprises deceptive matter:

Is the term misdescriptive of the character, quality, function, composition or use of the goods?

If so, are prospective purchasers likely to believe that the misdescription actually describes the goods?

If so, is the misdescription likely to affect a significant portion of the relevant consumers' decision to purchase?

In re Budge Mfg. Co., 857 F.2d 773, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988), *aff'g*, 8 USPQ2d 1790 (TTAB 1987). Deceptive marks may include marks that falsely

describe the material content of a product. *See In re Intex Plastics Corp.*, 215 USPQ 1045, 1048 (TTAB 1982).

Opposer argues that Applicant's mark **Marine One Down** for the identified goods is deceptive because it creates the mistaken impression that Applicant's goods are either offered by the Opposer, or licensed by the Opposer or the "official" goods of Opposer, or are otherwise authorized by or affiliated with the Opposer. Applicant counters that it is absurd to assert that the public would presume that the U.S. Marine Corps would endorse a form of fictional entertainment premised upon the demise of the POTUS helicopter.

Opposer conflates the concepts of likelihood of confusion under Section 2(d) with deceptiveness under Section 2(a). "[F]or a term to misdescribe goods, the term must be merely descriptive of a significant aspect of the goods which the goods could plausibly possess but in fact do not." *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1051 (TTAB 2002) (TTAB 2002). The issue is not whether consumers will be deceived as to the source of Applicant's goods as Opposer argues, but rather whether Applicant's mark misdescribes a "character, quality, function, composition or use" of the identified goods. In this regard, Opposer points to no such misdescription or evidentiary support therefor.

Accordingly, this claim under Section 2(a) is dismissed as well.

F. Deceptive Misdescriptiveness under Section 2(e)(1)

The test for deceptive misdescriptiveness under Section 2(e)(1) of the Trademark Act consists of the first two prongs of the test for deceptiveness under Section 2(a).

See In re Budge Mfg. Co., 8 USPQ2d at 1260. In view of our determination above, it logically follows that Opposer has also failed to carry its burden of establishing that Applicant's mark is deceptively misdescriptive of the identified goods within the meaning of Trademark Act Section 2(e)(1). As such, we dismiss this ground for opposition.

G. Misrepresentation of Source

Lastly, we consider Opposer's claim of misrepresentation of source. In Board proceedings, a party may bring a claim of misrepresentation of source under Trademark Act Section 14(3), 15 U.S.C. § 1064(3) "if the *registered mark* is being used by, or with the permission of, the *registrant* so as to misrepresent the source of the goods or services on or in connection with which the mark is used." (Emphasis added). This language expressly limits claims of misrepresentation of source to *registered* marks. Such claims can only be entertained in the context of a cancellation proceeding or counterclaim to cancel a pleaded registration. In view thereof, Opposer's misrepresentation of source claim asserted against Applicant's applied-for mark in this opposition proceeding is dismissed.

IV. Observations

The Board is compelled to comment on the litigation of this case. Opposer, having brought this opposition, chose not to take any testimony. The majority of evidence submitted by Opposer under notice of reliance was either inadmissible or irrelevant to the asserted claims. Opposer's brief included many factual statements with no evidentiary support. With the exception of Opposer's misrepresentation of

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source claim which is legally futile, we have dismissed all of Opposer's claims for lack of proof. A plaintiff in a Board proceeding cannot expect to prevail on its asserted claims based on mere assertions in its appeal brief. *See, e.g., Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1339 (Fed. Cir. 2004) ("Statements of counsel . . . are not evidence."); *In re Simulations Publ'ns, Inc.*, 521 F.2d 797, 187 USPQ 147, 148 (CCPA 1975) ("Statements in a brief cannot take the place of evidence."); *Boston Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581, 1587 (TTAB 2008) (broad and general statements in brief regarding marketing experience not supported by any evidence and cannot be accorded evidentiary value or consideration); *Schering-PloughHealthCare Products, Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1328 (TTAB 2007) (lack of evidence undercuts contentions in brief); *Baseball Am., Inc. v. Powerplay Sports, Ltd.*, 71 USPQ2d 1847, 1847 (TTAB 2004) (factual assertions in brief not supported by competent evidence not considered). This is true, even when the plaintiff is a governmental entity as important and valued as the United States Marine Corps, with special statutory protection for its "names." On a more developed record, the result may have been different.

DECISION: Opposer's claims of (1) likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d); (2) likelihood of dilution under Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c); (3) false suggestion of a connection under Section 2(a) of the Trademark Act, 15 U.S.C. § 1152(a); (4) deceptiveness under Section 2(a) of the Trademark Act, 15 U.S.C. § 1152(a); (5) deceptive misdescriptiveness under Section 2(e)(1)

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of the Trademark Act, 15 U.S.C. § 1052(e)(1); (6) misrepresentation of source under Section 14(3) of the Trademark Act, 15 U.S.C. § 1064(3); and (7) lack of bona fide intent to lawfully use the mark in commerce under Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127 are dismissed.