

This Opinion Is Not A
Precedent Of The TTAB

Oral Hearing: June 21, 2023

Mailed: October 13, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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JetBlue Airways Corporation

v.

Airblue Limited
—

Opposition No. 91239609
—

Edward Rosenthal, Kimberly M. Maynard, Rachel Santori and Kristina D'Angelo of
Frankfurt Kurnit Klein & Selz PC
for JetBlue Airways Corporation

J. Michael Keyes and Connor Hansen of Dorsey & Whitney LLP
for Airblue Limited
—

Before Kuhlke, Wellington and Lebow,
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, Airblue Limited, seeks registration of the mark AIRBLUE in standard
characters for:¹

Issuance of credit cards; credit card services, namely,
providing cash and other rebates for credit card use as part
of a customer loyalty program, International Class 36; and

¹ Serial No. 87459649, filed May 22, 2017 on the Principal Register, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Air transportation of passengers, property, and cargo; air transportation services featuring a frequent flyer bonus program; making reservations and bookings for air transportation; providing automated check-in and ticketing services for air travel, International Class 39.

Opposer, JetBlue Airways Corporation, has opposed registration of Applicant's mark on several grounds. First, Opposer alleges that, as used in connection with Applicant's services, the mark so resembles Opposer's various JETBLUE marks and BLUE-formative marks, for a variety of services, including JETBLUE for "transportation of passengers, parcels, freight and cargo by air; providing information about air transportation via a website on a global computer network; travel agency services, namely, making reservations and bookings for transportation; airline passenger services in the nature of a frequent flyer program" and JETBLUE CARD for "financial services, namely, providing credit card services" it is likely to cause confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).² Opposer also alleges that its BLUE-formative marks constitute a family of marks and relies upon this putative family of marks for purposes of its likelihood of confusion ground.

Second, Opposer alleges that Applicant's mark is likely to dilute Opposer's marks by blurring. Finally, Opposer alleges that Applicant did not have a bona fide intent

² Amended Not. of Opp., 13 TTABVue. Applicant also pleaded a fraud claim but did not brief it and confirmed at the oral hearing it waived that claim. *Alcatraz Media, Inc., v. Chesapeake Marine Tours, Inc.*, 107 USPQ2d 1750, 1753 (TTAB 2013) (petitioner's pleaded descriptiveness and geographical descriptiveness claims not argued in brief deemed waived), *aff'd*, 565 F. App'x 900 (Fed. Cir. 2014) (mem.).

to use the mark in commerce for the services in the involved application. By its answer, Applicant generally denies the salient allegations.³

I. RECORD

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

- Opposer’s Notices of Reliance on web page printouts of various articles from printed publications of general circulation (Exhs. 1-31, 48 TTABVUE), Applicant’s discovery responses (Exhs. 32-77, 49-51 TTABVUE), Opposer’s several pleaded registrations showing status and title and other of its unpleaded registrations⁴ (Exhs. 78-120, 52 TTABVUE), printouts of Applicant’s social media posts (Exhs. 121-122, 53 TTABVUE), excerpts from discovery deposition of Tariq Chaudhary (Chaudhary Disc. Depo.), Applicant’s CEO and Chairman of the Board (Exh. 123, 55 TTABVUE), various third-party and Opposer’s websites referencing Opposer, (Exhs. 124-137, 56 TTABVUE);

³ The answer also includes several “affirmative defenses” the bulk of which are simply amplifications of the denials. The “affirmative defense” that Opposer failed to state a claim upon which relief can be granted “is not a true affirmative defense because it relates to an assertion of the insufficiency of the pleading of Opposer’s claim rather than a statement of a defense to a properly pleaded claim.” *TiVo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1101 n.6 (TTAB 2018). Because Applicant did not file a motion to dismiss the claim or pursue the purported insufficiencies in its trial brief, Applicant has waived it. *Alcatraz Media v. Chesapeake Marine Tours*, 107 USPQ2d at 1753 n.63), *aff’d mem.*, 565 F. App’x 900 (Fed. Cir. 2014).

⁴ “While an unpleaded registration cannot be used as a basis for the opposition, it, like third-party registrations, may be considered for ‘whatever probative value’ it may lend to opposer’s showing under the *DuPont* factors in its case in chief.” *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031, 1035 (TTAB 2010). *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 704.03(b)(1)(A) (2014) (distinguishing between a federal registration owned by the plaintiff in an opposition or cancellation proceeding and one pleaded by the plaintiff in its complaint).” *Fujifilm Sonosite, Inc. v. Sonoscape Co., Ltd.*, 111 USPQ2d 1234, 1236 (TTAB 2014).

- Opposer’s Testimony Declaration of Elizabeth Windram, Opposer’s Vice President of Marketing, with exhibits (Windram Decl.) (57, 58, 60 (public) 59 (confidential) TTABVUE);
- Applicant’s Testimony Declaration of Tariq Chaudhary, Applicant’s CEO and Chairman of the Board with exhibits (Chaudhary Decl.) (73 (public) 78-79 (confidential) TTABVUE);
- Applicant’s Notices of Reliance on Opposer’s discovery responses, including excerpts from the discovery deposition of Chantal Van Wijnbergen, (Wijnbergen Disc. Depo.), excerpts from the Chaudhary Disc. Depo. under Trademark Rule 2.120(k)(4), excerpts from Opposer’s and third-party websites and social media, printouts of third-party registrations, printouts of online articles, excerpts from Applicant’s website and social media (Exhs. 1-78, 65-72, 88 (public) 74-77 TTABVUE);⁵
- Opposer’s Rebuttal Notice of Reliance on excerpts from Opposer’s and third-party websites, TSDR printouts of various third-party registrations, excerpts from Opposer’s Cross Examination Deposition of Chaudhary, excerpts from Chantal Van Wijnbergen discovery deposition under Trademark Rule 2.120(k)(4) (Exhs. 138-180, 94 (public) 95 (confidential) TTABVUE);
- Rebuttal Testimony Declaration of Elizabeth Windram (Windram Rebut. Decl.) with exhibits (96 (public) 97 (confidential) TTABVUE).

Both parties have asserted various evidentiary objections. None of them are outcome-determinative. An opposition proceeding is akin to a bench trial, with the Board as the trier of fact, and the Board is capable of assessing the proper evidentiary weight to be accorded admissible testimony and evidence. As necessary and

⁵ On April 25, 2022, the Board granted Opposer’s motion to strike certain of Applicant’s evidence submitted under notice of reliance, but allowed Applicant time to cure the evidentiary submissions. 87 TTABVUE. On May 16, 2023, Applicant filed its revised notice of reliance covering those paragraphs and exhibits that were stricken. 88 TTABVUE.

appropriate, we will point out any limitations in the evidence or otherwise note that we cannot rely on the evidence in the manner sought. We have considered all of the testimony and evidence properly introduced into the record. In doing so, we have kept in mind Opposer's and Applicant's objections and we have accorded whatever probative value the subject testimony and evidence merit. *See Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1479 (TTAB 2017); *U.S. Playing Card Co. v. Harbro, LLC*, 81 USPQ2d 1537, 1540 (TTAB 2006). *See also Poly-America, L.P. v. Ill. Tool Works Inc.*, 124 USPQ2d 1508, 1510 (TTAB 2017).

II. ENTITLEMENT TO A STATUTORY CAUSE OF ACTION

Opposer's entitlement to a statutory cause of action is a requirement that must be proven by the plaintiff in every inter partes case. *See Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, *3 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067 n.4 (2014)). A party in the position of plaintiff may oppose registration of a mark where such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and the party has a reasonable belief in damage that is proximately caused by the prospective registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, *6-7 (Fed. Cir. 2020).

Once a plaintiff has shown entitlement on one ground, it has the right to assert any other ground in an opposition proceeding. *See Poly-Am., L.P. v. Ill. Tool Works Inc.*, 124 USPQ2d 1508, 1512 (TTAB 2017) (if petitioner can show standing on the ground of functionality, it can assert any other grounds, including abandonment); *Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d 1477, 1479 (TTAB 2017) (standing

established based on surname claim sufficient to establish standing for any other ground); *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1481 (TTAB 2017) (opposer established its standing as to genericness ground of certification mark and was entitled to assert any other ground).

As listed above, the record includes status and title copies of Opposer's pleaded registrations. In view thereof, Opposer's entitlement to a statutory cause of action to oppose registration of Applicant's mark is established. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (pleaded registrations "suffice to establish ... direct commercial interest"; a belief in likely damage can be shown by establishing a direct commercial interest); *Made in Nature, LLC v. Pharmavite, LLC*, 2022 USPQ2d 557, at *7 (TTAB 2022) (pleaded registrations demonstrated entitlement to bring a statutory cause of action); *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *6 (TTAB 2020) (pleaded registrations establish statutory entitlement to bring opposition).

III. SECTION 2(d) CLAIM

Section 2(d) of the Trademark Act prohibits the registration of a mark that "[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1052(d). Opposer pleaded several JETBLUE-formative and BLUE-formative marks. However, we focus our analysis on Opposer's registered standard character mark JETBLUE for "Transportation of passengers, parcels, freight and

cargo by air; providing information about air transportation via a website on a global computer network; travel agency services, namely, making reservations and bookings for transportation; airline passenger services in the nature of a frequent flyer program” in Class 39 (Reg. No. 2449988)⁶ and the standard character mark JETBLUE CARD (Reg. No. 3331799) (CARD disclaimed) for “financial services, namely, providing credit card services” in Class 36 because the services are, in part, identical, legally identical and otherwise closely related to Applicant’s services. If we do not find a likelihood of confusion with respect to these marks and their services, then there would be no likelihood of confusion with the marks and services in Opposer’s other registrations. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010). In view of the determination in relation to the JETBLUE and JETBLUE CARD marks, we need not reach the issue of whether Opposer has established a family of BLUE-formative marks.

To prevail on its Section 2(d) claim, Opposer must prove, by a preponderance of the evidence, that it has priority with respect to its JETBLUE marks and Applicant’s mark AIRBLUE, and that Applicant’s use of its mark in connection with the services identified in its application is likely to cause confusion, mistake, or deception as to the source or sponsorship of those goods. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000).

⁶ Reg. Nos. 3163121 and 3163120, both for air transportation services, provide examples of how the mark appears emphasizing the “blue” portion of the mark.

A. PRIORITY

Because the pleaded registrations are not the subject of counterclaims, priority is not in issue with respect to the marks, and goods and services in the registrations. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); and *King Candy Co., Inc. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

B. Likelihood of Confusion Factors

We turn to consider the likelihood of confusion factors for which we have evidence and argument.

1. Relatedness of Goods and Services, Channels of Trade, Conditions of Purchase

The parties’ marks and services are set out below:

AIRBLUE	JETBLUE	JETBLUE CARD
Issuance of credit cards; credit card services, namely, providing cash and other rebates for credit card use as part of a customer loyalty program, International Class 36		financial services, namely, providing credit card services in Class 36
Air transportation of passengers, property, and cargo; air transportation services featuring a frequent flyer bonus program; making reservations and bookings	Transportation of passengers, parcels, freight and cargo by air; providing information about air transportation via a website on a global computer network; travel	

for air transportation; providing automated check-in and ticketing services for air travel, International Class 39	agency services, namely, making reservations and bookings for transportation; airline passenger services in the nature of a frequent flyer program in Class 39	
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Opposer’s JETBLUE and JETBLUE CARD marks are registered for legally identical and identical services to Applicant’s services in both classes. It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of services within a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014).

Further, where, as here, the services are legally identical and identical, and there are no limitations as to channels of trade or classes of purchasers in either the application or Opposer’s registrations, we must presume that Applicant’s and Opposer’s services will be sold in the same channels of trade and will be bought by the same classes of purchasers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

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

Capital v. Lion Capital, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)). The identifications of services in the application and registrations include all services of the type identified, without limitation as to their nature or price. *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013). Nonetheless, by their very nature, air transportation services and credit card services, consumers would apply at least some care to their purchase. There is no evidence of record, however, to better understand how such care may obviate likely confusion, where the services are identical and, as discussed below, where the marks are similar. We find the conditions of sale factor to be neutral or at most weigh slightly in favor of no likely confusion. The factors regarding the relatedness of the services and channels of trade weigh strongly in favor of a likelihood of confusion.

2. Strength or Weakness of Opposer's Mark JETBLUE

Before we make our comparison of the marks, we consider the strength, including any fame, of Opposer's JETBLUE mark, as well as any weakness of the JETBLUE mark or the common element BLUE. We do so because a determination of the strength or weakness of this mark helps inform us as to its scope of protection. In doing so, we consider the fifth *DuPont* factor which enables Opposer to expand the scope of protection that should be given to its mark through evidence showing "[t]he fame of the prior mark (sales, advertising, length of use)." *DuPont*, 177 USPQ at 567. We also consider the sixth *DuPont* factor which allows Applicant to contract the scope

of protection of Opposer's mark by adducing evidence of third-party use of similar marks on similar goods. *Id.*

When evaluating the strength or weakness of a mark, we look at the mark's inherent strength based on the nature of the term itself and its commercial strength in the marketplace, *Spireon Inc. v. Flex Ltd.*, 2023 USPQ2d 737, at *4 (Fed. Cir. 2023), citing *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (measuring both conceptual and marketplace strength), as well as "[t]he number and nature of similar marks in use on similar goods." See *Made in Nature*, 2022 USPQ2d 557, at *17 (quoting *DuPont*, 177 USPQ at 567). See also *New Era Cap v. Pro Era*, 2020 USPQ2d 10596, at *10; *In re Chippendales USA Inc.*, 96 USPQ2d 1681 at 1686 ("A mark's strength is measured both by its conceptual strength ... and its marketplace strength ..."). "[T]he strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak." *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003). See also *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017).

a. Conceptual Strength

Conceptual strength is a measure of a mark's distinctiveness and may be placed "in categories of generally increasing distinctiveness: . . . (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful." *Spireon*, 2023 USPQ2d 737, at *4, (quoting *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992)). Because both of Opposer's marks are registered on the Principal Register, without a claim of

acquired distinctiveness, the mark JETBLUE (CARD being disclaimed in one of the registrations) is presumed to be inherently distinctive for the identified services. Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006) (a “mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods”). In placing the JETBLUE mark on the spectrum of distinctiveness, the lowest it can be construed as is suggestive because “marks that are merely descriptive cannot be registered unless they acquire secondary meaning under § 2(f) of the Lanham Act, 15 U.S.C. § 1052(f), [and] marks that are suggestive are ‘inherently distinctive’ and can be registered.” *In re N.C. Lottery*, 866 F.3d 1363, 123USPQ2d 1707, 1709 (Fed. Cir. 2017). Thus, Applicant’s arguments that JETBLUE and its constituent parts are not inherently distinctive and are merely descriptive constitute an impermissible collateral attack absent a counterclaim. *Top Tobacco LP v. North Atlantic Operating Co.*, 101 USPQ2d 1163, 1174 n.17 (TTAB 2011) (plaintiff’s mark is registered without either a disclaimer of the term at issue or a claim of acquired distinctiveness, and there is no counterclaim so Board cannot entertain any attack on the term as being merely descriptive).

Nevertheless, JETBLUE may be weak if it is shown to be highly suggestive. *See Spireon*, 2023 USPQ2d 737, at *4 (“highly suggestive [marks] are entitled to a narrower scope of protection, *i.e.*, are less likely to generate confusion over source

identification, than their more fanciful counterparts”) (citations omitted). On the other hand, “the fact that a mark may be somewhat suggestive does not mean that it is a ‘weak’ mark entitled to a limited scope of protection.” *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985).

Applicant argues that the separate words JET and BLUE are suggestive of the recited air transportation services and the composite JETBLUE “does not create a non-descriptive term.” App. Brief, 103 TTABVUE 30. Both terms are suggestive of transportation services in differing degrees, JET being the mode of transportation and BLUE evoking the sky. However, this does not mean that JETBLUE, as a whole, is also suggestive and so weak as to be limited in its scope of protection. *See In re Carnation Co.*, 196 USPQ 716 (TTAB 1977) (“The fact that the term ‘partner’ [in the mark POTATO PARTNER] may be somewhat suggestive [for food topping] does not necessarily mean that a mark comprised in whole or in part of such term is a ‘weak’ mark entitled to but a limited scope of protection.”). To the contrary, combined they present a single word with no specific meaning and we conclude that Opposer’s entire mark, JETBLUE, (1) as used in connection with its air transport services is at most mildly suggestive and, (2) as used in connection with its credit card services (for which even the separate words have no meaning), is arbitrary.

b. Commercial Strength

Commercial strength is “based on marketplace recognition of the mark [],” *Made in Nature*, 2022 USPQ2d 557, at *21, and “may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the [services provided]

under the mark, and by the length of time those indicia of commercial awareness have been evident.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689-90 (Fed. Cir. 2018) (quoting *Bose Corp. v. QSC Audio Prods.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) (internal citations omitted)). Commercial strength may also be measured by “widespread critical assessments; notice by independent sources of the products identified by the marks; and the general reputation of the products and services.” *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *22 (TTAB 2023) (quotation marks and quotations omitted).

“Fame for confusion purposes arises as long as a significant portion of the relevant consuming public recognizes the mark as a source indicator.” *Id.* (citing *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)). Here, the “relevant consuming public” consists of purchasers of air transportation and travel services, and credit card services.

“[W]e must determine where to place Opposer’s mark on the ‘spectrum’ of marks, which ranges from ‘very strong to very weak.’” *Id.* (quoting *Joseph Phelps Vineyards*, 122 USPQ2d at 1734). “Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use,” *id.* (citing *Bose*, 63 USPQ2d at 1305), and, as a result, it is incumbent on Opposer to clearly prove that its JETBLUE mark is famous. *Made in Nature*, 2022 USPQ2d 557, at *31 (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012)).

To prove the commercial strength of its JETBLUE mark, Opposer relies on the length of use of the mark; sales; use with a variety of services; advertising and promotional expenditures; commercial impressions; sponsorships; recognition and awards; and unsolicited media coverage of Opposer and its services.

As shown below, Opposer has presented ample evidence to support its assertion that its mark is famous for likelihood of confusion purposes.

Length of Time and Amount of Sales

Opposer has rendered its air transportation services since 2000 under the mark JETBLUE and its credit card services since 2005 under the mark JETBLUE CARD. Windram Decl. ¶¶ 12, 18, 57 TTABVUE 4, 5. During this time Opposer flew over 42 million customers per year with an average of more than 1,000 daily flights. *Id.* ¶ 15, at 4. Opposer's revenue has increased steadily over the years and for 2019 it was \$8 billion. *Id.* ¶ 43, 57 TTABVUE 13.⁷ In that year, Opposer was the sixth largest passenger carrier in the United States. *Id.* ¶ 16, at 5. However, there is no information to place this ranking in context, e.g., how many passenger carriers there are in the United States. Currently, Opposer flies to 100+ international and domestic

⁷ Applicant objects to the SEC 10-K reports attached to the Windram declaration. Specifically, Applicant argues the matter contained in the reports is hearsay and Ms. Windram has not demonstrated personal knowledge as to the 10-K forms and that the 2019 report is not relevant because it post-dates Applicant's filing date. First, the 2019 report is relevant to demonstrate fame. For purposes of a claim under Section 2(d), a plaintiff may rely on the establishment of fame during its trial period and in "asserting dilution must also prove that its mark remains famous at the time of trial." *Tivo Brands LLC v. Tivoli, LLC*, 129 USPQ2d at 1113. Second, we find Ms. Windram, as Vice President of Marketing and her duties including overseeing the operating budget for marketing demonstrates sufficient personal knowledge for her to attest to the revenue and advertising figures in her declaration as derived from the SEC 10-K reports.

destinations in the United States, Mexico, the Caribbean, Latin America and South America. *Id.* ¶ 27, at 9.

Advertising and Promotion

Opposer engages in robust advertising and promotional campaigns for its air transportation and credit card services. Opposer's annual advertising costs range from \$53 million to \$72 million. *Id.* ¶ 43, at 13. Opposer advertises "through popular social media outlets, television, radio, multi-market and nationwide advertising campaigns, digital and physical billboards, local events, sponsorships, mobile marketing, direct email marketing and public and community relations efforts." *Id.* ¶ 41, at 13. Many of its television commercials engage in temporal events and in some cases garner attention from local and national broadcast news stations and popular talk shows. Opposer provided information on visits to its website which are quite substantial.⁸ *Id.* ¶¶ 69 Exhs. AA, at 24, 321-22 . In addition Ms. Windham testified that Opposer had over 1.47 million "likes" on Facebook and 1.97 million followers on Twitter (now X) and that Opposer "boasted the highest share of social media followers

⁸ Applicant's objection to this testimony and exhibit AA on the basis of a lack of personal knowledge is overruled. Based on Ms. Windham's position and responsibilities we give credence to her testimony confirming that the numbers contained therein are accurate. However, we agree that without more, the website "visits" number may not represent unique consumer visits. In view thereof, we consider these numbers as simply visits, and not as the number of different consumers that visited the website. Applicant's objection to the testimony and exhibits BB and CC concerning Opposer's social media and digital advertising is also overruled. Again, we find Ms. Windham to have sufficient knowledge regarding Opposer's social media accounts and her testimony is credible. The attached exhibits serve to illustrate how the social media or digital advertising appeared and we do not take statements made in the printouts for the truth of the matters asserted therein.

among the top five airlines in the United States.” *Id.* ¶¶ 71-73, Exhs. BB-CC, *Id.* at 24, 323-783, 58 TTABVUE 133-138.

Opposer uses the mark JETBLUE with various JETBLUE-formative marks for a variety of services, including a sports stadium and entertainment events, venture capital services, educational services and for charitable services. *Id.* ¶ 19, at 6. Opposer has been the official airline for many sports teams, including the Boston Red Sox, New York Jets, Florida Panthers, Brooklyn Nets, Boston Bruins, Boston Celtics, and the New England Patriots, as well as for arts and cultural institutions such as The Fillmore in Miami, and the New York Public Theater. *Id.* ¶ 59, 57 TTABVUE 21. In connection with these sponsorships JETBLUE is featured in stadiums, ice arenas, ballparks, outdoor advertising, etc. and such displays reach “hundreds of thousands of sports-spectators each year.” *Id.* ¶ 60.

Recognition and Unsolicited Media Coverage

Opposer receives mentions in widely-read publications (and online web pages of news organizations) including USA Today, Bloomberg, MSN, Fox News, Travel + Leisure, Conde Nast Traveler, New York Times, Forbes, The Washington Times, the Los Angeles Times, the Miami Herald, Newsweek, Oprah Magazine, and the Boston Globe. *Id.* ¶¶ 78-79, at 27-28; Exhs. FF, 58 TTABVUE 159-485. Opposer has also received ongoing public recognition and awards for its products. *Id.* ¶ 81, 57 TTABVUE 29-30; Exh. HH, 58 TTABVUE 534-564. Opposer’s mark JETBLUE frequently appears in popular television shows and has even been featured on Jeopardy as the correct question “What is JetBlue?” ¶ 75, 57 TTABVUE 26.

Applicant takes issue with the probative value of Opposer's evidence, for example, that the revenues and advertising figures relate to the global business. However, JetBlue is a domestic airline, its flights are either within the United States or between the United States and a foreign destination. While it may advertise in other countries, we may infer that because Opposer is a domestic airline, the bulk of its advertising occurs in the United States.

In addition, Applicant attempts to diminish the probative value of Opposer's revenue and advertising numbers pointing out there is no evidence as to Opposer's market share within the airline industry. While this is true, the evidence of consumer exposure to Opposer's JETBLUE marks – through ongoing advertising in various media, the many unsolicited mentions, including in popular television shows, and the several awards bestowed on it – is substantial; thus, the absence of specific market share does not undermine its weight.

Applicant also argues that the common element in their marks, BLUE, is weak in the air transportation industry. Because the parties agree that the word BLUE is found within the compound marks JETBLUE and AIRBLUE, we find that evidence on the word BLUE itself is relevant to understand whether other elements in the respective marks is sufficient to distinguish them in view of purported weakness of the word BLUE. *But see KME Germany GmbH v. Zhejiang Hailiang Co., Ltd.*, 2023 USPQ2d 1136, at * 15 (TTAB 2023), distinguishing, *Spireon*, 2023 USPQ2d 737, at * 5 (“[L]etters ‘ME’ are not a separate element of the three letter combination marks of Applicant [HME] or Opposer [KME] ... accordingly Applicant's evidence of third-

party uses and registrations does not show that Opposer's mark KME is conceptually or commercially weak.").

Applicant points to several third-party registrations, applications and websites to support this position. Much of the evidence does not have probative value on this point. First, the applications are not evidence of anything except that they were filed. *Weider Publications, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1360 (TTAB 2014) (evidence only that applications were filed, thus incompetent to show common third-party use), *appeal dismissed per stipulation*, No. 14-1461 (Fed. Cir. Oct. 10, 2014); *Glamorene Products Corp. v. Earl Grissmer Co.*, 203 USPQ 1090, 1092 n.5 (TTAB 1979) (evidence only of the filing of the application). Second, the third-party uses by airlines outside of the United States do not provide support that BLUE is a weak term in the air transportation industry in the United States. It may be that some U.S. consumers are exposed to some of these airlines; however, other than the evidence of U.S. consumer purchases involving AIRBLUE, there is no evidence to determine if these other airlines have had a measurable impact on U.S. consumer perception. (Atlas Blue (Morocco) Pacific Blue (New Zealand) Blue Air (Romania), Blue Panorama (Italy), Blue1 (Finland), Azul Airlines (Brazil)). Chaudhary Decl. ¶ 57, Exh. 25, 73 TTABVUE 18, 396-402 (printout from International Civil Aviation Organization website). Applicant does provide information as to U.S. customers for its AIRBLUE airline, showing that from 2014 to 2019, 12,080 U.S. citizens have flown on an international AIRBLUE flight. Chaudhary ¶ 50, Exh. 22, 73 TTABVUE15-16,

386. This small number provides little weight to understand U.S. consumer perception.

We turn then to the third-party registrations and third-party uses in the United States. None of the registrations are for identical marks and identical services inasmuch as Opposer's mark includes the term JET. *Cf. Spireon v. Flex*, 2023 USPQ2d 737 at * 7 (third-party registrations for FLEX, identical to Plaintiff's mark FLEX may be considered for commercial strength). They do not provide "evidence of what happens in the market place or that customers are familiar with them." *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406 (CCPA 1973). Considering the third-party registrations to understand if BLUE is conceptually weak, many are for different services, and although perhaps in the greater travel industry (travel agency services, arranging of travel tours and cruises, managing and arranging aircraft operations and aircraft crew, online journals, toy airplanes, stunt flying) *** , the services are sufficiently different such that the word BLUE may have a very different meaning than it does with air transportation. There are nine registrations that include the word BLUE for air transportation services. Two are cancelled. *Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("a canceled registration does not provide constructive notice of anything"); *A&H Sportswear Co. v. Yedor*, 2019 USPQ2d 111513, at *5 n.4 (TTAB 2019) ("a cancelled registration is not entitled to any of the statutory presumptions of Section 7(b) of the Trademark Act"); *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1606 (TTAB 2018) (a cancelled registration is only evidence that the

registration issued, and is not evidence of use of the mark at any time). If we include the travel services, there are 16 live registrations with 14 owners. Two of these issued under Trademark Act Section 66(a) and have no declaration of use and little persuasive value. *In re Info. Builders Inc.*, 2020 USPQ2d 10444, at *6 n.19 (TTAB 2020). While not overwhelming these third-party registrations, in particular those 6 live registrations for air transportation services (Reg. Nos. 1904666 for the mark THE BLUE TRAIN, 5218396 for the mark BLUE HAWAIIAN, 3997591 for the mark BLUEGRACE, 4086849 for the mark ST. BLUE, 5639914 for the mark BLUE WATER, 3958972 for the mark SHIP IT BLUE),⁹ support that the word BLUE has some suggestiveness in connection with air transportation, with the color of the sky evoking where the services are provided.

Turning to the third-party uses and any diminishment in the commercial strength of the word BLUE, Applicant submitted a few examples of use. For example, Applicant points to KLM's use of the mark FLYING BLUE in the United States for a customer loyalty program, and SHOPBLUE for online retail services. Opposer has submitted evidence under seal to show that in certain cases it has entered into co-existence or other settlement agreements with some of the various examples provided by Applicant or that some of the examples, e.g., SHOPBLUE, resolve to webpages that are no longer functional.

Based on the entirety of the record, we find that the word BLUE is somewhat conceptually and commercially diminished in the airline industry. However, there is

⁹ 66 TTABVUE 56-84.

no evidence showing that the commercial strength of Opposer's composite mark JETBLUE has been diminished. We find JETBLUE to be famous for air transportation services and commercially strong for credit card services and accord it a wide scope of protection for both services.

3. Similarity or Dissimilarity of the Marks

Considering the similarity or dissimilarity of the parties' marks, we compare them in their entireties in terms of appearance, sound, connotation and commercial impression. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018); *see also Palm Bay Imps.*, 73 USPQ2d at 1694. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)). "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. v. Triumph Learning*, 101 USPQ2d at 1721 (quotation omitted). The marks must be considered in their entireties, but "in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." *Detroit Athletic*, 128 USPQ2d at 1051 (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)).

The marks JETBLUE and AIRBLUE begin with a three letter word, and end with BLUE. The words JET and AIR share the connotative quality of relating to air travel. In addition, the marks are similar in structure. Although consumers are often inclined to focus on the first part of a trademark, similar to the case in *New Era Cap Co., v. Pro Era*, 2020 USPQ2d 10596, at *15 (PRO ERA confusingly similar to NEW ERA), “both marks are similar in structure, consisting of two words, commencing with a three-letter monosyllabic term and ending with the term [BLUE].” Moreover, in the context of the air transport services, consumers may perceive JET and AIR as indicative of air travel. A highly suggestive term of this type is less likely to form a strong impression amongst prospective consumers seeking to distinguish similar marks. Also, given the commercial strength of Opposer’s JETBLUE mark, consumers may perceive Applicant’s services offered under AIRBLUE as an extension of Opposer’s JETBLUE services. This holds true for Opposer’s JETBLUE CARD mark as well because the word CARD in the context of the credit card services is generic and has no source-identifying significance.

Applicant argues that the shared portion, BLUE, is conceptually and commercially weak and consumers are likely to focus on the first part of the marks which comprise differing words JET and AIR. As we found above, BLUE is somewhat weak in the air transport and travel industry. However, each of the third-party marks in the record are much more different from Opposer’s mark in sound, appearance, connotation, and commercial impression, than Applicant’s mark is.

Moreover, as we have here, where the services are legally identical and identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. See *Bridgestone Ams. Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 1337, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *In re Viterra Inc.*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992); *New Era Cap v. Pro Era*, 2020 USPQ2d 10596, at *14.

We find the similarities in the marks outweigh the dissimilarities and this factor favors likelihood of confusion.

4. Balancing the Factors

We have carefully considered all arguments and evidence properly of record, including any not specifically discussed herein, as they pertain to the relevant likelihood of confusion factors.

We have found that the parties' services, customers, and channels of trade are identical or legally identical, that Opposer's mark JETBLUE is famous for air transportation services, that JETBLUE CARD is commercially strong for credit card services affording them a broad scope of protection, and that the marks are similar. Thus, despite the fact that the services by their nature would receive a higher degree of care in the purchasing decision, Applicant's mark AIRBLUE is likely to cause

consumer confusion with Opposer's marks JETBLUE and JETBLUE CARD in association with the air transportation and credit card services.¹⁰

DECISION: The opposition is sustained as to the likelihood of confusion claim.

¹⁰¹⁰ In view of our decision on the likelihood of confusion claim, we do not reach the dilution or no bona fide intent to use claims. *Yazhong Investing Ltd. v. Multi-Media Tech. Ventures, Ltd.*, 126 USPQ2d 1526, 1540 n.52 (TTAB 2018) (Board has “discretion to decide only those claims necessary to enter judgment and dispose of the case,” as our “determination of registrability does not require, in every instance, decision on every pleaded claim.”) (quoting *Multisorb Tech., Inc. v. Pactive Corp.*, 109 USPQ2d 1170, 1171 (TTAB 2013)); *Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d 1477, 1478 (TTAB 2017) (same).