

This Opinion is Not a
Precedent of the TTAB

Hearing: September 17, 2024

Mailed: January 15, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Revolution Jewelry Works, Inc.

v.

Stonebrook Jewelry, LLC DBA Revolution Jewelry

Opposition Nos. 91248007 & 91248009

Adam L. Weitzel, Christopher J. Aikin, and Heather M. Arboleda of
Business Law Group for Revolution Jewelry Works, Inc.

John C. Stringham, Matthew A. Barlow, Brittany Frandsen and Thomas R.
Vuksinick of Workman Nydegger for Stonebrook Jewelry, LLC
DBA Revolution Jewelry.

Before Zervas, Lykos and Lynch,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background

This consolidated proceeding¹ consists of two oppositions filed by Revolution Jewelry Works, Inc. (“Opposer”) to applications filed by Stonebrook Jewelry, LLC DBA Revolution Jewelry (“Applicant”):

- Opposition No. 91248007 to the application to register, on the Principal Register, the mark REVOLUTION JEWELRY (JEWELRY disclaimed) in standard characters for “jewelry” in International Class 14 (185 Mark);² and

¹ The Board previously consolidated these proceedings and designated Opposition No. 91248007 as the parent case. 7 TTABVUE. Citations in this opinion to the briefs and other materials in the case docket refer to TTABVUE, the Board’s online docketing system. See *New Era Cap Co. v. Pro Era, LLC*, Opp. No. 91216455, 2020 TTAB LEXIS 199, *4 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Unless otherwise indicated, the TTABVUE citations are to the parent case of these consolidated proceedings.

As part of an internal Board pilot citation program on broadening acceptable forms of legal citation, this order cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this order employs citations to the LEXIS legal database and cites only precedential decisions, unless otherwise specified. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 101.03 (2024). Proceeding and serial numbers also are included for decisions of the Board. Those Board decisions that issued on or after January 1, 2008 may be viewed in TTABVUE by entering the proceeding number, application number, registration number, expungement/reexamination number, mark, party, or correspondent. Many precedential Board decisions that issued from 1996 to 2008 are available through USPTO.gov in the TTAB Reading Room by entering the same information. Most TTAB decisions that issued prior to 1996 are not available in USPTO databases.

² Application Serial No. 87306185 was filed January 18, 2017 under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), and alleges May 14, 2014 as the date of first use and first use in commerce.

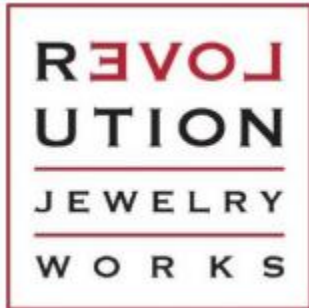
- Opposition No. 91248009 to the application to register, on the Principal

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Register, the mark (JEWELRY DESIGNS disclaimed) for “jewelry” in International Class 14 (218 Mark).³

Opposer asserts likelihood of confusion claims based on prior common law rights in the following three marks, which Opposer also has applied to register:

- REVOLUTION JEWELRY WORKS (JEWELRY WORKS disclaimed) in standard characters for “Jewelry; Jewelry brooches; Jewelry, namely, stone pendants; Diamond jewelry; Gemstone jewelry; Memorial jewelry; Necklaces; Rings; Women’s jewelry” in International Class 14 and “Retail jewelry stores” in International Class 35 (311 Mark);⁴



- (JEWELRY WORKS disclaimed) for “Jewellery boxes; Jewelry; Jewelry boxes; Jewelry brooches; Jewelry cases; Jewelry, namely,

³ Application Serial No. 87306218 was filed January 18, 2017 under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), and alleges May 14, 2014 as the date of first use and first use in commerce. The application contains the following description of the mark: “The mark consists of the words ‘REVOLUTION JEWELRY DESIGNS’ with a horizontal line between the words ‘REVOLUTION’ and ‘JEWELRY DESIGNS’ all of which appear in the color black except the first letter ‘O’ in ‘REVOLUTION’ which appears in the color red.” The colors black and red are claimed as a feature of the mark.

⁴ Application Serial No. 87341311 was filed February 18, 2017, under Section 1(a) based on alleged first use on May 13, 2013 and first use in commerce on November 8, 2013.

stone pendants; Diamond jewelry; Gemstone jewelry; Necklaces; Presentation boxes for jewelry; Rings; Women’s jewelry” in International Class 14 and “Retail jewelry stores” in International Class 35 (305 Mark);⁵ and

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- (JEWELRY WORKS disclaimed) for Jewelry; Jewelry brooches; Jewelry cases; Jewelry, namely, stone pendants; Diamond jewelry; Gemstone jewelry; Memorial jewelry; Presentation boxes for jewelry; Rings; Women’s jewelry” in International Class 14 and “Retail jewelry stores” in International Class 35 (301 Mark).⁶

⁵ Application Serial No. 87341305 was filed February 18, 2017, under Section 1(a) based on alleged first use on May 13, 2013 and first use in commerce on November 8, 2013. The application contains the following description: “The mark consists of a red square containing outlining the exterior border of the mark, within which is contained the stylized word ‘REVOLUTION’ in large, capital font with the letters ‘REVOL’ on one line and the letters ‘UTION’ on a second line of equal font size directly below the letters ‘REVOL.’ The ‘R’ and ‘UTION’ portions in black and the ‘EVOL’ in red, with the ‘E’ and the ‘L’ positioned backwards to spell the word LOVE backwards within the word REVOLUTION. Below the word REVOLUTION is a red line that extends the entire distance of the letters ‘REVOL’ and ‘UTION’. Under the red line is the stylized word ‘JEWELRY’ in capital font with a font height [sic] approximately one-half the size of the word ‘REVOLUTION’ in black. Under JEWELRY is a second red line that extends the entire distance of JEWELRY. Below the second red line is the stylized word ‘WORKS’ in capital font with a font height approximately one-half the size of the word ‘REVOLUTION’ in black, all against a white background.” The colors black, white, and red are claimed as a feature of the mark.

⁶ Application Serial No. 87341301 was filed February 18, 2017, under Section 1(a) based on alleged first use on May 13, 2013 and first use in commerce on November 8, 2013. The application contains the following description: “The mark consists of the stylized word ‘REVOLUTION’ in large, capital font, with the ‘R’ and ‘UTION’ portions in black and the ‘EVOL’ in red, with the ‘E’ and the ‘L’ positioned backwards to spell the word LOVE backwards within the word REVOLUTION, all against a white background. Below the word REVOLUTION is a gray line with a gradient that fades from gray in the middle to white at each end, with such gray line ending in the middle of the first and last letter in REVOLUTION. Below the gray line is the stylized word ‘JEWELRY WORKS’ in capital font approximately one-half the size of the word REVOLUTION’ [sic] in gray font, all against a

In Applicant's Answers,⁷ it admitted that "the parties' marks are similar" and "the parties' goods are similar," and otherwise denied the salient allegations in the Notices of Opposition. Applicant also asserted several affirmative defenses, including some that are not true affirmative defenses.⁸ Applicant did not pursue any purported affirmative defenses at trial, and we therefore consider them impliedly waived or forfeited.⁹ *Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107 USPQ2d 1750, 1753 n.6 (TTAB 2013), *aff'd*, 565 Fed. App'x 900 (Fed. Cir. 2014) (mem.).

The crux of the parties' dispute in this case rests on priority. Applicant does not explicitly concede likely confusion. Nonetheless, its admissions of similar marks and similar goods indicate the parties' agreement that two of the most important factors in the analysis weigh in favor of the likelihood of confusion. The parties devote most of their briefing to priority.

white background." The colors black, white, red and gray are claimed as a feature of the mark.

⁷ 4 TTABVUE (in both opposition records).

⁸ 4 TTABVUE (Answer); Applicant listed essentially the same "affirmative defenses" in both oppositions. To the extent the matters raised are not true affirmative defenses, we would not consider them as such regardless. *See, e.g., DeVivo v. Ortiz*, Opp. No. 91242863, 2020 TTAB LEXIS 15, at *3 (TTAB 2020) (mere amplifications of the applicant's denials not considered as separate affirmative defenses); *John W. Carson Found. v. Toilets.com, Inc.*, Opposition No. 91181092, 2010 TTAB LEXIS 226, *25 (TTAB 2010) ("The asserted defense of failure to state a claim 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.").

⁹ We note the admonition of our primary reviewing court regarding the distinction between waiver and forfeiture. *See In re Google Tech. Holdings LLC*, 980 F.3d 858, 862 (Fed. Cir. 2020) ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." (internal quotation marks omitted)). Affirmative defenses that were asserted in an answer but then not pursued at trial may be deemed impliedly waived, while affirmative defenses that were never asserted may be deemed forfeited.

The consolidated proceeding is fully briefed, and the Board held an oral hearing.

II. Evidentiary Record

The files of the opposed applications are part of the record pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b).¹⁰ Both parties introduced additional materials.

Opposer submitted:

- Testimony declarations with exhibits from: jewelry consumer Hayden Lopez (56 TTABVUE), Brent Cameron Hill, former Production Director for KILO/KRXPColorado Springs Radio Broadcasters/Bahakel Communications (“KILO”), (57 & 75 TTABVUE), Tom Frezza, co-owner of ACME Pawn (58 TTABVUE), Caraigh Clarkson, Senior Marketing Consultant for KILO (59 TTABVUE), Angela Johnson, co-owner of Stellar Specialty Printing (60 TTABVUE), Kathryn Hoepfel, owner and Principal of Kathryn Grill Graphic Design, LLC and a friend of Opposer’s founder and owner (61 TTABVUE), Frank Charles Hoepfel, III, a friend of Opposer’s founder and owner (62 & 63 (confidential) TTABVUE), Janelle McNeil, Opposer’s Shop Manager and jeweler (64 & 65 (confidential) TTABVUE), Trace Shelton, Editor-in-Chief of InStore Magazine (66 TTABVUE), Jeremy Farnes, Opposer’s co-founder and co-owner (71-72 & 73-74 (confidential) & 76 TTABVUE), and Elizabeth Ikonen, expert witness specializing in search engine optimization (141 TTABVUE).
- Opposer’s pleaded application files, under Notice of Reliance (67 TTABVUE);

¹⁰ Therefore, Applicant need not have submitted them under Notice of Reliance. 110 TTABVUE.

- Certain discovery requests and responses, under Notice of Reliance (68 TTABVUE; 138 TTABVUE);
- Internet evidence, under Notice of Reliance (69-70 TTABVUE; 137 TTABVUE);
- Documents from a U.S. district court civil action between the parties (139 TTABVUE);
- Documents from the State of Utah Department of Commerce (140 TTABVUE);
- Deposition testimony from Frank Charles Hoepfel, III, a friend of Opposer's founder and owner, Jennifer Farnes, with exhibits (116 TTABVUE);
- Deposition testimony from Angela Johnson, co-owner of Stellar Specialty Printing, with exhibits (117 TTABVUE);
- Deposition testimony from Trace Shelton, Editor-in-Chief of InStore Magazine, with exhibits (119 TTABVUE);
- Deposition testimony from Thomas Frezza, with exhibits (120 TTABVUE);
- Deposition testimony from Kathryn Hoepfel, owner and Principal of Kathryn Grill Graphic Design, LLC and a friend of Opposer's founder and owner, Jennifer Farnes, with exhibits (121 TTABVUE);
- Deposition testimony from Janelle McNeil, Opposer's Shop Manager and jeweler, with exhibits (122 TTABVUE);
- Deposition testimony, with exhibits, from Applicant's prior customers, Cody Wardle (142 TTABVUE), Rikki Smith (144 TTABVUE), and William Riggs (145 TTABVUE); and

- Deposition testimony from Applicant's Managing Partner, Matthew McDaniel, with exhibits (143 & 146 (confidential) TTABVUE).

Applicant submitted:

- Testimony declarations with exhibits from: its founder and owner, Eric Platt, with exhibits (105 & 106 TTABVUE), its Managing Partner, Matthew McDaniel, with exhibits (103 & 104 TTABVUE), its prior customers, Cody Wardle, Rikki Smith and William Riggs (107-109 TTABVUE);
- Deposition testimony from a former Production Director for KILO/KRXPColorado Springs Radio Broadcasters/Bahakel Communications ("KILO"), Brent Cameron Hill, with exhibits (115 TTABVUE);
- Deposition testimony from Frank Charles Hoeppe, III, a friend of Opposer's founder and owner, Jennifer Farnes, with exhibits (116 TTABVUE);
- Deposition testimony from Angela Johnson, co-owner of Stellar Specialty Printing, with exhibits (117 TTABVUE);
- Deposition testimony from Trace Shelton, Editor-in-Chief of InStore Magazine, with exhibits (119 TTABVUE);
- Deposition testimony from Tom Frezza, co-owner of ACME Pawn, with exhibits (120 TTABVUE);
- Deposition testimony from Kathryn Hoeppe, owner and Principal of Kathryn Grill Graphic Design, LLC and a friend of Opposer's founder and owner, Jennifer Farnes, with exhibits (121 TTABVUE);

- Deposition testimony from Janelle McNeil, Opposer’s Shop Manager and jeweler, with exhibits (122 TTABVUE);
- Deposition testimony from jewelry consumer Hayden Lopez, with exhibits (123 TTABVUE);
- Deposition testimony from Jeremy Farnes, Opposer’s co-founder and co-owner, with exhibits (124 TTABVUE (confidential)); and
- Fed. R. Civ. P. 30(b)(6) discovery deposition testimony from Opposer, through its designee Jennifer Farnes, with exhibits (125 TTABVUE).

Opposer and Applicant make numerous evidentiary objections in Appendices of their briefs. To the extent the parties raise for the first time in their briefs procedural objections (such as lack of authentication or foundation), “of the type that could have been remedied or obviated” had they been made earlier or had they been addressed during depositions, we consider the objections untimely. We decline to exclude the exhibits and testimony on this basis. *Cf. Moke Am. LLC v. Moke USA, LLC*, Opposition No. 91233014, 2020 TTAB LEXIS 18, *19-20 (TTAB 2020) (an applicant waived or forfeited its objection to sales records where the applicant “failed to assert its objection promptly after Opposer introduced the Todd Rome declaration into evidence,” and then “Applicant elected to cross-examine Todd Rome but did not raise its objection that Opposer failed to lay the foundation for the business records exception to the hearsay rule during or by the end of the cross-examination deposition.”).

The parties also lodge objections and arguments relating to lack of personal knowledge, potential bias, relevance, hearsay, “the Best Evidence Rule,” and “unreliability” or “inaccuracy.” Given their nature, for the most part, these types of objections go more to the reliability and persuasiveness of the evidence, rather than its admissibility. We remind the parties that in this administrative proceeding, “the Board is capable of assessing the proper evidentiary weight to be accorded the testimony and evidence, taking into account the imperfections surrounding the admissibility of such testimony and evidence. Thus, except as noted below, we have considered the evidence, keeping in mind the objections, and have accorded whatever probative value the testimony and evidence merits.” *U.S. Playing Card Co. v. Harbro, LLC*, Opp. 91162078, 2006 TTAB LEXIS 484, *9-10 (TTAB 2006).

However, because of the nature of the objection and the significance of its subject matter, we here decide Applicant’s objection to Opposer’s proffered “Confusion Log,” submitted through testimony by Jeremy Farnes and Janelle McNeil.¹¹ Opposer points to the log in passing in its Brief, stating, “Opposer has maintained business records reflecting other consumers who confused Applicant’s jewelry for Opposer’s jewelry due to the similarity of their marks.”¹² Mr. Farnes prefaced his discussion of the Confusion Log by stating, “Although I have not been involved tracking confusion at [Opposer], I have reviewed this log that is referred to by my wife Jennifer as the

¹¹ 71 TTABVUE (Jeremy Farnes Declaration).

¹² 149 TTABVUE 51 (Opposer’s Brief).

‘Confusion Log.’”¹³ Ms. McNeil testified that she did not enter the information into the log, was not familiar with instructions given to employees regarding entries in the log, and was not able to explain all of the entries.¹⁴ Applicant objects to the log as hearsay, and contends that it cannot qualify for the business record exception in Federal Rule of Evidence 803(6) because no “custodian or [other] qualified witness” authenticated it and because it is not trustworthy. Applicant highlights in its Brief examples of unexplained entries in the log, along with testimony by Mr. Farnes or Ms. McNeil indicating their uncertainty about the meaning of such entries.¹⁵ Based on the testimony of Mr. Farnes and Ms. McNeil surrounding the Confusion Log, we are not satisfied that it qualifies for the asserted business record exception. We lack testimony from the custodian of the log or another qualified witness, and the inability of the sponsoring witnesses to explain the entries on the log undercuts its reliability as evidence of underlying actual confusion. The objection is sustained.

We need not rule on Applicant’s objection, on the ground of improper rebuttal testimony, to Opposer’s proffered expert testimony of Elizabeth Ikonen. The subject matter of her testimony is the non-functionality of the revolutionjewelry.com website at a particular time in the past, based on Wayback Machine archived records. Applicant agrees that the site was inactive during this time.¹⁶ The objection to the testimony is moot.

¹³ 71 TTABVUE 21-22(Jeremy Farnes Declaration).

¹⁴ 122 TTABVUE

¹⁵ 153 TTABVUE 65-66.

¹⁶ 153 TTABVUE 69.

III. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action must be established in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1373 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 n.4 (2014)). An opposer may oppose registration of a mark when it demonstrates an interest falling within the zone of interests protected by the statute, and a reasonable belief in damage that is proximately caused by registration of the mark in the challenged application. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020).

Here, Opposer must demonstrate a real interest in the proceeding and a reasonable belief of damage. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1377 (Fed. Cir. 2012). Applicant has not challenged Opposer's entitlement.

As discussed in more detail below, Opposer has established its common law use of, and pending applications for, its pleaded marks in connection with goods that overlap with Applicant's goods.¹⁷ See *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1029 (CCPA 1982) (plaintiff may establish standing by proving a real commercial interest in its own marks and a reasonable belief that it would be damaged (e.g., a claim of likelihood of confusion that is not wholly without merit)); *Giersch v. Scripps Networks Inc.*, Canc. No. 92045576, 2009 TTAB LEXIS 72, *7 (TTAB 2009) (common law use of similar mark sufficient to establish standing). Opposer also established common law rights in, and identified in its applications,

¹⁷ 73 TTABVUE 5 (Farnes Declaration); 72 TTABVUE (pleaded application records).

retail jewelry store services. As previously noted, Applicant's Answers include admissions that "the parties' marks are similar" and "the parties' goods are similar."¹⁸

Thus, Opposer has asserted a plausible likelihood of confusion claim against the involved applications, thereby showing a real interest in this proceeding beyond that of a mere intermeddler, and a reasonable basis for its belief of damage. We therefore conclude that Opposer has proven its entitlement to bring the opposition proceedings.

IV. Priority

Priority is the critical issue in both the opposition proceedings. To prevail on its likelihood of confusion claim, Opposer first must establish priority. *See Embarcadero Techs., Inc. v. RStudio, Inc.*, Opp. No. 91193335, 2013 TTAB LEXIS 6, *28 (TTAB 2013) (citing *Hydro-Dynamics Inc. v. George Putnam & Co. Inc.*, 811 F.2d 1470 (Fed. Cir. 1987)). As the plaintiff in this proceeding, Opposer bears the burden of proof. *Bose Corp. v. QSC Audio Prods.*, 293 F.3d 1367, 1370 (Fed. Cir. 2002) ("[T]he burden of proof rests with the opposer . . . to produce sufficient evidence to support the ultimate conclusion of [priority of use] and likelihood of confusion"); *Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 1359 (Fed. Cir. 2001) ("[I]n opposition proceedings, the opposer bears the burden of establishing that the applicant does not have the right to register its mark").

To establish priority, Opposer must prove by a preponderance of the evidence that, vis-à-vis the adverse party, it owns proprietary rights in "a mark or trade name previously used in the United States . . . and not abandoned . . ." *Threshold.TV, Inc.*

¹⁸ 4 TTABVUE (in both opposition records).

v. Metronome Enters., Inc., Opp. No. 91152662, 2010 TTAB LEXIS 314, *13-14 (TTAB 2010); *see also Hydro-Dynamics*, 811 F.2d at 1472. In this case, Opposer does not rely on ownership of a pleaded federal registration for priority, but instead relies on common law rights in its marks. Opposer must therefore prove that it owns a trademark that was used in connection with its pleaded “sale of custom jewelry” and various jewelry goods, and not abandoned, prior to Applicant’s constructive use date of January 18, 2017 when it filed the applications, or any earlier priority date Applicant proves.¹⁹ *Life Zone Inc. v. Middleman Grp. Inc.*, Opp. No. 91160999, 2008 TTAB LEXIS 37, *21 (TTAB 2008); *see also* 15 U.S.C. § 1057(c); *Larami Corp. v. Talk to Me Programs, Inc.*, Opp. No. 85987, 1995 TTAB LEXIS 13, *14 (TTAB 1995) (parties may rely on the constructive use filing dates for purposes of priority). “The allegation in an application for registration, ... of a date of use is not evidence on behalf of the applicant ...; a date of use of a mark must be established by competent evidence.” Trademark Rule 2.122(b)(2), 37 C.F.R. § 2.122(b)(2).

A. Opposer’s Priority Claim

Opposer claims November 8, 2013, as its priority date as to all three of its pleaded marks. On this date, Opposer opened its retail store and made sales under the marks. Opposer establishes priority as of at least this date through voluminous testimony and documentary evidence, some examples of which are:

¹⁹ Opposer’s pending applications were filed February 18, 2017, a month after Applicant’s applications, so Opposer’s constructive use filing date is later than Applicant’s.

- Kathryn Grill Hoeppe, a family friend of Opposer’s founders and owners, testified in detail about the development of, and her graphic design work on, the logos in the 305 Mark and 301 Mark. This work occurred between May 2013 and August 2013. Ms. Hoeppe also testified that her husband became the “first official customer of Revolution Jewelry Works” by ordering custom earrings for her that she received “for Christmas 2013” “in a black giftbox with RJW’s logo printed on the box.” Her declaration includes as exhibits some corroborating documentation, including a screen shot of her file directory showing dated logo drafts, and various “rounds of drafts and edits” of the logos.²⁰
- Frank Charles Hoeppe, III, husband of Ms. Hoeppe, and family friend of Opposer’s founders and owners, testified about his custom jewelry order from Opposer placed “before October 2013” and delivered “sometime in December but before Christmas of 2013.” He states, “The earrings were in a black box with the Revolution Jewelry Works’ logo printed on the box.” As confidential exhibits, his declaration includes receipts for the custom jewelry dated in December 2013.²¹
- Opposer’s co-founder and co-owner, Jeremy Farnes, testified that the 301 Mark, the 305 Mark and the 311 Mark have been in continuous use since

²⁰ 61 TTABVUE (K. Hoeppe Declaration).

²¹ 62 & 63 (confidential) TTABVUE (F. Hoeppe Declaration).

2013 on jewelry and in connection with jewelry-related services.²² He recounts use of the 301 Mark, the 305 Mark and the 311 Mark in October 2013 in connection with a custom jewelry design and purchase order, and he provides details about the manner of use and corroborating documentation. His documentation includes the dated receipt bearing the 301 Mark and the 311 Mark for the December 2013 purchase by Mr. Hoepfel, described above. Numerous other receipts including the 301 Mark and the 311 Mark for custom jewelry, dated in October and November 2013, are attached as exhibits. Other exhibits include contracts bearing the 301 Mark and the 311 Mark for custom jewelry, dated in late 2013.²³

- Opposer’s Shop Manager and jeweler, Janelle McNeil, testified that since she began working for Opposer in 2014, she has “observed within the store and the shop, the name and logos of RJW on signs in the store and on brochures on or near the jewelry cases where we keep our jewelry available for retail purchase.”²⁴
- Angela Marie Johnson, of Stellar Specialty Printing, LLC, testified that in September 2013 Opposer was “close to opening [its] jewelry business,” placed a print order for shirts, pens and other types of promotional merchandise bearing Opposer’s 305 Mark and 301 Mark. Opposer placed

²² 73 TTABVUE (confidential Farnes Declaration).

²³ *Id.* at 9, 51-86, 124-25, 137, 140, 143, 147-50.

²⁴ 64 & 65 (confidential) TTABVUE (McNeil Declaration).

other similar orders for goods bearing the marks in October 2013, May 2014, and September 2014. Ms. Johnson attached as exhibits the invoices for the orders and the logo designs Opposer provided (of the marks) by .jpg file for printing.²⁵

- Trace Shelton, Editor-in-chief of InStore Magazine, testified that “[s]ince late 2013, InStore Magazine has published more than 80 articles and columns that reference Revolution Jewelry Works by its name,” with search results and exemplary articles attached, including from 2013, that generally corroborate use of Opposer’s 311 Mark.²⁶
- Tom Frezza, of ACME Pawn in Colorado Springs, Colorado, testified that ACME Pawn has used Opposer as a jewelry appraiser since at least August 2013, and he attached appraisal certificates dated August 1, 2013, September 2, 2013, November 20, 2013, and December 17, 2013, all bearing Opposer’s 301 Mark and 311 Mark.²⁷

Overall, we find the record more than sufficient to prove Opposer’s November 8, 2013 priority date for all three pleaded marks. The supporting testimony by multiple witnesses is detailed, clear and consistent, and the testimony is corroborated by voluminous documentation. Opposer’s established priority date therefore predates

²⁵ 60 TTABVUE (Johnson Declaration).

²⁶ 66 TTABVUE.

²⁷ 58 TTABVUE (Frezza Declaration).

Applicant's constructive use filing date of the applications for the 218 Mark and the 185 Mark.

B. Applicant's Priority Claim

Applicant's priority claim rests on its alleged use of the marks as trademarks for jewelry, as identified in the applications for the 218 Mark and the 185 Mark.

1. Applicant's 218 Mark

Turning to Applicant's alleged priority, Applicant has admitted that "the 218 Mark was not used by Applicant prior to May 14, 2014 [the alleged first use date in the applications]." Applicant also admitted that the mark was not used by Mr. Platt prior to May 14, 2014.²⁸ Thus, as to the 218 Mark, we find that Opposer has priority.²⁹

2. Applicant's 185 Mark

However, as to the 185 Mark, Applicant asserts a priority date earlier than Opposer's priority date, and earlier than the date Applicant previously alleged as its date of first use in the application for the 185 Mark. Without specifying a precise date in its Brief, Applicant asserts that "Applicant's use of its mark predates Opposer's use by at least several years."³⁰ In Applicant's answers to interrogatories, it asserts that first use of the 185 Mark occurred in December 2009 "on its website."³¹

²⁸ 68 TTABVUE 11-12 (Responses to Requests for Admission). The wording "was not used by" appears in both requests for admission, and is clear and well defined.

²⁹ Regardless, the same reasons that Applicant fails to establish its earlier asserted priority date for the 185 Mark, discussed below, also apply to Applicant's 218 Mark.

³⁰ 152 TTABVUE 6 (Applicant's Brief).

³¹ 68 TTABVUE 49 (answer to Interrogatory No. 5).

Because Applicant’s asserted priority date for the ‘185 Mark predates the alleged first use date of May 14, 2014 in the application for the 185 Mark, Applicant must prove this earlier date by clear and convincing evidence. *Martahus v. Video Duplication Servs., Inc.*, 3 F.3d 417, n.7 (Fed. Cir. 1993) (“VCDS alleges use prior to the date that it apparently listed in its registration application as its date of first use, i.e., prior to May of 1985, and therefore VCDS has the burden of establishing that use by clear and convincing evidence instead of mere preponderance of the evidence”); *Hydro-Dynamics Inc.*, 811 F.2d at 1473 (“Where an applicant seeks to prove a date earlier than the date alleged in its application, a heavier burden has been imposed on the applicant than the common law burden of preponderance of the evidence”). “The reason for such an increased evidentiary burden, supported by common sense, is that a change of position from one considered to have been made against interest at the time of filing of the application, requires enhanced substantiation.” *Id.* (cleaned up). We therefore agree with Opposer that Applicant’s Brief mischaracterizes the applicable burdens of proof surrounding the priority determination in this case.³² Until Applicant proves by clear and convincing evidence its use of the 185 Mark by this earlier date – which Applicant must do to overcome Opposer’s established November 8, 2013 priority date – there is no burden on Opposer to prove earlier use of its pleaded marks.

³² For example, Applicant incorrectly asserts that “in order to prevail, Opposer must show that Applicant did not begin using the REVOLUTION JEWELRY mark prior to, at the earliest, August 2013.” 152 TTABVUE 23 (Applicant’s Brief). *See also* 152 TTABVUE 38 (“Opposer fails to carry its burden to show abandonment [by Applicant]”).

Mr. Platt's testimony – as discussed in Applicant's Brief – provides the following factual background relevant to Applicant's priority claim. Applicant was formed as a legal entity on February 24, 2011, but claims to have acquired rights in the marks at issue from another entity. Mr. Platt and a business partner, Ben Noble, formed Revolution Jewelry, LLC as a Wyoming LLC in February 2006.³³ In December 2007, Mr. Platt registered Revolution Jewelry LLC as a foreign LLC with the Utah Division of Corporations, and the registration expired November 17, 2008.³⁴ Mr. Platt's business partnership with Mr. Noble ended in 2009, and the Wyoming LLC was administratively dissolved in April 2009.³⁵ Mr. Platt testified that he assumed all assets and obligations of the Wyoming LLC, including the "REVOLUTION JEWELRY word and design marks."³⁶

Applicant states in its Brief that:

- "[b]y at least as early as December 2009, ... Mr. Platt was personally doing business under the name Revolution Jewelry and selling men's rings under the REVOLUTION JEWELRY mark."³⁷
- Mr. Platt formed Applicant on February 24, 2011,

³³ 105 TTABVUE 19-21 (Platt Declaration, Exhibit B) (Articles of Organization for the Wyoming LLC).

³⁴ 105 TTABVUE 23 (Platt Declaration, Exhibit C) (Utah business search records regarding Revolution Jewelry, LLC).

³⁵ 105 TTABVUE 25-26 (Platt Declaration, Exhibit D) (Wyoming Secretary of State record).

³⁶ 105 TTABVUE 4 (Platt Declaration).

³⁷ 152 TTABVUE 14 (Applicant's Brief).

- Applicant “then began marketing and selling jewelry under the REVOLUTION JEWELRY mark and otherwise doing business as REVOLUTION JEWELRY.”³⁸
- the background on these various legal entities only “add[s] color and context to [Applicant’s] own use of the REVOLUTION JEWELRY mark.”³⁹
- “[i]t does not matter whether any rights were assigned to Applicant because Applicant itself used the REVOLUTION JEWELRY mark in connection with jewelry starting from its formation in February 2011.”⁴⁰

Applicant’s evidence of priority rests heavily on Mr. Platt’s testimony.⁴¹ Oral testimony alone can establish priority of use in a trademark proceeding if “the testimony is by a witness or witnesses personally conversant with the facts, and that it is clear, convincing, consistent, and sufficiently circumstantial to convince the trier of fact of the probative value thereof.” *Liquacon Corp. v. Browning-Ferris Indus.*, 1979 TTAB LEXIS 39, *39 (TTAB 1979). Such testimony must not be characterized by “inconsistencies, contradictions and uncertainties.” *Powermatics, Inc. v. Globe Roofing Prods. Co.*, 341 F.2d 127 (CCPA 1965). As discussed in more detail below, Applicant’s testimony does not meet the requisite standard.

Applicant also points to documentary evidence allegedly corroborating Mr. Platt’s testimony as to prior use, but none of the documents actually show use of the mark

³⁸ 152 TTABVUE 15 (Applicant’s Brief).

³⁹ 152 TTABVUE 35 (Applicant’s Brief).

⁴⁰ 152 TTABVUE 35-36 (Applicant’s Brief).

⁴¹ Although Mr McDaniel’s declaration refers to his awareness of Mr. Platt using the REVOLUTION JEWELRY mark in 2012, on cross-examination he clarified that this was not based on his own personal knowledge, and only beginning in June 2014 did he become directly aware of the mark being used. 143 TTABVUE 114-15 (McDaniel Deposition).

on the date alleged. We find that they fall short of corroborating the testimony so as to meet Applicant's clear and convincing burden of proof. We discuss the documentary evidence in detail below.

We must "look at the evidence as a whole, as if each piece of evidence were part of a puzzle which, when fitted together, establishes prior use." *W. Fla. Seafood Inc. v. Jet Rests. Inc.*, 31 F.3d 1122, 1125-26 (Fed. Cir. 1994). Opposer highlights the lack of documentary evidence that shows Applicant's actual use of the mark on goods or their packaging. We agree with Opposer's analysis, and find that Applicant has not proved that it has used the mark as a trademark for jewelry.⁴² While Mr. Platt's declaration refers to "REVOLUTION JEWELRY branded" goods, the record includes no examples of what that alleged branding looked like. And Applicant's evidence generally points more to use as a business name than as a mark for jewelry.

Mr. Platt states in his declaration:⁴³

In 2005, my then-business partner, Ben Noble, and I began selling jewelry under the REVOLUTION JEWELRY word mark.

...

On February 8, 2006, Mr. Noble and I organized Revolution Jewelry, LLC as a Wyoming limited liability company (the

⁴² Applicant did not plead trade name use as a basis for priority, as would be required in an inter partes proceeding to rely on such use. *Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, Opp. 91188816 (parent), 2013 TTAB LEXIS 439, *19 (TTAB 2013). Nor was the issue tried by implied consent. See TBMP § 507.03(b).

⁴³ 105 & 106 (confidential) TTABVUE (Platt Declaration).

“Wyoming LLC”) for the purpose of selling jewelry under the REVOLUTION JEWELRY word and design marks.⁴⁴

...

In 2009, the business partnership between myself and Mr. Noble ended. On April 12, 2009, the Wyoming entity Revolution Jewelry LLC was administratively dissolved by the State of Wyoming.

...

Upon the end of our relationship, I assumed all the assets and obligations of the Wyoming LLC including, but not limited to, the Revolution Jewelry business name, the REVOLUTION JEWELRY word and design marks, Revolution Jewelry LLC’s customers, the Website, other assets, debts, and liabilities. I continued to sell jewelry under the Revolution Jewelry business name and the REVOLUTION JEWELRY word and design marks to jewelry stores and directly to end users through the internet as we had before the business relationship between me and Mr. Noble ended. By at least as early as December 2009, I was personally doing business under the name Revolution Jewelry and selling men’s rings under the REVOLUTION JEWELRY marks.

...

During that time [2009-2014], I used different brands to sell different kinds of jewelry. For example, I used the mark STONEBROOK JEWELRY to sell men’s rings that were of a very traditional style. I used the mark ORIGIN JEWELRY to sell women’s jewelry. And I used REVOLUTION JEWELRY to sell custom rings with non-traditional inlays or made of alternative metals.

...

During the years from 2011 through 2014: (a) I continued to sell REVOLUTION JEWELRY branded jewelry to jewelry stores for resale to their customers; (b) I continued sell REVOLUTION JEWELRY branded jewelry to

⁴⁴ The declaration addresses both the 185 Mark, referred to as the “word” mark and the 218 Mark, referred to as the “design” mark.

individuals who were referred through word of mouth advertising; (c) I began selling REVOLUTION JEWELRY branded rings online through shopping sites such as Etsy.com; and (d) I continued to use the REVOLUTION JEWELRY mark on invoices and emails, including emails to jewelry stores, customers, and manufacturers.

[]Documents relating to sales made during the years 2011 through 2014 are attached as exhibits:

(a) Exhibit G is recreations [footnote omitted] of packaging slips I included with shipments of REVOLUTION JEWELRY branded jewelry. These packing slips all bore the old REVOLUTION JEWELRY design mark. These packaging slips are labeled with dates between December 1, 2009 and August 16, 2013.

(b) Exhibit H is a message string dated March 21, 2011, referencing orders for jewelry to be sold under the REVOLUTION JEWELRY mark.

(c) Exhibit I is an email string from March 2013 regarding an order placed for jewelry to be resold under the REVOLUTION JEWELRY mark. I sent and received these emails from and to the email address info@revolutionjewelry.com. In my email dated March 12, 2013, I represent that I service “about 120 jewelry stores and web sites here in the US and around the world.”

(d) Exhibit J is an email from PayPal to me at info@revolutionjewelry.com, dated March 28, 2013. The email confirms that PayPal sent a payment to info@revolutionjewelry.com.

...

From 2009 to the present day, I have meticulously maintained a spreadsheet identifying sales of REVOLUTION JEWELRY branded rings. I have also separately tracked the sales of STONEBROOK JEWELRY branded rings and ORIGIN JEWELRY branded rings.... Attached as Exhibit X is a true and correct copy of that spreadsheet detailing each and every sale made of REVOLUTION JEWELRY branded rings.

...

At no point since December 2009 have I, or my businesses Revolution Jewelry LLC or Stonebrook Jewelry LLC, ceased using the mark REVOLUTION JEWELRY in connection with men's rings.

□At no point since December 2009 have I, or my businesses Revolution Jewelry LLC or Stonebrook Jewelry LLC, ceased using the mark REVOLUTION JEWELRY or ever intended to abandon the mark.⁴⁵

As corroboration of Mr. Platt's testimony regarding priority, Applicant points to various documents, which we address in turn. *See Exec. Coach Builders, Inc. v. SPV Coach Co., Inc.*, Opp. No. 91212312, 2017 TTAB LEXIS 201, *36 (TTAB 2017) ("Oral testimony is strengthened by corroborative documentary evidence"). First, Applicant notes the 2005 domain name registration for REVOLUTIONJEWELRY.COM as of 2005. However, the registration gives no indication of use of REVOLUTION JEWELRY as a trademark for jewelry.⁴⁶ Mere use of wording within a domain name address does not constitute trademark use. *See United Glob. Media Grp., Inc., v. Tseng*, Opp. No. 91200786, 2014 TTAB LEXIS 348, *31-32 (TTAB 2014) (invoice for domain name does not show trademark use); *In re Eilberg*, Serial No. 75162788, 1998 TTAB LEXIS 522, *6 (TTAB 1998) ("the asserted mark WWW.EILBERG.COM merely indicates the location on the Internet where applicant's Web site appears. It does not separately identify applicant's legal services as such"); *see also Lockheed Martin Corp. v. Network Sol'ns, Inc.*, 985 F. Supp. 949, 956 (C.D. Cal. 1997) ("When a domain name is used only to indicate an address on the Internet, the domain name

⁴⁵ A prior Board order sanctioning Opposer for a violation of the protective order precluded Opposer from cross-examining Mr. Platt. 51 TTABVUE.

⁴⁶ 105 TTABVUE 16-17 (Platt Declaration, Exhibit A).

is not functioning as a trademark ... domain names, like trade names, do not act as trademarks when they are used merely to identify a business entity; in order to infringe they must be used to identify the source of goods or services”). This same principle applies to Exhibits I and J of the Platt Declaration, on which Applicant also relies as corroboration. These exhibits merely show info@revolutionjewelry.com as the email address used in connection with jewelry transactions.⁴⁷ Neither the email communication in Exhibit I nor the PayPal transaction receipt in Exhibit J gives any indication of use of REVOLUTION JEWELRY as a trademark for jewelry.

Applicant also relies on the 2012 Wayback Machine screenshot showing its website.⁴⁸ However, the screenshot merely shows a site listing types of jewelry or materials at the web address revolutionjewelry.com. It does not include any images of jewelry bearing the REVOLUTION JEWELRY mark, displays showing the mark associated with the goods, or other trademark or even any service mark usage of that mark.⁴⁹ Finally, we note Applicant’s admission⁵⁰ and Mr. McDaniel’s testimony that from February 2011 to June 2014, no jewelry was marketed on Applicant’s Revolution

⁴⁷ 106 TTABVUE 62-68 (Platt Declaration, confidential Exhibits I & J).


⁴⁸ Mr. Platt attested to the accuracy of the screenshot, except that “[t]he images were not captured.” 105 TTABVUE 5. *See Spiritline Cruises LLC v. Tour Mgmt. Servs. Inc.*, Opp. No. 91224000, 2020 TTAB LEXIS 3, at *12-13 (TTAB 2020) (“[O]ther witnesses associated with the underlying webpages [in Wayback Machine screenshots] that were archived also provided corroborating testimony to support authenticity and the accuracy of the captures as of the dates in question”).

⁴⁹ 105 TTABVUE 28-29 (Platt Declaration, Exhibit E). The specimen of use in the application file also shows the mark at the top of a website, but does not show any jewelry bearing the mark or any jewelry packaging, tags or labels that bear the mark.

⁵⁰ 68 TTABVUE 21 (Responses to Request for Admission Nos. 47-49).

Jewelry website, and no sales were completed via the Revolution Jewelry website -- Mr. McDaniel stated that there was “[n]o way to do so.”⁵¹

Although in discovery, Applicant purported to provide “packaging slips” for goods sold under the mark (Exhibit G), Applicant later disclosed that they were “recreations” for purposes of discovery, rather than originals or copies of originals.⁵² Such documentation, created after the fact for litigation purposes, obviously does not corroborate use of the mark as of the earlier date alleged. In addition, even putting that point aside, these recreations do not show trademark use of REVOLUTION JEWELRY for jewelry. Applicant designated the packaging slips confidential, so they are not excerpted here. We note, however, that the only place that “Revolution Jewelry” appears is underneath the message “Thank You for your business,” and as part of the domain name revolutionjewelry.com.⁵³ None of the goods listed on the slips under “DESCRIPTION” are referred to as REVOLUTION JEWELRY items. Mr. Platt states that the “packing slips all bore the old REVOLUTION JEWELRY design mark,” presumably referring to the domain name “revolutionjewelry.com” along with

a design: .⁵⁴ This disconnect between Mr. Platt’s characterization of the mark and what appears in the mark on the slips⁵⁵ highlights his testimony’s

⁵¹ 143 TTABVUE 103 (McDaniel Deposition).

⁵² 105 TTABVUE 5, n.1 (Platt Declaration, stating of Exhibit G, “These are recreations of the packaging slips because the originals were lost....”).

⁵³ 106 TTABVUE 32-57 (confidential Platt Declaration, Exhibit G).

⁵⁴ 105 TTABVUE 6 (Platt Declaration); 106 TTABVUE, confidential Exhibit G).

⁵⁵ We note as an aside that what appears on the packing slips is not the legal equivalent of the 185 Mark, and regardless, Applicant did not plead or argue the tacking doctrine for

lack of clarity and uncertainty regarding specifics to support priority. The fact that these recreated packing slips do not reflect trademark use of REVOLUTION JEWELRY, when Mr. Platt and Applicant suggest that they do, casts doubt on the reliability of Mr. Platt's and Applicant's representations about "REVOLUTION JEWELRY branded" goods.

As for what Applicant and Mr. Platt describe as an email message string referencing orders for jewelry to be sold under the REVOLUTION JEWELRY mark (confidential Exhibit H), we again find this document does not corroborate use of REVOLUTION JEWELRY as a trademark for jewelry for purposes of priority. Given the document's confidentiality designation, we only generally describe the relevant aspects of Exhibit H. Both the sender and recipient are shown as "Eric Platt," although the message reflecting order information begins with, "Hey Ben-." The message shows a revolutionjewelry.com email stem, and opens with, "Here is our order in formation [sic]. You may want to find out what the totals are before placing some of the items.... AAB, Bright, and some of Bvibe are a must order." The message then refers to "Bright (Revolution Order) -Pay with Revolution-," "Bvibe (Revolution Order) -Pay with Revolution-," "YZ Company (Revolution Order) [number omitted] - Pay with Revolution Funds-," and "Frontier (revolution Jewelry) [number omitted] - Pay with Pay [sic] with Revolution-."⁵⁶ Another part of the email string refers to "the

purposes of priority. *See, e.g., DrDisabilityQuotes.com, LLC v. Krugh*, Canc. No. 92074232, 2021 TTAB LEXIS 70, *19 (TTAB 2021) (noting that a "Respondent must properly plead tacking" and referring to the "stringent elements of tacking").

⁵⁶ 106 TTABVUE 58-61 (confidential Platt Declaration, Exhibit H).

Revolution card info.”⁵⁷ We find that the only references to REVOLUTION JEWELRY appear to be as part of a web address and likely as a trade name. None of the jewelry is referred to as REVOLUTION JEWELRY, and instead appears to be referred to by other names such as “Bright” and “Bvibe.” We find no use of REVOLUTION JEWELRY as a trademark for jewelry, or even any suggestion of such use, on Exhibit H.

Contrary to Applicant’s contentions in its Brief, its confidential tax filings simply do not “reflect[] the sale of REVOLUTION JEWELRY branded rings” in a way that would support priority.⁵⁸

Applicant offers confidential Exhibit X as a spreadsheet compendium of sales of REVOLUTION-branded jewelry,⁵⁹ with Mr. Platt stating that it was “meticulously” maintained with “each and every sale made of REVOLUTION JEWELRY branded rings.”⁶⁰ However, Applicant otherwise indicates that it lost its electronic records in June 2014 when it migrated servers,⁶¹ and Applicant does not explain why Exhibit X alone survived. Other aspects of Exhibit X also contribute to its inadequacy to support Applicant’s priority claim. For example, although Mr. Platt states that Exhibit X pertains only to REVOLUTION-branded jewelry (as opposed to other brands used by Applicant), Exhibit X does not so indicate on its face, and does not refer to

⁵⁷ *Id.*

⁵⁸ 153 TTABVUE 18-19 (Applicant’s Brief); 106 TTABVUE (confidential Exhibits K-O).

⁵⁹ 106 TTABVUE 539 (confidential Platt Declaration, Exhibit X).

⁶⁰ 105 TTABVUE 9, 49; 106 TTABVUE (Platt Declaration); 152 TTABVUE 31 (Applicant’s Brief).

⁶¹ 103 TTABVUE 2; 105 TTABVUE 6-7.

REVOLUTION JEWELRY at all. Also, significantly, despite purportedly including “each and every” relevant sale, Exhibit X does not show the three sales to Applicant’s only customer witnesses, Mr. Wardle, Ms. Smith, and Mr. Riggs, who, as set out below, attest to purchases from “REVOLUTION JEWELRY”.⁶²

We now turn to the allegedly corroborating customer testimony. We begin with Ms. Smith’s declaration where she testified that she is “familiar with the Applicant in this matter, Stonebrook Jewelry, LLC, doing business as Revolution Jewelry,” that she purchased “a men’s ring from Revolution Jewelry” in August 2014, and “understood [she] was purchasing a ring from Revolution Jewelry.”⁶³ She disclosed during her deposition that she is married to Eric Platt’s brother.⁶⁴ As to the specifics about her purchase of a ring from Mr. Platt, under deposition questioning, she stated that she “bought it from Eric,” but does not recall, or does not know, how she paid for it, whether she requested or received a receipt, how much she spent on it, whether there were insurance documents, and whether there was a warranty.⁶⁵

Second, Mr. Riggs testified in his declaration that he is “familiar with the Applicant in this matter, Stonebrook Jewelry, LLC, doing business as Revolution Jewelry,” that “[o]n or about June 2011, [he] purchased a men’s ring from Revolution

⁶² 106 TTABVUE (confidential Platt Declaration, Exhibit X); 107 TTABVUE 2; 108 TTABVUE 2; 110 TTABVUE 2. An entry marked “BILL RIGGS ORDER” for a customer identified as “Alex Riggs” appears on Exhibit X with a date of February 7, 2017, 106 TTABVUE 612, but that does not match the purchase information provided by William Riggs in his declaration and deposition.

⁶³ 108 TTABVUE 2-3 (Smith Declaration).

⁶⁴ 144 TTABVUE 11 (Smith Deposition).

⁶⁵ 144 TTABVUE 41-32 (Smith Deposition).

Jewelry.”⁶⁶ Mr. Riggs disclosed during his deposition that he is Eric Platt’s first cousin.⁶⁷ As to the specifics of his purchase of a ring in 2011, he testified that he spoke with Mr. Platt about the request received from Applicant’s attorney for testimony, but does not recall what they discussed.⁶⁸ Mr Riggs also did not recall who contacted him about testimony, what the email said, whether he spoke with the person who contacted him about the matter, and whether he drafted his own declaration or whether someone else drafted it for him.⁶⁹ He states that he “purchased a men’s ring from Revolution Jewelry,” but does not provide further detail about whether and where the mark appeared on or in connection with the goods.⁷⁰ In his deposition, he noted “I only know them as Revolution Jewelry. So I wasn’t familiar with Stonebrook.”⁷¹

Third, Mr. Wardle testified in his declaration that he is “familiar with the Applicant in this matter, Stonebrook Jewelry, LLC, doing business as Revolution Jewelry,” that “[s]ometime in 2012, [he] purchased a men’s ring from Revolution Jewelry” and that he “understood [he] was purchasing a ring from Revolution

⁶⁶ 109 TTABVUE 2-3 (Riggs Declaration).

⁶⁷ 145 TTABVUE 10 (Riggs Deposition).

⁶⁸ 145 TTABVUE 16-17 (Riggs Deposition).

⁶⁹ 145 TTABVUE 17-19 (Riggs Deposition).

⁷⁰ 109 & 145 TTABVUE (Riggs Declaration & Deposition).

⁷¹ 145 TTABVUE 28 (Riggs Deposition). Mr. McDaniel separately confirmed that “Stonebrook does business as Revolution Jewelry.” 146 TTABVUE 8 (McDaniel Deposition).

Jewelry.”⁷² He disclosed during his cross-examination deposition that he is Eric Platt’s brother-in-law.⁷³

This customer testimony, meant to support Applicant’s priority for trademark use on jewelry, does not do so. Applicant’s customer witnesses, Mr. Wardle, Ms. Smith, and Mr. Riggs, did not testify about the nature of the alleged use of the mark, and did not show that, or indicate whether, their purchased rings bore the mark, or whether the mark appeared on any tag or packaging for the rings, or any display associated with such goods.⁷⁴ Ultimately, none of the witnesses described any trademark use of REVOLUTION JEWELRY for the rings they purchased. Instead, based on what the witnesses say about “Revolution Jewelry,” at best, their testimony tends to support trade name use of REVOLUTION JEWELRY. Also, each of the customer witnesses has a familial relationship to Mr. Platt, such that they are not disinterested, neutral consumers. And finally, as just noted, the purchases by these witnesses do not appear on the “meticulously” maintained spreadsheet of all sales of jewelry under the mark. Thus, in the context of the record as a whole, this testimony is characterized by “inconsistencies, contradictions and uncertainties.” *Powermatics*, 341 F.2d 127.

Ultimately, all of the testimony offered by Applicant, including that of Mr. Platt, is “not specific enough” with respect to the nature of the alleged use of REVOLUTION JEWELRY to assure us that it was used as a trademark for jewelry by the relevant

⁷² 107 TTABVUE 2-3 (Wardle Declaration).

⁷³ 142 TTABVUE 10 (Wardle Deposition).

⁷⁴ 107 TTABVUE; 108 TTABVUE; 110 TTABVUE.

date. *See, e.g., Elder Mfg. Co. v. Int'l Shoe Co.*, 194 F.2d 114, 118-19 (CCPA 1952) (testimony without specifics and without supporting documentation deemed too vague). The testimony is not clear, specific and certain. And, for the reasons set out above, we lack persuasive documentary evidence that Applicant used REVOLUTION JEWELRY as a mark for the identified goods prior to Opposer's established priority date. *See H.D. Lee Co. v. Maidenform, Inc.*, Opp. No. 91168309, 2008 TTAB LEXIS 21, *19-20 (TTAB 2008) ("Ms. Cahill's oral testimony is not specific enough with respect to camisoles, and it is without any corroborating documentary evidence, to persuade us" as to priority). When we consider the evidence as a whole -- the testimony in conjunction with the purported documentary evidence -- it fails to meet Applicant's clear and convincing burden of proof to establish priority of use as of this earlier date than Applicant alleged in the application.

V. Likelihood of Confusion

Given that Opposer established its priority, we turn to the merits of the determination under Section 2(d), which involves 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, 1361 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as "*DuPont* factors"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003). A likelihood of confusion analysis often focuses on the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of

differences in the essential characteristics of the goods and differences in the marks.”). For the analysis, we focus on Opposer’s common law 301 Mark and 311 Mark used in connection with jewelry. *See In re Max Cap. Grp. Ltd.*, Serial No. 77186166, 2010 TTAB LEXIS 1, *4-5 (TTAB 2010) (“if confusion is likely between those marks, there is no need for us to consider the likelihood of confusion with the [remaining mark]”).

We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortgage Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019). As previously noted, Applicant concedes in its Answers to the Notices of Opposition that the marks and goods are similar, the first and second *DuPont* factors. We nonetheless assess likelihood of confusion under the relevant factors because while the parties may admit underlying facts, the Board makes the ultimate legal conclusion regarding likelihood of confusion based on the record. *See Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 929 (CCPA 1978) (finding likelihood of confusion is legal conclusion and cannot be an admission because only facts may be admitted). Applicant’s Brief fails to make arguments against likelihood of confusion under these or any other specific *DuPont* factors.

A. The Goods, Trade Channels and Classes of Consumers

Under the second *DuPont* factor, Applicant’s goods are identified as “jewelry,” *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1324 (Fed. Cir. 2014) (analysis of a likelihood of confusion is based on the identification in the subject

application), and Opposer has established common law rights in its 301 and 311 Marks for jewelry. The goods are identical.

Under the third *DuPont* factor, Applicant's goods are unrestricted, and therefore are deemed to travel in all the ordinary trade channels for jewelry and to the typical classes of consumers of such goods. The trade channels certainly include jewelry stores and online retail sites such as Mr. Platt testified to Applicant using.⁷⁵ *See Stone Lion*, 746 F.3d at 1323; *see also Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 948 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, "we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods"). Opposer's jewelry under its common law 301 and 311 Marks is sold through "a 'brick-and-mortar' retail store and shop in Colorado Springs, Colorado and through Facebook, other internet sites as well as 'forum sales' through private jewelry web pages."⁷⁶ Thus, the trade channels overlap and are deemed to reach some of the same class of jewelry consumers.

B. Similarity of the Marks

We next compare the respective marks "in their entirety as to appearance, sound, connotation and commercial impression." *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). The test assesses not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall

⁷⁵ 105 TTABVUE 3-7 (Platt Declaration).

⁷⁶ 71 TTABVUE 12 (Farnes Declaration).


commercial impressions are so similar that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs.*, 668 F.3d at 1368.

“Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Inn at St. John’s*, Serial No. 87075988, 2018 TTAB LEXIS 170, *13 (quoting *In re Davia*, Serial No. 85497617, 2014 TTAB LEXIS 214, *4 (TTAB 2014), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. Sept. 13, 2019)). We also bear in mind that, given the identical goods, when turning to the marks, “the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992); *see also Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373 (Fed. Cir. 2018).


Applicant’s 185 Mark, REVOLUTION JEWELRY in standard characters, is highly similar to Opposer’s common law 311 Mark, REVOLUTION JEWELRY WORKS. The disclaimed word JEWELRY in Applicant’s mark, and the words JEWELRY WORKS in Opposer’s mark, all are generic or descriptive. Consumers tend not to rely on generic or descriptive matter to distinguish between marks, and we find they would not do so here. *See, e.g., In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407 (Fed. Cir. 1997) (in comparing THE DELTA CAFÉ to DELTA, the addition of the generic term CAFÉ does not create a different commercial impression). Thus, the dominant term REVOLUTION in both marks, which also is the first term in both marks, is identical. *See Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (the first part of a mark “is most likely to be impressed upon the mind of a purchaser and remembered.”); *see also Palm Bay Imps.*, 396 F.3d at 1372.

The second word in both marks, JEWELRY, also is identical. Although Opposer's mark contains the additional word WORKS at the end, the marks nonetheless look and sound quite similar overall. Because Applicant has applied to register the 185 Mark in standard characters, we presume it could be displayed in any presentation and font size or style, including what Opposer uses. As to connotation and commercial impression, we also find them nearly the same because of the common wording. The additional word WORKS perhaps adds the nuance of custom jewelry, but as already explained, this is not the type of difference that distinguishes source for consumers.

The image shows the Applicant's 218 Mark. The word "REVOLUTION" is written in a large, bold, black sans-serif font. Below it, the words "JEWELRY DESIGNS" are written in a smaller, all-caps, black sans-serif font. A thin horizontal line is positioned between the two lines of text.

Turning to Applicant's 218 Mark, , we find it highly

The image shows the Opposer's 301 Mark. The word "REVOLUTION" is written in a large, bold, black sans-serif font. Below it, the words "JEWELRY WORKS" are written in a smaller, all-caps, black sans-serif font. A thin horizontal line is positioned between the two lines of text.

similar to Opposer's common law 301 Mark, , as well as Opposer's common law 311 Mark, REVOLUTION JEWELRY WORKS. Here, the disclaimed wording JEWELRY DESIGNS in Applicant's mark, and the wording JEWELRY WORKS in Opposer's marks, are generic or descriptive. Again, the dominant term REVOLUTION in both marks, which also is the first term in the parties' marks, is identical. The next word in Applicant's and Opposer's marks, JEWELRY, also is identical. And the final disclaimed word DESIGNS in Applicant's mark, and the descriptive word WORKS in Opposer's marks, would not distinguish source for consumers. Contributing to the overall strong visual similarity between the 218 Mark and the common law 301 Mark in particular, they both display REVOLUTION in relatively large block lettering that appears in the same black-and-

red color combination, contain underlining of REVOLUTION, and display the remaining wording in much smaller block lettering underneath. Overall, Applicant's 218 Mark, on the one hand and Opposer's common law 301 Mark and 311 Mark, on the other hand, look and sound similar, and share similar meanings and commercial impressions.

C. Actual Confusion

Under the seventh and eighth factors, we consider evidence of actual consumer confusion, or the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *In re Guild Mortg. Co.*, Serial No. 86709944, 2020 TTAB LEXIS 17, *25 (TTAB 2020); *see also DuPont*, 476 F.2d at 1361 (identifying seventh and eighth *DuPont* factors as “[t]he nature and extent of any actual confusion,” and “[t]he length of time during and conditions under which there has been concurrent use without evidence of actual confusion”). The actual confusion factor considers “confusion as to source in the form of either a potential diversion of sales, damage to goodwill, or loss of control over reputation because of the similarity of the marks.” *Coach/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, Canc. No. 92051006, 2014 TTAB LEXIS 95, *75 (TTAB 2014). Evidence of actual confusion, where it exists, is highly persuasive in the likelihood of confusion analysis. *Edom Labs. Inc. v. Lichter*, Opp. No. 91193427, 2012 TTAB LEXIS 81, *24 (TTAB 2012) (“The existence of actual confusion is normally very persuasive evidence of likelihood of confusion and undercuts any possible claim that the marks are so dissimilar that there can be no likelihood of confusion.”).

Opposer introduced several forms of actual confusion evidence in addition to the previously discussed (and excluded) Confusion Log. First, the declaration testimony and deposition testimony of Opposer's consumer Hayden Lopez recount his confusion as a returning customer of Opposer's in August 2019.⁷⁷ He encountered Applicant's website, mistook it for Opposer's, and began correspondence and work on a custom design ring order.⁷⁸ He realized his source confusion only when he visited Opposer's brick-and-mortar store to follow up and learned, as he put it, that "the two companies are different jewelry companies with no affiliation, that I had confused the two companies based on their similar names and logos, and that because of my confusion I had been emailing and working with the wrong company [Applicant] and not with the company I intended [Opposer]."⁷⁹ His declaration included the mistaken correspondence with Applicant.⁸⁰

Second, Brent Cameron Hill, previously of KILO/KRXPColorado Springs Radio Broadcasters/Bahakel Communications ("KILO"), and Caraigh Clarkson, Senior Marketing Consultant for KILO, testified about their experience working with Opposer as a client for radio advertising in February 2016.⁸¹ Ms. Clarkson conducted Internet research about Opposer to compile information for the draft advertising spot, and Mr. Hill used that information to prepare a script that they sent to Opposer. They

⁷⁷ 56 & 123 TTABVUE.

⁷⁸ 56 TTABVUE 4-6.

⁷⁹ 56 TTABVUE 6 (Lopez Declaration).

⁸⁰ 56 TTABVUE 8-14 (Lopez Declaration Exhibit 1).

⁸¹ 57, 59 & 75 TTABVUE.

later realized, through notice from Jennifer Farnes of Opposer, that they had relied on Applicant's website and information instead of Opposer's, and "used information about the wrong company from the wrong website in the draft script."⁸² Their declarations include their email exchanges about the mix-up and the erroneous draft script.⁸³ While this reflects some confusion in Opposer's business dealings with an advertising outlet, it does not constitute actual consumer confusion.

Third, Ms. McNeil testified to her recollection that Opposer "started getting calls and other communications that were clearly meant for [Applicant's] 'RevolutionJewelry.com' [sic] website," including what she characterized as complaints about service and products.⁸⁴ She also recounted Opposer's receipt of "mailed products that customers purchased from [Applicant's] RevolutionJewelry.com website and then sent to [Opposer], seeking to have us repair broken or poorly manufactured jewelry that was purchased from [Opposer] and then sent to use by mistake after problems with the purchases were discovered by the customer."⁸⁵ We find this testimony credible but only probative to a point, given the lack of more specific details about the aggrieved customers and their confusion.

In "the proper factual setting, even just a few instances of actual confusion can provide very persuasive evidence of how and why confusion can occur." J. Thomas McCarthy, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION

⁸² 59 TTABVUE 6 (Clarkson Declaration).

⁸³ 57, 59 & 75 TTABVUE (exhibits).

⁸⁴ 64 TTABVUE 5 (McNeil Declaration).

⁸⁵ 64 TTABVUE 6 (McNeil Declaration).

§ 23:14 (5th ed. May 2024 update). In the context of the record as a whole and the parties' respective uses, we find the testimony above from Mr. Lopez and Ms. McNeil probative to demonstrate some actual consumer confusion between Applicant's and Opposer's marks, and "evidence of some instances of actual confusion can serve as a powerful demonstration that many more people are likely to be confused." *See In re ALP of South Beach, Inc.*, Serial No. 75819306, 2006 TTAB LEXIS 108, *12 (TTAB 2006).

D. Balancing the *DuPont* Factors

Weighing the *DuPont* factors for which there has been evidence and argument in this proceeding, *In re Charger Ventures LLC*, 64 F.4th 1375, 1383-84 (Fed. Cir. 2023), confusion is likely. The parties' respective goods are identical, and the trade channels and consumers overlap, weighing heavily in favor of a likelihood of confusion. As previously noted, when marks appear on identical goods, the marks need not be as similar to lead to likely confusion. *Century 21 Real Estate Corp.*, 970 F.2d at 877. The parties' marks share sufficient indicia of similarity that we find them similar overall. In addition, the previous occurrence of actual confusion between the parties' respective marks weighs heavily in favor of likely additional confusion in the future. However, even if the actual confusion factor were neutral, we still would reach the same conclusion in overall balancing. Given that the relevant *DuPont* factors weigh in favor of likely confusion, most of them heavily so, the challenged applications present a likelihood of consumer confusion.

VI. Conclusion

Opposer has established its statutory entitlement and priority and proven its likelihood of confusion claims in the oppositions.

Decision: The oppositions are both sustained.