

**This Opinion is Not a
Precedent of the TTAB**

Mailed: September 25, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

Straight Arrow Products, Inc.
v.
Willette Manigault and Mane Esteem, LLC
—

Opposition No. 91266129
—

Douglas Panzer of Royer Cooper Cohen Braunfeld,
for Straight Arrow Products, Inc.

Rosezena J. Pierce and Antoinette Martin of R.J. Pierce Law Group, P.C.,
for Willette Manigault and Mane Esteem, LLC.
—

Before Heasley, Elgin, and Brock,
Administrative Trademark Judges.

Opinion by Brock, Administrative Trademark Judge:

Straight Arrow Products, Inc. (“Opposer”) opposes registration on the Principal Register of two single-class applications owned by Mane Esteem, LLC¹ for the mark

¹ The Board joined Mane Esteem, LLC as a party-defendant upon assignment of the applications by the original applicant, Willette Manigault. 14 TTABVUE. On December 4, 2020, Ms. Manigault assigned the application to Mane Esteem, LLC (recorded on the same day at Reel/Frame 007123/0733), of which she is the sole member. Manigault Deposition, 23 TTABVUE 76-77. For the sake of convenience, the party-defendants, whether jointly or individually, will be referred to as “Applicant.”

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, at *1-5 n.1 (TTAB 2020). The number preceding

MANE ESTEEM (MANE disclaimed) in standard characters for the following goods and services:

3-in-1 hair conditioners; 3-in-1 hair shampoos; Hair butter; Hair care creams; Hair care lotions; Hair care preparations; Hair care preparations consisting of organic coconut virgin oil and coconut virgin oil; Hair dye; Hair oils; Hair styling gel; Hair styling spray; Hair colourants; Hair colouring; Hair colouring and dyes; Hair conditioner; Hair conditioners; Hair creams; Hair gel; Hair gel and hair mousse; Hair lotion; Hair lotions; Hair mousse; Hair mousses; Hair nourishers; Hair pomades; Hair shampoo; Hair shampoos and conditioners; Hair sprays; Hair styling preparations; Oils for hair conditioning; Shampoo-conditioners; Shampoos; Beauty serums; Cosmetic preparations for the hair and scalp; Hair conditioners for curly hair and enhancing hair curls; Hair rinses; Non-medicated hair serums; Oil baths for hair care, in International Class 3;²

-and-

Beauty care services; Beauty salon services; Beauty treatment services especially for eyelashes; Color analysis for cosmetic purposes; Hair styling; Hair braiding services; Hair care services; Hair color salon services; Hair coloring services; Hair colouring services; Hair cutting; Hair cutting services; Hair foiling services; Hair highlighting services; Hair replacement, hair addition, and hair extension services; Hair salon services; Hair salon services, namely, hair cutting, styling, coloring, and hair extension services; Hair salon services, namely, treatments to protect hair from effects of exposure to sunlight, heat, humidity and chlorinated water; Hair weaving services; Microblading being eyebrow tattooing services; Advice relating to hair care; Body waxing services for hair removal in humans; Cosmetic hair removal by means of waxing; Cosmetic services, namely, non-permanent hair removal; Depilatory hair removal services; Hairdressing services; Providing advice and information in the fields of hairstyling, haircare, and hair maintenance; Providing information about beauty; Providing information in the field of hair styling; Providing on-site beauty services, namely, hair styling and make-up application services;

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.

² Application Serial. No. 90001575 was filed on June 15, 2020, based on Applicant's 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).

Providing online advice and information in the fields of hairstyling, haircare, and hair maintenance; Wig cleaning and styling services provided by hair dressers and hair stylist, in International Class 44.³

Opposer asserts one ground, likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on ownership of three registrations of the mark MANE 'N TAIL in standard characters on the Principal Register (collectively, the “Pleaded Registrations”), two with claims of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), as follows:

Reg. No. 2,199,136 (Section 2(f) claimed in whole), for non-medicated, non-veterinary grooming preparations for animals, namely hair, coat and skin shampoo and conditioner, in International Class 3;

Reg. No. 2,246,880 for line of hair, skin and nail care products, namely shampoo, conditioner, detangler, styling preparation, spray, gel, reconstructing conditioners, dressings, hand, nail and body cremes and nail care preparations, in International Class 3; and

Reg. No. 4,446,463 (Section 2(f) claimed in whole), for Medicated hair, coat and skin shampoo and conditioner for use by humans or domesticated animals; Topical analgesics for use by humans or domesticated animals; and Pharmaceutical preparations for the treatment of skin conditions associated with pathogenic microorganisms in horses, in International Class 5.⁴

³ Application Serial. No. 90001589 was filed on June 15, 2020, based on Applicant’s 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).

⁴ Notice of Opposition, Exhibits A-C, 1 TTABVUE 15-40. Each of the Pleaded Registrations has been renewed.

In its answer, Applicant denied the salient allegations in the notice of opposition.⁵ Each party filed a trial brief and Opposer filed a reply brief.⁶

I. Trial Record and Evidentiary Matters

The record consists of the pleadings and the files of the opposed applications, under Trademark Rule 2.122(b)(1), as well as evidence introduced by the parties under notices of reliance as described below. Neither party submitted admissible testimony evidence during the testimony periods.

Opposer introduced: (1) Applicant's responses to Opposer's discovery requests; (2) discovery deposition of Willette Manigault taken March 22, 2022 ("Manigault Deposition"); (3) TSDR records for Opposer's Pledged Registrations, as well as two additional registrations and two pending applications for MANE 'N TAIL marks owned by Opposer, and file histories thereof;⁷ and (4) various documents that Opposer identifies as "printed publications," including confidential exhibits.⁸ During its

⁵ 4 TTABVUE. Applicant also pleaded seven affirmative defenses. *Id.* at 6-7. In an August 19, 2022 order, the Board dismissed with prejudice the fifth and sixth defenses of laches and acquiescence. 16 TTABVUE 6. Applicant's other "affirmative defenses" remain but are treated as mere amplifications of Applicant's denials. *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.*, Opp. No. 91181092, 2010 TTAB LEXIS 226, at *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.").

⁶ Opposer's revised main brief, 34 TTABVUE; Applicant's brief, 35 TTABVUE; Opposer's reply brief, 36 TTABVUE. *See* note 11, *infra*.

⁷ 23 TTABVUE, Exhibits G-M, 182-868. In at least one instance, Opposer relies upon a 1995 declaration from its then-president, William R. Dunavant, filed in connection with the prosecution of one of Opposer's Pledged Registrations, Reg. No. 2,199,136. *Id.* at 250-265.

⁸ 23-24 TTABVUE; confidential exhibits at 25 TTABVUE.

rebuttal period, Opposer introduced additional printed publications under a notice of reliance, including another confidential exhibit.⁹

For its part, Applicant's notice of reliance introduced: (1) Opposer's and Applicant's responses to discovery requests; (2) the Manigault Deposition; (3) trademark registrations owned by Opposer and third parties; and (4) printed publications.¹⁰

In its main brief,¹¹ Opposer objected to most of Applicant's evidence because Applicant's notice of reliance as originally filed with the Board did not include any attachments although it had been properly served.¹² After trial briefing had closed, we granted Applicant time to cure the defect by refiling its notice of reliance with exhibits.¹³ We therefore construe Opposer's evidentiary objections based on Applicant's corrected notice of reliance with attached exhibits and note that some of Opposer's objections were mooted by Applicant's corrected notice of reliance.

⁹ 27 TTABVUE; confidential exhibit at 28 TTABVUE.

¹⁰ 39 TTABVUE. Applicant's original notice of reliance at 26 TTABVUE did not attach exhibits; we refer and cite to Applicant's corrected notice of reliance.

¹¹ 34 TTABVUE 19. Opposer filed a first main brief, 29 TTABVUE, that we declined to consider and granted Opposer 30 days to file a revised brief. 33 TTABVUE. We refer and cite to Opposer's corrected main brief. 34 TTABVUE.

¹² 26 TTABVUE.

¹³ 38 TTABVUE.

A. Opposer's evidentiary objections to exhibits to Applicant's notice of reliance

1. Exhibits A-I

Opposer objects to Applicant's Exhibits A-I to its notice of reliance on the basis that the identified written discovery responses of Opposer were not attached. In the corrected notice of reliance, Applicant identifies Opposer's responses to Applicant's discovery requests as well as Applicant's own responses to Opposer's discovery requests.¹⁴ In the attachments, there are sets of documents labeled Exhibit A and Exhibit B,¹⁵ but these are not the documents identified in the notice of reliance.¹⁶ We only consider evidence we have been able to identify in the record; no document will be considered as evidence unless it has been introduced in evidence in accordance with the applicable rules. *See generally*, TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 700 *et seq.* and authorities collected therein.

Opposer's objection is sustained.

2. Exhibits 10-149

Next, Opposer objects to Applicant's Exhibits 10-149 on the basis that the identified third-party registrations were not attached.¹⁷ Applicant was given an opportunity to remedy this error by attaching the third-party registrations to its

¹⁴ 39 TTABVUE 2-5, Exhibits A-I.

¹⁵ 39 TTABVUE 32, 48.

¹⁶ *Id.* At 2-3.

¹⁷ 34 TTABVUE 20.

corrected notice of reliance; it did not do so.¹⁸ See Trademark Rule 2.122(e)(1). “Attorney argument is no substitute for evidence.” *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005); see also *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018).

Opposer’s objection is sustained.

3. Exhibits 150-208; 219-244

Opposer also objects to Exhibits 150-208 and 219-244 on the basis that Applicant did not attach printouts of the listed third-party websites and only provided hyperlinks.¹⁹ Applicant attached printouts to its corrected notice of reliance.²⁰ The printouts are not labeled with exhibit numbers, nor are they in the order listed in the notice of reliance. For example, the first exhibit in Applicant’s attachments should be Exhibit 150, but instead, it appears to be the website of The Main League, identified as Exhibit 196 in the notice of reliance; the next few attachments appear to correspond to Exhibits 156, 158, and 176.

Unlike the third-party registrations that Applicant failed to attach, Applicant did attach third-party websites in some fashion, although it failed to order them properly and include exhibit cover pages. As “[a] notice of reliance is essentially a cover sheet for the materials sought to be introduced,” Applicant is reminded of the importance of identifying and ordering its materials. TBMP § 704.02 *et seq.* In this case, the order

¹⁸ 39 TTABVUE.

¹⁹ 34 TTABVUE 22.

²⁰ 39 TTABVUE 90-269.

of the exhibits does not matter so much as the overall impression with respect to the issue Applicant identifies in the notice of reliance: “third party use, weak nature of Opposer’s mark.”²¹ To the extent that any particular printout corresponds to a URL and access date in the notice of reliance cover sheet, and is otherwise legible and relevant, we have considered it. *See Hunt Control Sys. Inc. v. Koninkijke Philips Elecs. N.V.*, Opp. No. 91173417, 2011 TTAB LEXIS 137 at *18 (TTAB 2011) (“the Board is capable of weighing the relevance and strength or weakness of the objected-to ... evidence in this specific case, including any inherent limitations, and this precludes the need to strike the testimony and evidence.”), *rev’d on other grounds*, 2017 U.S. Dist. LEXIS 138374 (D.N.J. 2017).

Opposer’s objection is overruled.

4. Exhibits 209-218

Last, Opposer objects to Exhibits 209-218 in Applicant’s notice of reliance on the basis that they are “mere citations to cases ... and a section of the [TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP)], neither of which is evidence.”²² Citations are not evidence, *see generally* TBMP §§ 700 *et seq.* and authorities cited therein, and we remind parties that citation of non-precedential decisions is not encouraged because such decisions are not binding on the Board. *Id.* at §§ 101.03, 101.03(a)(2).

Opposer’s objection is moot.

²¹ 39 TTABVUE 19-24.

²² 34 TTABVUE 23.

B. Additional evidentiary issues

In addition to Opposer's objections, both parties' submissions present additional evidentiary issues, which we summarize below.²³

1. Opposer's confidential exhibits to notice of reliance

Opposer's notice of reliance²⁴ identified several confidential exhibits including documents identified publicly as, inter alia, Opposer's sales data,²⁵ a press release,²⁶ a television show script,²⁷ a settlement agreement,²⁸ and a license agreement.²⁹ Although these exhibits are not of the type that may be made of record under a notice of reliance, Applicant did not object.³⁰

Moreover, Opposer provided a "verification" signed by its attorney stating that the documents in Exhibits YY-BBB, GGG, and III to the notice of reliance were "produced by Opposer to Applicant in discovery" and "are authentic."³¹ To the extent that the verification was an attempt to lay a foundation for application of a business records exception to the hearsay rule, Applicant waived its objections by failing to timely object. *Compare Moke Am. LLC v. Moke USA, LLC*, Opp. No. 91233014, 2020 TTAB

²³ We address Opposer's rebuttal notice of reliance in our discussion of the strength of Opposer's mark.

²⁴ 23 TTABVUE.

²⁵ Confidential exhibits, 25 TTABVUE 14, 754.

²⁶ Confidential exhibit, 25 TTABVUE 6.

²⁷ Confidential exhibit, 25 TTABVUE 8.

²⁸ Confidential exhibit, 25 TTABVUE 1496.

²⁹ Confidential exhibit, 25 TTABVUE 1504.

³⁰ See 35 TTABVUE.

³¹ 25 TTABVUE 4.

LEXIS 18, at *14-15 (TTAB 2020) (failure to lay a proper foundation for hearsay exception is a procedural issue that is waived by failing to timely object). We have considered Exhibits YY, ZZ, AAA, BBB, GGG, and III to Opposer's notice of reliance, keeping in mind the lack of supporting testimony.

2. New evidence in Opposer's brief

Opposer's brief contains a YouTube screenshot of a Morgan Spurlock documentary, without a citation to the evidentiary record.³² This appears to be new evidence insofar as we are unable to locate this documentary in Opposer's notice of reliance. A party's evidence may only be submitted during its testimony period. *See* authorities collected in TBMP § 704.05(b).

This evidence is untimely and we do not consider it.

3. Hyperlinks in Applicant's brief

Applicant cites to hyperlinks in several places in its brief.³³ Providing only a web address or a hyperlink without the material attached is not sufficient to introduce it into the record. *See Chutter, Inc. v. Great Mgmt. Group, LLC*, Opp. No. 91223018, 2021 TTB LEXIS 365, at *41-42 n.67 (TTAB 2021) (article and accompanying video referenced by hyperlink inadmissible); *rev'd on other grounds*, 84 F.4th 1014 (Fed. Cir. 2023), modified and superseded, 90 F.4th 1333 (Fed. Cir. 2024).

Accordingly, the contents of the various websites that are not properly of record will be given no consideration.

³² 34 TTABVUE 16.

³³ 35 TTABVUE 14, 16-18, 31.

II. 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, 1373-74 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). An opposer must demonstrate an interest falling within the zone of interests and proximate causation. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020) (citing *Lexmark*, 572 U.S. at 120-37); *id.* at 1305 (applying *Lexmark* to inter partes TTAB cases). Demonstrating a real interest in opposing registration of a mark satisfies the zone-of-interests requirement, and demonstrating a reasonable belief in damage by the registration of a mark establishes damage proximately caused by registration of the mark. *Id.* at 1305-06.

Opposer's entitlement to oppose registration of Applicant's mark under Section 2(d) is established by Opposer's Pledaded Registrations, which Opposer entered into the record, showing Opposer's ownership and their active status.³⁴ *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945 (Fed. Cir. 2000) (party's ownership of pleaded registrations for arguably similar marks establishes statutory entitlement for Section 2(d) claim).

³⁴ 23 TTABVUE 183-185, 389-391, 489-491.

III. Priority and Likelihood of Confusion

“To prevail on its Section 2(d) claim, Opposer must show by a preponderance of the evidence that it has either a registration of or priority in its [MANE 'N TAIL] mark, and that Applicant’s use of its [MANE ESTEEM] mark is likely to cause confusion, mistake, or deception regarding the source of the [goods] identified in its Application[s].” *Sage Therapeutics, Inc. v. SageForth Psychological Servs., LLC*, Opp. No. 91270181, 2024 TTAB LEXIS 139, at *10-11 (TTAB 2024) (citation omitted).

Because Opposer’s Pleded Registrations are of record and there are no pending counterclaims to cancel them, priority is not at issue with respect to the marks and goods covered by those registrations. *See King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 1402 (CCPA 1974). We focus our analysis on Opposer’s Registration No. 2,246,880 (“Opposer’s ’880 Registration” or “Opposer’s Reg. No. ’880”) because although the Pleded Registrations are all for the same mark in standard characters, the goods identified in Opposer’s ’880 Registration, i.e., non-medicated hair care products for humans, are closest to the goods and services in Applicant’s two applications for, inter alia, hair care products and salon services (for humans). *See Heil v. Tripleye GmbH.*, Opp. No. 91277359, 2024 TTAB LEXIS 494, at *45-47 (TTAB 2024) (focusing on pleaded registrations for marks and goods and services that are most similar to Applicant’s involved application).

Our determination of Opposer’s claim of likelihood of confusion is based on an analysis of all of the facts in evidence that are relevant to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”). In

considering the evidence of record on these factors, we keep in mind that “[t]he 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.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976). We discuss these and other relevant factors below. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 1380 (Fed. Cir. 2019) (Board considers each *DuPont* factor for which there is evidence and argument).

A. The similarity or dissimilarity of the goods and services, trade channels, and conditions of sale

Under the second, third, and fourth *DuPont* factors, we consider the “similarity or dissimilarity and nature of the goods or services as described in an application or registration,” the “similarity or dissimilarity of established, likely-to-continue trade channels,” and “the conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 476 F.2d at 1361; *Detroit Athletic Co.*, 903 F.3d at 1306; *Sabhnani v. Mirage Brands, LLC*, Can. No. 92068086, 2021 TTAB LEXIS 464, at *20 (TTAB 2021). We base our consideration of the nature of the goods, channels of trade and classes of consumers on the goods as identified in the Application and Opposer’s ’880 Registration. *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.”).

We address the two opposed applications in turn.

1. Class 3 – Application No. 90001575

First, in Class 3, Opposer’s ’880 Registration and Applicant’s App. No. 90001575 both identify shampoo, conditioner, spray, and gel. The parties’ identified goods in Class 3 are thus identical or legally identical in part. In the one paragraph addressing “[t]he similarity or dissimilarity and nature of the goods or services,” Applicant “concedes that there is some overlap in services with Opposer’s Registration No. 2246880, however even if the goods were legally identical, the differences in the overall appearances of the mark and the number of the third-party use and registrations containing “MANE” weighs against a likelihood of confusion.”³⁵ We construe the first part of this statement as mistakenly referring to “services” rather than goods.

Because the goods are identical or legally identical in part and neither identification contains any limitations, we must presume that they flow through the same trade channels to the same classes of consumers. *See In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (“[I]t is well established that, absent restrictions in the application and registration, [identical] goods and services are presumed to travel in the same channels of trade to the same class of purchasers.”) (citation and internal quotation marks omitted), cited in *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1372 (Fed. Cir. 2018).

³⁵ 35 TTABVue 29.

Applicant concedes this presumption before arguing that “[t]here is no evidence of record that Opposer’s goods or services and Applicant’s services are provided or advertised through the same websites or the same social media accounts, or as applicable.”³⁶ As we have explained in innumerable decisions, the Board may not consider arguments “about how the parties’ actual goods, services, customers, trade channels, and conditions of sale are narrower or different from the goods and services identified in the applications and registrations.” *In re FCA US LLC*, Ser. No. 85650654, 2018 TTAB LEXIS 116, at *12 n.18 (TTAB 2018); *see also, e.g., In re i.am.symbolic, llc*, 866 F.3d 1315, 1327 (Fed. Cir. 2017) (“[T]he Board properly declined to import restrictions into the identification of goods based on alleged real world conditions.”); *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1373 (Fed. Cir. 2013) (“The PTO proceedings are ‘based on the content of the registration application’ and not upon any specific use of the challenged mark in commerce.”); *In re Thor Tech, Inc.*, Ser. No. 78634024, 2009 TTAB LEXIS 253, at *15 (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”).

Additionally, the evidence shows that hair care products like Opposer’s are offered at low price points of around \$10 or less; prices range from \$2.96 for one item to \$43.99 for a set of four items.³⁷ “When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of

³⁶ *Id.* at 29-30.

³⁷ 24 TTABVUE 39-40, 49-51, 59-63.

such products are held to a lesser standard of purchasing care.” *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000). Applicant argues that if Opposer’s product is as famous as Opposer asserts, then even for low price-point goods, Opposer’s consumers exercise a higher degree in care in purchasing a product used by their favorite celebrities.³⁸ Without evidence, however, Applicant’s argument is unavailing.

The second, third, and fourth *DuPont* factors weigh in favor of likelihood of confusion as to Applicant’s App. No. 90001575.

2. Class 44 – Application No. 90001589

Turning to Applicant’s second application, App. No. 90001589, identifying services in Class 44, Applicant’s services and the Class 3 goods in Opposer’s ’880 Registration need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [they] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, Opp. No. 91117739, 2007 TTAB LEXIS 58, at *28-29 (TTAB 2007)). There is an inherent relationship between the various hair care products in Opposer’s Reg. No. ’880 and Applicant’s hair styling, hair care services, advice relating to hair care, and providing advice and information in the fields of hairstyling, haircare, and hair maintenance. *See In re Country Oven, Inc.*, 2019 USPQ2d 443903, *6 (TTAB 2019) (“[T]he identifications in the application [services in International Classes 35 and 40] and

³⁸ 35 TTABVUE. at 31-32.

registration [goods in International Class 30] themselves support finding the goods and services are related.”); *see also Detroit Athletic Co.*, 903 F.3d at 1307. For example, Applicant’s services of “Providing information in the field of hair styling” would include information about hair styling products, such as Opposer’s spray and gel. Moreover, it is well recognized that use of the same or similar marks for goods by one party, and for services involving those goods by another, may lead to a likelihood of confusion. *See Detroit Athletic Co.*, 903 F.3d at 1307 (finding clothing and sports apparel retail services related as “confusion is likely where one party engages in retail services that sell goods of the type produced by the other party”).³⁹

With respect to trade channels and consumers, our analysis is similar to our consideration of Applicant’s Class 3 goods, but without the presumption accorded to goods that are in part identical. “[A]s with the relatedness of the goods, the similarity or dissimilarity of the channels of trade must be determined based on the identifications of goods [or services] in the parties’ registrations rather than current real-world conditions.” *Sabhnani v. Mirage Brands, LLC*, Can. No. 92068086, 2021 TTAB LEXIS 464, at *25 (TTAB 2021). It is clear that hair care products are used and sold in hair salons (including in the hair salon where Ms. Manigault works).⁴⁰ Regarding the purchasing conditions and buyers under the fourth *DuPont* factor, as noted previously, the goods of Opposer’s Reg. No. ’880 and Applicant’s Class 44

³⁹ And as we concluded above, Applicant did not squarely address the relationship of Opposer’s goods and Applicant’s services in its brief. 35 TTABVUE 29 (“Applicant concedes that there is some overlap in services [sic] with Opposer’s Registration No. 2246880”).

⁴⁰ 23 TTABVUE 69, Manigault Deposition 65:1-3.

services do not include any purchaser restrictions, so we must assume that the parties' identified goods and services are available to all the usual purchasers for such goods and services. *See Octocom*, 918 F.2d at 942. Consequently, the classes of consumers for such goods and services overlap. Despite Applicant's argument to the contrary, the low price point of Opposer's goods supports this finding. *Cf. Detroit Athletic Co.*, 903 F.3d at 1308 ("Even if true [that Registrant athletic club sells clothing only to members and in one store], this assertion is, once again, irrelevant.").

With respect to Applicant's Ser. No. 90001589, the second, third, and fourth *DuPont* factors weigh in favor of a likelihood of confusion.

B. The strength or weakness of Opposer's mark

Because it affects the scope of protection to which it is entitled, we next consider the strength or weakness of Opposer's registered MANE 'N TAIL mark. "Two of the *DuPont* factors (the fifth and sixth) consider strength." *Spireon, Inc. v. Flex LTD*, 71 F.4th 1355, 1362 (Fed. Cir. 2023). The "fifth *DuPont* factor enables Opposer to prove that its pleaded marks are entitled to an expanded scope of protection by adducing evidence of '[t]he fame of the prior mark (sales, advertising, length of use),' while "the sixth *DuPont* factor allows Applicant to contract that scope of protection by adducing evidence of '[t]he number and nature of similar marks in use on similar goods.'" *Made in Nature, LLC v. Pharmavite LLC*, 2022 TTAB LEXIS 228, at *23-24 (TTAB 2022) (quoting *DuPont*, 476 F.2d at 1361).

"There are two prongs of analysis for a mark's strength under the sixth factor: conceptual strength and commercial strength. Conceptual strength is a measure of a

mark's distinctiveness" along the spectrum of distinctiveness from generic terms to fanciful marks, *Spireon*, 71 F.4th at 1362 (citations omitted), while commercial strength "is the marketplace recognition value of the mark." *Id.* at 1363 (quoting 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80).

Opposer and Applicant presented arguments and evidence under the fifth and sixth factors, respectively. We will consider the conceptual and commercial strength of Opposer's MANE 'N TAIL mark, and then Applicant's evidence of its weakness.

1. Asserted strength of Opposer's mark

In determining the strength of a mark, we consider both its inherent strength, based on the nature of the mark itself, and, if there is evidence in the record of marketplace recognition of the mark, its commercial or marketplace strength. *Spireon*, 71 F.4th at 1362 (citing *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength ... and its marketplace strength")); *Top Tobacco, L.P. v. N. Atl. Operating Co.*, Opp. No. 91157248, 2011 TTAB LEXIS 367, at *25 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength).

a. Conceptual strength

Conceptual or inherent strength is a measure of a mark's distinctiveness. *Chippendales*, 622 F.3d at 1352-1354. As discussed above, we focus our analysis on Opposer's '880 Registration. Because Opposer's mark is registered on the Principal Register, with no claim of acquired distinctiveness under Section 2(f), we presume it is inherently distinctive, i.e., that it is at least suggestive of the goods. 15 U.S.C.

§ 1057(b) (registration is “prima facie evidence of the validity of the registered mark”); *see also New Era*, 2020 TTAB LEXIS 199, at *29-30 (TTAB 2020).

As background, Applicant entered a disclaimer of the term MANE in both applications.⁴¹ The Examining Attorney offered dictionary evidence that MANE in Applicant’s MANE ESTEEM marks can mean both “[t]he long hair along the top and sides of the neck of certain mammals, such as a horse or male lion,” and also “[a] long thick growth of hair on a person’s head.”⁴² Accordingly, in Applicant’s mark, MANE is descriptive of a characteristic of its Class 3 hair care goods and Class 44 hair care services.

Opposer appears to concede tacitly that there is some conceptual weakness in the term MANE in its mark by emphasizing the identical connotation of the identical term in Applicant’s mark. Referring to the term MANE, Opposer states “[s]hared terms in marks have the same connotation when the parties advertise the goods offered under the marks for the same purpose. ... Opposer and Applicant each use the word ‘MANE’ on hair care and skin care products. As a matter of law, that shared term has the same connotation in MANE 'N TAIL and MANE ESTEEM.”⁴³ We agree. Therefore, in acknowledging that the shared term in their marks “have the same connotation,” MANE in Opposer’s mark – for those goods and services – also connotes “[a] long thick growth of hair on a person’s head,” i.e., hair.

⁴¹ See September 18, 2020 Office Actions (App. Nos. 90001575 and 90001589), TSDR 2.

⁴² *Id.* at TSDR 4, THE AMERICAN HERITAGE DICTIONARY.

⁴³ 34 TTABVUE 28.

We also agree with Opposer's argument that, "[t]o the extent Applicant uses the word 'MANE' in MANE ESTEEM to connote hair, Applicant cannot logically or legally argue that Opposer's use of 'MANE' in MANE 'N TAIL fosters any other connotation."⁴⁴

We find that the mark MANE 'N TAIL in Opposer's 880 Registration is at least suggestive as a whole, but based on the evidence and arguments of record, the MANE component in Opposer's mark is descriptive and thus conceptually weak.⁴⁵

b. Commercial strength/fame

Next, we consider Opposer's arguments regarding the commercial strength or fame of its mark, i.e., the extent to which a significant portion of the relevant public recognizes a mark as denoting a single source. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 1324-1325 (Fed. Cir. 2017) (per curiam). Here, the relevant consumers are purchasers of hair care products. In the likelihood of confusion context, commercial strength is not an "all-or-nothing measure," but rather involves placing a mark on a "spectrum," which ranges from "very strong to very weak." *Id.* (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 1344 (Fed. Cir. 2003)). The stronger the mark, the greater the scope of protection. *Kenner Parker Toys Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 352 (Fed. Cir. 1992) ("[S]trong marks enjoy a wide latitude of legal protection.").

⁴⁴ *Id.* at 30.

⁴⁵ The two other Pleded Registrations for Opposer's MANE 'N TAIL mark include a claim of acquired distinctiveness as to the mark as a whole, as noted above.

Opposer contends that its mark is strong based on use of the MANE 'N TAIL mark for shampoo and conditioner since 1971.⁴⁶ However, in support of its long use, Opposer cites the dates of use in its Registration No. 2,199,136. Registrations do not serve this purpose.⁴⁷ See Trademark Rule 2.122(b) (2), 37 CFR 2.122(b) (2) (“The allegation in an application for registration, or in a registration, of a date of use is not evidence on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence.”).

“Commercial strength is a question of whether consumers in fact associate the ... mark with a unique source, and can be shown by, for instance, exclusive use of a mark in the marketplace, advertising and marketing, and sales.” *Spireon*, 71 F.4th at 1363 (citing *Bridgestone Ams. Tire Opers., LLC v. Fed. Corp.*, 673 F.3d 1330, 1336 (Fed. Cir. 2012) (“The prolonged exclusive use of these marks, the extensive promotion and marketing, the billions of dollars in sales, of tires bearing these marks, shows commercial strength.”)). In its brief, Opposer alleges gross sales in 2019 and 2020 in the tens of millions of dollars based on its sales records.⁴⁸ There are still significant

⁴⁶ 34 TTABVUE 41. The relevant goods and dates require some context, however. As the identifications of goods in the Pleadings indicate, Opposer’s hair care products are for people and animals. For the reasons discussed herein, we do not reach the issue of whether grooming products for animals are related to hair care products and services for humans.

⁴⁷ Opposer also points to the TSDR file history of the same registration, including a 1994 declaration of Opposer’s then-president and the specimens of use submitted at that time. This declaration is hearsay in this proceeding, and for the same reason, the specimens of use (even if they were dated) could be used only to show they too were filed in 1994. TBMP § 704.04 (“statements made in an affidavit or declaration in the file of an application or registration are not testimony; rather, such matter constitutes hearsay, except for statements falling under Fed. R. Evid. 801(d)”).

⁴⁸ 34 TTABVUE 43.

deficiencies that preclude us from accepting Opposer’s allegations of its total sales of products under the MANE 'N TAIL mark at face value.⁴⁹ Most significantly, the sales data does not include Opposer’s MANE 'N TAIL mark to identify any of the products. In fact, the word MANE does not appear anywhere in the hundreds of pages of sales data⁵⁰ nor is there any supporting testimony on this point.⁵¹ The references in the sales data to “M&T” do not prove that these products were sold under the MANE 'N TAIL mark.⁵² Indeed, portions of the sales data show no product names at all.⁵³ Yet another section of the tables appears to list products – again with no indication of the MANE 'N TAIL mark – but apart from any sales information at all, such as date, purchaser, quantity, etc.⁵⁴

Commercial strength may also be measured indirectly by “other factors such as ... widespread critical assessments; notice by independent sources of the [goods and services] identified by the mark []; and the general reputation of the [goods and services].” *Tao Licensing, LLC v. Bender Consulting Ltd.*, Can. No. 92057132, 2017 TTAB LEXIS 437, at * 42 (TTAB 2017); *see also Bose Corp. v. QSC Audio Prods. Inc.*,

⁴⁹ Opposer’s 2019 and 2019 United States sales data by merchant is designated as confidential. 23 TTABVUE 10, 25 TTABVUE 14-729, 1495. We discuss confidential materials generally.

⁵⁰ 25 TTABVUE 15, 730.

⁵¹ For example, Opposer states that “[f]or more than fifty years, Straight Arrow has invested the primary efforts and resources – human and financial – of its business in the brand represented by the MANE 'N TAIL mark,” 34 TTABVUE 12, but there are no statements (supported by testimony) indicating that all of Opposer’s products are offered in connection with its MANE 'N TAIL mark.

⁵² *Id.* at 15-759, 755-1495.

⁵³ 25 TTABVUE 730-41.

⁵⁴ *Id.* at 742-753.

293 F.3d 1367, 1371 (Fed. Cir. 2002). Opposer attempted to provide its ranking relative to other brands in certain markets,⁵⁵ but did so improperly, in its rebuttal notice of reliance.⁵⁶ “Rebuttal evidence is supposed to be limited to that which is responsive to the adversary’s evidence: . . . [it] must accomplish the function of rebuttal; to explain, repel, counteract, or disprove the evidence of the adverse party.” *Belden Inc. v. BerkTek LLC*, 805 F.3d 1064, 1081-82 (Fed. Cir. 2015) (citation omitted). Accordingly, during Opposer’s rebuttal testimony period it was appropriate for it to “introduce evidence and testimony to deny, explain or discredit facts and witnesses adduced by [Applicant,] [but] [e]vidence is improper rebuttal . . . where it relates to a witness and facts that might appropriately have been introduced during [Opposer’s] case-in-chief.” *Illyrian Imp., Inc. v. ADOL Sh.p.k.*, Opp. No. 91234244, 2022 TTAB LEXIS 91, at *10-11 (TTAB 2022). Opposer may not use the rebuttal testimony period to merely “add[] to its proofs made as part of its case in chief.” *United States Playing Card Co. v. Harbro, LLC*, Opp. No. 91162078, 2006 TTAB LEXIS 484, at *9 (TTAB 2006).

Opposer’s rebuttal notice of reliance identifies “printed publications available to the general public in libraries or in general circulation among members of the public as well as internet materials,” yet the first exhibit is none of that. Exhibit LLL, designated confidential, is described in Opposer’s public cover sheet as “IRI 52 Week

⁵⁵ Opposer’s rebuttal notice of reliance, 27 TTABVUE; Opposer’s confidential exhibit thereto, 28 TTABVUE.

⁵⁶ 27 TTABVUE, Opposer’s notice of reliance; 28 TTABVUE, confidential exhibit thereto.

Data for Multicultural Industry Ending May 21, 2023.”⁵⁷ In its brief, i.e., publicly, Opposer describes this document as evidence of Opposer’s rank amongst “223 brands based on performance in African American Hair Care and Color category.”⁵⁸ Confidential market analysis is not a printed publication under Trademark Rule 2.122(e), (g); *see also* Trademark Rule 2.120(k)(3)(ii). As this market report merely adds to Opposer’s proofs outside of Opposer’s main testimony period, we do not consider Exhibit LLL to Opposer’s rebuttal notice of reliance.

Opposer introduced evidence of its print advertisements and marketing as exhibits to its notice of reliance,⁵⁹ but without supporting testimony or context we cannot evaluate the scope or effectiveness of these efforts, such as the size of the viewing market and what percentage of particular product categories are occupied by Opposer. *Cf. Bose*, 293 F.3d at 1376. Additionally, Opposer’s evidence does not show consistent marketing efforts over time, as the dates appear sporadic. For example, Exhibit GG to Opposer’s notice of reliance is a photograph of a NASCAR vehicle branded primarily with Opposer’s “MANE 'N TAIL COLOR PROTECT” mark and presented entirely without context.

Similarly, while we could infer that many magazine readers saw Opposer’s advertisement in a 2018 issue of ELLE magazine featuring Kim Kardashian on the cover,⁶⁰ there is no corresponding information or testimony, for example, as to

⁵⁷ 27 TTABVUE 2.

⁵⁸ 34 TTABVUE 43.

⁵⁹ *See generally* 23 TTABVUE 1030-52.

⁶⁰ 23 TTABVUE 1036-39.

Opposer's advertising spend (in total and in context with its competitors), or the number of readers of ELLE magazine or this particular issue. The other magazine advertisements are even older: the advertisement in a Cosmopolitan magazine is from a 2007 issue;⁶¹ the issues of Black College Today are dated 2007⁶² and 2009;⁶³ the Hype Hair magazines are dated 2009;⁶⁴ Today's Black Woman is from 2009.⁶⁵ The store magazines are also old: an issue of Sally Beauty is from 2006;⁶⁶ the CVS/pharmacy Beauty Bulletin is from 2008.⁶⁷ Even if Opposer had presented circulation data for these publications, advertisements appearing at least 10 years before the filing dates of Applicant's applications do not create a current or comprehensive picture of Opposer's marketing efforts and their effects on the commercial recognition of Opposer's mark.

Opposer's product placement evidence is similarly presented without contextual information, such a still from the film Blades of Glory⁶⁸ or a description of an episode of a Lifetime channel show, Designing Spaces.⁶⁹ As we explained above in our discussion of Opposer's evidence improperly submitted with its notice of reliance, the

⁶¹ *Id.* at 1052.

⁶² *Id.* at 1047.

⁶³ *Id.* at 1043.

⁶⁴ 24 TTABVUE 5, 9.

⁶⁵ *Id.* at 14.

⁶⁶ *Id.* at 23.

⁶⁷ *Id.* at 28.

⁶⁸ See 23 TTABVUE 1034-35. Moreover, the screenshot from Blades of Glory shown in Opposer's notice of reliance is different from the image shown in Opposer's brief. 34 TTABVUE 16.

⁶⁹ 25 TTABVUE 8-13 (confidential).

documents regarding Opposer's participation in a television show exist – as do a license and settlement agreement – but absent supporting testimony or context, they have very little probative value.

A screenshot of Opposer's Instagram page, "Mane n' Tail [sic] Beauty"⁷⁰ – which itself is effectively a website presented without access date or full URL – shows 22,600 followers. Absent supporting testimony, the number of followers is hearsay, and even so, Opposer gives no context for these numbers vis-à-vis its competitors or how many of its followers are located in the United States. Opposer's "Twitter" page (now known as X) shows only 4,385 followers, and this evidence suffers from the same deficiencies.⁷¹

Last, we consider Opposer's evidence of "unsolicited, positive mention of the MANE 'N TAIL brand in print publications"⁷² attached to its rebuttal notice of reliance. Like Opposer's market rank evidence that should have been offered during Opposer's testimony period, this evidence was introduced outside of Opposer's testimony period and does not constitute rebuttal evidence. We do not consider Exhibits MMM-QQQ to Opposer's rebuttal notice of reliance.

Opposer's mark may have acquired some degree of brand recognition strength, but on this record, there are too many deficiencies in Opposer's evidence that preclude us

⁷⁰ *Id.* at 21.

⁷¹ *Id.* at 26.

⁷² 34 TTABVUE 42.

from finding that the MANE 'N TAIL mark is entitled to an expanded scope of protection under the fifth *DuPont* factor for Opposer's hair care products.

The fifth *DuPont* factor is neutral.

2. Asserted weakness of Opposer's mark

Next, under the sixth *DuPont* factor, we address whether the scope of protection of Opposer's MANE 'N TAIL mark is limited. *Spireon*, 71 F.4th at 1362 (citing *DuPont*, 476 F.2d at 1361) (the sixth *DuPont* factor "is a measure of the extent to which other marks weaken the assessed mark"). "[T]he strength of a mark is not a binary factor" and "varies along a spectrum from very strong to very weak." *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1340 (Fed. Cir. 2015) (internal citations omitted). "The weaker an opposer's mark, the closer an applicant's mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection." *Id.* at 1338-39 (internal citations omitted).

The purpose of introducing evidence of third-party marketplace use is "to show that customers have become so conditioned by a plethora of such similar marks that customers 'have been educated to distinguish between different [such] marks on the bases of minute distinctions.'" *Omaha Steaks Int'l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1324 (Fed. Cir. 2018) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1374 (Fed. Cir. 2005)); accord *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1373 (Fed. Cir. 2015); *Juice Generation*, 794 F.3d at 1338-39.

“Extensive evidence of third-party use and registrations is ‘powerful on its face,’ even where the specific extent and impact of the usage has not been established.” *Jack Wolfskin*, 797 F.3d at 1373-74 (quoting *Juice Generation*, 794 F.3d at 1339). *Accord Spireon*, 71 F.4th at 1364.

a. Third-party registration evidence

Properly made of record, third-party registrations may be relevant “to prove that some segment of the [mark] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation*, 794 F.3d at 1339 (internal citation quotation marks omitted). As discussed above, although Applicant produced lists of third-party registrations, it did not enter the registrations into the record properly.

b. Third-party use evidence

“The number and nature of similar marks in use on similar goods ... is a measure of the extent to which other marks weaken the assessed mark.” *Spireon*, 71 F.4th at 1362; *see Palm Bay*, 396 F.3d at 1373 (“Evidence of third-party use of similar marks on similar goods [or services] is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”); *see also Jack Wolfskin*, 797 F.3d 1363; *Juice Generation*, 797 F.3d at 1373-1374 (internal citations omitted). Applicant states that it “has provided over 50 third-party websites” that demonstrate that MANE is weak in “the beauty marketplace [because it is] ... a synonym for human hair.”⁷³ If

⁷³ 35 TTABVUE 15.

supported, this reinforces the definition of MANE as “[a] long thick growth of hair on a person’s head.”⁷⁴

Excluding websites that are illegible⁷⁵ or not directed to United States consumers,⁷⁶ Applicant’s third-party website evidence shows the term MANE is frequently used in marks used in connection with hair care products and services:

- TML Hair Studio (hair salon services): “The Mane League is a hair studio location in Houston Texas. Offering a number of hair extension services and products for clients to maintain their extensions and natural manes.”⁷⁷
- Fable & Main (hair care products)⁷⁸
- Mane Solution (hair loss treatment services and products)⁷⁹
- Mane Control Hair Care (hair salon services and hair care products)⁸⁰
- Halo Mane (hair care products)⁸¹
- Mane Affair Studio (hair salon services)⁸²
- Mane Tame (hair care products)⁸³
- Rooted Mane (hair salon services)⁸⁴

⁷⁴ September 18, 2020 Office Actions (App. Nos. 90001575 and 90001589), TSDR 4, THE AMERICAN HERITAGE DICTIONARY.

⁷⁵ 39 TTABVUE 138.

⁷⁶ *Id.* at 167-73, 260-61.

⁷⁷ 39 TTABVUE 90-92.

⁷⁸ *Id.* at 96-101.

⁷⁹ *Id.* at 102-08.

⁸⁰ *Id.* at 109-13.

⁸¹ *Id.* at 115-27

⁸² *Id.* at 128-30. Portions of the printout is illegible. Applicant is again reminded to check its material prior to filing.

⁸³ *Id.* at 133-37.

⁸⁴ *Id.* at 139-45.

- Manetamed Studio (hair salon services)⁸⁵
- The Grand Mane Salon (hair salon services)⁸⁶
- Mane Life Studio (hair salon service, wigs, and hair care products)⁸⁷
- The Mane Culture (education and networking services for hair stylists)⁸⁸
- The Mane House (hair salon and hair loss treatment services)⁸⁹
- Mane Attraction Salon (hair salon services)⁹⁰
- Trust & Mane Salon (hair salon services)⁹¹
- Mane Beauty (wigs, extensions)⁹²
- Mane & Mani (hair and nail salon)⁹³
- Mane & Tailored Salon (hair salon services)⁹⁴
- Mane 3 Hair Studio (hair salon services)⁹⁵
- Mane Addicts (hair care products)⁹⁶
- Mane Candy Products (hair care products)⁹⁷

⁸⁵ *Id.* at 146-53.

⁸⁶ *Id.* at 154.

⁸⁷ *Id.* at 155-66.

⁸⁸ *Id.* at 174-84. As noted, this is not a hair salon or hair care product, but the term MANE is used to refer to hair.

⁸⁹ *Id.* at 185-88.

⁹⁰ *Id.* at 189-92.

⁹¹ *Id.* at 193-98.

⁹² *Id.* at 199-200. Wigs are not hair care products, but the term MANE is used to refer to hair.

⁹³ *Id.* at 209-16.

⁹⁴ *Id.* at 217-20.

⁹⁵ *Id.* at 221.

⁹⁶ *Id.* at 223-27.

⁹⁷ *Id.* at 228-31.

- Mane Club (hair care products)⁹⁸
- Mane Duo Salon (hair salon services)⁹⁹
- Mane Event Salon (hair salon services)¹⁰⁰
- Mane Growth hair pomade (hair care product)¹⁰¹
- Mane Hair (hair salon services).¹⁰²

In total, Applicant properly entered into the record twenty-six examples of the term MANE used in connection with a hair care product or service. In some cases, the word MANE additionally appears in text on the websites, as a synonym for hair (“maintain their extensions and natural manes,”¹⁰³ “let your mane grow like never before,”¹⁰⁴ “welcome to your mane home,” “need some mane lovin [sic],” “all the mane things you need,” “mane merch,” and “maintain a luxurious mane”¹⁰⁵).

We find that the evidence of third-party use in connection with hair-related businesses, hair salons, and hair care products, significantly limits the scope of protection for the MANE term in Opposer’s mark. *See Jack Wolfskin*, 797 F.3d at 1373; *see also Juice Generation*, 794 F.3d at 1338-1339.

⁹⁸ *Id.* at 232-41.

⁹⁹ *Id.* at 242-46.

¹⁰⁰ *Id.* at 247-59.

¹⁰¹ *Id.* at 262-64.

¹⁰² *Id.* 265-69.

¹⁰³ *Id.* at 92.

¹⁰⁴ *Id.* at 127.

¹⁰⁵ *Id.* at 139, 141.

3. Conclusion as to strength or weakness of Opposer's mark

Under the fifth *DuPont* factor, Opposer has shown some degree of brand recognition strength but has not demonstrated that its mark is on the high end of the fame or commercial strength spectrum amongst a “significant portion of the relevant U.S. consumers” in the human hair care industry under the fifth *DuPont* factor.

Therefore, the fifth *DuPont* factor is neutral.

Despite some degree of brand recognition strength developed by Opposer for its MANE 'N TAIL mark, we find that the MANE portion of Opposer's mark is so conceptually or inherently weak and diluted by third party use that it will not act as a bar to the registration of every mark that includes the word MANE. “[I]t will only bar the registration of marks as to which the resemblance to [MANE 'N TAIL] is striking enough to cause one seeing it to assume that there is some connection, association or sponsorship between the two.” *Anthony's Pizza & Pasta Int'l Inc. v. Anthony's Pizza Holding Co.*, Opp. No. 91171509, 2009 TTAB LEXIS 718, at *25-26 (TTAB 2009), *aff'd*, 415 Fed. Appx. 222 (Fed. Cir. 2010) (internal quotation omitted).

The sixth *DuPont* factor thus weighs against likely confusion.

C. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression

Under the first *DuPont* factor, we consider the “similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *DuPont*, 476 F.2d at 1361; *see also Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1319 (Fed. Cir. 2014). “Similarity in any one of these

elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, Ser. No. 87075988, 2018 TTAB LEXIS 170, at *13 (TTAB 2018) (citing *In re Davia*, Ser. No. 85497617, 2014 TTAB LEXIS 214, at *4 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019).

We do not predicate our analysis on a dissection of the involved marks; we consider the marks in their entireties. *Stone Lion*, 746 F.3d at 1321; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression such that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs.*, 668 F.3d at 1368. 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 Co.*, 903 F.3d at 1305 (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985)). The focus is on the recollection of an ordinary consumer, who normally retains a general rather than specific impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 1007 (CCPA 1971); *L’Oreal S.A. v. Marcon*, Opp.

No. 91184456, 2012 TTAB LEXIS 77, at *16 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, Opp. No. 91055167, 1975 TTAB LEXIS 236, at *6 (TTAB 1975).

Opposer's mark is MANE 'N TAIL and Applicant's mark is MANE ESTEEM; both marks are in standard characters.¹⁰⁶ We begin by noting that the only similarity in the marks is the term MANE. Conceptually, as we have found, MANE is descriptive and weak in the context of the relevant goods and services. Commercially, we have found the term MANE in Opposer's mark is weak due to third-party use of the term for the same or similar goods and services. Despite our findings as to the weakness of the shared MANE component and Opposer's potential estoppel issue, we will consider the marks in their entirety as to appearance, sound, connotation, and commercial impression. *DuPont*, 476 F.2d at 1361.

Opposer begins by asserting that MANE is dominant in both parties' marks,¹⁰⁷ and Applicant agrees.¹⁰⁸ We disagree but ultimately, our conclusions rest on the weakness of this shared term. With respect to Opposer's mark, we will return to the issue of dominance in our discussion of the marks' connotations and commercial impressions below.

As to Applicant's mark, we disagree that the term MANE is dominant because in both of Applicant's applications, the term MANE is disclaimed. Disclaimed matter

¹⁰⁶ Opposer's Reg. No. 2,246,880 does not include a claim of acquired distinctiveness under Section 2(f).

¹⁰⁷ 34 TTABVUE 25. Opposer also argues that MANE is the dominant portion of Applicant's mark because Applicant uses other "MANE-formative marks." *Id.* at 29-30. While we consider third-party uses of the term MANE, Applicant's own use of the term in other alleged marks is not before us or relevant.

¹⁰⁸ 21 TTABVUE 14, 21.

that is descriptive or generic of a party's goods or services is typically less significant or less dominant when comparing marks. *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 1351 (Fed. Cir. 2011) (when a mark consists of two or more words, some of which are disclaimed, the word not disclaimed is generally regarded as the dominant or critical term). Opposer goes further, arguing "[t]hat Applicant eventually disclaimed the word 'MANE' during prosecution is irrelevant to the determination of that term's dominance and the existence of a likelihood of confusion."¹⁰⁹ While "[t]he technicality of a disclaimer in [an] application to register its mark has no legal effect on the issue of likelihood of confusion, *Nat'l Data Corp.*, 753 F.2d 1056, a disclaimed term is not "irrelevant" in considering a term's dominance, as Opposer suggests. Opposer has proffered no evidence for its position that MANE is dominant other than the term's position at the beginning of Applicant's mark.¹¹⁰ Opposer has not shown that the disclaimed term, MANE, in Applicant's mark is dominant.

While the parties' marks are somewhat similar visually, in that both share the same first term, the similarities end there. The remaining components in the marks are visually dissimilar. Opposer's mark adds 'N TAIL while Applicant's mark adds ESTEEM, and there are no apparent visual similarities between these portions of the marks.

As to the sound of the marks, the latter portion of the marks share an initial short "e" vowel sound in N TAIL (i.e., "en tail") and ESTEEM as well as the additional two

¹⁰⁹ 34 TTTABVUE 30.

¹¹⁰ We previously addressed the relevance of evidence of Applicant's other uses of the term MANE. *See* n. 114 *supra*.

syllables. When spoken as a whole, however, the marks are readily distinguishable. Even given “the penchant of consumers to shorten marks,” due to the descriptive nature of the word MANE in Applicant’s mark, it would not make sense for a consumer to rely on the term MANE to request a particular product or service. *Cf. In re Bay State Brewing Co.*, Ser. No. 85826258, 2016 TTAB LEXIS 46, at *9 (TTAB 2016); *see Detroit Athletic Co.*, 903 F.3d at (“the non-source identifying nature of the words ‘Co.’ and ‘Club’ and the disclaimers thereof constitute rational reasons for giving those terms less weight in the analysis.”).

We next consider the meaning and commercial impression of the MANE 'N TAIL and MANE ESTEEM marks. We agree with Opposer that MANE in its mark can refer to human hair, as it does in Applicant’s mark: “[t]o the extent Applicant [also] uses the word ‘MANE’ in MANE ESTEEM to connote hair, Applicant cannot logically or legally argue that Opposer’s use of ‘MANE’ in MANE 'N TAIL fosters any other connotation.”¹¹¹ In considering Opposer’s mark as a whole, as we must, *Stone Lion*, 746 F.3d at 1321, MANE 'N TAIL connotes a horse – an animal with a mane and a tail; humans can have a “mane” of hair but they do not have a tail.¹¹² This combination of two features of a horse – the mane and tail – tends to show that the MANE and TAIL portions of Opposer’s mark work together and reinforce the

¹¹¹ 34 TTABVue 30.

¹¹² There is a “ponytail” hairstyle, of course, and this meaning may be part of Opposer’s mark as well.

meaning of the other. In this manner, the term MANE is not more dominant than the TAIL or 'N TAIL components of Opposer's mark.¹¹³

Opposer's mark also has a secondary meaning. The terms MANE and TAIL refer to the front and back of an animal and suggest a shorthand for completeness, in the same sense that one might use the phrases "A to Z," "beginning to end," "head to toe," "nose to tail," etc. This phrasing implies that Opposer offers a full "line of ... products," as it does, in fact, in its '880 Registration. Opposer's MANE 'N TAIL mark thus calls to mind either the images of a horse and horse's hair, i.e., its mane and tail, or a comprehensive product offering, e.g., from head to toe. *See Heil*, 2024 TTAB LEXIS 494, at *79-80. These meanings – of a horse's mane *and* tail or the "beginning to end" phrasing – are absent from Applicant's mark, MANE ESTEEM.

Turning to Applicant's mark, as stated above, we agree with Opposer that "Applicant uses the word 'MANE' in MANE ESTEEM to connote [human] hair."¹¹⁴ Applicant said as much,¹¹⁵ and entered a disclaimer to this effect based on the Examining Attorney's dictionary evidence¹¹⁶ that MANE can mean both "[t]he long hair along the top and sides of the neck of certain mammals, such as a horse or male lion," and also "[a] long thick growth of hair on a person's head."¹¹⁷ Accordingly, in

¹¹³ In the file history of Opposer's Reg. No. 2,199,136, that Opposer made of record, Opposer argued that its MANE 'N TAIL mark is unitary. 23 TTABVUE 275-76.

¹¹⁴ 34 TTABVUE 30.

¹¹⁵ 23 TTABVUE 133 238:24-239:14; 23 TTABVUE 74.

¹¹⁶ *See* Office Actions issued in both App. Nos. 90001575 and 90001589 on September 18, 2020, TSDR 2.

¹¹⁷ *Id.* at TSDR 4, THE AMERICAN HERITAGE DICTIONARY.

Applicant's mark, MANE is descriptive of a characteristic of its Class 3 hair care goods and Class 44 hair care services. The remaining term in Applicant's MANE ESTEEM mark is the term ESTEEM. Opposer argues that Applicant's addition of the term ESTEEM "does not alleviate the high likelihood of confusion by the use of the dominant, shared, first word MANE in the parties' marks as used on identical goods and closely related, complementary services."¹¹⁸ We disagree. Given the descriptive nature of MANE in Applicant's mark, the term ESTEEM gives Applicant's mark its overall meaning of "hair confidence." Applicant's mark suggests feeling confident about one's hair. This meaning is not present in Opposer's mark.

Taking into account the appropriate degree of strength of Opposer's mark, including the weakness of the only shared component with Applicant's mark (i.e., MANE), and in view of these significant differences in connotation and commercial impression, along with the differences in sight and sound, we find that the marks as a whole are dissimilar.

The first *DuPont* factor weighs against a finding of likely confusion.

¹¹⁸ 34 TTABVue 28.

D. Other *DuPont* factors

In addition to the *DuPont* factors discussed above, Opposer briefly discusses the seventh, eighth, ninth,¹¹⁹ tenth,¹²⁰ eleventh,¹²¹ and twelfth factors.¹²² We address them briefly as well.

The seventh and eighth *DuPont* factors relate, respectively, to the nature and extent of any actual confusion and the extent of the opportunity for actual confusion. See *DuPont*, 476 F.2d at 1361. These “factors are interrelated; the absence of evidence of actual confusion, under the seventh *DuPont* factor, by itself is entitled to little weight in our likelihood of confusion analysis unless there also is evidence, under the eighth *DuPont* factor, that there has been a significant opportunity for actual confusion to have occurred.” *Keystone Consol. Indus. v. Franklin Inv. Corp.*, Can. No. 92066927, 2024 TTAB LEXIS 290, at *75-76 (TTAB 2024) (citation omitted). Opposer asserts that a showing of actual confusion is not necessary to find a likelihood of confusion nor has there been a reasonable opportunity for confusion to have occurred.¹²³ We agree. According to Applicant’s responses to Opposer’s interrogatories, Applicant started selling its products under the mark in February

¹¹⁹ The ninth *DuPont* factor considers “the variety of goods and services on which a mark is or is not used (house mark, ‘family’ mark, product mark).” *DuPont*, 476 F.2d at 1361.

¹²⁰ The tenth *DuPont* factor considers “[t]he market interface between applicant and the owner of a prior mark[.]” *Id.*

¹²¹ The eleventh *DuPont* factor considers “[t]he extent to which applicant has a right to exclude others from use of its mark on its goods.” *Id.*

¹²² The twelfth *DuPont* factor considers “[t]he extent of potential confusion, i.e., whether de minimis or substantial.” *Id.*

¹²³ 34 TTABVue 46-47.

2021, and was selling around \$50 per month.¹²⁴ In light of such minimal use of the mark, we cannot say that there has been a significant opportunity for confusion to have occurred and thus cannot find that the absence of actual confusion here is legally significant. *See, e.g., Keystone*, 2024 TTAB LEXIS 290, at *78-79 (“Because of the more limited nature of Respondent’s activities . . . , we find the evidence of concurrent use based on actual market conditions does not indicate a significant opportunity for confusion to occur.”).

Therefore, we treat the seventh and eighth *DuPont* factors as neutral. *See In re Davey Prods. Pty*, Ser. No. 77029776, 2009 TTAB LEXIS 524, at *22-25 (TTAB 2009).

As to the ninth *DuPont* factor, having already found that Opposer’s hair care products are identical in part to Applicant’s hair care products and related to Applicant’s services, there is no need for Opposer to rely on a factor used to show the relatedness of the goods or services. *KME Ger. GmbH v. Zhejiang Hailiang Co.*, Opp. No. 91267675, 2023 TTAB LEXIS 279, at *55 (TTAB 2023), *rev’d on other grounds*, No. 1:23-cv-01606, 2025 U.S. Dist. LEXIS 25637 (E.D. Va. Jan. 10, 2025), *appeal docketed*, No. 25-1129 (4th Cir. Feb. 12, 2025).

Opposer asserts that the tenth *DuPont* factor is neutral. It does not present any further argument or evidence on this factor, and Applicant does not address it, so we find that it is indeed neutral.

As for the eleventh *DuPont* factor, Opposer repeated its arguments made under the eighth factor which were duly considered. Therefore, we treat this *DuPont* factor

¹²⁴ 23 TTABVUE 19. We note that Applicant’s responses are not verified.

as neutral. *Cf. Heil*, 2024 TTAB LEXIS 494, at *94 (finding twelfth factor neutral where the arguments “essentially repeat arguments under the other *DuPont* factors, and have been duly considered”).

Similarly, under the twelfth *DuPont* factor, Opposer’s argument concerning the extent of potential confusion under this factor was combined with its argument under the ninth *DuPont* factor, repeated argument under the third *DuPont* factor, and has been duly considered. Therefore, we treat the twelfth *DuPont* factor as neutral. *Heil*, 2024 TTAB LEXIS 494, at *94.

E. Balancing the *DuPont* factors

The final step in analyzing likelihood of confusion is to weigh the *DuPont* factors for which there has been evidence and argument; “explain the results of that weighing;” and “the weight [we] assigned to the relevant factors.” *In re Charger Ventures LLC*, 64 F.4th 1375, 1384 (Fed. Cir. 2023). Opposer must prove this element of its Section 2(d) claim by a preponderance of the evidence.

We did not consider or found neutral the seventh, eighth, ninth, tenth, eleventh, and twelfth *DuPont* factors.

The second, third, and fourth *DuPont* factors considering the similarity or dissimilarity of the goods and services, trade channels, and conditions of sale weigh in favor of likely confusion for App. No. 90001589 in Class 44, and heavily so for App. No. 90001575 in Class 3.

Regarding Opposer’s mark’s strength or weakness, the fifth *DuPont* factor was neutral, while the sixth weighed against likely confusion.

Under the first *DuPont* factor, we find that the dissimilarity of the marks in sound, appearance, connotation, and commercial impression to be crucial insofar as this dissimilarity, in conjunction with the conceptual and commercial weakness of the only shared element of the marks (i.e., MANE) outweighs the other *DuPont* factors. *See Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 1381-82 (Fed. Cir. 2016) (“a single *du Pont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks”); *Odom’s Tenn. Pride Sausage, Inc. v. FF Acquisition, LLC*, 600 F.3d 1343, 1346-47 (Fed. Cir. 2010) (“[E]ven if all other relevant *DuPont* factors were considered in [opposer’s] favor, as the board stated, the dissimilarity of the marks was a sufficient basis to conclude that no confusion was likely.”).

Decision: The opposition to registration of Applicant’s MANE ESTEEM mark in application Ser. Nos. 90001575 and 90001589 based on Trademark Act Section 2(d) is **dismissed**.