

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

Hearing Date: March 24, 2015

Mailed: May 1, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*Mango's Tropical Cafe, LLC*¹

v.

Tango Mango, Inc.

Cancellation No. 92055269

Richard S. Ross, Esq.
for Mango's Tropical Cafe, LLC.

Rebecca J. Stempien Coyle of Levy & Gradinetti
for Tango Mango, Inc.

Before Taylor, Wellington, and Ritchie,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Mango's Tropical Cafe, LLC ("Petitioner") petitions to cancel Registration No. 3328822 for the standard character mark TANGO MANGO for "carry-out restaurants; restaurant services; restaurants; [and] take-out restaurant services" in

¹ Pursuant to a stipulation, Petitioner's name has been changed from Mango's Tropical Cafe, Inc. Accordingly, the caption for this proceeding has been amended. TBMP § 512.02 (2014). We note that assignments of all Petitioner's pleaded registrations are recorded with the USPTO's Assignment Branch at Reel/Frame 5112/0088.

International Class 43. The registration is owned by Tango Mango, Inc. (“Respondent”) and was issued on November 6, 2007.²

Petitioner claims likelihood of confusion with several “Mango” formative marks, as set forth with particularity, *infra*, which Petitioner asserts it has used in commerce in association with restaurant and bar services since 1991. Petitioner also pleads a claim of “abandonment” that is based on various assignments of the subject registration, including an assignment to an entity that “does not exist as a legal entity and therefore cannot possibly be using the mark for which registration has been obtained.”³

An oral hearing was held on March 24, 2015, at the request of Respondent, and only Respondent’s counsel, Ms. Coyle, appeared before the Board.⁴

I. The Parties’ Cross-Motions for Summary Judgment and Alternative Case Resolution (ACR) Agreement

In the course of this cancellation proceeding, the parties filed cross-motions for summary judgment. The Board denied these motions finding, *inter alia*, that genuine disputes of material fact exist which precluded decision by summary judgment.⁵ Petitioner and Respondent shortly thereafter entered into an ACR

² The registration alleges first use anywhere and in commerce on July 25, 2005, and is based on an application filed on February 23, 2007.

³ Petition to Cancel, as amended, at paragraph 19. 18 TTABVUE 10.

⁴ Prior to the hearing, Petitioner informed the Board that it waived its right to attend the oral hearing. 48 TTABVUE.

⁵ 34 TTABVUE.

agreement and filed a copy with the Board which, in turn, was noted and approved.⁶

The agreement contains, *inter alia*, the following stipulations:

1. The Board, in lieu of a full trial, may employ its ACR procedure to resolve this proceeding based on the parties' cross-motions for summary judgment, responses and reply briefs filed in support thereof, and evidence and testimony submitted therewith, including the supplementation to their respective motions for summary judgment, as provided below, the subject Registration No. 3328822, and Petitioner's pleaded registrations submitted with its motion for summary judgment.
2. The Board may consider the parties' cross-motions for summary judgment and reply briefs, and supplementation thereto, as the parties' final briefs on the merits.
3. The parties may not submit and the Board will not consider any additional briefs or evidence for purposes of the ACR trial and decision, except for the permitted supplementation limited to the issues of (a) the commercial impressions of the parties' marks, (b) the scope of protection that should be afforded petitioner's marks in light of the extent of the fame, if any, of petitioner's marks contending with the strength or weakness of petitioner's marks in view of the evidence of third-party usage of the term MANGO in relation to restaurant and bar services, and (c) Petitioner's abandonment claim, namely whether the original assignment of respondent's underlying application from Tango Mango, LLC to Knightspin, LLC was an invalid assignment or whether identifying Tango Mango, LLC as the assignor in the original assignment is also a curable mistake.
4. The evidence submitted in connection with the parties' respective cross-motions for summary judgment and reply briefs and permitted supplementation is authentic for purposes of admission into the evidence and deemed properly of record for purposes of the ACR trial and the Board's ACR final decision. The parties have agreed that the Declarations of Joshua Wallack and Shirley Spinetta submitted in support of their respective summary judgment motions shall be deemed testimony and subject to the parties' rights to cross-examine testimonial witnesses, as set forth in the below schedule.

⁶ 35 and 36 TTABVUE, respectively.

5. The parties maintain all evidentiary, relevance, and other objections and arguments made in their respective briefs and reply briefs on the cross-motions for summary judgment and any objections which may be interjected in their supplementation of their respective motions for summary judgment.
6. The Board may resolve any genuine disputes of material fact, including the drawing of reasonable inferences from any such fact(s), presented by the parties' cross-motions and related filings noted above.
7. The parties reserve the right to request an oral hearing on the merits by no later than their respective final supplementation submissions to the Board;
8. The Board will not entertain any further extensions of time for deadlines set forth in this order absent a showing of extraordinary circumstances.
9. Any party to this proceeding who is dissatisfied with the ACR decision of the Board retains the right to appeal to the United States Court of Appeals for the Federal Circuit or to appeal by civil action in a United States District Court in accordance with Trademark Rule 2.145 and TBMP §§ 900 and 901 (3d ed. rev. 2 2013).

Pursuant to the Agreement, the parties filed a stipulation of facts.⁷ In particular the parties stipulated that Petitioner is the owner of the following registrations:

Mark	Reg. No.	Goods and Services
MANGO'S (standard characters)	4190731 ⁸	Nightclub services, in Class 41 Restaurant and bar services, in Class 43
MANGO'S TROPICAL CAFE (standard characters)	4224643 ⁹	Nightclub services, in Class 41 Restaurant and bar services, in Class 43

⁷ 39 TTABVUE and 40 TTAVUE, respectively.

⁸ Issued August 14, 2012, based on an application filed on January 11, 2012.

⁹ Issued October 16, 2012, based on an application filed on December 22, 2011.

 <p>(“Mambo Bar” disclaimed)</p>	3108906 ¹⁰	Restaurant and bar services, in Class 43
 <p>(“Tropical Cafe” disclaimed)</p>	3284057 ¹¹	Restaurant and bar services, in Class 42
	3512984 ¹²	Prepackaged foods, namely, entrees consisting primarily of poultry, in Class 29 Computer services, namely, providing a website featuring entertainment information via a global computer network, namely, concert information, nightlife information, and entertainment information about music, singing, dancing, music videos, in Class 41
	3700648 ¹³	Clothing, namely, infant’s and children’s underwear and bodysuits, t-shirts, sweatshirts, pants, sweatpants, shorts, tank-tops, halter tops, hats, jackets, shirts and sleepwear, in Class 25

¹⁰ Issued June 27, 2006; §§ 8 and 15 declaration accepted and acknowledged.

¹¹ Issued Aug. 28, 2007; §§ 8 and 15 declaration accepted and acknowledged, and based on an application filed on November 1, 2000.

¹² Issued Oct. 7, 2008; §§ 8 and 15 declaration accepted and acknowledged, and based on an application filed on October 25, 2000.

¹³ Issued Oct. 27, 2009, and based on an application filed on November 1, 2000.

	3649192 ¹⁴	Metal key chains, in Class 6 Postcards, greeting cards, calendars and pens, in Class 16 Towels, in Class 24 Bottled drinking water, in Class 32 Smoker's articles, namely, cigars, cigar cutters, cigarette lighters not of precious metal, and cigar boxes of non-precious metal, in Class 34
--	-----------------------	--

The parties also stipulated to the following:

- The underlying applications for the first two of the aforementioned registrations owned by Petitioner were filed after Respondent's involved registration issued and neither application "received a refusal to register due to Registrant's mark."
(¶ 2 of the Stipulation of Facts)
- "Prior to the issuance of the subject registration, an entity identified as Tango Mango, LLC assigned all rights, title, and interest in the underlying application to Knightspin, LLC. The assignment was executed on September 24, 2007 and was recorded with the USPTO's Assignment Branch on November 8, 2007 (two days after the subject registration issued)."
(¶ 6 of the Stipulation of Facts)
- "The subject registration was then assigned back to Tango Mango, LLC by Knightspin LLC via a *nunc pro tunc* assignment effective September 20, 2010. This *nunc pro tunc* assignment was executed on April 30, 2012 and recorded with the USPTO's Assignment Branch on May 3, 2012."
(¶ 7 of the Stipulation of Facts)
- "A corrective assignment was executed on April 30, 2012 and recorded on November 6, 2013 confirming that the previous *nunc pro tunc* assignment from Knightspin LLC to Tango Mango, LLC was in error and that the receiving party should have been identified as Tango Mango, Inc. and not Tango Mango, LLC."
(¶ 8 of the Stipulation of Facts)

¹⁴ Issued July 7, 2009, based on an application filed on November 1, 2000.

- A corrective assignment was executed on June 2, 2014, and recorded on June 2, 2014, confirming that the previous assignment of September 24, 2007, from Tango Mango, LLC to Knightspin, LLC was in error and the conveying party should have been identified as Tango Mango, Inc. and not Tango Mango, LLC.
(¶ 9 of the Stipulation of Facts)

II. Evidentiary Objections

Petitioner has objected to certain materials, submitted by Respondent for the first time with its ACR brief, because they purportedly contain “hearsay and [are] without foundation.” Reply Brief, p. 1, fn. 1. The objected-to exhibits comprise dictionary definitions of the word “tango”; “Caribbean Sea”; and “South America,” all taken from the *Merriam-Webster* online dictionary and encyclopedia website. Authoritative reference materials, including online versions that exist in printed format or have regular fixed editions, have long been accepted and the Board frequently takes judicial notice of such materials. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). Accordingly, we have considered these definitions.

Petitioner has also objected to Respondent’s evidence of purported third-party use of marks containing the term MANGO (or a derivative) as “inadmissible” and “hearsay.” See Petitioner’s Brief at pp. 6-8 and Reply Brief at p. 3. Petitioner does not specifically request that these materials be stricken from the record and we decline to do so; rather, as addressed more fully later in this decision, we consider the materials for what probative value they possess.

III. Record

The record in this case consists of the pleadings and, by rule, the file of Respondent's involved registration. Trademark Rule 2.122(b)(1). In addition, and pursuant to the parties' ACR agreement, the record includes the materials submitted in support of the parties' cross motions for summary judgment as well as materials with their ACR briefs. The additional materials, submitted with ACR briefs, include definitions and supplemental declarations from the parties' principal witnesses. In particular, Petitioner submitted the definitions referenced above and the supplemental declaration of Joshua Wallack, Petitioner's chief operating officer, with exhibits.¹⁵ Respondent, likewise, submitted a supplemental declaration of Shirley Spinetta, Respondent's president, with additional exhibits.

We have considered the entire record, and without providing an exhaustive list of all materials filed, note that it includes the following:

- Screenshots of pages from Petitioner's website mangostropicalcafe.com;¹⁶
- Printouts of USPTO records for Petitioner's registrations;¹⁷
- Various articles and website printouts submitted for purposes of demonstrating Petitioner's purported fame;¹⁸

¹⁵ 42 TTABVUE at 36. Exhibit 2 to the supplemental Wallack declaration was designated as "confidential" and submitted separately at 41 TTABVUE (not viewable on USPTO public website). In general, this exhibit consists of a summary described as Petitioner's "Advertising Initiatives – television, print and Internet."

¹⁶ Exhibit 1 to Wallack Decl. and Wallack Supp. Decl. at 29 and 42 TTABVUE, respectively.

¹⁷ Exhibit B at 29 TTABVUE and Exhibit A at 42 TTABVUE.

¹⁸ Exhibits 1-3 to Wallack Decl. and Exhibit C, all at 29 TTABVUE; Exhibits 3 and 5 to Wallack Supp. Decl. at 42 TTABVUE.

- Printouts from third-party websites, including review sites such as Yelp and TripAdvisor as well as websites for restaurants, discussing or referencing restaurants with MANGO (or a derivative) in the name;¹⁹
- Copies of third-party registrations and applications obtained from PTO records for marks containing the term MANGO (or a derivative);²⁰ and
- Online telephone directory business listings (www.yellowpages.com) for various states, including Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Nevada, New Jersey, New York, North Carolina, Rhode Island, South Carolina, Texas, Virginia, Washington and Wisconsin, for establishments with the term “Mango” (or a derivative) in the name.²¹

IV. Petitioner’s Standing

Petitioner must have standing in order to prevail on either of its grounds for cancellation. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Here, there is no dispute and the record clearly establishes Petitioner’s standing. In particular, the parties have stipulated to Petitioner’s ownership of several registrations for marks including the term “Mango’s” used in connection with restaurant services and Petitioner made of record evidence showing these registrations are valid and subsisting. These demonstrated facts show that Petitioner is more than a mere intermeddler and has a personal interest in bringing this cancellation proceeding.

¹⁹ Exhibit 3 at 30 TTABVUE and Exhibits T through FF to Spinetta Supp. Declaration, 43 TTABVUE.

²⁰ Exhibit 2 at 30 TTABVUE and Exhibits GG-HH to Spinetta Supp. Declaration and 43 TTABVUE.

²¹ Exhibit 3 at 30 TTABVUE.

V. Claim of “Abandonment” Based on Invalid Assignment(s)

Petitioner has alleged and argued on summary judgment that Respondent has abandoned its registered mark through non-use because of purported invalid assignments of the underlying application for the registered mark. Specifically, on summary judgment, petitioner relied on the following factual circumstances:

- The underlying application was filed by Respondent (“Tango Mango, Inc.”);
- Prior to the issuance of the subject registration, the underlying application, which was filed by Respondent was assigned by an entity identified as Tango Mango, LLC to Knightspin LLC;²²
- The registration was then assigned back to Tango Mango, LLC via a *nunc pro tunc* assignment;²³ and
- A corrective assignment was filed confirming that the previous *nunc pro tunc* assignment from Knightspin LLC to Tango Mango, LLC was in error and that the receiving party should have been identified as Tango Mango, Inc. and not Tango Mango, LLC.²⁴

Petitioner argued on summary judgment that Tango Mango, LLC is a nonexistent entity and, therefore, could not use or assign the Respondent’s underlying application to Knightspin, LLC nor could Knightspin, LLC assign back the mark to a nonexistent entity. Petitioner further argued that this was not a

²² Assignment recorded with the USPTO on November 8, 2007 at reel/frame 3657/0409. Although the assignment was recorded one day after issuance of the registration, the execution date of the assignment was September 24, 2007 according to the USPTO assignment records.

²³ Assignment recorded with the USPTO on May 3, 2012 at reel/frame 4772/0194.

²⁴ Assignment was executed on April 30, 2012 and recorded with the USPTO on November 6, 2013, recorded at reel/frame 5150/0073.

curable defect and that Respondent has abandoned the mark because of this alleged invalid assignment.

In the order denying the cross-motions for summary judgment, the Board held that the corrective assignment was “a permissible cure to the misidentification of Tango Mango, LLC as the assignee in the *nunc pro tunc* assignment from Knightspin, LLC,” citing to TMEP § 503.06(b) (October 2013); *In re Abacab Int’l Computers Ltd.*, 21 USPQ2d 1078 (Comm’r Pats. 1987).²⁵ However, the Board further noted that there was no corrective assignment on file with the USPTO as to the original assignment of Respondent’s underlying application from “Tango Mango, LLC” to “Knightspin, LLC.” Thus, there was no decision as to whether this original assignment was also a curable mistake that has since been corrected.²⁶

Subsequent to the Board’s summary judgment order, a second corrective assignment was filed by Respondent confirming that the original assignment from “Tango Mango, LLC” to Knightspin LLC was in error and that the assigning party should have been identified as “Tango Mango, Inc.” The parties stipulated to the existence of this second corrective assignment. (See bulleted point listed above referencing ¶ 9 of the Stipulation of Facts, *infra*).

To the extent that Petitioner’s abandonment claim, or any invalid assignment claim, is based on the original assignment, we note that all defects in the subject

²⁵ 34 TTABVUE 15.

²⁶ Assignment was recorded with the PTO on June 2, 2014, recorded at reel/frame 5293/0731.

registration's assignment history have now been cured. Accordingly, the claim of abandonment based on an invalid assignment history is dismissed.

VI. Priority and Likelihood of Confusion

We now turn our attention to the ground of priority and likelihood of confusion. Our determination under Trademark Act Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

A. Priority

In a cancellation proceeding in which both parties own registrations, the petitioner must prove priority of use. *See Brewski Beer Co. v. Brewski Bros., Inc.*, 47 USPQ2d 1281 (TTAB 1998).

The parties may rely on the filing dates of the underlying applications for the involved registration and the pleaded registrations as constructive use dates for purposes of priority. *M.C.I. Foods, Inc. v. Bunte*, 96 USPQ2d 1544, 1550 (TTAB 2010); *see also, J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 437 (CCPA 1965). Accordingly, Respondent may rely on its February 23, 2007 filing date of the underlying application for the involved registration.²⁷ A review of

²⁷ Respondent's registration contains allegations of first use of its mark anywhere and in commerce as of July 25, 2005. However, these allegations are not evidence that the mark was actually first used on this date. Had Respondent sought to rely on this earlier date for purposes of priority, and it did not, it would have had to prove this earlier use.

Petitioner's pleaded registrations reveals that all but the first two (listed above, see footnote nos. 8-14) are based on applications filed before February 23, 2007. Accordingly, Petitioner can establish priority with respect to its pleaded Registrations Nos. 3284057, 3108906, 3700648, 3512984, and 3649192.

However, with respect to Registrations Nos. 4190731 (MANGO'S) and 4224643 (MANGO'S TROPICAL CAFE), that is, the two pleaded registered marks without stylization or design elements, Petitioner cannot rely on the underlying application filing dates to establish its priority. Rather, it must establish by a preponderance of the evidence that it acquired rights in these marks prior to February 20, 2007.

On summary judgment, Petitioner asserted priority with respect to all of its pleaded marks on the basis that its "first use date (and trademark application filing dates) precede [Respondent's] alleged first use date (and trademark application filing date)."²⁸ Petitioner also submitted the declaration of its principal, Mr. Wallack, who averred:

5. Mango's displays the MANGO'S Marks²⁹ prominently on all business signage, menus, clothing items, pre-packaged food products, music and other memorabilia products, a practice Mango's has followed since commencing operation of MANGO'S TROPICAL CAFE in 1991.

Respondent challenged Petitioner's priority on summary judgment by arguing that "[t]he priority at issue is when the Petitioner began use of each of its Marks,

²⁸ 29 TTABVUE 12.

²⁹ "MANGO'S Marks" was defined in Mr. Wallack's declaration as all of the registered marks that the parties stipulated that Petitioner was the owner of, including Registrations Nos. 4190731 (MANGO'S) and 4224643 (MANGO'S TROPICAL CAFE).

not when it opened its establishment.” (bold in original).³⁰ Respondent reiterated this argument in its ACR brief, with emphasis on the MANGO’S registration (No. 4190731), noting that Petitioner “offers no evidence of the dates of its first use of the MANGO’S mark for restaurant, bar or nightclub services.”³¹ Respondent, citing to the Board’s decision in *Calypso Tech., Inc. v. Calypso Capital Mgmt., LP*, 100 USPQ2d 1213 (TTAB 2011), argues that Mr. Wallack’s statements in his declaration are “at best ... similar to those by the plaintiff in *Calypso*, [and] are directed only to when the Petitioner commenced operations and its continuing operation of its establishment.”³²

In its ACR reply brief, Petitioner reiterates its reliance on the “unrebutted, sworn testimony of Mr. Wallack ... that proves commencement of the services in question under the MANGO’S Marks.”³³ Petitioner, again, placed emphasis on paragraph 5 of the Wallack declaration, and argues that the *Calypso* proceeding is “factually inapposite to the record evidence here.”³⁴

In proving priority, the oral testimony of a single witness may be conclusive so long as it is not tainted by contradiction, inconsistency or indefiniteness, but rather carries a conviction of accuracy and applicability. *B.R. Baker Co. v. Lebow Bros.*, 150

³⁰ 33 TTABVUE 3.

³¹ 43 TTABVUE 8.

³² *Id.*

³³ 45 TTABVUE 3.

³⁴ *Id.*

F.2d 580, 66 USPQ 232 (CCPA 1945). Oral testimony may be buttressed by documentary evidence corroborating the dates of use. *Elder Manufacturing Co. v. International Shoe Co.*, 194 F.2d 114, 92 USPQ 330 (CCPA 1952). Finally, when considering evidence of first use, 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.” *West Florida Seafood Inc. v. Jet Restaurants Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994). In the *Calypso* decision, whose significance to this proceeding the parties dispute, the Board contemplated the importance of an interrogatory response in the context of priority. The Board ultimately found the response was too vague, notably lacking “any information as to when plaintiff began use” of its mark, to support any finding of an earlier date of first use. *Calypso Tech., Inc.*, 100 USPQ2d at 1220. While *Calypso* has some bearing to our proceeding, we do note that Mr. Wallack’s declaration contains references to Petitioner’s use of its marks.

Nevertheless, upon review of the record, and with particular attention to the Wallack declaration, we do not find that Petitioner has established prior rights in the standard character MANGO’S and MANGO’S TROPICAL CAFE marks. Simply put, the Wallack declaration not only lacks sufficient detail with respect to when Petitioner first used these two marks in connection with restaurant and bar services, but appears to be inconsistent with the record. Specifically, Mr. Wallack, in his declaration, lumps these two registered word marks with the other pleaded registered marks containing design elements and the additional words MAMBO

BAR or TROPICAL CAFE and references all of the marks collectively as the “MANGO’S Marks.” Mr. Wallack then avers, in addition to his statement in paragraph 5, that Petitioner has “20 years of uninterrupted use of the MANGO’S Marks” (paragraph 14);³⁵ and that “[f]rom the outset of MANGO’S TROPICAL CAFE, Mango’s has ... [been] promoting its services under the MANGO’S Marks” (paragraph 8).³⁶ These statements leave ambiguity as to when Petitioner began use of each of its individual pleaded marks, including the standard character MANGO’S and MANGO’S TROPICAL CAFE marks. To the extent that Petitioner relies on the Wallack declaration for the proposition that it began use of all of its “MANGO’S Marks” in the same year (1991), this would contradict Petitioner’s own allegations of first use in four of the seven pleaded registrations. For example, Registration No. 3108906 (MANGO’S MAMBO BAR stylized with design) provides “December 1, 1997” as the date Petitioner first used the mark anywhere and in commerce. Moreover, although the Wallack declaration exhibits consist in part of website printouts or advertisements depicting Petitioner’s use of its marks, with an emphasis on the MANGO’S or MANGO’S TROPICAL CAFE marks without accompanying designs, they are not dated prior to Respondent’s priority date of February 20, 2007, nor does Mr. Wallack attest to when any of the specific advertisements were placed.

³⁵ 42 TTABVUE 39.

³⁶ 42 TTABVUE 38.

Because Petitioner has not established priority with respect to the two standard character marks, MANGO'S and MANGO'S TROPICAL CAFE, it cannot rely on these marks for purposes of its likelihood of confusion claim. Accordingly, we continue our analysis with the pleaded marks for which Petitioner has established priority, MANGO'S TROPICAL CAFE and MANGO'S MAMBO BAR (both marks in stylized lettering with a parrot, and the latter also having bongo drums), and whether there is a likelihood of confusion between either of these two marks and Respondent's TANGO MANGO mark.

B. Similarity of the Services and Channels of Trade

As recited in the respective recitations of services, the parties' services include "restaurant services" and thus the services are, at least, partially identical. We must therefore presume that these identical restaurant services will move in the same channels of trade and are available to the same potential classes of ordinary consumers for restaurant services. *See Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011). *See also, American Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011); *see also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this presumption). The second and third *du Pont* factors thus strongly support a finding of likely confusion.

C. Similarity of the Marks

We now consider the similarity or dissimilarity of the marks at issue in terms of appearance, sound, meaning, and overall commercial impression. *Palm Bay Imports*

Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). We keep in mind that in circumstances where the parties use their marks in connection with services that are legally identical, as we have present here, the similarity between the marks necessary to support a determination that confusion is likely declines. See *Bridgestone Americas Tire Operations LLC v. Federal Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012).

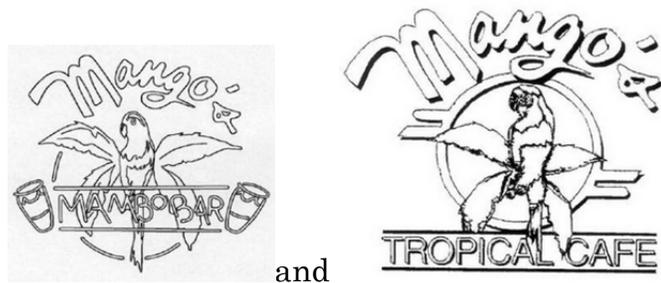
Again, Respondent's mark is TANGO MANGO, in standard characters, and it has not been demonstrated that either word has any significance with respect to restaurant services. While "mango" is a fruit and thus may be suggestive of a menu item ingredient,³⁷ it has not been shown to be descriptive nor has it been disclaimed. Another significant feature of Respondent's mark is that the initial term "tango" rhymes with the second term, "mango." Moreover, given the meanings of the two terms, one a type of dance³⁸ and the other a fruit, the combination of terms is seemingly incongruous or appears to be nothing more than a combination creating a playful rhyme. We do not find that one term is dominant over the other in Respondent's mark; however, the fact that "Tango" appears first may make it more

³⁷ The Board takes judicial notice that "Mango" is defined as "a tropical usually large ovoid or oblong fruit with a firm yellowish-red skin, hard central stone, and juicy aromatic pulp." *Merriam-Webster.com*. 2011. <http://www.merriam-webster.com> (retrieved on 8 May 2011). *Univ. of Notre Dame du Lac*, 213 USPQ 594, *aff'd*, 703 F.2d 1372 (Board may take judicial notice of dictionary definitions.)

³⁸ "Tango" is defined as "a Latin-American dance in which couples make long pauses in difficult positions." *Merriam-Webster.com*. 2011. <http://www.merriam-webster.com> (retrieved on 8 May 2011).

likely to be impressed in a customer's memory. *See Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"); *see also* Palm Bay Imports, *supra*, ("Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word).

As for Petitioner's two marks with which we base our comparison, they are:



In each of Petitioner's marks, the term MANGO'S clearly plays an important role. It appears in larger letters at the apex of each mark and is the only non-descriptive literal term. Again, it has not been demonstrated that MANGO'S will necessarily be understood as having any special meaning in the context of restaurant services; however, the term is being used in a possessive manner and thus may be understood as referencing a person. The descriptive and generic wording, "Mambo Bar" and "Tropical Cafe," have been disclaimed in Petitioner's registrations for restaurant services and, accordingly, have less significance in

creating the marks' commercial impressions and carry little weight in our likelihood of confusion determination. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on likelihood of confusion.") (quoting *In re Nat'l Data Corp.*, 224 USPQ at 752). As to the parrot and drum design elements, it is also generally held that with word and design composite marks, the design portions are accorded less weight in the likelihood of confusion analysis because consumers are more likely to rely on wording to request the goods or services. *See Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 (TTAB 2011); *M.C.I. Foods Inc. v. Bunte*, 96 USPQ2d 1544, 1551 (TTAB 2010). However, the parrot design figures prominently in the middle of each mark and cannot be ignored; when considering the marks' overall commercial impressions, we find the parrot and bongo drums help create or reinforce a tropical theme brought to mind by the wording in Petitioner's marks.

Although the parties' marks are similar to the extent that they include a variation of the term MANGO, Respondent's mark begins with an arbitrary term, TANGO coupled with the rhyming word MANGO. It is the word placement, rhyme scheme and absence of a design element in Respondent's mark that distinguishes the marks in sight, sound and commercial impression. With particular respect to the commercial impressions, Petitioner's mark connotes a tropical themed

restaurant belonging to “mango” whereas Respondent’s mark connotes a more arbitrary and playful rhyming name.

Moreover, the degree of similarity between the marks revolves greatly around the strength of the common element, MANGO(S), as well as that the overall strength of Petitioner’s marks. We discuss these two factors in the following sections.

D. Number and Nature of Similar Marks in Use for Similar Services

Respondent focuses much of its evidence and arguments on the sixth *du Pont* factor, the number and nature of similar marks in use on similar goods or services. Respondent contends that the term MANGO is widely used and therefore weak for restaurants, relying on evidence of third-party trademark registrations and websites, including online phone listings. Relying on the third-party websites and online phone listings, Respondent asserts there “at least 155 different restaurants [who] use the term MANGO or its variant in their names.”³⁹ Respondent notably omitted the following in arriving at this number: multiple listings for the same name in multiple states, third-party websites and online listings that were presumably for the same establishment, or listings for establishments that Petitioner has brought an action against.

Petitioner objects to Respondent’s evidence as “inadmissible hearsay” or that, “at most, [the evidence] is admissible only to prove that web site existed at a point in

³⁹ 43 TTABVUE 18 (bold in original omitted).

time, and does not prove the truth of any matter asserted therein, including actual usage of any mark.”⁴⁰ Petitioner essentially concludes that the record does not include “credible, admissible evidence of substantial or meaningful third party use of” marks with the term MANGO or a variation thereof.”⁴¹

With respect to the third-party registrations, Petitioner is correct and the Board has long held that they have limited probative value and are not evidence that the registered marks have been actually used in commerce or that consumers have even been exposed to these marks. *See, e.g., Olde Tyme Foods Inc. v. Roundy’s Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992) (“As to strength of a mark, however, registration evidence may not be given *any* weight.”); *Weider Publ’ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1351 n.10 (TTAB 2014) (“As we have often stated, because third-party registrations of marks are not evidence that the registered marks are in use, they are of limited probative value for demonstrating weakness of the marks.”). As a result, the third-party registrations, by themselves, offer little to no insight into whether consumers may be accustomed to restaurants with the term “Mango” (or a variation thereof) in the name.

However, listings from the online yellow pages website for numerous different restaurants with the term “Mango” (or a variation) in the name have probative value because they, at least, “carry a presumption that the name ... is being used by

⁴⁰ 42 TTABVUE 8.

⁴¹ *Id.*

third parties in connection with their ... services.” *Anthony’s Pizza & Pasta Int’l Inc. v. Anthony’s Pizza Holding Co.*, 95 USPQ2d 1271 (TTAB 2009), *aff’d*, 415 Fed. Appx. 222 (Fed. Cir. 2010). In *Anthony’s Pizza*, the Board relied on our primary reviewing court’s decision in *Lloyd’s Food Products Inc. v. Eli’s Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993), where the Federal Circuit stated that service mark use “includes listing the name of the business, including the mark, in telephone directories and placing listings and advertisements in the yellow pages.”

In *Anthony’s Pizza*, the record not only included online yellow pages telephone listings for restaurants with the name “Anthony’s,” but also testimony that many of the listed businesses contacted by telephone to verify their existence. Ultimately and based on the entirety of the evidence, it was found that a mark comprising the name “Anthony’s” in connection with restaurant services should be given a restricted scope of protection because this name had been extensively adopted, registered, and used in marks for restaurant services. *Id.* at 1278.

Respondent in this proceeding did not introduce testimony verifying the existence of any of the listed restaurants with “Mango” in their name. However, Respondent did submit evidence in the form of printouts of online restaurant consumer reviews, printouts of third-party restaurant websites (many of which contain photographs of the establishment) and Google search results to help corroborate and buttress the existence of the listed restaurants and others. This includes:

“Mango’s Taqueria and Cantina”

Yelp website (www.yelp.com) reflects 89 consumer reviews (dating from 2012 to 2013) for a restaurant with this name located at Pier 39 in San Francisco, California;⁴²

“Mango Mexican Restaurant”

Yelp website (www.yelp.com) reflects 22 consumer reviews (dating from 2010 to 2013) for a restaurant with this name located in Niles, Illinois;⁴³

“Mango Caribbean Restaurant & Bar”

Yelp website (www.yelp.com) reflects 286 consumer reviews (dating from 2006 to 2013) for restaurant with this name located in Palo Alto, California;⁴⁴

“Under the Mango Tree”

Yelp website (www.yelp.com) reflects 16 consumer reviews (dating from 2011 to 2013) for a juice and smoothie bar with this name located in Miami Beach, Florida;⁴⁵

“Mango’s Noodle House”

Yelp website (www.yelp.com) reflects 137 consumer reviews (dating from 2010 to 2013) for a restaurant with this name located in North Dallas, Texas;⁴⁶

“Sweet Mango Cafe”

Yelp website (www.yelp.com) reflects 142 consumer reviews (dating from 2007 to 2013) for a restaurant with this name located in Washington, D.C.;⁴⁷

“Mango Mike’s”

Yelp website (www.yelp.com) reflects 92 consumer reviews (dating from 2007 to 2013) for a restaurant with this name located in Alexandria, Virginia;⁴⁸

⁴² 30 TTABVUE at pp. 251-262, excerpts of reviews provided and website printout for restaurant (www.pier39.com) submitted (at p. 250).

⁴³ 30 TTABVUE at pp. 264-270, excerpts of reviews provided.

⁴⁴ 30 TTABVUE at pp. 271-287, excerpts of reviews provided. The Yelp website indicates that this restaurant is now “closed.”

⁴⁵ 30 TTABVUE at pp. 337-346, excerpts of reviews provided.

⁴⁶ 30 TTABVUE at pp. 347-364, excerpts of reviews provided.

⁴⁷ 30 TTABVUE at pp. 373-388, excerpts of reviews provided.

⁴⁸ 30 TTABVUE at pp. 389-408, excerpts of reviews provided. We note that a TripAdvisor printout (located at 43 TTABVUE 190) indicates this restaurant has since “Closed.”

“Mango Mexican Restaurant”

Yelp website (www.yelp.com) reflects 140 consumer reviews (dating from 2012 to 2013) for a restaurant with this name located in Seattle, Washington.⁴⁹

“Mango’s on the Bayou”

Facebook website page (www.facebook.com) reflects 390 consumer ratings for a restaurant with this name located in Ft. Walton Beach, Florida;⁵⁰ and

“Mango’s”

TripAdvisor website (www.tripadvisor.com) reflects 102 consumer reviews (dating from 2005 to 2014) for a restaurant with this name located in Bethany Beach, Delaware.⁵¹

We are mindful, however, that Respondent did not submit restaurant review evidence for a great majority of the establishments listed in the online yellow pages website printouts. Also, aside from the number of reviews identified and the dates for these reviews, there is no evidence indicating how long the marks for these restaurants have been in use or their level of exposure to the purchasing public. *See e.g., Coach/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014).

In weighing the entirety of the evidence and keeping in mind its shortcomings, we cannot find that consumers have grown so accustomed to seeing the term “Mango(s)” in association with restaurant services that Petitioner’s marks should

⁴⁹ 30 TTABVUE at pp. 409-422, excerpts of reviews provided.

⁵⁰ 43 TTABVUE at pp. 204-272, excerpts of reviews and Facebook posts provided discussing the restaurant. A website printout for the same restaurant was submitted (43 TTABVUE 200-204). A TripAdvisor website page for the same restaurant indicates “28 reviews” (43 TTABVUE 273-286).

⁵¹ 43 TTABVUE at pp. 264-270, excerpts of reviews provided.

be accorded a very narrow scope of protection. Nonetheless, the evidence does show that the term has been adopted, registered, and used in various marks for restaurant services throughout the United States. And while the record before us is not exactly on par with that in *Anthony's Pizza*, there is sufficient evidence before us to conclude that use of the term "Mango" or "Mango's" in restaurant names is not unusual or unique and the significance of any similarity between the involved marks, based on their sharing this term, is lessened. Accordingly, we find that the sixth *du Pont* factor weighs in Respondent's favor.

E. Strength or Fame of Petitioner's Marks

Fame, if it exists, plays a dominant role in the likelihood of confusion analysis. *Kenner Parker Toys Inc. v. Rose Art Indus. Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). In the likelihood of confusion context, fame "varies along a spectrum from very strong to very weak." *Midwestern Pet Foods Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005)). In view of the extreme deference that is accorded to a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it. *Leading Jeweler Guild Inc. v. Ljow Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007). In reviewing the evidence of fame, we are mindful that fame is not a "yes or no" decision but usually involves placing a mark's strength in the spectrum of very

weak to famous. *Carefirst of Maryland Inc. v. FirstHealth of the Carolinas Inc.*, 77 USPQ2d 1492, 1507 (TTAB 2005) (stating that “[f]ame is relative . . . not absolute”), *aff’d*, 479 F.3d 825, 81 USPQ2d 1919 (Fed. Cir. 2007).

At the outset, we note the evidence submitted by Petitioner to prove fame almost exclusively involves the MANGO’S TROPICAL CAFE (stylized with design). There is no evidence to suggest that MANGO’S MAMBO BAR (stylized with design) has acquired any fame.

We do find that Petitioner has established that its MANGO’S TROPICAL CAFE (stylized with a parrot design) mark has been exposed to a wide audience for restaurant services and the mark is likely to have acquired some renown; however, this level of recognition falls short of justifying the heightened scope of protection afforded truly famous marks. While Petitioner has been in business since 1991, is listed by a single publication as No. 10 on a list of 100 top-grossing U.S. nightclubs and bars,⁵² and has received some unsolicited coverage in local and national newspapers, we cannot conclude on this record that its MANGO’S TROPICAL CAFE (stylized with a parrot design) mark enjoys widespread recognition among consumers. Rather, we assess this mark as being a strong mark in connection with restaurant services.

We make the above assessment in light of the evidence of the number and nature of similar marks that have been adopted by third-parties as well as

⁵² Exhibit 5, 42 TTABVUE at 246.

Petitioner's attempts to enforce its rights against others who attempt to use what Petitioner regards as confusingly similar marks.

To the extent that we find the MANGO'S TROPICAL CAFE (stylized with a parrot design) mark as a strong one, the fifth *du Pont* factor weighs slightly more in Petitioner's favor.

VII. Conclusion

On this record, we find no likelihood of confusion between either of Petitioner's marks, MANGO'S TROPICAL CAFE (stylized with the parrot design) or MANGO'S MAMBO BAR (stylized with parrot and drum design) with Respondent's TANGO MANGO mark. Despite all three marks being used in connection with restaurant services and Petitioner's MANGO'S TROPICAL CAFE and design mark having some degree of renown, the marks themselves are sufficiently different such that consumers will distinguish the sources of the restaurant services, given that the shared use of "Mango(s)" has decreased significance in view of the evidence of third-parties who have also adopted this term in names for restaurants.

Decision: The petition to cancel is dismissed.