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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

ANDRE YOUNG,

Opposer,

-against-

DRAION M. BURCH DO, LLC,

Applicant.

Consolidated Proceedings

Opposition No. 91224580 (parent)

Opposition No. 91226572

**OPPOSER ANDRE YOUNG'S REPLY BRIEF**

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## INTRODUCTION

In an effort to enhance his self-proclaimed “media personality,” Dr. Draion Burch attempts to secure two federal trademark registrations, including for use in the entertainment sector, that are identical aurally, and virtually identical visually to DR. DRE, one of the most famous names and trademarks in the music industry. Applicant Draion M Burch Do, LLC’s applied-for marks, DR. DRAI and DOCTOR DRAI OBGYN & MEDIA PERSONALITY & Design both falsely suggest a connection with Dr. Dre, in violation of Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a), as they plainly were intended to do, and are likely to cause consumer confusion in violation of Section 2(d), 15 U.S.C. § 1052(d).

Opposer<sup>1</sup> set forth in its trial brief the factual and legal bases for its claims and anticipated many of Applicant’s counterarguments. Applicant’s response brief spends only a few pages attempting to refute Dr. Dre’s primary claim of false suggestion and, in those pages, demonstrates fundamental misunderstandings of the relevant doctrines, cites cases that bolster *Dr. Dre’s* position rather than its own, and fails to counter Opposer’s basic arguments. Applicant’s responses to Opposer’s Section 2(d) claim are likewise meritless.

As his trial brief made clear, Dr. Dre is “one of the most important and influential figures in rap music” and, indeed, “one of the most important voices in modern music.” (Opposer’s Trial Brief (“Opp. Br.”) at 15-16.) He has won six Grammy Awards, has sold over 17 million solo albums, and was named the highest-earning hip-hop performer of the last decade by *Forbes*. *Id.* All of this celebrity and success has been inextricably linked to his eponymous DR. DRE trademark. Moreover, by the very nature of the goods and services, the use of the name and

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<sup>1</sup> Opposer employs the same defined terms set out in its trial brief.

mark was promoted extensively to the public across all types of the most popular and visible media channels.

Notwithstanding Applicant's rhetoric,<sup>2</sup> Dr. Dre has no interest in preventing Dr. Burch from using his name to practice medicine. Indeed, as the Board is well aware, this opposition proceeding would not be an appropriate mechanism to achieve such a result. Rather, Dr. Dre is seeking to prevent Dr. Burch and his company from obtaining a federal registration for a moniker that falsely suggests a connection to Dr. Dre in violation of the Lanham Act's prohibitions on registrability, and which Dr. Burch would use to continue to offer sex guides and get-rich quick lectures as he builds his brand as a celebrity "sexpert." (App. Br. 27.)

Instead of adopting "Dr. Burch," "Dr. Draion" or any number of other names that may have been available and not associated with an established entertainment superstar, Dr. Burch has attempted to expand his medical practice into the realm of media personality under the stage name "Dr. Draï." Far from Dr. Burch's given name, "Dr. Draï" inserts an unusual *nickname* ("Draï") of an unusual *first name* ("Draion") after the title "Dr.," where a last name is typically used. And, while Opposer has no obligation to demonstrate Applicant's bad faith, Applicant's insistence that it adopted the mark without knowledge of Dr. Dre is simply incredible, especially given Dr. Burch's own damaging admissions.

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<sup>2</sup> In its trial brief ("Applicant's Trial Brief"), Applicant suggests that finding for Opposer here would somehow allow celebrities far and wide "to chill others in unrelated fields from using their own given names, along with any professional designations they have earned," and claims that Opposer seeks "to obtain a monopoly on goods and services" beyond those it offers, as well as "rights in gross" and "unlimited rights." Applicant's Trial Brief ("App. Br.") at 2, 3, 22, 30, 36.)

## A. FALSE SUGGESTION OF A CONNECTION

Applicant disputes Opposer's primary claim, namely that the Applications should be refused pursuant to 15 U.S.C. § 1052(a), for falsely suggesting a connection to Dr. Dre. (Opp. Br. 23-32.)<sup>3</sup> Although Applicant's brief tends to conflate the analyses, "[t]he issue in a § 2(a) case is not whether consumers would believe that the defendant's goods emanate from the plaintiff." 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 19:76 (5th ed. 2017). Rather, the issue is merely "whether consumers would falsely assume the goods had some connection with plaintiff." *Id.*

### 1. Element One: Applicant's Marks are a Close Approximation of DR. DRE

#### a. Applicant's Marks Sound the Same

The first element turns on whether DR. DRAI is "a close approximation" of DR. DRE. Dr. Burch has admitted the marks are pronounced the same, an admission Applicant concedes in its brief. (App. Br. 7.) Although this should foreclose any further discussion on the aural similarity of the marks, Applicant nevertheless attempts to marshal arguments about why the marks do *not* sound the same.<sup>4</sup> In so doing, Applicant bolsters *Opposer's* position.

Applicant states, for example, that "consumers may pronounce a mark differently than intended by the brand owner." (App. Br. 7.) While this is true, it is exceedingly unlikely that Applicant's marks would be mispronounced given the extent to which the goods and services include aural performances by Dr. Burch. When listening to a lecture, audio book, webinar, class or consulting session provided by Dr. Burch, a consumer will hear him introduce himself

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<sup>3</sup> Applicant does not dispute that Opposer has standing.

<sup>4</sup> Applicant makes these arguments in connection with the Section 2(d) claim (App. Br. 7), and then references them in discussing the Section 2(a) claim (App. Br. 30 ("As discussed *supra* . . .")).

(or be introduced) with his own pronunciation of his name. (App. Br. 8.) Moreover, as a popular recording artist, much of Dr. Dre's fame has arisen from mention of his name on the radio. Accordingly, under the circumstances the identity of the marks as pronounced should on its own establish that DR. DRAI and DOCTOR DRAI are close approximations of DR. DRE.

Applicant wholly ignores the unusual importance under the circumstances of aural similarity. Indeed, the case law Applicant cites regarding the close approximation of the marks (and/or similarity of the marks) does not concern the names or marks of those who perform their services predominantly aurally. (App. Br. 7-8 (*In re Belgrade Shoe Co.*, 162 U.S.P.Q. 227, 227 (C.C.P.A. 1969) (involving shoe and clothing brands); *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 111 U.S.P.Q.2d 1649, 1650 (Fed. Cir. 2014) (involving epoxy coatings)).) Furthermore and surprisingly, both cited cases, *Belgrade Shoe* and *StonCor*, plainly support Dr. Dre's position, not Applicant's.

In *Belgrade Shoe*, the court considered the similarity between the applied-for mark COL'EEJUNS' for shoes and the registered mark COLLEGIENNE for shoes and clothing. 162 U.S.P.Q.2d at 227. Noting that different pronunciations of COLLEGIENNE were possible, including 'Colleejen' or 'Colleejun,' the court held that since one of these pronunciations was identical to the applied-for mark, save for the plural *s*, the final sound "does not amount to a material difference in a trademark sense." *Id.* On this basis, the court found that consumer confusion *is likely*. Since, here, at least one of the pronunciations of "Dr. Draï" – Applicant's *own* pronunciation, in fact – is identical to "Dr. Dre," the Board ought to reach the equivalent result, namely that Applicant's marks are a close approximation.

In *StonCor*, the court held that the Board erred when it determined that the *o* in STONSHIELD would be pronounced as a short vowel, a pronunciation markedly different from

the trademark owner's own evidence of pronunciation. The court ruled the Board's determination was "not supported by substantial evidence." *StonCor Grp.*, 111 U.S.P.Q.2d at 1651. "Where a trademark is not a recognized word and the weight of the evidence suggests that potential consumers would pronounce the mark in a particular way, it is error for the Board to ignore this evidence entirely and supply its own pronunciation." *Id.* Here, the only evidence suggesting how consumers pronounce the mark is Applicant's own pronunciation, which is identical to that of Opposer's Mark, and no evidence has been submitted to the contrary. Applicant, nevertheless, is asking the Board to analyze the mark as if it were pronounced differently – *which would be to err precisely as the Board did in StonCor*. Accordingly, *StonCor* supports *Opposer's* proposition that relying on Applicant's own pronunciation of its marks is appropriate.

Applicant also attempts to argue that the vowel combination "ai" is not typically pronounced "ay" – notwithstanding the host of English-language words (e.g., "aid," "paid," "paint," "contain," "claim" and "waist") containing "ai" that are pronounced precisely this way. (App. Br. 8.) Applicant's argument that when "ai" appears at the end of a word it is pronounced differently cannot be maintained at the same time as it argues that the public will recognize "Drai" as a shorthand for "Draion," since, if Applicant is correct, the public would presumably understand that the "ai" sound would be pronounced the same as it would be within the name Draion, i.e., the same sound as in "Dre." (App. Br. at 6, 8.)

**b. Applicant's Marks are a Close Visual Approximation of DR. DRE**

Although aural similarity should be weighed heavily given the aural nature of many of the identified goods and services, the Board should also conclude that DR. DRAI is a close

visual approximation of DR. DRE,<sup>5</sup> as Opposer has argued and as is readily apparent. (Opp. Br. 23-25.)<sup>6</sup> The addition in one of Applicant’s applied-for marks of the generic text “ObGyn & Media Personality” and certain design elements does not alter the analysis. *Id.* Although Applicant argues that the generic language and design elements serve to distinguish the marks at issue, it fails to discuss the contrary case law relied upon by Opposer and, instead, relies on cases that (again) explicitly undermine Applicant’s own argument. (App. Br. 31 (citing *In re Computer Commc’ns, Inc.*, 179 U.S.P.Q. 51 (C.C.P.A. 1973); *Envirotech Corp. v. Nat’l Serv. Indus., Inc.*, 197 U.S.P.Q. 292 (T.T.A.B. 1977).))

In *Computer Communications*, the Board had refused on the basis of likelihood of confusion to register a mark despite the incorporation of additional terms and distinguishable design elements, and the court *affirmed*. 179 U.S.P.Q. at 52 (“We do *not* think that the presence of appellant’s ‘Computer Communications’ sufficiently differentiates between the marks, considering appellant’s prominent letter-design portion.” (emphasis added)). Similarly, in *Envirotech*, the Board held that two design marks were *confusingly similar* notwithstanding that the applicant’s design mark incorporated a distinctive word that the opposer’s did not. 197

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<sup>5</sup> Applicant’s statement that Dr. Burch “specifically indicates that he spells his mark “d-r-a-i” every time he promotes his services on the radio” is misleading. (App. Br. 8.) In fact, he testified that he only spells his name at the end of his presentations. (Burch Dep. 154:11-154:16.)

<sup>6</sup> Applicant could only locate a single case where a near-homophone was not found likely to cause confusion, namely one comparing the marks CAPITAL CITY BANK and CITIBANK, which is distinguishable given that “city” is a common term and “Drai” and “Dre” are not. (App. Br. 8.) The second case Applicant cites regarding the importance of misspellings concerns marks that are spelled *identically* and *found confusingly similar*. (App. Br. 8 (citing *Worthington Foods, Inc. v. Kellogg Co.*, 14 U.S.P.Q.2d 1577, 1593 (S.D. Ohio 1990)).) Notably, the court in *Worthington Foods* dismisses differences in the design features and lettering styles of the word marks, as is appropriate in the instant case, and undermines Applicant’s argument elsewhere in its brief that such differences do serve to distinguish word marks, *i.e.*, pages 9-10. *Id.*

U.S.P.Q. at 296 (“we are of the opinion that purchasers . . . might well believe . . . that such lighting fixtures were made by or were in some way connected with opposer, as, for example, that ‘LITHONIA’ was merely the name of one of opposer’s divisions”). Thus, as Applicant’s own precedent suggests, Applicant’s incorporation of additional elements in its DOCTOR DRAI OBGYN & MEDIA PERSONALITY & Design application still falsely implies a connection with Dr. Dre.<sup>7</sup>

**c. The Overall Impression of Applicant’s Marks Closely Approximate that of DR. DRE**

To the extent that the Board chooses to consider the overall impression of the marks in its “close approximation” analysis, it should not be swayed by Applicant’s argument that the spelling of DR. DRAI conveys a different overall impression than the spelling of DR. DRE. Applicant insists that the term “Drai” incorporated within Applicant’s Marks is a shortened version of the name “Draion,” while the term “Dre” incorporated within the DR. DRE mark is a shortened version of the name “Andre,” and, as a result, the overall impressions of the marks differ significantly. (App. Br. 31.) However, Applicant provides no evidence that any meaningful percentage of the public is familiar with the name Draion, or, more important, familiar with “Drai” *as a nickname for* “Draion.” It is certainly not obvious that either “Draion” or “Drai” are commonly known or recognized first names. Indeed, Applicant even admits elsewhere in its brief that the name “Drai” “*is uncommon and unlikely to be recognized*” – which as a matter of common sense dramatically undercuts its argument that it will be recognized as the nickname for “Draion.” (App. Br. 8 (emphasis added).) Accordingly, Applicant’s argument regarding divergent overall impressions holds no water.

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<sup>7</sup> The third case Applicant cited, *Rolex Watch U.S.A., Inc. v. AFP Imaging Corp.*, 101 U.S.P.Q.2d 1188 (T.T.A.B. 2011), is inapposite for several reasons including that it solely concerns a dilution claim.

In sum, the first element is satisfied.

**2. Element Two: Applicant's Marks Point Uniquely and Unmistakably to Dr. Dre**

**a. No Other Well-Known Third Parties Exist**

The second element of Opposer's false suggestion claim is whether Applicant's Marks point uniquely and unmistakably to Dr. Dre. As laid out in Opposer's brief, the near identity of the marks, the pervasive renown of Dr. Dre, and the relative lack of public familiarity with Dr. Burch or anyone else who uses a name similar to Dr. Dre, together handily satisfy this element (Opp. Br. 25-28), especially given that, to satisfy the element, "DR. DRE" *need not be a unique term* (Opp. Br. 26).

In response, and despite the precedent to the contrary, Applicant merely attempts to show that the name "Dr. Dre" is not unique, specifically that Dr. Dre is not the only individual or entity in the country to have a name that sounds like "Dre." And despite claiming that the name DR. DRE "is so inherently common" (App. Br. 2), and despite the capabilities of today's search engines, Applicant still could only point to a nightclub named DRAI, a podcast named DRAY DAY, and a children's talent coach named Irene Dreayer whose nickname is "Dray" – none of which incorporate the term "Dr." or "Doctor" – as well as *one individual* who used the similar name "Doctor Dré." (App. Br. 33.) Moreover, Applicant submitted no meaningful evidence demonstrating the renown of these individuals or entities or that the public might view the DR. DRAI mark as pointing to any of these names instead of the enormously well-known Dr. Dre. (App. Br. 32-35.) With respect to the individual named Doctor Dré, Applicant could assert only that "the public has been exposed" to Doctor Dré, but not that the public has any meaningful familiarity with this individual or that consumers would view Applicant's Marks as indicating

Doctor Dré instead of Opposer. (App. Br. 33.) Indeed, the anecdotal evidence Applicant submitted explicitly demonstrated the opposite. (Opp. Br. 27.)

**b. Applicant's Bad Faith is Obvious**

Applicant next disputes that it possessed a bad faith intent in adopting the DR. DRAI mark even though the main contention upon which Applicant's position rests, namely that Dr. Burch had never heard of Dr. Dre prior to adopting the mark, is simply incredible. While not a required element of a 2(a) claim, bad faith is "highly persuasive [evidence] that the public will make the intended false association." *Univ. of Notre Dame Du Lac v. J.C. Gourmet Food Imps. Co.*, 217 U.S.P.Q. 505, 509 (Fed. Cir. 1983).

Applicant maintains that Dr. Burch had not heard of Dr. Dre until sometime between 2011 and 2015 (App. Br. 33), even though Dr. Burch's nickname since childhood was "Drai" (which he admits is pronounced "Dre"), he grew up and attended college *listening to hip-hop music during the heyday of Dr. Dre's career*, he had heard of equally well-known artists associated with Dr. Dre including 50 Cent and Eminem, then he attended medical school and became a *doctor* while still *using the nickname Drai*, – and finally on or before 2011 adopted the moniker "Dr. Drai" – all with purportedly no knowledge of the celebrity Dr. Dre. (Burch Dep. 113:17-18; 175:11-12; 175:21-22; 114:3-9.) In addition, Dr. Burch was notably vague in responding to questions under oath about whether he had heard of Dr. Dre prior to adoption of the mark. (Burch Dep. 174 ("anywhere between 2011 and 2015"); ("I remember someone in – had mentioned something, but not, like, specific details . . ."); 176: 5-9 ("I don't think so. I've – so I've heard of the name before, but not in detail. Like, someone told me about it, right, in detail. Right? So then I've noticed things because someone's telling me about it."); 176: 15 ("I

can't remember.”)). As the trier of fact, the Board can and should infer Applicant's bad faith intent from these unclear and evasive responses.<sup>8</sup>

**c. Applicant's Marks Point Uniquely and Unmistakably to Dr. Dre Even Though Dr. Draion is a Doctor**

Applicant notes in various formulations throughout its brief that Dr. Burch is a medical doctor while Dr. Dre is a musician and music producer, that Dr. Dre is unlikely ever to obtain the advanced degree required to offer similar medical services, and that consumers do not view Dr. Dre as a medical doctor. (*See, e.g.*, App. Br. 9, 17, 34.) These distinctions, even if true, hardly preclude a finding that Applicant's marks falsely suggest a connection to Dr. Dre. The painter Marc Chagall may have had no particular expertise in vodka, yet the Board held that registration of his name in connection with vodka violated Section 2(a). (Opp. Br. 40.) The Board must consider whether the applied-for marks when used in connection with the applied-for goods and services are likely to falsely suggest a connection with Dr. Dre. Any marks that closely approximate the renowned DR. DRE name and mark that are being used in any aspect of the entertainment sector will undoubtedly point uniquely to Dr. Dre. That Dr. Burch attended medical school and Dr. Dre did not is of no moment.

Thus, the second element of the claim is satisfied.

**3. Element Three: Dr. Dre is Not Connected to Applicant**

As Opposer explained in its trial brief, the third element of the 2(a) claim is whether an opposer is connected with the activities performed by the applicant under the applied-for marks,

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<sup>8</sup> Applicant appears to suggest that because Opposer has not submitted evidence of having performed a trademark search before adopting the mark DR. DRE, Opposer is somehow estopped from arguing that Applicant's failure to do so is evidence of bad faith. (App. Br. 7.) Of course, Opposer adopted the DR. DRE mark years before Applicant did. So whether or not Opposer performed a search is of no moment in the instant dispute and does not mitigate Applicant's failure to do so.

given that the claim prevents only *false* suggestions of a connection. (Opp. Br. 28-29.) Of course, here there is no evidence that Dr. Dre is connected with Applicant in any way. And Applicant does not dispute this fact or provide evidence to the contrary. Accordingly, Opposer has satisfied this element of its claim.

Applicant, it seems, is under the misimpression that, in order to satisfy the element, Opposer would have to provide one or more of the services offered by Applicant or some set of related services. (App. Br 35.) This notion is simply incorrect.

**4. Element Four: Dr. Dre is of Sufficient Fame or Reputation that Consumers Would Presume a Connection**

To demonstrate the fourth element, Opposer must show that Dr. Dre is of sufficient fame or reputation such that use of a close approximation of the name or mark with Applicant's goods and services would point to Opposer. In disputing that this element is satisfied, Applicant makes the same mistake that the applicant made in *In re Nieves & Nieves LLC*, 113 U.S.P.Q.2d 1629 (T.T.A.B. 2015), a precedential decision cited and discussed in Opposer's trial brief. (Opp. Br. 29.) Specifically, Applicant incorrectly presumes that the test requires Dr. Dre to be well known specifically in connection with *Applicant's* goods and services. (App. Br. 35.) In fact, Dr. Dre need only be sufficiently well known in *his own* field, *i.e.*, music and entertainment, such that, if consumers were to encounter a close approximation of his name in another field, they would presume a connection. *See Nieves & Nieves*, 113 U.S.P.Q.2d at 1637 ("We do not require proof that Kate Middleton is well-known for cosmetics, jewelry, handbags, bedding and clothing. Our inquiry is whether Kate Middleton's renown is such that when the mark ROYAL KATE is used with those products, consumers will recognize ROYAL KATE as referring to Kate Middleton such that a connection with Kate Middleton will be presumed.").

Nevertheless, Dr. Dre's own field and Applicant's goods and services are indeed related. Applicant seeks protection in connection with MP3 files, magazines, audio books, a series of books and other types of public performance, while Dr. Dre is a household name in the recording industry. As a result, the Board should find that Dr. Dre's identity is of sufficient fame or reputation that, when Applicant uses its marks on such related goods and services, the public will presume a connection. *Id.* at 1638.

In connection with this element, the case law Applicant relies upon again serves only to *undercut* its position. The only case Applicant cites in its discussion of the fourth factor is *Ate My Heart Inc. v. Swan*, Opp. No. 91202493, 2013 WL 3191220 (T.T.A.B. May 24, 2013), distinguishable at the outset for being a *summary judgment decision* regarding a *2(d) claim for likelihood of confusion*. Nevertheless, as Applicant notes, “[i]n evaluating fame for the performer Lady Gaga, the Board indicated that despite evidence showing fame as a performer, the evidence of record did not translate directly to fame for apparel,” the applicant's goods (App. Br. 35.). *See Ate My Heart*, 2013 WL 3191220, at \*5 (“we cannot conclude that there is no genuine dispute as to whether the mark LADY GAGA is famous with respect to clothing”). It was for this point that Applicant relied on the decision. Yet the Board held the *opposer* was “entitled to judgment as a matter of law as to its claim of priority and likelihood of confusion,” notwithstanding that the applicant's goods were in a sector in which the opposer had not demonstrated fame. *Id.* at \*8. Moreover, given that Lady Gaga and Dr. Dre are both renowned recording artists and the ruling was made at summary judgment, *Ate My Heart* strongly supports Opposer's position that, even if Dr. Dre's fame is indeed limited to entertainment services, consumers are still likely to presume a connection when used on Applicant's goods and services.

Although Applicant cites no other case in its discussion of the fourth factor of the 2(a) claim, Applicant does reference its analysis of Dr. Dre's fame under Section 2(d). (App. Br. 35-36; 22-24.) However, none of the six cases cited in its 2(d) discussion bear any relation to Applicant's position here. For example, although Applicant references *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 U.S.P.Q.2d 1901 (T.T.A.B. 2007), twice without explanation, the only discussion of fame in the decision relates to the finding that the plaintiff's evidence of fame of its *collective membership mark* is insufficient, including because only 27 members belong to the membership. *Id.* at 1904. It is not clear how this decision undermines Opposer's claims here regarding the ample fame of the recording superstar Dr. Dre.

In addition, Applicant cites *UMG Recordings, Inc. v. Mattel, Inc.*, 100 U.S.P.Q.2d 1868 (T.T.A.B. 2011), apparently because the Board found the well-known mark MOTOWN to be famous in connection with musical recordings and musical entertainment but not famous in connection with other goods. (App. Br. 23.) However, Applicant fails to point out that – notwithstanding this finding – the Board held consumer confusion likely as regarding applicant's toy car products because, although MOTOWN is not famous for such goods, “*a famous mark such as Motown can be expected to cast a long shadow and to be used in connection with numerous collateral goods*, i.e., consumers would expect certain non-music-related items containing the Motown brand to be sponsored by opposer.” *UMG Recordings*, 100 U.S.P.Q.2d at 1883 (emphasis added). This is precisely Opposer's position with respect to the DR. DRE mark. Specifically, even if Dr. Dre lacks fame in Applicant's field specifically, the Board may nevertheless find that his mark casts “a long shadow” and that consumers will perceive a connection to Dr. Dre based merely on his fame in the music business.

Three additional cases cited by Applicant in its discussion of Opposer’s fame are even more problematic for Applicant’s argument because they belie a fundamental misunderstanding of the law. (App. Br. 23-24 (citing *Carefirst of Md., Inc. v. FirstHealth of the Carolinas Inc.*, 77 U.S.P.Q.2d 1492 (T.T.A.B. 2005); *Bose Corp. v. QSC Audio Prods., Inc.*, 63 U.S.P.Q.2d 1303 (Fed. Cir. 2002); *Christian Broad. Network, Inc. v. ABS-CBN Int’l*, 84 U.S.P.Q.2d 1560 (T.T.A.B. 2007)). With reference to these three cases, Applicant asserts that “[e]vidence of fame is of no probative value if it lacks proper *context*.” *Id.* (emphasis added). However, Applicant views this to mean that the fame must be *in the context of the applicant’s field*. But this is not so. Even the case law Applicant cites makes clear that, by “context,” the Board means information that contextualizes raw data so that those unfamiliar with the industry can assess the significance of the data. For example, in *Carefirst of Maryland*, the Board explains that the needed “context” is that which “would confirm the reliability of the numbers as indicators of fame,” rather than raw data with no reference to equivalent data of competitors or overall metrics of market share. 77 U.S.P.Q.2d at 1505; *see also Bose*, 63 U.S.P.Q.2d 1308-09 (“the Board discounted the sales and advertising evidence for the product marks, standing alone, because those indicia of fame had not been placed in any context ‘from which to determine how substantial the figures are for these types of products’”; “A tiny percentage of the market share for the product or a small share of advertising revenues for the product market could undermine the weight given to the figures for assessment of fame. Large market shares of product sales or large percentages of advertising expenditures in a product line would buttress claims to fame.”) (citation omitted).<sup>9</sup>

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<sup>9</sup> Applicant’s citation to *Christian Broadcast Network*, is plainly helpful to *Opposer*, since the evidence of fame presented in the case – which is comparable to that which Dr. Dre has presented here – was found *sufficient*. The Board did hold that the services in *Christian Broadcast Network* were not sufficiently related. However, unlike Dr. Dre in the instant case,

Here, Opposer has not simply submitted evidence of raw data. Rather, Opposer has presented highly contextualized evidence including rankings and recognitions from numerous national publications that demonstrate Dr. Dre's success and stature as compared to his peers. (Opp. Br. 12-15.) In sum, since Opposer's brief demonstrates that this element is satisfied, and Applicant is unable to point to any argument or precedent that should give the Board pause, the Board should hold that the fourth element is satisfied.

**B. DR. DRE HAS ESTABLISHED LIKELIHOOD OF CONFUSION**

Since the Opposition should be sustained based on Dr. Dre's false suggestion claim, the Board need not reach Dr. Dre's likelihood of confusion claim. Nevertheless, based on the arguments set forth in Dr. Dre's trial brief and given Applicant's unsuccessful arguments in its response brief, the Board has clear support to sustain the opposition on Dr. Dre's likelihood of confusion claim as well. Applicant does not refute Opposer's priority. Moreover, Applicant's ineffective arguments regarding the similarity of the marks, the strength of the DR. DRE mark, and Applicant's bad faith intent in adopting the mark are discussed at length above and do not require further mention. Rather, Opposer discusses below the most important remaining *DuPont* factors. (Opp. Br. 33.)

**1. Applicant's Goods and Services and Trade Channels Extend Far Beyond Medicine**

Applicant insists the respective sets of goods and services and channels of trade are not related because Applicant's pertain to medicine and Opposer's pertain to entertainment. But Applicant wholly fails to acknowledge that Dr. Burch is a self-proclaimed "media personality" whose corporate entity offers his goods and services far outside the medical setting, including on

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the plaintiff in that case did not contend that the services were related, whereas here the goods and services are related and overlapping.

TV, radio, social media, magazines and other media dominated by popular culture and entertainment celebrities, and that Dr. Burch has himself blurred the lines between the industries that he now professes are so distinct. Applicant maintains its own YouTube channel which includes a video entitled “Dr. Draï’s Sizzle Reel,” offers webinars to “Monetize Your Medical Degree,” markets a book that promises to teach readers how to “Discover his G-spot” and “Learn how to ride an ‘anaconda’ or sex a ‘short short’ man,” and promotes Dr. Burch’s book entitled *From Medicine to Mogul: 7 Steps to 7 Figures*. (App. Br. 10; Burch Dep. Exhs. 5, 6, 8 and 9.) While these goods and services may arguably have some basis in medicine, they also extend by any measure far beyond it and constitute what is primarily *entertainment*. Applicant cannot defend its Applications by ducking behind Dr. Burch’s medical degree and role as a “health service professional,” while at the same time jumping with both feet into the entertainment sector. (App. Br. 12.)

## **2. Applicant’s Customers are not Seeking Medical Care**

Applicant makes the same disingenuous distinction with respect to the sophistication of its purchasers. “When purchasing healthcare services, even ordinary consumers are likely to exercise greater care and will know with whom they are dealing.” (App. Br. 20.) Yet, Applicant here is not a medical professional but rather a corporate entity. And consumers of the types of products discussed above are not known to take great care in purchasing, and Applicant does not reference any evidence or cite any case law to suggest otherwise. Indeed, the only evidence Applicant mentions on this point is the fee Dr. Burch charges for speaking engagements, which is to say the price the host pays to Dr. Burch. (App. Br. 20.) However, noticeably absent from Applicant’s brief is the ticket price the many audience members must spend for *attending* the

lectures, which presumably is far lower if not gratis. The book entitled *From Medicine to Mogul: 7 Steps to 7 Figures* costs only \$2.99. (Burch Dep. Exh. 11 (emphasis added).)

Applicant cites a number of decisions purportedly finding that services within the entertainment sector to be unrelated to each other. (App. Br. 13-15.) However, none involve a plaintiff with as famous a mark within the entertainment industry as DR. DRE. This commercial strength of the DR. DRE mark, unlike those in the cited cases, is far more likely to result in confusion when a similar mark is launched anywhere in the entertainment industry. (Opp. Br. 40-42.) For example, Applicant relies most strongly on a decision involving the marks M2 COMMUNICATIONS and M2, marks without any commercial fame, *M2 Software, Inc. v. M2 Communications, Inc.*, 78 U.S.P.Q.2d 1944, 1946 (Fed. Cir. 2006) (“There is little evidence to indicate that opposer’s mark has achieved any significant level of fame.”). (App. Br. 18-19.)

#### CONCLUSION

For the foregoing reasons, for those set forth in Opposer’s trial brief, and based on the evidence properly of record in this proceeding, Dr. Dre respectfully requests that the registration of the marks shown in Application Serial Nos. 86/590,205 and 86/730,410 be denied and that the opposition be sustained.

Dated: New York, New York  
December 26, 2017

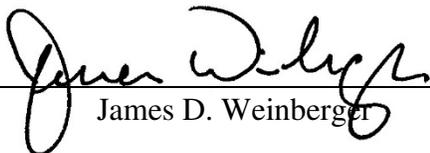
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**CERTIFICATE OF SERVICE**

I hereby certify that I caused, on this 26th day of December 2017, a copy of the foregoing **OPPOSER ANDRE YOUNG'S REPLY BRIEF** to be sent by email to Applicant's counsel at andrea.evans@evansiplaw.com, jon@schiffreinlaw.com, and alexis@schiffreinlaw.com.

  
James D. Weinberger