

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing: September 23, 2022

Mailed: March 14, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Greater Orlando Aviation Authority

v.

Sanford Airport Authority

—
Opposition No. 91234602

Opposition No. 91235774
—

Stephen H. Luther of Luther Law PLLC,
for Greater Orlando Aviation Authority.

Woodrow H. Pollack of Shutts & Bowen LLP,
for Sanford Airport Authority.

—
Before Shaw, Coggins, and Allard,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:

Sanford Airport Authority (“Applicant”) seeks registration on the Principal Register of the mark ORLANDO SANFORD INTERNATIONAL AIRPORT (in standard characters, INTERNATIONAL AIRPORT disclaimed)¹ and a related composite word-and-design mark shown below:

¹ Application Serial No. 87115958, which is the subject of Opposition No. 91235774 (the “774 proceeding”), was filed on July 26, 2016, under Section 1(a) of the Trademark Act, 15 U.S.C.



(ORLANDO SANFORD and INTERNATIONAL AIRPORT disclaimed),² both for “airport services” in International Class 39. The composite mark is described in the application as “consist[ing] of an incomplete oval-like shape sweeping left to right with the words ‘ORLANDO SANFORD’ above a bisection containing the words ‘INTERNATIONAL AIRPORT’ and the words ‘WE ARE SFB: SIMPLER. FASTER. BETTER’ below the bisection.” Color is not claimed as a feature of the mark.

Greater Orlando Aviation Authority (“Opposer”) has filed notices of opposition against the registration of each of Applicant’s marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s marks for the identified airport services so resemble Opposer’s previously registered composite word-and-design mark shown below:



§ 1052(a), based upon Applicant’s claim of first use anywhere and use in commerce as of December 31, 1996. Applicant seeks registration under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

²Application Serial No. 87115959, which is the subject of Opposition No. 91234602 (the “’602 proceeding”), was filed on July 26, 2016, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1052(a), based upon Applicant’s claim of first use anywhere and in commerce as of October 1, 2012.

(INTERNATIONAL AIRPORT disclaimed) for “airport services” in International Class 39,³ and its common law rights in both the word mark ORLANDO INTERNATIONAL AIRPORT and its composite word-and-design mark shown above, as to be likely to cause confusion.⁴ In each notice of opposition, Opposer alleges that all of its marks were in use and acquired distinctiveness long before both the filing of Applicant’s applications and any use by Applicant of either of its marks.⁵

In each of its answers, Applicant denied the salient allegations of the notices of opposition and asserted the affirmative defense of acquiescence.⁶

Opposer filed a stipulated motion to consolidate the proceedings,⁷ which was granted.⁸ The parties have fully briefed the issues and appeared for oral argument.

As plaintiff, Opposer bears the burden of proving its entitlement to a statutory cause of action and its Section 2(d) claims by a preponderance of the evidence. *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015)

³ Registration No. 1565079; issued on November 7, 1989; twice renewed. Opposer registered this mark under the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

⁴ Notice of opposition, paras. 1-4, 6-10 (1 TTABVUE 3-6) in the ’602 proceeding; notice of opposition, paras. 1-4, 6-10 (1 TTABVUE 3-6) in the ’774 proceeding.

Citations to the record and briefs reference TTABVUE, the Board’s online docket system. *See, e.g., Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, at *4 n.6 (TTAB 2022).

⁵ Notice of opposition, para. 6 (1 TTABVUE 5) in the ’602 proceeding; notice of opposition, para. 6 (1 TTABVUE 5) in the ’774 proceeding.

⁶ Answer, p. 2 (4 TTABVUE 3) in the ’602 proceeding; answer, p. 2 (6 TTABVUE 3) in the ’774 proceeding.

⁷ 7 TTABVUE in the ’602 proceeding; 8 TTABVUE in the ’774 proceeding.

⁸ October 12, 2017 Order at 8 TTABVUE in the ’602 proceeding, and at 8 TTABVUE in the ’774 proceeding. The Order designated the ’602 proceeding as the “parent” case. All TTABVUE citations hereafter are to the parent case unless otherwise indicated.

("The party opposing registration bears the burden of proof, 37 C.F.R. § 2.116(b), and if that burden cannot be met, the opposed mark must be registered"). As discussed more fully below, we find that Opposer has met its burden of proof and therefore sustain the oppositions.

I. Evidentiary Matters

Each party makes evidentiary objections, some of which we address immediately below. However, Applicant makes a number of objections in an appendix of objections attached to its main brief that seek to exclude evidence that is not outcome-determinative or even relied upon by either party in its brief.⁹ Given this fact, coupled with the number of objections, we see no compelling to discuss each objection in detail at this stage. *See e.g., AT&T Mobility LLC v. Thomann and Dormitus Brands LLC*, 2020 USPQ2d 53785, *3-4 (TTAB 2020). Our specific rulings on any evidentiary objections not addressed immediately below are set out herein as the need arises.

A. Opposer's Motion to Strike

Opposer filed a motion to strike the trial testimony of Tom Nolan, Applicant's President and CEO, arguing that Applicant did not disclose Mr. Nolan in Applicant's initial disclosures, or its pretrial disclosures, but rather first disclosed Mr. Nolan as a trial witness in its amended pretrial disclosures.¹⁰ Alternatively, Opposer sought to strike paragraphs 9 and 29 of Mr. Nolan's testimony, and Exhibits A and G, and a portion of Exhibit F, on the basis that Mr. Nolan provided testimony on documents

⁹ Applicant's statement of objections to opposer's evidence (84 TTABVUE 39-50).

¹⁰ Opposer's Motion to Strike Evidence, pp. 1-3 (66 TTABVUE 2-4).

that Applicant failed to produce during discovery.¹¹ Applicant opposed the motion, arguing Mr. Nolan was not President and CEO of Applicant at the time of the initial disclosures, Applicant had previously identified Diane Crews, Applicant's then-President and CEO, and Applicant did not change the identified subjects or documents from its original pretrial disclosures, it only changed Ms. Crews' name to Mr. Nolan's when he took over.¹² In an Order dated September 14, 2021, this Board determined that Applicant's failure to make the pretrial disclosure of Mr. Nolan was harmless and, accordingly, denied Opposer's motion to strike the trial testimony of Mr. Nolan in its entirety.¹³ However, this Board deferred until trial the remainder of Opposer's motion, namely, its request to strike paragraphs 9 and 29 of Mr. Nolan's testimony, and Exhibits A and G, and a portion of Exhibit F based on its argument that Mr. Nolan provided testimony on documents that Applicant failed to produce during discovery.¹⁴

Turning to the deferred portion of Opposer's motion to strike, Opposer argues that Mr. Nolan provided testimony on documents Applicant failed to produce in discovery and that those documents and any related testimony should be stricken because those

¹¹ Opposer's motion to strike, pp. 3-4 (66 TTABVUE 4-5). Although Opposer asserts that only a portion of Exhibit G should be stricken, it cites pages 58 TTABVUE 54-121, which constitutes the entirety of Exhibit G. We thus presume Opposer seeks to strike the entirety of Exhibit G.

¹² Applicant's response to Opposer's motion to strike (68 TTABVUE). When the present proceedings were initiated, Diane Crews was the President and CEO of Applicant. Crews Depo. Tr. (43 TTABVUE 74). She held this position until October 2020, whereupon Tom Nolan succeeded her. Nolan Decl., para. 2 (58 TTABVUE 2).

¹³ September 14, 2021 Order (70 TTABVUE).

¹⁴ *Id.* at pp. 8-9 (70 TTABVUE 8-9).

documents were responsive to Opposer's discovery requests. Without pointing to any discovery request in particular, Opposer's sole argument is that "These documents were responsive to discovery requests [Opposer] issued to [Applicant] more than three years ago in February 2018."¹⁵

While Opposer vaguely contends that it requested those documents during discovery and Applicant did not produce them, Opposer does not identify specific documents and associate them with specific discovery requests. This is not sufficient. That is, it is not enough that Opposer merely refers in a cursory manner to Applicant's alleged failure to comply with discovery requests and then leaves it to the Board to figure out which of the documents should have been produced in response to specific document requests. *Illyrian Imp., Inc. v. ADOL Sh.p.k.*, 2022 USPQ2d 292, at *11-12 (TTAB 2022). Accordingly, we deny the remainder of Opposer's motion to strike.

B. Applicant's Second Motion to Strike

Opposer attached to its brief the Trial Testimony of Brian Engle, who testified about incidents of actual confusion that occurred during the first quarter of 2022.¹⁶ Opposer argues that this new evidence should be accepted because it came into Opposer's possession only after its trial testimony period closed.¹⁷ Opposer argues

¹⁵ Opposer's motion to strike, p. 3 (66 TTABVUE 4).

¹⁶ Trial Testimony of Brian Engle attached as Exhibit A to Opposer's Trial Brief (80 TTABVUE 37-38).

¹⁷ Opposer's brief, p. 24 (80 TTABVUE 30).

that the newness of the evidence, combined with Opposer's offer to Applicant of the opportunity to cross examine Mr. Engle, alleviates any potential prejudice.¹⁸

Applicant moved to strike the testimony of Mr. Engle as untimely, arguing, *inter alia*, that after a party's trial testimony period has closed, a party may not submit a testimony declaration except by stipulation of the parties approved by the Board, or upon motion granted by the Board, or order of the Board, none of which occurred in this case nor which were even sought by Opposer.¹⁹

Applicant's objection to the Trial Testimony of Brian Engle is sustained. Opposer's attaching evidence to its trial brief that was not properly submitted during its assigned testimony period is untimely and not properly of record. Accordingly, we give it no consideration. *See, e.g., Hole In 1 Drinks, Inc. v. Lajtay*, 2020 USPQ2d 10020, at *4 (TTAB 2020) (exhibits attached to brief not considered); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *2 n.8 (TTAB 2019) ("Exhibits and other evidentiary materials attached to a party's brief on the case can be given no consideration unless they were properly made of record during the time for taking testimony.").

II. Record

The record consists of the pleadings, and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), each of Applicant's application files.

In addition, Opposer introduced the following testimony and evidence:

¹⁸ *Id.* at p. 24 n.1 (80 TTABVUE 30).

¹⁹ Applicant's motion to strike, p. 2 (81 TTABVUE 3); Applicant's statement of objections, p. 8 (84 TTABVUE 49-50).

- Opposer’s first notice of reliance:
 - (1) Deposition transcript of Diane Crews,²⁰ Applicant’s then-President and CEO, and exhibits thereto (“Crews Depo. Tr.”).²¹
 - (2) TSDR printout of Opposer’s pleaded registration and the related application file history.²²
 - (3) Application files for Applicant’s involved applications.²³
- Trial Testimony of Sarah Butler, Opposer’s survey expert, including her expert report and exhibits (“Butler Decl.”).²⁴
- Trial Testimony of Lee Hoffman,²⁵ Edward Lawson,²⁶ and Thomas Woodle,²⁷ and related exhibits, each describing their actual confusion between the parties’ marks (“Hoffman Decl.”, “Lawson Decl.”, and “Woodle Decl.”, respectively).
- Opposer’s second notice of reliance on, inter alia, various Internet website printouts, such as OrlandoSentinel.com, Fromers.com, Twitter, Facebook, and Wikipedia.²⁸
- Trial Testimony of Phillip N. Brown, Opposer’s CEO, and related exhibits (“Brown Decl.”).²⁹

²⁰ The deposition transcript is attached as Exhibit 37 to Opposer’s first notice of reliance. 43 TTABVUE 68-272.

²¹ Exhibits 1-13 (41 TTABVUE); Exhibits 14-30 (42 TTABVUE); and Exhibits 31-36 (43 TTABVUE 1-67). Opposer also filed a “Supplement to Opposer’s first notice of reliance,” re-filing Exhibit 27 to Ms. Crews’ deposition exhibits, this time with the slip sheet that was inadvertently omitted from the original filing. 46 TTABVUE 2-8.

²² Exhibits 38 and 39 (43 TTABVUE 274-354).

²³ Exhibits 40 and 41 (43 TTABVUE 355-460). Because the files of the involved applications are automatically of record, filing them under a notice of reliance was unnecessary. Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b).

²⁴ 44 TTABVUE 2-331.

²⁵ 45 TTABVUE.

²⁶ 48 TTABVUE 2-6.

²⁷ 48 TTABVUE 7-11.

²⁸ 47 TTABVUE.

²⁹ 48 TTABVUE 12-93.

Applicant introduced the following testimony and notice of reliance evidence:

- Trial Testimony of Tom Nolan, Applicant’s current President and CEO, and related exhibits (“Nolan Decl.”).³⁰
- Applicant’s notice of reliance evidence:
 - (1) Public (redacted) and confidential versions of the discovery deposition transcript of Phillip Brown, Opposer’s CEO, and related exhibits (“Brown Depo. Tr.”).³¹
 - (2) Applicant’s Certificate of Registration, TSDR printout and application file history for its WE ARE SFB. SIMPLER. FASTER. BETTER. mark (Reg. No. 5175377).³²
 - (3) Certain of Applicant’s corporate governance documents, including Applicant’s resolution regarding its change of name.³³
 - (4) Select newspaper and Internet website articles.³⁴
 - (5) Discovery deposition transcript of Sarah Butler, Opposer’s survey expert, and related exhibits (“Butler Depo. Tr.”).³⁵

Opposer’s brief refers to Mr. Brown as Opposer’s President (Opposer’s brief, p. 5 (80 TTABVUE 11)); however, in his testimony, Mr. Brown refers to himself as CEO (Brown Decl., para. 2 (48 TTABVUE 12)), so we refer to him as CEO, as that testimony is under oath.

³⁰ 58 TTABVUE 2-125.

³¹ 59 TTABVUE 10-172. The deposition transcript appears at Exhibit 17 (59 TTABVUE 49-172) and the confidential portion of the transcript appears as Exhibit 18. Confidential Exhibit 12 and the confidential portion of the transcript (Exhibit 18) are filed separately at 64 TTABVUE.

³² 59 TTABVUE 173-210.

³³ 59 TTABVUE 211-18.

³⁴ Exhibit 23 (59 TTABVUE 219), Exhibits 24-43 (60 TTABVUE) and Exhibits 44-56 (61 TTABVUE 2-18).

³⁵ The transcript appears as Exhibit 57 (61 TTABVUE 19-102). Butler deposition Exhibit 58, which is the expert report, is very lengthy and is filed at 61 TTABVUE 103-132, 62 TTABVUE 2-86, 63 TTABVUE 2-120, and 65 TTABVUE 2-94. The remaining Butler deposition exhibits, i.e., Exhibits 59-62, can be found at 65 TTABVUE 95-98.

Opposer also introduced the following evidence during its rebuttal period:

- Rebuttal Trial Testimony of Mr. Brown and related exhibits (“Brown Rebuttal Decl.”).³⁶
- Notice of reliance on the transcript of the cross-examination of Mr. Nolan and related exhibits (“Nolan Cross-Exam. Tr.”).³⁷

Finally, Applicant introduced:

- Transcript of the cross-examination of rebuttal testimony of Mr. Brown and related exhibits (“Brown Cross-Exam. Tr.”).³⁸

III. Background

A. Opposer’s Business and Marks

Opposer, Greater Orlando Aviation Authority, is a public and governmental body, existing under the laws of the state of Florida.³⁹ Opposer has continuously provided airport services under its ORLANDO INTERNATIONAL AIRPORT word mark since

³⁶ 72 TTABVUE 2-13. A portion of Mr. Brown’s rebuttal testimony regarding high passenger volume is properly part of Opposer’s case-in-chief as it is evidence of the strength of Opposer’s mark. However, Applicant has not objected to it and even addressed it substantively. Applicant’s brief, p. 26 (84 TTABVUE 32 (“Over the 27+ years of coexistence between the airports, Opposer has serviced more than half of a billion travelers.”). Therefore, we will consider it. *Cf. W. Leather Goods Co. v. Blue Bell, Inc.*, 178 USPQ 382, 383 (TTAB 1973) (“The evidence presented in rebuttal by petitioner did not in any way attempt to deny, explain or discredit the facts and witnesses adduced by respondent but rather related to a witness and facts which might appropriately have been introduced in the case-in-chief.”).

³⁷ 73 TTABVUE 2-148. While testimony is not proper subject matter for introduction by means of notice of reliance, *see* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 704.02 (2022), we have not excluded the transcript. *WeaponX Perf. Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1037 & n.12 (TTAB 2018) (motion to strike testimony declarations filed and served as exhibits to a Notice of Reliance denied).

³⁸ 78 TTABVUE.

³⁹ Brown Decl., para. 3 (48 TTABVUE 12).



at least 1976,⁴⁰ and under its composite mark since at least as early as September 19, 1981.⁴¹ Opposer applied to register its composite mark with the United States Patent and Trademark Office (“USPTO”), and the mark was registered on November 7, 1989, with services identified as “airport services.”⁴²

Tens of millions of customers are served every year by Opposer’s airport services offered under its marks, including more than 50 million passengers in 2019 alone, making the ORLANDO INTERNATIONAL AIRPORT the tenth most visited airport in the United States for the year.⁴³ Opposer has continually served a generally increasing number of passengers over the past years: 41.9 million passengers in 2016; 44.6 million in 2017; 47.6 million in 2018; 50.6 million in 2019; and 21.6 million in 2020.⁴⁴ Due to the high number of travelers passing through Opposer’s airport, its operating budget from 2015-2020 ranged from \$400 million to about \$600 million.⁴⁵ Opposer advertises and promotes its marks on its website and its social media platforms.⁴⁶ Between 2015-2020, Opposer spent between \$4.2 million and \$10.1 million each year advertising and promoting its marks.⁴⁷ Between January 1, 2015

⁴⁰ *Id.* at paras. 4, 24 (48 TTABVUE 12, 19).

⁴¹ *Id.* at paras. 5, 24 (48 TTABVUE 12, 19).

⁴² *Id.* at para. 6 (48 TTABVUE 13).

⁴³ Brown Rebuttal Decl., para. 9 (72 TTABVUE 3).

⁴⁴ *Id.* (72 TTABVUE 3).

⁴⁵ Brown Decl. at para. 16 (48 TTABVUE 15-16).

⁴⁶ *Id.* at paras. 10-13 (48 TTABVUE 14-15).

⁴⁷ *Id.* at para. 17 (48 TTABVUE 16).

and December 31, 2019, Opposer has had more than 32 million visitors to its website, with more than 43 million sessions viewing over 123 million pages.⁴⁸

In addition to the present opposition proceedings involving Applicant, Opposer has been involved in litigation in the United States District Court for the Middle District of Florida with Melbourne Airport Authority (“Melbourne”) over Melbourne’s use of the Orlando Melbourne International Airport name (Case No. 6:19-cv-540-CEM-GJK).⁴⁹ The Melbourne trademark litigation was settled when the parties entered into a Consent and License Agreement (“Agreement”).⁵⁰ In the Agreement, Melbourne agreed to change trademarks, branding, identifiers and signage from ORLANDO MELBOURNE INTERNATIONAL AIRPORT to MELBOURNE ORLANDO INTERNATIONAL AIRPORT, and Opposer consented to and licensed Melbourne’s use the new mark.⁵¹

B. Applicant’s Business and Marks

Applicant is a public and governmental body, existing under the laws of the state of Florida.⁵² Applicant operates what is now known as the Orlando Sanford International Airport, located in Sanford, Florida,⁵³ approximately thirty-one miles

⁴⁸ *Id.* at para. 11 (48 TTABVUE 14).

⁴⁹ Brown Rebuttal Decl., para. 3 and Exhibit A thereto (72 TTABVUE 2, 6).

⁵⁰ Brown Rebuttal Decl., para. 4 and Exhibit A thereto (72 TTABVUE 2, 6-13).

⁵¹ Sections 1 and 2 of the Agreement attached as Exhibit A to the Brown Rebuttal Decl. (72 TTABVUE 6-7).

⁵² Nolan Decl., para. 4 (58 TTABVUE 2).

⁵³ *Id.* at para. 5 (58 TTABVUE 2).

from Opposer's airport.⁵⁴ Applicant has operated the airport at this location since at least 1942.⁵⁵

Over the years, Applicant's airport has undergone a series of name changes. For example, in 1990, it was changed from the Sanford Regional Airport to the Central Florida Regional Airport.⁵⁶ On April 4, 1995, Applicant's governing body voted to change the name from Central Florida Regional Airport to Orlando Sanford Airport.⁵⁷ According to the testimony of Applicant's current President and CEO, Tom Nolan, the purpose of the name change was to reflect Applicant's proximity to its "primary city", i.e., Orlando, which has "global name recognition."⁵⁸

About a year later, in 1996, Applicant changed the name of the airport again, this time to add the term "International," resulting in its mark ORLANDO SANFORD INTERNATIONAL AIRPORT,⁵⁹ which is a subject of the present proceedings. Applicant has offered airport services under its ORLANDO SANFORD INTERNATIONAL AIRPORT word mark continuously since it was first used at least as early as December 31, 1996,⁶⁰ and under its related composite word-and-design mark, also subject to these proceedings, since October 1, 2012.⁶¹ In 2016, decades

⁵⁴ *Id.* at para. 11 (58 TTABVUE 3).

⁵⁵ *Id.* at paras. 6, 12 (58 TTABVUE 2, 3).

⁵⁶ *Id.* at para. 13 and Exhibit B (58 TTABVUE 3, 13).

⁵⁷ *Id.* at para. 14 and Exhibits B, C (58 TTABVUE 4, 13-17).

⁵⁸ *Id.* at paras. 2, 14 (58 TTABVUE 2, 4).

⁵⁹ *Id.* at paras. 7, 19 (58 TTABVUE 3, 5).

⁶⁰ *Id.* at paras. 8, 20 (58 TTABVUE 3, 5).

⁶¹ *Id.* at paras. 20-21 (58 TTABVUE 5).

after the first use of its word mark, Applicant filed applications to register its trademarks,⁶² resulting in the present dispute.

Although Applicant's airport has changed names over the years, the name of Applicant, Sanford Airport Authority, has remained the same.⁶³

Ms. Crews testified that the number of passengers flying out of Applicant's airport increased significantly each year from 2015-2018, and that 3.2 million passengers flew out of Applicant's airport in 2019.⁶⁴ While Applicant did not disclose its general operating budget, Mr. Nolan testified that generally, for the years between 2015-2020, Applicant has seen \$12 million to \$25 million in annual revenue.⁶⁵ As for its advertising budget, Applicant spends \$300,000 to \$900,000 annually advertising and promoting its marks.⁶⁶

C. The Parties' Familiarity with Each Other

Each party has long been familiar with the other. The record shows that Applicant considered reaching out to Opposer prior to adding the word ORLANDO to its name.⁶⁷ However, Opposer appears to have reached out first on advice of counsel. Specifically, on June 14, 1995, Opposer's trademark counsel sent Opposer a memorandum

⁶² *Id.* at paras. 22-23 (58 TTABVUE 5).

⁶³ *Id.* at paras. 10, 13, 19 (58 TTABVUE 3, 5).

⁶⁴ Crews Depo. Tr., p. 135, line 18 through p. 136, line 7 (43 TTABVUE 203-04).

⁶⁵ Nolan Decl., para. 30 (58 TTABVUE 7).

⁶⁶ *Id.* at para. 31 (58 TTABVUE 7).

⁶⁷ Minutes to the March 7, 1995 Sanford Airport Authority meeting attached as Exhibit C to Nolan Decl. (58 TTABVUE 15-16) (“[Mr. Shoemaker] further advised that a name change to include Orlando should be discussed with Orlando Airport people.”).

regarding Applicant's airport name, addressed the issue of whether there might be a likelihood of confusion between the parties' marks and offered recommendations.⁶⁸

A short time later, on June 29, 1995, representatives of both parties met to discuss the airport names, and Opposer pitched to Applicant the idea of conducting a trademark survey, arguing that it might take some of the subjectivity out of the issue.⁶⁹ No survey was conducted, nor was suit filed.⁷⁰ According to Applicant, "Opposer [did not raise] any further concerns with Applicant's name until 2017, twenty-two (22) years later, when Opposer filed the present consolidated opposition proceedings."⁷¹

IV. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action must be established in every inter partes proceeding. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021). A party in the position of plaintiff may oppose registration of a mark where such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and the party has a reasonable belief in damage that is proximately caused by registration of the mark. *See Peterson v. Awshucks SC, LLC*, 2020 USPQ2d 11526, at *6 (TTAB 2020) (citing *Corcamore*, 2020 USPQ2d 11277, at *6-7).

⁶⁸ Exhibit D to Nolan Decl. (58 TTABVUE 18-25).

⁶⁹ June 30, 1995 memorial letter from Opposer to Applicant, attached as Exhibit E to Nolan's Decl. (58 TTABVUE 26).

⁷⁰ Nolan Decl., para. 24 (58 TTABVUE 6).

⁷¹ *Id.* (58 TTABVUE 6).

“[A] party that demonstrates a real interest in [oppos]ing a trademark under [Trademark Act Section 13, 15 U.S.C.] § 106[3] has demonstrated an interest falling within the zone of interests protected by [the Trademark Act]. . . . Similarly, a party that demonstrates a reasonable belief of damage by the registration of a trademark demonstrates proximate causation within the context of § 106[3].” *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *17 (TTAB 2022) (quoting *Corcamore*, 2020 USPQ2d 11277, at *7).

Inasmuch as Opposer has made its pleaded registration of record,⁷² it has established a direct commercial interest in the consolidated proceedings as plaintiff. Moreover, Opposer has pleaded a plausible likelihood of confusion claim, which establishes the necessary reasonable belief in damage. *See Australian Therapeutic Supplies, Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1320, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (pleaded registrations “suffice to establish . . . direct commercial interest”; a belief in likely damage can be shown by establishing a direct commercial interest); *Barbara’s Bakery v. Landesman*, 82 USPQ2d 1283, 1285 (TTAB 2007) (opposer’s entitlement to opposition established by pleaded registration being of record and non-frivolous likelihood of confusion claim).

Additionally, as discussed in more detail below, Opposer, through its declaration testimony and related exhibits has established common law use of its ORLANDO INTERNATIONAL AIRPORT mark in connection with airport services. *See Giersch*

⁷² Exhibit 38 to Opposer’s first notice of reliance (43 TTABVUE 273-79).

v. Scripps Networks, Inc., 90 USPQ2d 1020, 1022 (TTAB 2009) (common-law use sufficient to establish standing). All of the evidence on this issue (discussed in more detail below) further demonstrates that Opposer has a real interest in this proceeding and a reasonable belief that it would be damaged by registration of Applicant's marks.

Applicant argues that Opposer "does not have standing to challenge Applicant's marks where Opposer acquiesced to Applicant's use for more than twenty-seven years."⁷³ Opposer's entitlement, however, is an issue separate from Applicant's affirmative defense. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co., Inc.*, 2022 USPQ2d 1242, *5 n.14 (TTAB 2022) ("Lack of standing, now referred to as entitlement to a statutory cause of action . . . , is also not a true affirmative defense because '[t]he facts regarding standing . . . are part of [a plaintiff's] case and must be affirmatively proved.'" (quoting *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1848 (TTAB 2017) and *Lipton Ind., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982))). The fact that the parties' marks may have co-existed for some time does not bar Opposer from establishing its entitlement to now oppose the registration of the marks of the involved applications, where Opposer timely filed its notices of oppositions. Applicant's argument is relevant, if at all, to its alleged defense of acquiescence, which we address below.

⁷³ Applicant's brief, p. 28 (84 TTABVUE 34).

V. Section 2(d) Claim

To prevail on a likelihood of confusion claim brought under Trademark Act Section 2(d), a party must first prove that it owns “a mark registered in the Patent and Trademark Office or a mark or trade name previously used in the United States by another and not abandoned” 15 U.S.C. § 1052(d).

A. Priority

Because Opposer’s pleaded registration is of record and because Applicant did not counterclaim to cancel it, priority is not at issue with respect to the registered mark and the airport services identified therein. *Nkanginieme v. Appleton*, 2023 USPQ2d 277, *4 (TTAB 2023); *Made in Nature*, 2022 USPQ2d 557, at *19 (“In a likelihood of confusion proceeding where the opposer relies on registrations, the applicant can claim priority only if it files a counterclaim or separately petitions to cancel the opposer’s registrations[.]”); *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (*citing King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)).

Rather than concentrating exclusively on its registered mark in its briefs to support its claim under Section 2(d), Opposer also relies on its alleged common law rights in its word mark. This common law mark and the services with which it is allegedly used, as identified in the notices of opposition, if found to have acquired distinctiveness prior to Applicant’s use or constructive use of the subject marks, would support a likelihood of confusion claim. In other words, if Opposer could prevail

on its Section 2(d) claim on prior common law use of the common law word mark, then consideration of Opposer's pleaded registered mark would be unnecessary.

However, neither party squarely addressed this issue in its brief. In any event, we need not consider the issue further because we find it sufficient to rely upon Opposer's registration of the composite word-and-design mark in analyzing whether a likelihood of confusion exists, and based on the record before us this appears to be the mark that Opposer uses most frequently and consistently. *Cf. Fiserv, Inc. v. Elec. Transaction Sys. Corp.*, 113 USPQ2d 1913, 1917 (TTAB 2015) (likelihood of confusion analysis may focus on registration of a single mark). Further, compared to its common law mark, the registration of Opposer's mark offers additional advantages: the registration is prima facie evidence of the validity of the registered mark and of the registration of the mark, and of Opposer's ownership of it. 15 U.S.C. § 1057(b).

B. Likelihood of Confusion

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as "*DuPont* factors"). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). "Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case." *Stratus Networks, Inc. v. UBTA-UBET Commc'ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020) (citation omitted). In making our determination, we

consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

In every likelihood of confusion analysis, two key factors are the similarity or dissimilarity of the marks and the goods or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). The parties address these two key factors and others as well, which we address each in turn.

1. The Similarity of the Services, Customers, and Channels of Trade

The second *DuPont* factor considers “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” while the third *DuPont* factor considers “the similarity or dissimilarity of established, likely-to-continue trade channels.” *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014) (citing *DuPont*, 177 USPQ at 567). Our analysis under these factors is based on the identifications of services in Applicant’s involved applications and Opposer’s registration. *Stone Lion*, 110 USPQ2d at 1162; *Octocom Sys., Inc. v. Houston Comput. Servs.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (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 [services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s [services], the particular channels of trade or the class of purchasers to which sales of the [services] are directed.”).

Each of Applicant's involved applications identifies "airport services." Opposer's registration similarly identifies "airport services." Indeed, Applicant concedes that both parties offer airport services.⁷⁴ Thus, we find that the services identified in each of Applicant's involved applications are identical to the services identified in Opposer's registration. Accordingly, the second *DuPont* factor weighs in favor of finding a likelihood of confusion.

Turning to the third *DuPont* factor, because Applicant's services and the services identified in Opposer's registration are identical and unrestricted as to trade channels, we must presume that those services move in the same channels of trade and are available to the same classes of customers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this presumption). *See also, Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1437 (TTAB 2014). Thus, the third *DuPont* factor also weighs in favor of finding a likelihood of confusion.

2. The Strength of Opposer's Mark


We next consider the strength of Opposer's mark, *DuPont*, 177 USPQ at 567, as that may affect the scope of protection to which Opposer's mark is entitled. In determining the strength of a mark, we consider both its inherent strength, based on the nature of the mark itself, and its commercial strength, based on marketplace recognition of the mark. *Made in Nature*, 2022 USPQ2d 557, at *21; *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength

⁷⁴ Applicant's brief, p. 29 (84 TTABVUE 35).

of a mark is determined by assessing its inherent strength and its commercial strength); 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 11:80 (5th ed. 2023) (“The first enquiry is for conceptual strength and focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another’s use.”).

The commercial strength of a mark rests on the extent to which “a significant portion of the relevant consuming public . . . recognizes the mark as a source indicator[.]” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (citing *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)). The commercial strength of the mark also is affected by the number and nature of third-party uses of similar marks for similar goods or services. *DuPont*, 177 USPQ at 567. A very strong mark receives a wider latitude of legal protection in the likelihood of confusion analysis. *See Palm Bay*, 73 USPQ2d at 1694 (Strong marks “enjoy wide latitude of legal protection” since they are “more attractive as targets for would-be copyists.”).

a. Inherent Strength

Opposer registered its composite word-and-design mark  ORLANDO INTERNATIONAL AIRPORT in part under the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), as to the wording ORLANDO INTERNATIONAL AIRPORT, and with a disclaimer of

INTERNATIONAL AIRPORT.⁷⁵ For procedural purposes, a claim of distinctiveness under Section 2(f), whether made in the application as-filed or in a subsequent amendment, may be construed as conceding that the matter to which it pertains is not inherently distinctive and, thus, not registrable on the Principal Register absent proof of acquired distinctiveness. *In re RiseSmart Inc.*, 104 USPQ2d 1931, 1932 (TTAB 2012) (“[W]hen an applicant responds to a refusal based on mere descriptiveness of a mark, or portion of a mark, by claiming acquired distinctiveness, such amendment to seek registration under Section 2(f) of the Trademark Act is considered an admission that the proposed mark [or portion thereof] is not inherently distinctive.”). *See also Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) (“Where an applicant seeks registration on the basis of Section 2(f), the mark’s descriptiveness is a nonissue; an applicant’s reliance on Section 2(f) during prosecution presumes that the mark is descriptive.”).

Accordingly, we find that the wording ORLANDO INTERNATIONAL AIRPORT in Opposer’s mark is not inherently distinctive. That portion of the mark was registered pursuant to a claim of acquired distinctiveness under Section 2(f), an admission that the matter is not inherently distinctive. *See In re RiseSmart*, 104

⁷⁵ “Claiming §2(f) in part is appropriate when descriptive matter that is combined with an inherently distinctive element, such as . . . an inherently distinctive design, presents a separate and distinct commercial impression apart from the other matter in the mark and has acquired distinctiveness through use by itself. *** An applicant may claim §2(f) in part as to wording consisting of both geographically descriptive matter and generic matter if the applicant establishes that the combined wording as a whole has acquired distinctiveness and provides a disclaimer of the generic matter.” TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1212.02(f)(ii)(A) (July 2022).

USPQ2d at 1932; *Cold War Museum*, 92 USPQ2d at 1629; *Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988) (“Where, as here, an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the statute accepts a lack of inherent distinctiveness as an established fact.”). Thus, we find that Opposer’s mark is not a conceptually strong mark. This is not fatal, however, as even a weak mark is entitled to protection against confusion. *See e.g., King Candy*, 182 USPQ at 109.

Applicant argues that Opposer’s mark is weak and that consumers are used to seeing multiple airports sharing the name of a city, and that consumers are accustomed to recognizing these differences in airports.⁷⁶ Thus, travelers are accustomed to paying attention to what airports are utilized during travel and have learned to distinguish between multiple airports that service a single city.⁷⁷ Applicant requests that we take judicial notice of the following airport names: Chicago O’Hare /Chicago Midway; Dallas Ft. Worth/Dallas Love Field; Washington National/Washington Dulles; London Heathrow/London Gatwick/London Luton; Paris Charles deGaul/Paris Orley; and New York JFK/New York LaGuardia/New York Newark.⁷⁸

⁷⁶ Applicant’s brief, pp. 16-17 (84 TTABVUE 22-23).

⁷⁷ *Id.* (84 TTABVUE 22-23).

⁷⁸ *Id.* at p. 17 & n.7 (84 TTABVUE 23).

In response, Opposer writes that it has no objection to Applicant's request for judicial notice, so long as evidence in the form of links to Wikipedia in support of its counter argument are also considered.⁷⁹ Specifically, Opposer argues that

The problem with Sanford's argument is that **all of the U.S. airports on its list are run by the same airport entities**. Chicago O'Hare and Chicago Midway are both owned and operated by the City of Chicago; Dallas Ft. Worth and Dallas Love Field are both owned and operated, at least partly, by the City of Dallas; Washington National and Washington Dulles are both owned and operated by the Metropolitan Washington Airports Authority; and New York's JFK, LaGuardia and Newark Airports are all run by the Port Authority of New York and New Jersey. Far from making Sanford's point, this evidence establishes that consumers expect multiple airports in a city with the same city name to be operated by the same entity – thus further underscoring the likelihood of confusion Sanford has created.⁸⁰

We decline to take judicial notice of the third-party airport names, as requested by Applicant for two reasons. First, the third-party airport names as specified by Applicant and consumer recognition of them are not facts that are not subject to reasonable dispute and, second, Applicant has not made the necessary supporting information of record, as required by Fed. R. Evid. 201(b), (c)(2).

b. Commercial Strength

Commercial strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1898-89 (TTAB 2006). In the context of a likelihood of confusion analysis, the commercial strength of a mark is not a binary factor. Rather, it “varies along a

⁷⁹ Opposer's reply brief, p. 18 & nn.5-9 (85 TTABVUE 22).

⁸⁰ *Id.* at pp. 18-19 (85 TTABVUE 22-23) (footnotes omitted).

spectrum from very strong to very weak.” *Joseph Phelps Vineyards*, 122 USPQ2d at 1734 (quoting *Palm Bay*, 73 USPQ2d at 1694). We may measure the commercial strength of Opposer’s mark indirectly by the volume of sales of and advertising expenditures for the services identified by the mark at issue, widespread marketing, and unsolicited media attention, for example. *See, e.g., Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1694 (Fed. Cir. 2018); *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002).

i. Opposer’s Marketing Efforts

Opposer contends that its mark is commercially strong and points to several types of evidence to support its position.⁸¹ First, Opposer points to its use of the mark since 1981.⁸² Second, Opposer points to the high number of travelers served by its airport: tens of millions of customers use Opposer’s airport services each year, including more than 50 million passengers in 2019 alone, making Opposer’s airport the tenth most visited airport in the United States for the year.⁸³ Opposer has continually served a generally increasing number of passengers: 41.9 million in 2016; 44.6 million in 2017; 47.6 million in 2018; 50.6 million in 2019; and 21.6 million passengers in 2020, the first year of the global COVID pandemic.⁸⁴

⁸¹ Opposer’s brief, pp. 18-20 (80 TTABVUE 24-26).

⁸² Brown Decl., para. 5 (48 TTABVUE 12).

⁸³ Brown Rebuttal Decl., para. 9 (72 TTABVUE 3).

⁸⁴ *Id.* (72 TTABVUE 3).

Third, Opposer has promoted and continues to promote its mark heavily, both in print and online.⁸⁵ Mr. Brown, Opposer's CEO, testified about Opposer's advertising on its website and its social media platforms, and attached representative samples of use of its mark on Twitter and Facebook to his testimony declaration.⁸⁶ Mr. Brown further testified that Opposer has used social media platforms to promote its mark for years, including YouTube since 2010, Twitter since 2011, Facebook since 2009, Instagram since 2016, and LinkedIn since 2015. Between 2015-2020, Opposer spent between \$4.2 million to \$10.1 million annually advertising and promoting its marks, including its registered mark.⁸⁷

Between January 1, 2015 and December 31, 2019, Opposer has had more than 32 million visitors to its website, with more than 43 million sessions viewing over 123 million pages.⁸⁸ Looking back over that decade, i.e., between January 1, 2010 and December 31, 2019, more than 45 million persons visited Opposer's website, with more than 62 million sessions viewing over 167 million pages.⁸⁹

Although Applicant disputes that Opposer's mark is strong, it does not dispute Opposer's evidence discussed above.

⁸⁵ Exhibit A to Brown Decl. (48 TTABVUE 25, 31, 34-35). We note that the print advertising evidence attached at 48 TTABVUE 31 appears to be a printer's proof, as suggested by the lines in the corner of the document. *Cf. In re The Signal Cos.*, 228 USPQ 956, 957-58 n.4 (TTAB 1986) (noting that a printer's proof of an advertisement would not be an acceptable specimen because it does not show actual use in commerce). However, as Applicant has not objected to it, we consider it.

⁸⁶ Brown Decl., paras. 10-13 and Exhibits A and B (48 TTABVUE 14-15, 25-52).

⁸⁷ *Id.* at para. 17 and Exhibit C (48 TTABVUE 16, 68).

⁸⁸ *Id.* at para. 11 (48 TTABVUE 14).

⁸⁹ *Id.* (48 TTABVUE 14).

ii. The Number and Nature of Similar Marks in Use on Similar Goods

“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *In re FabFitFun*, 127 USPQ2d 1670, 1674 (TTAB 2018) (quoting *Palm Bay*, 73 USPQ2d at 1693).

Opposer argues that there is no evidence that its mark is weak because, now that Opposer has resolved its dispute with Melbourne Airport Authority, there are no other ORLANDO-formative trademarks in use with airport services outside of its control, except for Applicant.⁹⁰ Further, Opposer made of record its executed Settlement Agreement with Melbourne to show that Melbourne acknowledged Opposer’s rights in its marks, including Opposer’s registered mark, and agreed to license from Opposer use of its marks.⁹¹

Applicant counters that Opposer’s settlement with Melbourne, and Melbourne’s recital that it acknowledges Opposer’s “rights in the [Opposer’s] Marks and the strength of the unitary mark ‘Orlando International Airport’” does not increase the strength of Opposer’s mark, as “Melbourne agreed to a statement favorable to Opposer to resolve litigation brought against it.”⁹² Applicant continues that “[t]his is not evidence of a strong mark (if it is even evidence at all) particularly where Opposer did not allege its mark is famous, let alone that its mark became famous prior to

⁹⁰ Opposer’s brief, pp. 19-20 (80 TTABVUE 25-26).

⁹¹ Brown Rebuttal Decl., paras. 3-7 and Exhibit A thereto (72 TTABVUE 2-3, 6-13).

⁹² Applicant’s brief, p. 19 (84 TTABVUE 25).

Applicant's use of its mark."⁹³ Applicant concludes: "To the contrary, evidence that competitors have used a particular word as the name of their goods is persuasive evidence of genericness."⁹⁴

Applicant additionally seeks to discredit the substantive nature of the license, arguing that it is in name only, that Opposer does not retain any quality control, but instead defers to the Federal Aviation Authority ("FAA"), and that "Melbourne can only lose the 'license' if it stops satisfying the obligations to be an airport pursuant to FAA regulations."⁹⁵ Thus, Applicant concludes that, even if Opposer could have trademark rights in a generic term, it has abandoned all potential trademark rights through naked licensing.⁹⁶

First, Applicant's arguments are unavailing and none of them are successful in diminishing the commercial strength of Opposer's mark. To the extent that Applicant's arguments are premised on its assumption that Opposer's registered mark is generic, these arguments constitute a collateral attack on the registration, which is impermissible without a pending counterclaim. 37 C.F.R. § 2.106(b)(3)(ii) ("An attack on the validity of a registration pleaded by an opposer will not be heard unless a counterclaim or separate petition is filed to seek the cancellation of such registration."). *See also, Fort James Operating Co. v. Royal Paper Converting, Inc.*, 83

⁹³ *Id.* (84 TTABVUE 25).

⁹⁴ *Id.* (84 TTABVUE 25).

⁹⁵ *Id.* at p. 20 (84 TTABVUE 26).

⁹⁶ *Id.* (84 TTABVUE 26).

USPQ2d 1624, 1626 n.1 (TTAB 2007) (absent a counterclaim, Board cannot consider arguments against the validity of a pleaded registration).

Second, Applicant conflates strength with fame, arguing Opposer's mark is not strong because it is not famous. Because Opposer opposed registration of Applicant's marks on the ground of likelihood of confusion and not dilution, it is not necessary for Opposer to demonstrate, inter alia, that its mark is famous.

Finally, Applicant's argument that Opposer's mark has been abandoned due to naked licensing constitutes a collateral attack upon the validity of Opposer's registration, which, again, cannot be entertained absent a counterclaim to cancel Opposer's registration. *Freki Corp. N.V. v. Pinnacle Entm't, Inc.*, 126 USPQ2d 1697, 1701 (TTAB 2018) ("To the extent Freki's sixth affirmative defense in the Prior Proceeding alleging that Pinnacle abandoned its mark due to naked licensing was an attack on the validity of Pinnacle's Registrations, it was a compulsory counterclaim that should have been pleaded with the original answer or pleaded promptly after the grounds were learned.").

Applicant also argues that, according to the FAA's Airport/Facilities Directory ("AF/D"), which classifies airports in various regions, a search for "Orlando" in the AF/D returns five hits: (1) ORLANDO SPB; (2) KISSIMEE GATEWAY; (3) ORLANDO INTL (Opposer's airport); (4) EXEC; and (5) ORLANDO SANFORD INTL (Applicant's airport).⁹⁷ To the extent that Applicant is arguing that these directory

⁹⁷ Nolan Decl., para. 9 and Exhibit A (58 TTABVUE 3, 12); Applicant's brief, p. 11 (84 TTABVUE 17).

search results are evidence of another third-party use of the ORLANDO term with airport services, i.e., ORLANDO SPB, this argument is unpersuasive, as Applicant has not made of record any evidence of use of the ORLANDO SPB “hit” as a trademark. *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010) (rejecting search engine summary results as evidence of third-party use because, inter alia, “they do not show that third parties actually use [the searched term] as a mark, or how consumers might encounter any such third-party uses.”).

iii. Opposer’s Survey Evidence

Opposer also points to the results of its consumer survey as evidence that the literal elements of its mark are commercially strong and have acquired secondary meaning.⁹⁸ Specifically, Opposer’s survey expert concluded that the survey “[demonstrated] consumers overwhelmingly view an airport with the name ‘Orlando’ in its title as a single airport, in one location.”⁹⁹ Moreover, Opposer’s expert added, “[a] net of at least 41.5 percent of respondents identify this airport with a single place and this is a strong indication of secondary meaning.”¹⁰⁰

Applicant takes issue with Opposer’s survey, arguing that it does not show Opposer’s mark is strong.¹⁰¹ Comparing the present proceeding to an issue presented

⁹⁸ Opposer’s brief, p. 19 (80 TTABVUE 25); Butler Decl., para. 4 (44 TTABVUE 2) (“To evaluate consumer perceptions of the name “Orlando International Airport,” I designed and conducted a survey in 2016.”).

⁹⁹ Expert Report of Sarah Butler, para. 5 (44 TTABVUE 8).

¹⁰⁰ *Id.* at para. 6 (44 TTABVUE 8).

¹⁰¹ Applicant’s brief, pp. 27-28 (84 TTABVUE 33-34).

in a genericness case, *USPTO v. Booking.com B.V.*, 591 U.S. ___, 140 S. Ct. 2298, 2020 USPQ2d 10729 (2020), Applicant argues:

According to the Supreme Court in *Booking.com*, an appropriate question to ask would be: Is Travelocity a Booking.com? *Booking.com*, 140 S. Ct. at 2305-06. The answer there was obviously no, showing that “Booking.com” was not generic. But the question to ask in an appropriate survey here would be: Is Opposer’s airport an Orlando international airport? Is Applicant’s airport an Orlando international airport? The answer to both questions is yes, further demonstrating the futility of Opposer’s position.¹⁰²

Further, Applicant argues that the survey asks the wrong questions. That is, “Ms. Butler[, Opposer’s survey expert,] did not ask [the] respondents what they believe an Orlando international airport to be.”¹⁰³ Rather, she presented the question to the respondents “as though such a thing must only identify a single location and asked whether or not the respondents thought it did so.”¹⁰⁴

Applicant’s criticism of the survey is premised on its assumption that all of the literal elements of Opposer’s mark are generic for airplane services. For example, Applicant argues that:

Although the [parties’] marks share similar wording, the marks are not identical and Opposer’s mark is generic. Opposer operates an international airport in Orlando and does so under the name Orlando International Airport. Therefore, Opposer’s design mark is weak and entitled to limited, if any, protection. Indeed, Opposer made a claim of

¹⁰² *Id.* at p. 28 (84 TTABVUE 34).

¹⁰³ *Id.* at p. 27 (84 TTABVUE 33).

¹⁰⁴ *Id.* (84 TTABVUE 33).

acquired distinctiveness under Section 2(f) to obtain its design registration.¹⁰⁵

Applicant makes other references throughout its brief to Opposer's "generic" mark, arguing that "[t]rademark law does not protect generic terms, meaning terms that do no more than name the product or service itself."¹⁰⁶ Applicant then sums up its argument: "Opposer's airport is literally an international airport in Orlando."¹⁰⁷

We are unpersuaded by Applicant's arguments. As noted above, Applicant's argument that Opposer's mark is generic amounts to an impermissible collateral attack on the validity of the registration, which we cannot consider without a counterclaim against Opposer's registration. *Fort James Operating Co*, 83 USPQ2d at 1626 n.1; *NASDAQ Stock Mkt. v. Antartica, S.r.l.*, 69 USPQ2d 1718, 1735 (TTAB 2003) ("The law, of course, is well settled that an applicant cannot collaterally attack opposer's registration in the absence of a counterclaim for cancellation."). *See also* Trademark Rule 2.106(b)(3)(ii) ("An attack on the validity of a registration pleaded by an opposer will not be heard unless a counterclaim or separate petition is filed to seek the cancellation of such registration.").

In sum, we find that Opposer's mark is not conceptually strong but is commercially strong, and falls on the higher end of the commercial strength spectrum from very strong to very weak.

¹⁰⁵ *Id.* at p. 16 (84 TTABVUE 22) (citing Exhibit 39 to Opposer's first notice of reliance (43 TTABVUE 281-354)).

¹⁰⁶ Applicant's brief, p. 26 (84 TTABVUE 32) (quotation omitted).


¹⁰⁷ *Id.* (84 TTABVUE 32).

3. Similarity or Dissimilarity of the Parties' Marks

“The first *DuPont* factor requires examination of the ‘similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.’” *Palm Bay*, 73 USPQ2d at 1691 (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (internal quotation omitted). The proper test regarding similarity “is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs.*, 101 USPQ2d at 1721). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific impression of marks.” *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018). Here, the average customer is a member of the general public who uses airports.

Our findings above on the second *DuPont* factor reduce the degree of similarity between the marks that is necessary for confusion to be likely. Because the services are identical, “the degree of similarity necessary to support a conclusion of likely confusion declines.” *Cai*, 127 USPQ2d at 1801 (quoting *Viterra*, 101 USPQ2d at 1908 (internal quotation omitted)).



Again, Opposer's registered mark is . We find that the literal elements ORLANDO INTERNATIONAL AIRPORT are the dominant portion of the mark because consumers will request or discuss the services by the literal components. *Viterra*, 101 USPQ2d at 1908 ("In the case of a composite mark containing both words and a design, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.") (quotation omitted). *See also Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134-35 (Fed. Cir. 2015) (marks must be considered as a whole, and while paw print design portion of opposer's and applicant's marks are substantially similar, verbal portion of opposer's mark cannot be disregarded as the verbal portion is the one most likely to indicate origin; there was no evidence in the record to indicate that consumers recognize solely the paw print portion of the registered mark as being associated with opposer's products so as to give it more weight in the analysis). This is especially true in this case where, as here, Opposer's design element is a common geometric shape, which is not likely to be utilized by an average purchaser to distinguish the services. *Cf., In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) (finding that the "ordinary geometric shape that serves as a background for the word mark" did not change the commercial impression or distinguish the mark for likelihood of confusion purposes).

Turning to Applicant's word mark, it contains the literal elements ORLANDO SANFORD INTERNATIONAL AIRPORT. The literal elements of Applicant's mark

are highly similar to the literal elements in Opposer's mark inasmuch as Applicant's mark incorporates all of the literal elements of Opposer's mark in the same order, beginning with the term ORLANDO and adding the term SANFORD. Both Opposer and Applicant have disclaimed the elements INTERNATIONAL AIRPORT, an acknowledgement that these terms are descriptive and generally have less significance in likelihood of confusion determinations. *See Cunningham v. Laser Golf*, 55 USPQ2d at 1846 ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'") (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *Dixie Rests. Inc.*, 41 USPQ2d at 1533-34; *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often "less significant in creating the mark's commercial impression").

Because Applicant's standard character mark encompasses the literal elements of Opposer's mark, the marks are similar in sight and sound, have generally the same meaning and make similar commercial impressions. The presence of the geographically descriptive term SANFORD does not distinguish the marks because Sanford is in such close proximity to Orlando, as the parties' airports are only thirty-one miles apart.¹⁰⁸ Indeed, Tom Nolan, Applicant's President and CEO, testified that Applicant changed its name to include "Orlando" to reflect Applicant's proximity to its "primary city", i.e., Orlando, which has "global name recognition."¹⁰⁹ *See Double*

¹⁰⁸ Nolan Decl., para. 11 (58 TTABVUE 3).

¹⁰⁹ *Id.* at paras. 2, 14 (58 TTABVUE 2, 4).

Coin Holdings, 2019 USPQ2d 377409, at *7 (“[I]f a junior user takes the entire mark of another and adds a generic, descriptive or highly suggestive term, it is generally not sufficient to avoid confusion.”). In sum, considering the totality of how the marks will be perceived by the public, including the disclaimed elements, we find the parties’ marks to be highly similar. *Shen Mfg. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1355 (Fed. Cir. 2004) (“The disclaimed elements of a mark . . . are relevant to the assessment of similarity. This is so because confusion is evaluated from the perspective of the purchasing public, which is not aware that certain words or phrases have been disclaimed.”) (internal citation omitted); *see also In re Offshore Tech. Corp.*, 201 USPQ 861, 863 (TTAB 1978) (“[A]lthough disclaimed, the [disclaimed] words . . . cannot be ignored in considering the question of likelihood of confusion since they are not physically removed from the mark, the public is not aware of disclaimers or of their significance, and these [disclaimed] words would be the means by which . . . the registrant’s . . . service would be identified and referred to.”).

Turning next to Applicant’s composite word-and-design mark



, we find that the compound literal element OrlandoSanford is the dominant element. *Viterra*, 101 USPQ2d at 1908. *See also Jack Wolfskin*, 116 USPQ2d at 1134-35. It is prominently positioned on the first line and in the largest font. The literal elements INTERNATIONAL AIRPORT, which are disclaimed, appear less prominently and in a smaller font. The tag line WE ARE SFB. SIMPLER. FASTER. BETTER. appears in the smallest font and at the bottom of the three lines

of literal elements. While this phrase may be clever in that it incorporates the airport code SFB, its placement at the bottom and in such small font diminishes its significance.

Neither do we consider Applicant's design feature to be sufficient to distinguish between the marks. Applicant's oval shape encompasses the literal elements of its mark and is a common geometric shape and not likely to be pronounced or recalled by consumers. As a basic common shape, it does little to distinguish the mark. *See, e.g., Dixie Rests.*, 41 USPQ2d at 1534.

In comparing the dominant elements of Opposer's mark with the dominant elements of Applicant's composite mark, we apply the same analysis set forth above with respect to Applicant's standard character mark, and consider the marks in their entireties. For the reasons set forth above, the additional elements of Applicant's mark do not compel a different conclusion. Thus, we find Applicant's mark, considered in its entirety, to be highly similar to Opposer's mark.

Applicant argues that the "dominant feature of [its] design is the combined word 'OrlandoSanford,' a location that itself does not exist."¹¹⁰ However, this argument is not persuasive. Here, the "OrlandoSanford" element is comprised of two geographically descriptive terms that retain their geographic descriptiveness even when combined. Thus, the combination results in a term that is itself geographically descriptive; it is not, as Applicant argues, a coined term that has no significance relative to the services offered. *Cf. In re Positec Gr. Ltd.*, 108 USPQ2d 1161 (TTAB

¹¹⁰ Applicant's brief, p. 18 (84 TTABVUE 24).

2013) (SUPERJAWS merely descriptive for a variety of machine and hand tools including jaws); *In re Petroglyph Games, Inc.*, 91 USPQ2d 1332 (TTAB 2009) (BATTLECAM merely descriptive for computer game software.). In short, the combination of these two elements does not cause Applicant's mark to make a sufficiently different commercial impression such that confusion is unlikely, especially because ORLANDO is the leading term.

In sum, we find both of Applicant's marks to be highly similar to Opposer's mark. Accordingly, the first *DuPont* factor weighs in favor of a finding of likelihood of confusion.

4. Nature and Extent of Actual Confusion and Related Conditions for Confusion

The parties vigorously dispute the seventh *DuPont* factor, i.e., the nature and extent of any actual confusion. "A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion." *Majestic Distilling*, 65 USPQ2d at 1205. However, proof of actual confusion is not necessary to show a likelihood of confusion. *See Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1843 (Fed. Cir. 1990).

Opposer argues that there is "ample evidence of confusion" and offers the following evidence:¹¹¹

- Testimony of Mr. Phillip Brown regarding customer feedback indicating confusion between the parties' marks, or complaining about or requesting information about Allegiant Airlines flights;
- Testimony from confused travelers Messrs. Lawson, Woodle, and Hoffman;

¹¹¹ Opposer's brief, pp. 21-23 (80 TTABVUE 27-29).

- Twitter posts by confused travelers; and
- Newspaper articles discussing the similarity of the parties' marks.

We discuss each in turn.

a. Testimony of Mr. Brown and Related Customer Feedback Indicating Confusion Between the Parties' Marks

Phillip Brown, Opposer's CEO, testified that there have been many instances of actual confusion between the parties' marks.¹¹² He testified that confusion manifests itself in one of two ways. First, some confusion is expressly described in complaints about the airport names submitted to Opposer from confused customers.¹¹³ Second, confusion manifests itself in complaints/questions submitted to Opposer about Allegiant Airlines, which during the time that the complaints/questions were received by Opposer, flew out of Applicant's airport but not out of Opposer's airport.¹¹⁴ Mr. Brown testified that because Allegiant Airlines does not fly out of Opposer's airport, people contacting Opposer to ask questions or to complain about Allegiant Airlines were confused about which airport provided the services.¹¹⁵

Mr. Brown attached to his testimony declaration certain email and web feedback form printouts evidencing incidents of confusion:

¹¹² Brown. Decl., paras. 2, 33 (48 TTABVUE 12, 20-21).

¹¹³ *Id.* at para. 33 and Exhibit D thereto (48 TTABVUE 20-21, 71-79).

¹¹⁴ Brown Decl., para. 35 and Exhibit D thereto (48 TTABVUE 21, 71-79).

¹¹⁵ *Id.* at para. 35 (48 TTABVUE 21).

- Ed Allen complained that friends of his travelling to Orlando arrived at Applicant's airport but due to confusion with the airport names, they booked a car rental at Opposer's airport.¹¹⁶
- Jessica Keelan requested information about proper identification needed for minor children travelling on an Allegiant Airlines flight.¹¹⁷
- Eileen Maguire complained that Allegiant Airlines put her luggage on the wrong plane and needed help locating it.¹¹⁸
- Keahla White wrote that she left her wallet on an Allegiant Airlines flight and needed help finding it.¹¹⁹
- Nikki Rohde complained about the poor customer service she received from Allegiant Airline staff.¹²⁰

Additionally, Opposer's phone call log and letter log show more traveler questions and complaints about Allegiant:

¹¹⁶ Exhibit D to Brown Decl. (48 TTABVUE 73).

¹¹⁷ *Id.* (48 TTABVUE 71).

¹¹⁸ *Id.* (48 TTABVUE 74).

¹¹⁹ *Id.* (48 TTABVUE 75-76).

¹²⁰ *Id.* (48 TTABVUE 77-78).

Phone Calls

1/17 – Amber Perry 804-496-0467 – Needs wheelchair for Allegiant flight
1/17 – Jeremy Butts 318-613-4117 – Questions about his delayed Allegiant flight
2/17 – Laurie Cook 231-721-5937 – Lost ID, traveling Allegiant
2/17 – Linda Heffner 540-273-7401 – Seat assignment question on Allegiant
3/17 – Mario 812-549-1241 – Thought his child was lost in the airport (Sanford/arrived on Allegiant)
3/17 – Sherry Thomas 724-348-7613 – Unaccompanied minor flying on Allegiant
4/17 – Gloria Hunter 217-761-4454 – Complaint about security in Sanford Airport
6/17 – Abby Lynch 865-567-8332 – Need information from Allegiant regarding a reservation
8/17 – Larry Hice 352-495-7826 – Needs hotel info near Sanford airport
9/17 – Fred Armstrong 352-672-4071 – Allegiant question
10/17 – Ed Walsh 937-475-1243 – Reschedule his Allegiant flight
11/17 – No Name 417-468-8826 – He is flying Allegiant, what does he need for his flight
1/18 – Melissa 308-386-6503 – Complaint about Allegiant
3/18 – Mackenzie Condreski 828-360-2274 – Wants to change her Allegiant flight
6/18 – Evelyn 309-207-1316 – Question about her Allegiant flight
6/18 – No Name 317-640-4613 – Question about Allegiant flight
7/18 – No Name 863-999-4740 – Question about Allegiant flight
11/18 – Don Cassing 810-730-7103 – Does Allegiant fly into Orlando or another airport?

Letters

Mrs. Wanty - nana_wanty10@hotmail.com
1/18 - Mrs Wanty sent a letter complaining about her wheelchair assistance with Allegiant

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We find that the above evidence is admissible as it has been properly established by Mr. Brown’s testimony as business records. In addition, letters, or their electronic equivalent, such as emails, from customers are recognized as an exception to the hearsay rule. *Nat’l Rural Elec. Coop. Ass’n v. Suzlon Wind Energy Corp.*, 78 USPQ2d 1881, 1886 (TTAB 2006). *See also Freddie Fuddruckers, Inc. v. Ridgeline, Inc.*, 589 F. Supp. 72, 223 USPQ 1139, 1141 (N.D. Tex. 1984) (“Hearsay letters and statements of customers are admissible in evidence under Fed. R. Evid. Rule 803(3) where they reveal the then existing state of mind of the writers and speakers and their state of mind is relevant to the case.”), *aff’d mem.*, 783 F.2d 1062 (5th Cir. 1986); *Edom Labs*,

¹²¹ *Id.* (48 TTABVUE 79).

Inc. v. Lichter, 102 USPQ2d 1546, 1552 (TTAB 2012) (Evidence of misdirected phone calls are admissible under an exception to the hearsay rule. “The statements are not offered for the truth of the statement but rather simply for the fact that they were made.”).

b. Testimony from Confused Travelers

Lee Hoffman testified that he was confused by the similarity between the parties’ airport names and, consequently, mistakenly booked a flight out of Applicant’s airport; he realized his confusion when he arrived at Opposer’s airport on the day of his flight.¹²² He eventually submitted a feedback form to Opposer complaining about the similarity of the airport names, which was attached as an exhibit to his testimony declaration.¹²³

Applicant objects to the attached feedback form, arguing that Mr. Hoffman failed to lay the foundation for the proffered evidence and as such the exhibit does meet the business record exception.¹²⁴ Applicant’s objection is overruled. Mr. Hoffman testified about the feedback form based on his personal knowledge and testified that it is a true copy of the “feedback form **I submitted** to [Opposer].”¹²⁵ We find that Mr.

¹²² Hoffman Decl., paras. 3-4 (45 TTABVUE 2).

¹²³ *Id.* at paras. 5-6 and attached exhibit (45 TTABVUE 2-3, 5).

Pointing to the feedback form attached to Mr. Hoffman’s testimony, Applicant argues that Mr. Hoffman was just “confused by road signage.” Applicant’s brief, p. 23 (84 TTABVUE 29). This argument is unpersuasive, as Mr. Hoffman clearly states in the opening line of his feedback form that “I am currently in a shuttle from [Applicant’s airport] to [Opposer’s airport] because of the confusion of the two airport names.” Exhibit to Hoffman Test. (45 TTABVUE 5).

¹²⁴ Applicant’s statement of objections, pp. 4-5 (84 TTABVUE 42-43).

¹²⁵ Hoffman Decl., paras. 1, 6 (45 TTABVUE 2, 3) (emphasis added).

Hoffman sufficiently established his personal knowledge of the feedback form; as a result, there was no need to establish it as a business record.

Another confused traveler, Edward Lawson, testified that he was also confused by the similarity between the airport names.¹²⁶ He testified that he booked what he thought was a flight to Opposer's airport but mistakenly booked a flight to Applicant's airport.¹²⁷ He realized that he arrived at the wrong airport when his ride-sharing service driver mentioned that Opposer's airport would have been much closer to his hotel, which was in Orlando.¹²⁸ After he arrived at the wrong the airport, he contacted Opposer's customer service number to reschedule his return flight;¹²⁹ his call was entered on Opposer's call log, a copy of which was attached to his testimony declaration.¹³⁰ Mr. Lawson testified that the call log properly recites his phone number, but his name is incorrectly recorded as "Walsh."¹³¹ Although we acknowledge the mistake in the call log, overall, we find that it corroborates Mr. Lawson's testimony.

A third confused traveler, Thomas Woodle, testified that he booked what he thought was a flight to Opposer's airport, but due to his confusion with the parties' airport names, he mistakenly booked a flight to Applicant's airport.¹³² He realized he

¹²⁶ Lawson Decl., para. 3 (48 TTABVUE 2).

¹²⁷ *Id.* at paras. 2-3 (48 TTABVUE 2).

¹²⁸ *Id.* at para. 4 (48 TTABVUE 2).

¹²⁹ *Id.* at para. 5 (48 TTABVUE 2-3).

¹³⁰ *Id.* at paras. 5-6 and Exhibit 1 (48 TTABVUE 2-3, 6).

¹³¹ *Id.* at para. 5 (48 TTABVUE 2-3).

¹³² Woodle Decl., paras. 2-3 (48 TTABVUE 7).

was at the wrong airport when he learned that the rental car agency he used to book his rental car was at Opposer's airport.¹³³ Mr. Woodle testified that the friends he came to visit later submitted a feedback form to Opposer, asking Opposer to address the issue of the confusingly similar names.¹³⁴ Although the feedback form was not submitted by Mr. Woodle, we find that it corroborates his testimony.¹³⁵

Applicant seeks to strike the call log and Mr. Lawson's testimony about it, arguing that it is not based on Mr. Lawson's personal knowledge and is not otherwise admissible under the business records exception as Mr. Lawson is not competent to authenticate Opposer's business records.¹³⁶ As to the evidence corroborating Mr. Woodle's testimony, Applicant objects to it, arguing that since Mr. Woodle did not submit the form but rather his friends did, Mr. Woodle failed to establish a proper foundation for its admission under the business record exception.¹³⁷

Opposer counters that (i) the documents attached to both Lawson's and Woodle's testimony declarations were the subject of Mr. Brown's testimony declaration; (ii) they were each properly made of record by Mr. Brown; (iii) Applicant does not seek to

¹³³ *Id.* at para. 4 (48 TTABVUE 7).

¹³⁴ *Id.* at para. 6 and Exhibit 1 (48 TTABVUE 8, 11). Applicant makes a number of additional arguments seeking to discredit the testimony of Mr. Woodle. For example, Applicant takes issue with Mr. Woodle's testimony that, because of his confusion, his trip to central Florida was "much less enjoyable." Woodle Decl., para. 5 (48 TTABVUE 7). Applicant argues that "[t]his assertion is not credible because a traveler flying into either parties' Orlando area airport could easily enjoy Central Florida given the close proximity of each airport to the region." Applicant's brief, p. 25 (84 TTABVUE 31). We are not persuaded by Applicant's arguments; we find Mr. Woodle's testimony credible on the issue of likelihood of confusion.

¹³⁵ *Id.* at para. 6 and Exhibit 1 (48 TTABVUE 8, 11).

¹³⁶ Applicant's statement of objections, p. 5 (84 TTABVUE 43).

¹³⁷ *Id.* at p. 6 (84 TTABVUE 44).

strike these business records where they are attached to Mr. Brown's testimony; and (iv) because Mr. Brown properly authenticated them, other witnesses are free to testify about their connection to the contents thereof.¹³⁸

We find that the exhibits attached to the Lawson and Woodle testimony declarations are also attached as exhibits to the Brown testimony declaration. Applicant does not object to their admissibility in this context. Consequently, they are properly of record. As these exhibits are properly of record, Opposer, like Applicant, is entitled to rely on them for any purpose. Trademark Rules 2.120(k)(7), 2.122(a); 37 C.F.R. §§ 120(k)(7), 2.122(a). *See also Nazon v. Ghiorse*, 119 USPQ2d 1178, 1181 n.6 (TTAB 2016) ("Once evidence is properly of record, it may be relied on by any party for any purpose."). In view thereof, Applicant's objections are overruled.

c. Twitter Posts Indicating Consumer Confusion Between the Parties' Marks

As part of his trial testimony, Mr. Brown testified that Twitter posts reflecting confusion between Opposer's and Applicant's marks were collected and that printouts of these posts were attached as Exhibit E to his testimony declaration.¹³⁹ Applicant objects to the Twitter posts on the ground that they contain inadmissible hearsay under Fed. R. Evid. 802, as the statements of the Twitter users are offered to prove

¹³⁸ Opposer's response to Applicant's statement of objections, p. 2 attached to Opposer's reply brief (85 TTABVUE 27). The call log attached to Mr. Lawson's testimony declaration is attached to the Brown testimony declaration at 48 TTABVUE 79, while the feedback form attached to Mr. Woodle's testimony is attached to Mr. Brown's testimony declaration at 48 TTABVUE 73.

¹³⁹ Brown Test., para. 36 and Exhibit E (48 TTABVUE 21, 81-93). To the extent that Exhibit E contains duplicative posts, they have not been considered.

the truth of the matter asserted, i.e., that the Twitter users were actually confused.¹⁴⁰ Applicant also objects because this evidence was submitted as part of trial testimony, arguing it should be admitted only under a notice of reliance¹⁴¹ and that it is cumulative since it was also introduced under a notice of reliance.¹⁴²

The following posts are exemplary of this social media evidence:



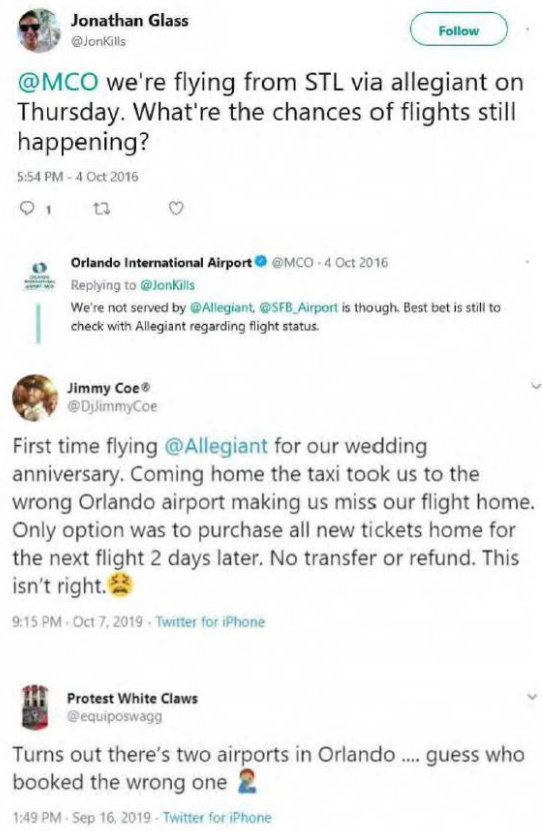
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¹⁴⁰ Applicant's statement of objections, p. 6 (84 TTABVUE 45); Applicant's brief, p. 23 (84 TTABVUE 29).

¹⁴¹ *Id.* at pp. 6-7 (84 TTABVUE 44-45).

¹⁴² *Id.* (84 TTABVUE 44-45).

¹⁴³ 48 TTABVUE 81.



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“As a general matter, we do not treat testimony as to third-party out-of-court statements as proof of the truth of the matter asserted. . . . However, such materials are frequently competent to show, on their face, matters relevant to trademark claims (such as public perception), regardless of whether the statements are true or false. Accordingly, they will not be excluded outright, but considered for what they show on their face.” *Harry Winston*, 111 USPQ2d at 1427-28. As such, statements made via Twitter may not be offered for the truth asserted, but rather simply for the fact that they were made. In view thereof, Applicant’s objection is overruled and the Twitter communications have been considered for what they are worth. *See, e.g., Spiritline*

144 48 TTABVUE 82.

Cruises LLC v. Tour Mgmt. Serv., Inc., 2020 USPQ2d 48324, at *2 (TTAB 2020) (“[S]uch materials are frequently competent to show, on their face, matters relevant to trademark claims (such as public perception), regardless of whether the statements are true or false.”); *Toys “R” Us, Inc. v. Lamps R Us*, 219 USPQ 340, 346 (TTAB 1983) (out-of-court statements admissible to show “that people have, in fact, made an association” between the parties); *Fin. Co. of Am. v. BankAmerica Corp.*, 205 USPQ 1016, 1035 (TTAB 1979, as amended 1980) (employees’ testimony regarding receipt of misdirected mail or telephone calls not hearsay), *aff’d in unpub’d opinion*, Appeal No. 80-558 (CCPA February 12, 1981).

Although Applicant’s objections are overruled, we are cognizant of its objections and the inherent limitations of the Twitter evidence, and accord it an appropriate probative weight. To the extent that this evidence has any probative value, it serves to buttress our conclusion of likelihood of confusion.

d. Newspaper Articles

Opposer also argues that news articles and travel guides have long acknowledged the confusion created by Applicant’s airport name:¹⁴⁵

- From an article titled, “Airports’ Names are Ticket to Confusion,” published in the *Orlando Sentinel* on January 26, 2004: “Almost daily, passengers have similar car-rental glitches [i.e., flying into Applicant’s airport while renting a car at Opposer’s airport] or send loved ones to pick them up at the wrong airport because of confusion caused by the two airports’ similar names.”¹⁴⁶ “There’s a lot of problems,” said Lucy Lopez, an Avis sales agent in Sanford. “They’re booking the wrong airport all the time.”¹⁴⁷

¹⁴⁵ Opposer’s reply brief, p. 10 (85 TTABVUE 14).

¹⁴⁶ Exhibit 43 to Opposer’s second notice of reliance (47 TTABVUE 30).

¹⁴⁷ *Id.* (47 TTABVUE 30).

- From an article titled, “End Confusion,” published in the *Orlando Sentinel* on February 4, 2004: “What’s in a name? Plenty, if you ask the 100 or so travelers who each month confuse Orlando International Airport with Orlando **Sanford** International Airport. Lost vacation time. Car-rental mishaps. Utter confusion. And those are just the folks who actually take the time to complain or inquire as to their whereabouts. Who knows how many others similarly are befuddled?”¹⁴⁸
- An article titled, “Orlando Sanford International Airport’s Name Can Confuse Tourists Going to Orlando,” published in *Frommers* in 2019 noted: “Some customers who think they’re flying to the main airport for Orlando, [Opposer’s airport] (MCO) ... actually wind up somewhere else-at [Applicant’s airport] If you drive by the curb at Arrivals on any given evening, at least a couple of people will be on mobile phones, trying to sort out ground transportation because of their error – I observed it myself after a family member recently made the same mistake.”¹⁴⁹

Applicant objects to this evidence, arguing that Opposer failed to lay a proper foundation and that they contain impermissible hearsay.¹⁵⁰ The Board’s rules provide that a document obtained from the Internet which identifies its date of publication or date that it was accessed and printed, and its source (i.e., the URL), are self-authenticating and may be submitted as evidence under a notice of reliance. *See* Trademark Rule 2.122(e)(2); *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) (a document obtained from the Internet displaying a date and its source is regarded as presumptively true and genuine). As a result, a proper foundation is not necessary and, accordingly, Applicant’s objection is overruled.

¹⁴⁸ Exhibit 45 to Opposer’s second notice of reliance (47 TTABVUE 53-54).

¹⁴⁹ Exhibit 44 to Opposer’s second notice of reliance (47 TTABVUE 33-50).

¹⁵⁰ Applicant’s statement of objections, p. 7 (84 TTABVUE 45).

However, we agree with Applicant that these published articles constitute hearsay and, accordingly, they will not be considered for the truth of the matter asserted therein. *WeaponX Performance*, 126 USPQ2d at 1040 n.18. Nonetheless, the newspaper articles are evidence that the similarity between the parties' airport names is considered newsworthy, and the Frommers article is evidence that similarity between the parties' airport names was sufficiently close to warrant an alert to travelers. Therefore, to the extent that this evidence has any probative value, again, it serves to buttress our conclusion of likelihood of confusion.

e. Whether Opposer's Evidence is *de minimis* in Light of the High Number of Travelers

Applicant argues that:

[E]ven taking Opposer's insufficient evidence at face value, it ignores the elephant in the room. Over the 27+ years of coexistence between the airports, Opposer has serviced more than half of a billion travelers. Even if Opposer's evidence were evidence of trademark confusion (and it most assuredly is not), the at most 15 incidents out of 500,000,000 travelers does not even rise to the level of *de minimis* (representing 0.000003% of Opposer's total travelers). Simply put, the market has clearly demonstrated that there is no confusion.¹⁵¹

Applicant's arguments are unpersuasive. Applicant's comparisons of the number of actual confusion witnesses in the record to the total number of passengers served by Opposer is of no value without metrics to evaluate how those reporting confusion relate to the total universe of confused consumers. *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 70 USPQ2d 1874 (3d Cir. 2004). Evidence of actual confusion is difficult

¹⁵¹ Applicant's brief, p. 26 (84 TTABVUE 32).

to find because many incidents are unreported. *Kos Pharm.*, 70 USPQ2d at 1891. “The rarity of such evidence makes even a few incidents ‘highly probative of the likelihood of confusion.’” *Id.* (quoting *Checkpoint Sys. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 60 USPQ2d 1609, 1622 (3d Cir. 2001) (“Because ‘reliable evidence of actual confusion is difficult to obtain in trademark and unfair competition cases, **any such evidence is substantial evidence** of likelihood of confusion.’”) (quotation omitted, emphasis added)); *cf. Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 38 USPQ2d 1449, 1457 (4th Cir. 1996) (“We can but wonder how often the experiences related by the trial witnesses have been repeated--but not reported--in stores across the country.”). Accordingly, Applicant’s arguments are not persuasive and we find Opposer’s evidence to be more than *de minimis*.

f. Conclusion as to Opposer’s Evidence of Actual Confusion

In sum, we find that Opposer has introduced some evidence of actual confusion, including the business records introduced by Mr. Brown, the testimony of three confused travelers, and published articles.¹⁵² We find this evidence causes this factor to weigh in favor of a finding of a likelihood of confusion. *See e.g., Majestic Distilling*, 65 USPQ2d at 1205 (“A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion.”). *See also* 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 23:13 (5th ed.

¹⁵² Having found evidence of actual confusion under the seventh *DuPont* factor, Applicant’s arguments that the eighth *DuPont* factor - the length of time during and conditions under which there has been concurrent use without evidence of actual confusion - is dispositive because there is “no actual confusion” (Applicant’s brief, pp. 28-29 (84 TTABVUE 34-35)) is moot. Thus, the eighth *DuPont* factor is neutral.

March 2023 update) (“Any evidence of actual confusion is strong proof of the fact of a likelihood of confusion.”).

5. Conditions under which and Buyers to whom Sales are Made, i.e., Impulse versus Careful Purchasing

“The fourth *DuPont* factor considers ‘[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.’” *See Stone Lion*, 110 USPQ2d at 1162 (quoting *DuPont*, 177 USPQ at 567). Under this factor, we must consider all potential consumers of the services and base our decision on the least sophisticated consumer. *Stone Lion*, 110 USPQ2d at 1163 (“[T]he analysis must focus on the ‘least sophisticated potential purchasers’ of the goods [or services]”).

Applicant argues without citing any evidence that (1) the decision to purchase airline tickets is generally not an impulse purchase; (2) most purchasers will spend significant time researching exactly where to fly; (3) travelers are generally sophisticated purchasers who make advanced reservations; and (4) customers purchasing flights will determine what airport is best to fly into based on their travel needs.¹⁵³ However, without supporting evidence, Applicant’s assertions amount to mere attorney argument, which is rarely, if ever, persuasive. *Cai*, 127 USPQ2d at 1799 (“Attorney argument is no substitute for evidence.”).

Moreover, the parties agree that each airport serves travelers of all different levels of sophistication, i.e., well-seasoned travelers (such as tour operators), elected

¹⁵³ Applicant’s brief, p. 20 (84 TTABVUE 26).

officials that travel all the time, and first-time flyers.¹⁵⁴ Where, as here, consumers consist of both experienced travelers and novices, we must base our decision on the least sophisticated consumer. *Stone Lion*, 110 USPQ2d at 1163.

Given that the evidence shows that unsophisticated consumers are potential consumers, we find the fourth *DuPont* factor weighs in favor of a finding of likelihood of confusion.

6. Market Interface

Applicant also discusses the tenth *DuPont* factor, “the market interface between applicant and the owner of a prior mark.” *DuPont*, 177 USPQ at 567. Specifically, Applicant argues:

When Applicant changed its name in 1995, Opposer sought counsel from its attorney. That advice was to conduct a survey to determine if there was a likelihood of confusion. If there was such a likelihood, Opposer was advised in 1995 to pursue a legal remedy against Applicant. If there was not such a likelihood, Opposer was advised to let it go. Either Opposer conducted the survey and learned there was no likelihood of confusion, or Opposer itself concluded the obvious, that airports will coexist in a region using regional identifiers. As mentioned above, this was the risk Opposer took by adopting a generic name for its airport. Opposer took no legal action, nor did Opposer raise any further concerns with Applicant’s name. And the parties have peacefully coexisted for decades.¹⁵⁵

¹⁵⁴ Crews Depo. Tr., p. 138, line 21 through p. 139, line 11 (43 TTABVUE 206-07); Brown Test., para. 27 (48 TTABVUE 19-20) (“Opposer’s airport services are marketed to the travelling public generally which includes ... first time flyers to those who fly many times a month and to all levels of customer sophistication.”).

¹⁵⁵ Applicant’s brief, pp. 30-31 (84 TTABVUE 36-37).

Applicant’s arguments are not persuasive and essentially consist of a recasting of its acquiescence defense, which we discuss more fully below. According to the record, there is no market interface between Applicant and Opposer.¹⁵⁶ In other words, Opposer has not consented to Applicant’s use or registration of Applicant’s involved marks, nor have the parties entered into any agreement regarding their respective marks.¹⁵⁷ There is no evidence of any type of understanding or arrangement between the parties that demonstrates that confusion is not likely to result from the contemporaneous use of the parties’ respective marks in commerce. Consequently, this factor is neutral.

7. Extent of Potential Confusion

The twelfth *DuPont* factor concerns “[t]he extent of potential confusion, i.e. whether *de minimis* or substantial.” *DuPont*, 177 USPQ at 567. Applicant rehashes its arguments here, again arguing that “[e]ven taking Opposer’s best case, a handful of anecdotal complaints are irrelevant in light of the literally hundreds of millions of travelers that have passed through the parties’ airports over the past twenty-seven years.”¹⁵⁸ Applicant’s argument is unpersuasive. Both parties’ identical “airport services” target the general public, and their marks are similar.¹⁵⁹ Further, both parties’ airports see a high number of travelers; in 2019 alone, Opposer served over

¹⁵⁶ Brown Decl., para. 32 (48 TTABVUE 20).

¹⁵⁷ *Id.* See also *DuPont*, 177 USPQ at 567 (enumerating evidence of market interface).

¹⁵⁸ Applicant’s brief, p. 31 (84 TTABVUE 37).

¹⁵⁹ Brown Test., para. 27 (48 TTABVUE 19-20) (“Opposer’s airport services are marketed to the travelling public generally which includes ... first time flyers to those who fly many times a month and to all levels of customer sophistication.”); Crews Depo. Tr., p. 138, line 21 through p. 139, line 11 (43 TTABVUE 206-07).

50 million passengers,¹⁶⁰ and Applicant served 3.2 million passengers.¹⁶¹ Consequently, we find that the potential for confusion is not *de minimis*, but substantial. *See Cunningham v. Laser Golf*, 55 USPQ2d at 1847 (“Cunningham next argues that there was no analysis of the ‘extent of potential confusion.’ As described above, however, the Board explained that the relevant goods of both parties were identical, based on the identification of goods in the respective registrations, and, as such, traveled in the same channels of trade to the same purchasers.”). Accordingly, this *DuPont* factor favors a finding of likelihood of confusion.

8. Applicant’s Incentive to Create Confusion

Under the thirteenth *DuPont* factor, evidence of an applicant’s bad faith adoption of its mark is relevant to our likelihood of confusion analysis. *L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1890 (TTAB 2008).

Opposer argues Applicant had an improper motive when adopting its mark,¹⁶² characterizing it as an intent to deceive.¹⁶³ Opposer argues that (1) there can be no question that Applicant was aware of Opposer when it changed its airport name to ORLANDO SANFORD INTERNATIONAL AIRPORT;¹⁶⁴ (2) Orlando is one of the most well-known tourist destinations in the world, so it would make sense that Applicant would want to capitalize off of its proximity to Orlando;¹⁶⁵ and (3) “it is not

¹⁶⁰ Brown Rebuttal Decl., para. 9 (72 TTABVUE 3).

¹⁶¹ Crews Depo. Tr., p. 135, lines 18-22 (43 TTABVUE 203).

¹⁶² Opposer’s brief, p. 20 (80 TTABVUE 26).

¹⁶³ Opposer’s reply brief, p. 2 (85 TTABVUE 6).

¹⁶⁴ Opposer’s brief, p. 20 (80 TTABVUE 26).

¹⁶⁵ *Id.* at pp. 20-21 (80 TTABVUE 26-27).

hard to see why Sanford intentionally added Orlando to its airport name to create confusion with and gain the benefit of the reputation of the much larger and more well-known Orlando International Airport.”¹⁶⁶

Although Applicant does not address this factor in its brief, we are not persuaded by Opposer’s arguments. A finding of bad faith must be supported by evidence of an intent to confuse, rather than mere knowledge of another’s mark. *Cf., Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 588 F.3d 97, 92 USPQ2d 1769, 1782 (2d Cir. 2009) (“[T]he only relevant intent is intent to confuse. There is a considerable difference between an intent to copy and an intent to deceive.”) (quotation omitted). Inasmuch as the only evidence of record merely pertains to Applicant’s prior knowledge and not to Applicant’s intent, we find this record does not support, by a preponderance of the evidence, a conclusion of bad faith adoption. Therefore, this *DuPont* factor is neutral.

9. Balancing the Factors

In sum, we find that the services identified in each of Applicant’s involved applications are identical to the services identified in Opposer’s registration. Because the parties’ services are identical and unrestricted as to trade channels, we must presume that the services move in the same channels of trade and are available to the same classes of customers. As for the strength of Opposer’s mark, we find that it is not conceptually strong; however, we do find it to be commercially strong. Comparing each of Applicant’s marks to Opposer’s mark, we find them to be highly similar. Opposer’s evidence of the nature and extent of actual confusion weighs in

¹⁶⁶ *Id.* at p. 21 (80 TTABVUE 27).

favor of a finding of confusion. As the evidence of record shows that unsophisticated consumers are potential consumers, the factor regarding consumer sophistication also weighs in favor of a finding of likelihood of confusion. Because both parties target the general public for identical services, the potential for confusion is not *de minimis* but substantial. There is no market interface between the parties, and there is no evidence of record to support a finding of bad faith adoption, therefore, these two factors are neutral. Weighing all of the factors, we find that they weigh in favor of a likelihood of confusion.

VI. Potential Affirmative Defense of Acquiescence

We now turn to Applicant's affirmative defense of acquiescence. In both of its answers, Applicant pleaded a traditional affirmative defense of acquiescence: "Applicant has been using Applicant's marks for more than five years. Opposer has had knowledge of Applicant's use of Applicant's marks and has failed to take any action to prevent Applicant's use of Applicant's marks."¹⁶⁷ However, in its brief, Applicant shifts the focus of its acquiescence defense to dispute Opposer's entitlement to bring this present proceeding¹⁶⁸ and to counter Opposer's arguments under the eighth *DuPont* factor.¹⁶⁹

As an initial matter, we find that Applicant has not pursued a true affirmative defense of acquiescence and therefore we find it to be waived. *See Alcatraz Media,*

¹⁶⁷ Answer, p. 2 (4 TTABVUE 3) in the '602 proceeding; answer, p. 2 (6 TTABVUE 3) in the '774 proceeding.

¹⁶⁸ Applicant's brief, p. 28 (84 TTABVUE 34).

¹⁶⁹ *Id.* at pp. 28-30 (84 TTABVUE 34).

Inc. v. Chesapeake Marine Tours Inc., 107 USPQ2d 1750, 1753 n.6 (TTAB 2013), *aff'd mem.*, 565 F. App'x 900 (Fed. Cir. 2014). Rather, Applicant's arguments constitute an amplification of its denials of the allegation of likelihood of confusion and a challenge to Opposer's entitlement to bring this action, both of which we previously addressed.

Even assuming that Applicant argued that Opposer's time for taking action, if at all, was in 1995 when Opposer first raised this issue with its counsel,¹⁷⁰ and, even assuming that Opposer took no action then, such a defense of acquiescence would fail.

Section 19 of the Trademark Act, 15 U.S.C. § 1069, expressly provides that the equitable principles of acquiescence apply to inter partes proceedings. However, because inter partes proceedings before the Board concern registration rights arising only through the registration process, the potential delay time can begin to run only when the marks of the involved applications were published for opposition, even where the plaintiff was aware of the defendant's use earlier. *Brooklyn Brewery Corp. v. Brooklyn Brew Shop*, 17 F.4th 129, 2021 USPQ2d 1069, at *8 (Fed. Cir. 2021) ("Laches and acquiescence are generally not available as defenses in an opposition proceeding, given that the clock for laches begins to run from the date the application is published for opposition."); *Ava Ruha Corp. v. Mother's Nutritional Ctr., Inc.*, 113 USPQ2d 1575, 1580 (TTAB 2015) ("If there is actual knowledge of a defendant and its mark prior to publication for opposition, the date of publication is the operative date for laches."). This rule effectively eliminates the defense of acquiescence in opposition proceedings, except where the defense is based on the opposer's failure to

¹⁷⁰ Exhibit 6 to Crews Deposition (41 TTABVUE 56-63).

object to an applicant's earlier "registration of substantially the same mark," *Brooklyn Brewery*, 2021 USPQ2d 1069, at *8, an exception which does not apply in this case. *See also Coach House Rest., Inc. v. Coach & Six Rests., Inc.*, 934 F.2d 1551, 19 USPQ2d 1401, 1404 (11th Cir. 1991) ("[A]cquiescence as to use" is distinct from "acquiescence as to registration.").

In accordance with the foregoing discussion, we find that the affirmative defense of acquiescence fails.

VII. Decision

The opposition to registration of the marks of Application Serial Nos. 87115958 and 87115959 is sustained on the ground of likelihood of confusion under Section 2(d), 15 U.S.C. § 1052(d), and registration to Applicant is refused.