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

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

GANG CAO,

Opposer,

v.

APPLE INC.,

Applicant.

Opposition No. 91239006

APPLE INC.'S TRIAL BRIEF

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PRELIMINARY STATEMENT

Over five and a half years ago, Apple announced an innovative new product which it coined LIVE PHOTOS. LIVE PHOTOS is a software feature that allows users to simultaneously record a still image along with a snippet of video (with sound), and store the two as a hybrid photo/video file. Apple has been using the name LIVE PHOTOS continuously ever since. The United States Patent and Trademark Office (“USPTO”) examiner accepted Apple’s application for LIVE PHOTOS as inherently distinctive and published Apple’s application. Opposer Gang Cao (“Cao”) seeks to block Apple’s registration of LIVE PHOTOS on grounds it is generic or descriptive without secondary meaning. Lacking consumer surveys, consumer testimony, dictionary definitions of the phrase “live photos,” or any probative evidence, Cao rests his case primarily on inadmissible hearsay evidence from little-known Internet sources of unknown distribution. Cao falls far short of meeting his burden in this case. His opposition fails for multiple reasons.

First, the LIVE PHOTOS mark is suggestive, as the examiner already determined. This decision is well founded, as the LIVE PHOTOS mark requires imagination to connect the name to the applied-for goods, and Cao has not met his burden of proving otherwise. “Live” could mean many things in connection with photographs: it could mean vivid; evoke a live broadcast; or indicated a fixed life span. Understanding the possible meanings of the incongruous pairing of “live” with an inanimate still photograph only “clicks” after a moment of pause and consideration. Given the creative nature of Apple’s name, unsurprisingly, other companies such as Google, Samsung, and Microsoft have promoted similar products without the need to use the term LIVE PHOTOS. Samsung called its similar feature “Motion Photo.” Google similarly uses the term “motion photos,” and Microsoft uses the term “Living Images.”

Second, while LIVE PHOTOS is a suggestive mark, in any event, LIVE PHOTOS has acquired secondary meaning, so is eligible for registration regardless of whether LIVE PHOTOS is descriptive or suggestive. Apple has engaged in five and a half years of continuous and substantially exclusive use of the mark, which alone creates a presumption of secondary meaning. Apple has also heavily marketed

LIVE PHOTOS on its website and through print and television advertising, and included the feature in every edition of its highly successful iPhone since 2015 and iPad since 2016, which collectively have had over \$200 billion in estimated U.S. sales. (49 TTABVUE 23 ¶ 52; 52 TTABVUE 487, 524.) The LIVE PHOTOS feature has also received considerable unsolicited press coverage from heavily circulated, well-respected news sources such as *The Washington Post*, *USA Today*, *The Wall Street Journal*, and *The New York Times*. (49 TTABVUE 7 ¶¶ 21–22) In addition, Google Trends data shows a strong link between Apple and the LIVE PHOTOS mark, as nearly all of the top queries and topics connected to “live photos” mention Apple or one of its products. (49 TTABVUE 29 ¶ 62.)

Third, Cao’s argument that LIVE PHOTOS is a generic term defies common sense. Cao falls woefully short of meeting his burden of showing that consumers *primarily* understand the LIVE PHOTOS mark as a generic term for a category of products. Tellingly, there are *no* dictionary definitions for “Live Photos,” except two dictionaries that define “Live Photos” *by reference to Apple or its iPhone device*. Faced with this, Cao contorts the law and relies on obscure third-party references in an attempt to come up with something to support his position. The documents are inadmissible and irrelevant. 75% of the documents Cao cites in his trial brief were submitted for the first time on rebuttal. Cao cannot rely on such belated evidence to support his affirmative case. These new documents are also hearsay, as no affidavit was provided attesting to them. Compounding the problem, virtually none of the documents Cao presents from both his initial and rebuttal trial periods have any information about how many consumers would have seen the document, and thus are of low probative value at best. At least 45 documents Cao submitted appear to be from outside of the United States, and Cao provided no information as to whether they would have been seen by United States audiences, so they are irrelevant. Several of the documents also use the phrase “Live Photos” to *correctly refer to Apple’s product*, so they do not show generic usage at all. Other documents do not even use the phrase “live photos” though Cao deceptively tries to present them as though they do. Other documents use the phrase “live photo(s),” but contain no information as to what the underlying “live photo” product purportedly is, making it impossible to know whether the product is in the relevant class of goods.

Cao also argues that the LIVE PHOTOS mark is generic because Apple has used it as a noun to refer to both its software and the resulting photo/video files the software creates. There is no such rule that a mark is generic merely because it is used as a noun. Indeed, such a rule would invalidate nearly every famous brand, as it is standard speech to say, “Drive a Mercedes,” “Grab a Budweiser,” or “Eat your Wheaties.” Nor is there a rule preventing a company from naming software and the output of that software with the same trademark. In fact, this too is standard practice. Microsoft’s Excel platform creates an Excel file, the PowerPoint software creates a PowerPoint slide deck, and Apple’s LIVE PHOTOS feature creates a branded LIVE PHOTO file. Cao’s position is simply untenable.

Finally, Cao lacks standing to bring this opposition. Cao has never shown a genuine interest in using the phrase “live photos.” The only link Cao has to “live photos” is that he owned two dormant domains, livephoto.com and livephoto.ca, for four years prior to Apple’s announcement, which he did nothing with except direct them to a “for sale” page. Only *after* Apple’s announcement did Cao suddenly stop offering the domains for sale, and start to manufacture the appearance of interest by filing a patent application [REDACTED] and, for the first time, offer apps through Apple’s App Store that he now claims he wants to describe using the phrase “live photo(s).” But none of these apps provides the functionality of Apple’s LIVE PHOTOS software feature. Rather, they are apps that use a “spin” gesture to move video frames forwards and backwards and this is why Cao named them SpinFun and Spin Explorer. If Cao has any interest here, it is to “spinfun” and “spin explorer,” not “live photos.” Cao has not met his burden of showing a real interest in this proceeding or a reasonable basis for believing he will be damaged by Apple’s registration. Apple’s rights in LIVE PHOTOS simply have no consequence for Cao.

COUNTERSTATEMENT OF THE ISSUES

1. Whether Apple’s LIVE PHOTOS mark is suggestive given the imagination required to connect the trademark with Apple’s goods, the incongruous pairing of the word “live” with an inanimate “photo,” and the many of other words competitors can use to describe similar products.

2. Even if descriptive, whether Apple’s LIVE PHOTOS mark has acquired secondary meaning through Apple’s extensive and continuous use and marketing for over five years, strong sales record for devices containing this feature, extensive press coverage for this feature, and Google Trends data showing an association between the LIVE PHOTOS mark and Apple.
3. Whether Cao has met his burden of showing that consumers primarily understand LIVE PHOTOS as a generic term for a class of products given the lack of any dictionary definitions for this term and Cao’s failure to present any admissible and probative evidence to support his claim.
4. Whether Cao has standing to bring this opposition given that he has never used the phrase LIVE PHOTOS in commerce, nor shown a genuine interest in using this phrase.

DESCRIPTION OF THE RECORD

The record consists of the items identified in Section II in Cao’s brief, except that Cao failed to disclose that his seventh through twelfth notices of reliance were not submitted until his rebuttal period.

STATEMENT OF UNDISPUTED FACTS

I. APPLE’S LIVE PHOTOS MARK

A. Apple Launched the Innovative LIVE PHOTOS Feature More Than Five Years Ago

Apple designs, manufactures and markets smartphones, personal computers, tablets, wearables and accessories, and offers a variety of related software and services. Apple’s products include the iconic iPhone and iPad devices. (49 TTABVUE 3, 20–23 ¶¶ 5, 47–55.) More than five years ago, on September 9, 2015, Apple announced a new camera feature for its iPhone device, which it named using the coined term, “LIVE PHOTOS.” (49 TTABVUE 4 ¶ 10; 63 TTABVUE 107 at 103:2–13.) This innovative camera feature allows users to simultaneously record a still image along with a snippet of a video (with sound) of one and a half seconds before and after the photograph is taken and combines them into a single hybrid medium. (49 TTABVUE 4 ¶ 11; *see also* 52 TTABVUE 622) When a user presses and holds down on the image, the video plays, transforming the image from a still photo to a short moving image. (49 TTABVUE 4 ¶ 11; *see also* 52 TTABVUE 46, 50.) Apple also branded the resulting photo/video file

created by the LIVE PHOTOS software feature a “LIVE PHOTO” file, similar to the way the QuickTime software creates a QuickTime file. (63 TTABVUE 19-20, 32, 55-56 at 15:18–23, 16:13–22, 28:2–6, 51:13–52:5.)

B. Extensive Use, Advertising and Sales By Apple and Considerable Media Attention for LIVE PHOTOS Since 2015

The LIVE PHOTOS camera feature debuted with the release of the new iPhone 6s and iPhone 6s Plus models in 2015. As a highly touted new iPhone feature, LIVE PHOTOS received considerable attention from both Apple and the media at rollout. Apple announced the LIVE PHOTOS feature during an Apple Special Event at the 7,000-seat Bill Graham Civic Auditorium in San Francisco; devoted a portion of the event to the new feature, including prominently displaying the LIVE PHOTOS mark on the stages’ main screen during the presentation, which has since been viewed more than 2.6 million times; and highlighted the LIVE PHOTOS feature in a widely-distributed press release on the day of the announcement. (49 TTABVUE 6–7 ¶¶ 17–20; 39 TTABVUE 38; 48 TTABVUE 498.)

Shortly thereafter, reputable bloggers and media sources with widespread circulation (*e.g.*, *The New York Times*, *The Houston Chronicle*, *The New York Post*, and *The Washington Post*) ran stories highlighting Apple’s new LIVE PHOTOS feature. (49 TTABVUE 7–9 ¶¶ 21–22; 53 TTABVUE 33–36, 40–63, 124–185¹; 52 TTABVUE 65–119 (circulation data).) For example, the well-known blogger Marques Brownlee reviewed the LIVE PHOTOS software feature after the Apple Special Event in a YouTube video that has garnered more than 6.9 million views. (49 TTABVUE 7 ¶ 21.) The *Wall Street Journal* raved to its more than one million readers that the LIVE PHOTOS feature was “the phone’s best new feature” and a “groovy new tool for self-expression.” (49 TTABVUE 10 ¶ 26; 52 TTABVUE 79–80; 53 TTABVUE 43–44, 149–151.) A Google Trends report showed that there were virtually no searches for “live photos” prior to Apple’s announcement, but that after Apple’s announcement, searches on Google jumped from nearly nothing to high levels. (63 TTABVUE 310.)

¹ Most of these new articles come from a Lexis search as explained in the trial testimony of Erika Dillon. (50 TTABVUE 2–3 ¶¶ 1–5.)

Apple's LIVE PHOTOS feature has been included in every version of the iPhone since the iPhone 6s and 6s Plus devices. (49 TTABVUE 18 ¶ 40.) The feature has also come preinstalled on iPad devices since March 2016 (*id.*), and can be used on Mac computers as well to both view and take photo/videos, (*see, e.g.*, 53 TTABVUE 111–113, 138; 63 TTABVUE 129, 139 at 125:21–25, 135:13–25.) Sales of iPhone and iPad devices since the LIVE PHOTOS feature first came pre-installed on these devices are well over \$600 billion globally, with a substantial portion of that revenue coming from the United States. (49 TTABVUE 22–23 ¶¶ 50–54.) For example, from 2017 through 2019, 36.8% to 39.3% of Apple's total sales came from the United States. (49 TTABVUE 23 ¶ 52.)

Apple heavily promoted the LIVE PHOTOS feature. (49 TTABVUE 10-17 ¶¶ 24–38; 63 TTABVUE 99 at 95:12–21.) The feature, for example, was the subject of a national television commercial with hundreds of thousands of views and millions of impressions, as well as millions more on the Internet. (49 TTABVUE 10-11 ¶¶ 25–26; 60 TTABVUE; 52 TTABVUE 49–51; 63 TTABVUE 209–212 at 205:23–208:6.) The commercial included the following image promoting the LIVE PHOTOS feature in a prominent manner:



52 TTABVUE 49–51.) Apple also promoted the LIVE PHOTOS feature in print ads. (49 TTABVUE 14–15 ¶ 35; 49 TTABVUE 52.) It further promoted, and continues to promote, the LIVE PHOTOS feature on its website, which is one of the most highly ranked in terms of traffic and engagement. (49 TTABVUE 11–16 ¶¶ 27–33, 36; 49 TTABUVE 76; 52 TTABVUE 146–157.)

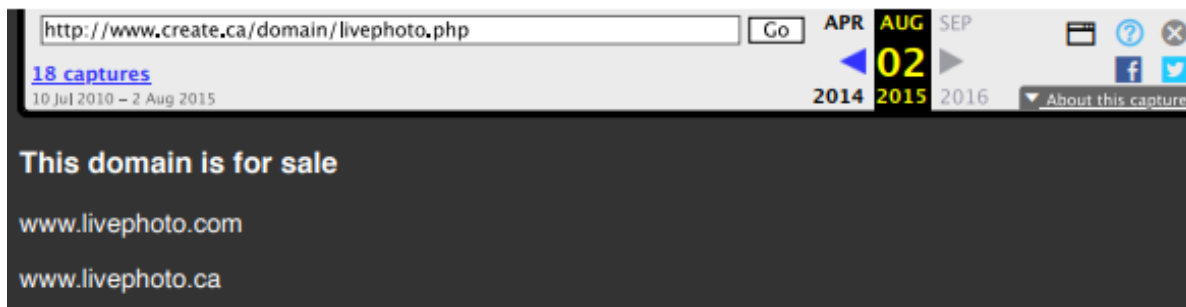
Apple also continued investing in the LIVE PHOTOS feature following the 2015 launch, including adding new effects, creating compatibility with other apps, and expanding consumer access to

the feature by offering it on iPad devices and Mac computers. (*See, e.g.*, 49 TTABVUE 16–17 ¶ 37; 53 TTABVUE 230.) Apple also highlighted the LIVE PHOTOS feature in its press release commemorating the tenth anniversary of its iPhone device in 2017 (52 TTABVUE 249–253) and in promotional materials for the iOS 11 mobile operating system. (52 TTABVUE 254–308.) In addition, press coverage for the LIVE PHOTOS feature continued well into 2020, with hundreds of third-party articles in the United States from reputable national sources, including *The New York Times*, *The Washington Post*, *CNET*, *The Wall Street Journal*, and *USA Today*. (49 TTABVUE 35 ¶ 86) (53 TTABVUE 37–39, 64–105, 111–116, 186–242 (articles 2016 to 2020), 261–264 (circulation data).)

II. CAO’S FAILURE TO USE THE LIVE PHOTOS MARK

A. Cao’s Lack of Use of “LIVE PHOTOS” Prior to Apple’s Announcement

Unlike Apple, Cao has never used the phrase “live photos” in a consumer-facing manner. Cao has no products called “Live Photos,” (53 TTABVUE 22–23 at RFAs 45–48), no promotional materials containing this phrase, and no trademark applications for LIVE PHOTOS. (48 TTABVUE 249–251 at 234:10–236:16.) In fact, at the time of Apple’s announcement in September 2015, Cao had no apps on the market and was doing nothing with the name LIVE PHOTOS except offering the two dormant domain names, livephoto.com and livephoto.ca (“Live Photo Domains”), for sale. (48 TTABVUE 147–152 at 132:22–133:22, 136:2–137:1; 39 TTABVUE 5 at ¶ 13.) Cao acquired these domains in 2011, but for the four years leading to Apple’s announcement, redirected them to the website create.ca where the following message was displayed, as shown in preservations authenticated by Archive.org:



(51 TTABVUE 2–3, 7; *see also id.* 51 TTABVUE 6, 8–11 (preservations from archive.org showing the same message in 2011, 2013 and 2014); 48 TTABVUE 146 at 131:13–20 (“no website that existed” on

livephoto.com from 2011 to 2015); 48 TTABVUE 148–149 at 133:23–134:5 (“no website that existed” on livephoto.ca); 48 TTABVUE 159 144:7–10 (as of Sept. 13, 2015, livephoto.com redirected to create.ca); 48 TTABVUE 184 at 169:1–18 (in 2015 livephoto.ca redirected to create.ca).)

B. Cao’s Efforts To Manufacture an Interest In The Phrase “Live Photos” After Apple’s Announcement

At the time of Apple’s announcement in September 2015, Cao did not have any apps on the market at all. (See 39 TTABVUE 8 ¶ 10 (apps launched in 2016 or later).) He did not have any products or businesses named “Live Photo(s)” either. (48 TTABVUE 249–251 at 234:11–19, 236:18–25.) It was only *after* Apple’s announcement that Cao started to engineer an appearance of interest in the phrase “live photos.” (39 TTABVUE 6 at ¶ 14; 48 TTABVUE 146, 165, 209 at 131:7–12, 150:12–18, 194:7–13.) A few weeks after Apple’s announcement, for the first time ever, Cao redirected his Live Photo Domains away from the “for sale” page. (52 TTABVUE 128; 48 TTABVUE 185–188 at 170:6–13, 171:2–173:13.) At the same time, however, Cao also proceeded to stockpile 16 other domains which include the term “live photos,” including livephotos.men, livephotos.wedding and livephotos.sexy. (48 TTABVUE 280–281 at 265:8–266:10.)

Only *after* learning of Apple’s LIVE PHOTOS product did Cao create a single-page purported “marketing plan” for his Live Photo Domains. (48 TTABVUE 237 at 222:22–25.) This self-serving, self-created marketing plan, which nobody saw except Cao, is the only alleged marketing or business plan concerning Cao’s purported intention to use the phrase “live photo.” (48 TTABVUE 245–246 at 230:23–231:8.) Cao admitted he never executed any of the steps in this purported marketing plan. (48 TTABVUE 238–245 at 223:2–224:10, 224:20–229:21, 230:13–21.)

Similarly, only after learning of Apple’s LIVE PHOTOS product, did Cao file two patent applications [REDACTED]

[REDACTED] (70 TTABVUE 41–86, Exs. 2 & 3.) Tellingly, the patent application filed *before* Apple’s announcement [REDACTED]. (70 TTABVUE 5–39, Ex. 1.) And only after Apple’s announcement did Cao begin offering his three apps to the public: (1) SpinFun (launched in 2016); (2)

Spin Explorer (launched in 2017); and (3) Spin Explorer 2 (launched in 2018) (collectively, “Spin Apps”). (48 TTABVUE 453.) The Spin Apps do not compete with Apple’s LIVE PHOTOS product and they do not offer even remotely the same function (52 TTABVUE 490–497; 49 TTABVUE 38 ¶ 92; 48 TTABVUE 255–268 at 240:8–241:13, 244:21–24, 249:11–19, 252:21–253:20.) Rather, the Spin Apps allow users to view a series of photographs and fast forward or rewind video using a “spin gesture” (52 TTABVUE 490–497) and have nothing to do with the phrase “live photos.” Thus, aside from owning the dormant Live Photo Domains and filing a confidential patent application that [REDACTED] [REDACTED] after Apple’s announcement, Cao could not identify a single “current use,” “business use,” or “public[] use” he has made of the phrase “live photo.” (48 TTABVUE 246–247 at 231:10–232:12 (Cao’s patent application is confidential, so hardly a “public use” of the phrase).) Cao promotes the Spin Apps on his websites, spinfun.co and spinexplorer.com (“Spin Websites”) and consumers can download them from the Apple App Store, (52 TTABVUE 490-497; 39 TTABVUE 5 at ¶¶ 10–12; 39 TTABVUE 6 at ¶ 15; 48 TTABVUE 267, 238–239 at 252:6–10, 223:9–224:10). Neither the websites nor the App Store pages contain the phrase “live photo(s).” (48 TTABVUE 490–497; 48 TTABVUE 256–265 at 241:18–242:8, 243:4–8, 245:12–21, 247:2–6, 250:10–13.)

III. Apple Applies for the LIVE PHOTOS Trademark

On January 7, 2016, Apple applied to register the LIVE PHOTOS mark with the USPTO in International Class 9 for “Computer software for recording and displaying images, video and sound.” The USPTO examiner approved the application as an inherently distinctive mark and did not require Apple to show secondary meaning. The USPTO published the LIVE PHOTOS mark for opposition on September 19, 2017. Although Google, Samsung, and Microsoft offered products with functionality similar to the LIVE PHOTOS feature, (49 TTABVUE 32-33 ¶¶ 73–77; 52 TTABUVE 538–539; 34 TTABVUE 9), none of those entities opposed. Cao has been the only entity to oppose Apple’s application anywhere in the world. (49 TTABVUE 38 ¶ 90.)

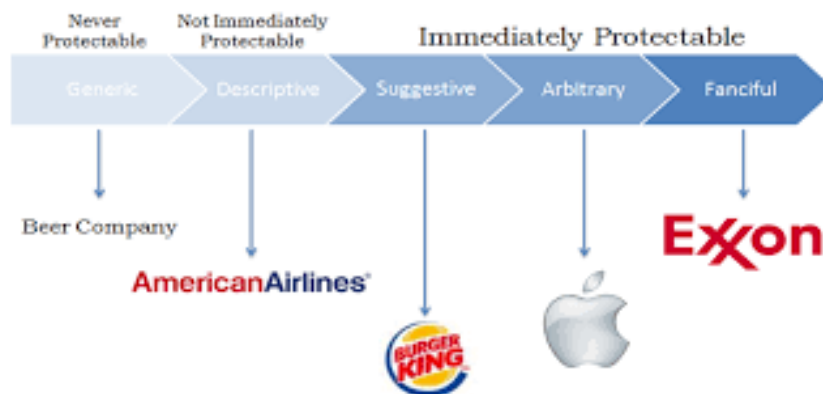
ARGUMENT

Cao’s opposition fails because: (1) the LIVE PHOTOS mark is suggestive; (2) even if descriptive, it has acquired secondary meaning; (3) the LIVE PHOTOS mark is not generic and Cao has not introduced any admissible, credible evidence to support this claim; and (4) Cao lacks standing to bring his claim.

IV. THE LIVE PHOTOS MARK IS SUGGESTIVE

A. Legal Standard for Suggestiveness

It is trademark 101 that trademarks are evaluated for distinctiveness along a continuum, with generic marks at one end and fanciful marks at the other. *U.S. Pat. & Trademark Off. v. Booking.com B. V.*, 140 S. Ct. 2298, 2302 (2020). Suggestive marks lie in the middle of this spectrum and are protectable as inherently distinctive, without a showing of secondary meaning. *Id.*



A trademark is “suggestive” if it “requires imagination, thought and perception to reach a conclusion as to the nature of the goods.” *See StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 1332–33, 111 U.S.P.Q. 1649, 1652 (Fed. Cir. 2014) (citation omitted). If one must exercise “mature thought or follow a multi-stage reasoning process” to determine attributes of the product or service, the term is suggestive, not descriptive. *In re Tennis in the Round, Inc.*, 199 U.S.P.Q. 496, 498 (T.T.A.B. 1978) (TENNIS IN THE ROUND held not descriptive of tennis facilities); *see also Anheuser-Busch, Inc. v. Holt*, 92 U.S.P.Q.2d 1101, 1105 (T.T.A.B. 2009) (A “mark is suggestive if, when the goods or services are encountered under the mark, a multi-stage reasoning process, or the utilization of

imagination, thought or perception, is required in order to determine what attributes of the goods or services the mark indicates.”).

A descriptive mark, by contrast, “conveys an *immediate* idea of the ingredients, qualities or characteristics of the goods.” *StonCor Grp.*, 759 F.3d at 1332–33, 111 U.S.P.Q.2d at 1652 (emphasis added); *see also* TMEP § 1209.01(b) (mark is merely descriptive “if it immediately conveys knowledge of a quality, feature, function, or characteristic of an applicant’s goods or services”). Generic terms refer to the “name of the good itself (*e.g.* ‘wine’).” *Booking.com*, 140 S. Ct. at 2303. “[T]he distinctions are critical to the availability and the evidentiary requirements of registration.” *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 1569, 4 U.S.P.Q.2d 1141, 1142 (Fed. Cir. 1987).

The USPTO evaluated Apple’s application for LIVE PHOTOS and determined the mark was suggestive and approved the application for publication without requiring proof of secondary meaning. It thus is presumed that the application meets the requirements for registration. *McGregor-Doniger Inc. v. Drizzle Inc.*, 599 F.2d 1126, 1132, 202 U.S.P.Q. 81, 88 (2d Cir. 1979) (decision of the USPTO to register a mark without requiring proof of secondary meaning “affords a rebuttable presumption that the mark is more than merely descriptive”), *see also Cross Com. Media, Inc. v. Collective, Inc.*, 841 F.3d 155, 165, 120 U.S.P.Q.2d 1517, 1523 (2d Cir. 2016) (giving “great weight” to USPTO’s decision to allow the mark to proceed to registration); 3 McCarthy § 20:13 (5th ed. 2018) (“once the applicant’s mark is published, it is presumed that the Examiner is satisfied that the mark meets the criteria of the Act.”). The USPTO’s decision is well founded and the legal standard supports a finding that LIVE PHOTOS is suggestive.

B. LIVE PHOTOS Is an Incongruous Pairing Which Does Not Immediately Convey the Nature of the Product

The party opposing registration (*i.e.*, Cao) bears the burden of proving “by a preponderance of the evidence” that an applicant’s mark is merely descriptive or generic, rather than suggestive. *StonCor Grp.*, 759 F.3d at 1332, 111 U.S.P.Q.2d at 1652 (descriptiveness); *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 965, 114 U.S.P.Q.2d 1827, 1830 (Fed. Cir. 2015) (genericness). Cao falls far

short of meeting his burden. Instead, the evidence supports the finding that LIVE PHOTOS is a suggestive mark.

First, the mark LIVE PHOTOS does not immediately convey a quality or characteristic of computer software for recording and displaying images, video and sound. Rather, the name conjures many different ideas about the underlying product. For example, it could suggest that photographs taken using the LIVE PHOTOS feature are very vivid. It also could suggest that the photos are broadcast to an audience when they are taken (*i.e.*, a live broadcast). Or the phrase could suggest that photographs taken using the LIVE PHOTOS feature have a specified lifespan, such that they might disappear over time. (See 49 TTABVUE 4–5 ¶¶ 12–13; 63 TTABVUE 99 at 95:22–24); *Anheuser-Busch*, 92 U.S.P.Q.2d at 1106 (BEER 1 and ONE BEER suggestive because a purchaser could view the mark as meaning many things).

Second, the words “live” and “photos” are an incongruous pairing, which further underscores the suggestive nature of the name. TMEP § 1209.01(a); McCarthy § 11:67 (“Incongruity can be a strong indicator of suggestiveness.”) Photographs by nature are inanimate, and thus it is incongruous to pair “photo” with a word such as “live.” The name LIVE PHOTOS requires one to pause and think about what it might mean for a still photograph to be “alive.” Only after pausing to think about the phrase “LIVE PHOTOS” in relation to Apple’s product does the name make sense, as the name plays on the imaginative notion that photographs can come to life when they, of course, cannot. For similar reasons, the Board in *In re Simon Property Group, L.P.* held that the phrase LOOKBOOK LIVE is suggestive of fashion shows and beauty demonstrations:

LOOKBOOK LIVE suggests the incongruity that a book of still photographs either has come to life or is being presented live. This leads us to the conclusion that the wording LOOKBOOK LIVE is not a natural or obvious way to describe entertainment services featuring fashion. Thus, the import of the wording would not be grasped without some measure of imagination or mental pause. *In re Shutts*, 217 U.S.P.Q. 363, 365 (T.T.A.B. 1983). With the combined wording, Applicant has given the individual words an imaginative twist, that is, to juxtapose the inanimate word “lookbook” with the animate word “live.”

Serial No. 86/341,571, 2016 WL 3912938, at *9 (July 7, 2016) (non-precedential). The same result is proper here. *See id*; *In re Transit Audio & Techs., Inc.*, Serial No. 75/534,346, 2001 WL 315034, at *4 (Mar. 30, 2001) (VOCAL BUS suggestive as it “contains an element of incongruity” as an “inanimate object like a bus is not usually regarded as being ‘vocal’ in the sense of having a voice or being capable of emitting sound or speech”) (non-precedential); *In re Shutts*, 217 U.S.P.Q. at 364–65 (SNO-RAKE for snow removal tool suggestive given “incongruous word combinations whose import would not be grasped without some measure of imagination and ‘mental pause’”).

Third, dictionary evidence confirms that LIVE PHOTOS is suggestive. To start, as Cao admits, more than 20 dictionaries and thesauruses contain *no definition* of “live photo” or “live photos.” (52 TTABVUE 378–439; 48 TTABVUE 84–99 at 83:12–98:11.) The two dictionaries that do define the term do so only in relation to Apple’s iPhone device. (52 TTABVUE 440–442.) Therefore, the phrase is neither descriptive nor generic. Rather, this dictionary evidence shows the term LIVE PHOTOS is associated primarily with Apple.

Moreover, the Merriam-Webster Dictionary contains 22 definitions of the word “live,” several of which are “equally plausible in the context of applicant’s goods.” *Anheuser-Busch*, 92 U.S.P.Q.2d at 1106. But what is most striking about the dictionary definitions of “live” is that none of them connect the word “live” to “photography” or photography software. Rather, the definitions relate to items such as microphones (“live microphone”), copy (“live copy”), explosives (“live bomb,” “live ammunition”), sports (“live ball”), entertainment (“live entertainment,” “live radio,” “live record album”), or literally having life (“live lobster”). (33 TTABVUE 7.) That is because there is no standard meaning of “live” as applied to photographs. Nor is “live” defined as a standard word to describe imbuing inanimate objects with motion or activity. Apple’s LIVE PHOTOS mark is an incongruous, playful use of words that does not directly apply any of the dictionary definitions of “live.” The whole reason the name is fun is because photographs are not actually alive. This further demonstrates that the mark is suggestive.

Fourth, third parties that offer software features, like Apple’s, which simultaneously capture a still photograph and video do not need to use the phrase “live photos.” (49 TTABVUE 4 ¶ 14.)

Samsung, for example, calls its product “Motion Photo” and promotes it without using the phrase “live photos.” (49 TTABVUE 32 ¶ 73; 52 TTABVUE 538.) Google similarly promotes its product for “tak[ing] a photo that contains a short video” without using the phrase “live photos,” and instead uses the term “motion photos.” (49 TTABVUE 32 ¶ 74; 52 TTABVUE 539.) Microsoft did not need to use the phrase “live photos” either, and instead calls its software “Lumia Camera” and the resulting pictures “Living Images.” (49 TTABVUE 32 ¶ 76; 52 TTABVUE 540.) Nor did HTC Zoe need to use “live photos,” instead calling its software “Zoe,” and the resulting pictures simply, “photos” or “images.” (49 TTABVUE 32 ¶ 75; 34 TTABVUE 9.) None of these other entities that offer products like Apple’s opposed Apple’s registration of LIVE PHOTOS. (49 TTABVUE 5-6 ¶ 15).

Fifth, the press also frequently identifies or describes products that simultaneously capture photographs and video, and/or the resulting photos/videos themselves, without using the phrase “live photos,” except when it references Apple’s brand. For example, the *New York Post* uses the term “moving pictures.” (53 TTABVUE 131.) *The San Francisco Chronicle* calls them “gif-like images.” (53 TTABVUE 167.) Gadget Hacks uses terms such as “Motion Photo,” “Motion Stills,” “Live Shot,” “moving images,” and “looping GIFs”. (35 TTABVUE 140–45.) This evidence further shows that the trademark LIVE PHOTOS is suggestive as there are any number of ways to describe this type of camera effect.

Finally, many of the articles released shortly after Apple’s launch needed to *explain* what Apple’s LIVE PHOTOS software does. (*See, e.g.*, 52 TTABVUE 46–48; 53 TTABVUE 131–134, 147–148, 212–215.) This further indicates that consumers would “not immediately understand” the meaning of Apple’s mark as the authors felt the need to explain what the feature did so that consumers would understand the product. *Baroness Small Ests., Inc. v. Am. Wine Trade, Inc.*, 104 U.S.P.Q.2d 1224, 1230 (T.T.A.B. 2012) (evidence that articles “spell[ed] out the connection between CMS and the names of the varieties” indicated consumers would not immediately understand the mark).

Accordingly, as is detailed above, because the meaning of LIVE PHOTOS in connection with Apple’s product requires imagination; the combination of “live” with “photos” is incongruous; third

parties use many words other than “live photos” to identify products similar to Apple’s; and dictionary evidence shows that the word “live” has no meaning in connection with photographs, Apple’s mark is suggestive.

V. CAO’S ARGUMENT THAT THE LIVE PHOTOS MARK IS DESCRIPTIVE FAILS

Cao’s primary argument for why the mark is descriptive rather than suggestive is that the individual components “live” and “photos” retain their individual “descriptive meaning” in relation to Apple’s goods even when combined. (72 TTABVUE 41–44.) This argument fails. As described above, the word “live” *has no common descriptive meaning* in connection with photography or software for recording and displaying images, video and sound. *Supra* IV.B. Only after pausing to think about the phrase “LIVE PHOTOS” in relation to Apple’s product does the name make sense, as the name plays on the imaginative notion that photographs can come to life when they, of course, cannot. *In re Lynn*, Serial No. 76/470,354, 2005 WL 548049, at *3 (T.T.A.B. Mar. 1, 2005) (phrase METAPHYSICAL EXERCISE “causes a mental pause for the consumer to correlate the two ideas,” so is suggestive) (non-precedential); *In re Scripps Networks, Inc.*, Serial No. 77/418,854, 2010 WL 1920470, at *2 (T.T.A.B. Apr. 27, 2010) (“mental pause or hiccup” needed to understand CLUB DANCE for restaurant and bar services) (non-precedential).

Cao also tries to argue that dictionary definitions establish that the LIVE PHOTOS mark is descriptive. As discussed above, the dictionary definitions only support *Apple’s* position as they show: (1) there is no definition of the phrase “Live Photos,” except with reference to Apple’s product (48 TTABUVE 378–439, 440–442); (2) the word “live” has no meaning in relation to the types of services Apple offers; and (3) “live” has numerous definitions, many of which could apply to Apple’s services. Tellingly, Cao’s own argument concerning dictionary definitions is convoluted. It requires first selecting one of the 22 definitions of “live,” then flipping to the definition of a *different word*, “life,” which itself has 20 definitions and *is not even one of the words in Apple’s mark*, to cobble together a meaning for the phrase “Live Photos.” (72 TTABVUE 23.) This underscores that LIVE PHOTOS is not descriptive, as any definition requiring such mental gymnastics hardly shows that Apple’s mark conveys an “immediate”

idea of its goods. This parsing is also inconsistent with *Princeton Vanguard*, which makes clear that the Board “cannot simply cite definitions and generic uses of the constituent terms of a mark [] in lieu of conducting an inquiry into the meaning of the disputed phrase as a whole.” 786 F.3d at 967, 970, 114 U.S.P.Q.2d at 1831–32, 1834 (Board erred in “focus[ing] primarily on evidence of the word ‘crisps’ in isolation” and selecting “a few pieces of evidence” concerning the combined term).

Cao further cites to the EUIPO Board of Appeal’s decision holding that Apple’s LIVE PHOTOS mark is descriptive to support his argument. (72 TTABVUE 43.) The problems Cao has with this evidence are indicative of the problems Cao has with the bulk of the evidence in his brief. Cao did not introduce this EUIPO decision until his rebuttal period. Therefore, he cannot use it to support his affirmative case. *Am. Meat Inst. et al. v. Horace W. Longacre, Inc.*, 211 U.S.P.Q. 712, 719 (T.T.A.B. 1981) (“in his case on rebuttal” a party plaintiff may “not . . . introduce . . . any facts or witnesses which might appropriately have been introduced during its case-in-chief to sustain its pleading. That is, a plaintiff may not utilize its rebuttal period to prove its case-in-chief”). Indeed, Cao cites *five times as many* documents submitted during his rebuttal period to support his affirmative arguments of genericness and descriptiveness as he cites documents submitted during his opening trial period. As discussed below and in Appendix A hereto, all of these documents should be excluded as untimely. In addition, the EUIPO refusal also is irrelevant because it concerns EU, rather than U.S. law and consumer perceptions. *Puma-Sportschuhfabriken Rudolf Dassler, K.G. v. Superga S.p.A.*, 204 U.S.P.Q. 688, 689 n.3 (T.T.A.B. 1979) (decisions of German courts are “irrelevant” and “of no probative value”); *Exxonmobil Oil Corp. & Exxon Mobil Corp. v. Bartels Mangold Elec. GmbH*, Opposition No. 91152334, 2007 WL 2344690, at *3 (T.T.A.B. Aug. 2, 2007) (sustaining objection to consideration of OHIM decision as “the decisions of foreign courts are ‘irrelevant’ or ‘of no probative value’”) (non-precedential).

Putting aside the evidentiary issues, Cao’s point is also moot because Apple has obtained a registration in the EU for the LIVE PHOTOS mark via IR designation, an updated fact that Cao conveniently withholds. In the end, the EUIPO’s ultimate decision to allow registration supports Apple’s position that LIVE PHOTOS is registrable. In fact, Apple’s LIVE PHOTOS mark has been registered in

125 countries and jurisdictions, including in many other English-speaking jurisdictions, so Cao's view is the only view that is an outlier here. (63 TTABVUE 41 at 37:6–11; *see also* 49 TTABVUE 31 ¶ 67.)

VI. LIVE PHOTOS HAS ATTAINED SECONDARY MEANING

The LIVE PHOTOS mark was properly assessed by the USPTO examiner to be a suggestive term and thus inherently registrable. In any event, regardless of whether the LIVE PHOTOS mark is suggestive or descriptive, the mark is registrable because it has attained secondary meaning. This is a whole separate basis for registration.

A. Apple has Continuously Used the LIVE PHOTOS Mark for Five and a Half Years

First of all, Apple has engaged in five and a half years of continuous and substantially exclusive use of LIVE PHOTOS which alone is sufficient for establishing secondary meaning. The TMEP states that substantially exclusive and continuous use of a mark in commerce for five years before the date on which the claim of distinctiveness is made may be accepted as *prima facie* evidence that a mark has acquired secondary meaning. TMEP § 1212.05; *accord Schlafly v. Saint Louis Brewery, LLC*, 909 F.3d 420, 423–24, 128 U.S.P.Q.2d 1739, 1742 (Fed. Cir. 2018). Apple meets this standard, as it has used the LIVE PHOTOS mark continuously since it first announced the LIVE PHOTOS software feature on September 9, 2015. (49 TTABVUE 4.) The LIVE PHOTOS feature has been included in every iPhone model since the iPhone 6 and iPhone 6s Plus, as well as a number of other Apple devices, such as the iPad device. (49 TTABVUE 18–20 ¶¶ 40–45.)

B. Advertising, Sales Success and Media Coverage of LIVE PHOTOS

In addition to the more than five years of substantially exclusive and continuous use of LIVE PHOTOS, Apple has also heavily advertised and marketed the LIVE PHOTOS feature on its website and through print and television advertising since 2015, and has had substantial sales for the iPhone since 2015 and iPad since 2016, which include the LIVE PHOTOS feature. Moreover, the LIVE PHOTOS feature has received considerable press coverage from well-respected news sources since 2015.

It is well established that circumstantial evidence, such as advertising expenditures, sales success and unsolicited media coverage may serve as proof of secondary meaning in addition to length and

exclusivity of use. TMEP § 710.01(b); *see also Royal Palm Props., LLC v. Pink Palm Props., LLC*, 950 F.3d 776, 785 (11th Cir. 2020). Where there is evidence of high sales, extensive advertising, and/or significant press coverage, secondary meaning has been found where marks were in use for far less time than Apple's use. Apple has undoubtedly met the standard for secondary meaning in this case.

1. High Profile Launch of LIVE PHOTOS

The high-profile launch of the LIVE PHOTOS feature supports a finding that the mark has acquired secondary meaning. Apple announced the LIVE PHOTOS feature at a special event held at the Bill Graham Civic Center, a 7,000-seat auditorium. (42 TTABVUE 6 ¶ 17.) The LIVE PHOTOS mark was prominently displayed on the stage's main screen, where consumers could readily see it. (42 TTABVUE 6 ¶ 17.) In addition, the LIVE PHOTOS feature was announced in a widely-distributed press release. (42 TTABVUE 7 ¶¶ 18–21; 52 TTABUVE 45–48.)

News of the launch of LIVE PHOTOS quickly reached a broader audience. A YouTube video of the announcement of the LIVE PHOTOS feature has been viewed 240,000 times. (42 TTABVUE 7 ¶ 20; 48 TTABVUE 498; 49 TTABVUE 38.) In addition, a well-known technology blogger posted a review of the LIVE PHOTOS feature soon after the event, in a video garnering **6.9 million** views. (42 TTABVUE 7 ¶ 21; 52 TTABUVE 45–48, 61; 48 TTABVUE 498.)

2. Substantial Advertising and Promotion of the LIVE PHOTOS Feature by Apple

Apple's substantial advertising and promotion of LIVE PHOTOS is further evidence of secondary meaning. For example, the feature has been highlighted in television advertisements across the United States, including in one commercial garnering **847 million** television impressions, 980,000 online views, and 2.2 million social impressions. (49 TTABVUE 10–11 ¶¶ 25–26; 60 TTABVUE.) The LIVE PHOTOS product was featured prominently throughout the commercial. (49 TTABVUE 10 ¶ 25.) Such television advertising has led to significant consumer exposure to the LIVE PHOTOS mark in connection with Apple devices. *See In re Minky Couture*, Serial No. 87/589,711, 2020 WL 1873064, at *6 (T.T.A.B. Apr. 2, 2020) (significant television advertising showed secondary meaning) (non-precedential).

The LIVE PHOTOS feature has also been prominently featured on the Apple website. (49 TTABVUE 11–12 ¶¶ 27–28; 49 TTABVUE 76.) The Apple website is one of the most visited websites in the world, receiving around 100 million visitors per day since September 2015, with roughly a third of those visitors coming from the United States according to web traffic data. (29 TTABVUE 12–14 ¶¶ 29–33; 52 TTABUVE 146–157.) This strongly contributes to consumer recognition of the LIVE PHOTOS mark and its association with Apple, and supports a finding of secondary meaning. *See St. Luke’s Cataract and Laser Inst., P.A. v. Sanderson*, 573 F.3d 1186, 1208–09, 91 U.S.P.Q.2d 1302, 1317 (11th Cir. 2009) (evidence of significant website traffic to LaserSpecialist.com supported jury’s conclusion that the mark had acquired secondary meaning). An example of LIVE PHOTOS promoted on the Apple website as a core feature of iPhone devices and the iOS operating system that powers the iPhone device is as follows:

**Live Photos.
Livelier than ever.**

Now your Live Photos can be even more expressive, creative, and just plain fun.

[Learn more about Photos >](#)

[Loop](#) [Bounce](#) [Long Exposure](#)

Turn a Live Photo you love into a fun video loop. Choose an image yourself, or let Photos suggest which ones would make great loops.



(52 TTABVUE 275–276.) The LIVE PHOTOS feature is so important that Apple highlighted it in its tenth anniversary iPhone X press release, and featured it in at least nine press releases since 2015. (49 TTABVUE 16–17 ¶ 37; *see* 52 TTABVUE 301–308.) Print advertisements for Apple devices also emphasize the LIVE PHOTOS feature for consumers. (49 TTABVUE 14–17 ¶ 34–37; 49 TTABVUE 52.)²

² Cao relies on *In re Duvernoy & Sons, Inc.*, a case that is over 60 years old, in asserting that the Board may find no secondary meaning even when faced with this significant advertising evidence. 41 C.C.P.A. 856, 858–59 (C.C.P.A. 1954). In this case, the Court found no secondary meaning because of lack of direct evidence. *Id.* Numerous Courts have since recognized that circumstantial evidence can in fact

3. Substantial Sales of iPhone and iPad Devices Containing the LIVE PHOTOS Software

Apple's significant sales of iPhone and iPad devices featuring the LIVE PHOTOS software feature is also evidence of secondary meaning. *See Viacom*, 891 F.3d at 190–91, 127 U.S.P.Q.2d at 1119 (finding mark had developed secondary meaning where plaintiff had earned millions on products displaying the mark); *TCPIP Holding Co., Inc. v. Haar Commc'ns, Inc.*, 244 F.3d 88, 96, 57 U.S.P.Q.2d 1969, 1976 (2d Cir. 2001) (noting it had “no doubt” plaintiff could establish secondary meaning due in part to the sales success of the product). The LIVE PHOTOS feature is a core feature of iPhone and iPad devices. It has been prominently advertised along with the iPhone and iPad devices, and has been contained in every iPhone sold since the iPhone 6s, and every iPad since 2016. (49 TTABVUE 19–20 ¶¶ 43–45.) Thus, sales information for the iPhone and iPad devices is relevant in showing secondary meaning for LIVE PHOTOS, as each and every one of these devices sold since 2015 (iPhone) and 2016 (iPad) includes the LIVE PHOTOS feature, so consumers who have purchased iPhone and iPad devices since then have been exposed to the LIVE PHOTOS feature in a meaningful way. A summary of the sales information regarding iPhone devices since the release of the LIVE PHOTOS feature is as follows:

- Only three days after the iPhone 6s and 6s Plus went on sale, Apple reported it had sold 13 million of the devices. (49 TTABVUE 21 ¶ 47; 52 TTABVUE 309–311; 53 TTABVUE 161, 163.)
- Three months after the release of the iPhone 7 device, Apple had sold 78.3 million iPhone devices worldwide. (49 TTABVUE 21 ¶ 48; 52 TTABVUE 312.)
- Likewise, in the first month of their release, the iPhone 8, 8 Plus, and iPhone X had sold, respectively, 13.7 million units, 18.6 million units, and 11.2 million units globally. (49 TTABVUE 21–22 ¶ 49; 53 TTABVUE 119.)

show secondary meaning. *E.g. Viacom Int'l v. IJP Cap. Invs., L.L.C.*, 891 F.3d 178, 191, 127 U.S.P.Q.2d 1112, 1119–20 (5th Cir. 2018).

A significant portion of these sales is from purchases within the United States. (49 TTABVUE 23 ¶ 52; 52 TTABVUE 487, 524.) For example, from 2017 through 2019, 36.8% to 39.3% of Apple’s total sales came from the United States. (49 TTABVUE 23 ¶ 52.)

Sales of iPad devices, which also feature the LIVE PHOTOS software feature, are significant as well. Since 2016, Apple sold over 40 million units each year and achieved tens of billions in net sales globally. (49 TTABVUE 23–24 ¶ 53; 52 TTABVUE 313–622.) Within the Americas, a large portion of which is comprised of the United States, Apple achieved \$8.2 billion in net sales of the iPad in 2016, \$7.9 billion in 2017, \$7.7 billion in 2018, and \$9.6 billion in 2019. (49 TTABVUE 24.)³

4. The LIVE PHOTOS Feature Has Received Considerable Unsolicited Media Coverage

In addition, the considerable unsolicited press coverage the LIVE PHOTOS feature has received also supports a finding of secondary meaning. *See Harlequin Enters., Ltd. v. Gulf & W. Corp.*, 644 F.2d 946, 950, 210 U.S.P.Q. 1, 3 (2d Cir. 1981) (finding that unsolicited media coverage supported finding of secondary meaning). The LIVE PHOTOS feature has received acclaim from major publications across the United States, including, but not limited to, *USA Today*, *The Washington Post*, *The New York Times*, *The Wall Street Journal*, *The Tampa Tribune*, *Chicago Daily Herald*, *Atlanta Business Chronicle*, *The Seattle Times*, *Forbes*, *The Houston Chronicle*, *TechCrunch*, *CNET*, *The Cincinnati Enquirer*, *The Denver Post*, *Detroit Free Press*, and *The Verge*. (49 TTABVUE 7 ¶¶ 21–22.)

Examples of such media coverage from the LIVE PHOTOS launch include (with “Live Photos” and reference to Apple in bold for easier reading):

³ Cao cites *Brooks Shoe Manufacturing Co., Inc. v. Suave Shoe Corp.*, to argue this evidence does not show secondary meaning. 716 F.2d 854, 221 U.S.P.Q. 536 (11th Cir. 1983). This case is distinguishable, however, because the applicant did not engage in substantial advertising or promotion featuring the mark at issue, and therefore its product sales could not necessarily be connected to the mark. *Id.* at 540–41. By contrast, Apple has used the LIVE PHOTOS mark extensively in its advertising and promotion for the LIVE PHOTOS software feature, including its press releases and product launch event. *Supra* § I.B.1-2.

- The Verge, *Apple’s new Live Photos feature turns your pictures into videos*, dated September 9, 2015 (“Phil Schiller announced a few new **iPhone** camera tricks at today’s **Apple** event, but one of the strangest was something called ‘**Live Photos**.’”). (53 TTABVUE 34.)⁴
- The New York Post, *How do you like them Apples! New iPhones, iPads and even lifesaving watch apps on the way*, September 10, 2015 (“The phones give new life to pictures with ‘**Live Photos**’ - a new camera option that records a second and a half of video before and after a photo is snapped, to enable ‘moving pictures.’”). (53 TTABVUE 131.)⁵
- The Houston Chronicle, *DR. MAC; Pressure-sensitive touch feature stands out*, dated September 15, 2015 (“What was totally unexpected, at least for me, was the new **Live Photos** feature.”). (53 TTABVUE 141.)⁶
- The New York Times Blogs, *Daily Report: A New iPhone for the Slow Upgrade Crowd*, dated September 22, 2015 (“The first [upgrade], called **Live Photos**, keeps a ‘buffer of a second and a half’s worth of motion frames before and after you take the photo.’”). (53 TTABVUE 147.)⁷
- The Wall Street Journal, *Why We Keep Buying Each New iPhone*, dated September 23, 2015 (“And now, on the **iPhone 6s**, there’s **Live Photos**, a groovy new tool for self-expression. It captures a three-second burst of video around a photo.”). (53 TTABVUE 150.)⁸
- The Washington Post, *A new line of iPhones, designed with millennials and functionality in mind*, dated September 25, 2015 (“**Live Photos**, the feature that captures a few seconds before and after your shutter clicks . . .”). (53 TTABVUE 153.)⁹

⁴ The Verge ranks as the 382nd website in the United States, according to Alexa. (52 TTABVUE 75.)

⁵ The New York Post had a daily weekday circulation of 245,000 in Sept. 2015. (52 TTABVUE 79.)

⁶ The Houston Chronicle had a daily weekday circulation of 169,000 in Sept. 2015. (52 TTABVUE 79.)

⁷ The New York Times had more than 1 million digital-only subscribers and nytimes.com had a monthly average of approximately 62 million unique visitors in the United States. (52 TTABVUE 81–83.)

⁸ The Wall Street Journal had a daily weekday circulation of 1,064,000 in Sept. 2015. (52 TTABVUE 79–80.)

⁹ The Washington Post had a weekday paid print circulation of 330,000 in Sept. 2015. (52 TTABVUE 79.)

- The Biloxi Sun Herald, *Photography gets even better with Apple's new iPhones*, dated September 26, 2015 (“**Apple** calls this ‘**Live Photos**.’ Just tap and hold the screen to see the three-second animation.”) (article from the Associated Press). (53 TTABVUE 158.)¹⁰
- The HollywoodReporter.com, *Apple iPhone 6s Sets New Sales Record in First Weekend*, dated September 28, 2015 (“The new **iPhone** also includes a ‘**Live Photos**’ feature that animates still photos by capturing the second-and-a-half before and after the photo is taken.”). (53 TTABVUE 161.)¹¹
- The San Francisco Chronicle, *iPhone 6s sales break record at 13 million; Apple sells record 13 million iPhone 6s devices in first weekend*, dated September 29, 2015 (“The **6s devices** have several new features, including . . . **Live Photos**, which records action a few seconds before and after a photo is taken, creating gif-like images.”). (53 TTABVUE 167.)¹²

Apple provided a representative sample of this unsolicited¹³ media coverage to the Board, showing not only that the coverage was extensive, but that the media coverage continued well past the initial launch in 2015. (49 TTABVUE 7–9, 41 ¶¶ 22–23, 101, 102; 53 TTABVUE 33–44, 124–185.) A few examples of the post-2015 unsolicited press coverage is below (bold added).

- On January 19, 2016, WKKG - 101.5 FM released an ABC Radio article, which stated, “The 6s and 6s Plus are **Apple’s** newest **iPhones**. . . . Another feature called ‘**Live Photos**,’ allows details in the photos to move, such as a moving waterfall with the sound of rushing water.” (53 TTABVUE 189.)

¹⁰ The Biloxi Sun-Herald reports 137,000 weekly print readers as of Jan. 24, 2020. (52 TTABVUE 84–88.)

¹¹ The *Hollywood Reporter* draws 16 million online visitors per month, as evaluated by independent media analyzer Comscore, and has a print circulation of 74,000. (52 TTABVUE 89–95.)

¹² The San Francisco Chronicle has a daily readership of 460,529 and 1.6 million unique monthly visitors to its website. (52 TTABUVE 100–101.)

¹³ 63 TTABVUE 169 at 165:9–14 (confirming that the bulleted press coverage contained in the LaPerle declaration, other than a *Business Wire* article, was unsolicited).

- On a September 15, 2016, The New York Times released an article titled *About Those Wireless Headphones, and Other Apple Accessories*, which stated, “The **iPhone 6s** series bumped up the camera resolution to 12 megapixels and added the animate **Live Photos** feature and 4K video support” (53 TTABVUE 213.)
- On January 10, 2017, The San Antonio Express News released an article titled *Digital Dish Your weekly serving of tech news*, which explained that on Instagram “**Apple Live Photos** users will find those vivid pics import seamlessly too.” (53 TTABVUE 216.)
- On March 28, 2017, The Houston Chronicle released an article titled *Dr. Mac Chewing over Apple’s news*, which stated, “The **iPad Pro** includes exclusive features such as a fully laminated display with an antireflective coating, a wide color True Tone display, 12MP camera with **Live Photos**, True Tone flash and wide color photo capture.” (53 TTABVUE 218.)
- On June 11, 2017, The Arizona Republic released an article titled *Eleven changes for iPhone with iOS 11 coming this fall*, which stated, “**iOS 11** also lets you add effects and trim the short video snippets inside **Live Photos** images.” (original from USA Today) (53 TTABVUE 224.)
- On September 14, 2017, CNET released an article titled *iOS 11 livens up Live Photos with some new tricks*, which stated, “Starting with **iOS 11**, **Apple** is adding some much-needed capabilities to the **Live Photos** feature.” (53 TTABVUE 64.)
- On January 9, 2018, The New York Times released a column titled *Finding the Perfect Part of a Live Photo*, which answered the question, “How can I retrieve a still photo from the 1.5 seconds of an **iPhone Live Photo** before or after the official picture?” In response, the column stated, “**Live Photos** -- **Apple’s** format that captures a bit of the subject's movement right before and after the ‘official’ picture -- can be edited.” (53 TTABVUE 242.)
- On March 29, 2019, USA Today released an article titled *Apple News+: Are 300 magazines worth \$9.99 a month?*, which stated, “those magazine covers come alive, moving just like the **Live Photos** images on an **iPhone**.” (53 TTABVUE 81–82.)

Cao has not and cannot adequately rebut the sheer volume of unsolicited media coverage that the LIVE PHOTOS feature has received.

C. Google Data Indicate Consumers Associate the LIVE PHOTOS Mark with Apple

Google trends data also supports Apple’s position that consumers associate the LIVE PHOTOS mark with Apple and no other company. A Google trends report shows that before Apple’s announcement in September 2015, there was virtually *no* searching for the term “live photos.” (63 TTABVUE 213 at 210:8–16; 63 TTABVUE 310.) Searches for the term spiked after Apple’s September 9, 2015 announcement. (*Id.*) This indicates that consumers associate the phrase “live photos” specifically with Apple and searched for it in connection with Apple products in particular. (*See* 49 TTABVUE 29–30 ¶ 64.)

In addition, internet search results further demonstrate that the LIVE PHOTOS mark is associated with Apple. Google trends results for the top five rising “related topics” for “live photos” between September 1, 2015 and October 25, 2018 were “iPhone 6s,” “iPhone 6s Plus,” “iOS 10,” and “iPhone SE,” all of which are related to Apple. (52 TTABVUE 535.) The top five rising “related queries” were “iphone 6s live photos,” “iphone 6s,” “turn off live photos iphone,” “post live photos to Instagram,” and “iphone 6 plus live photos,” four of which are related to Apple. (*Id.*) A search for “iphone 6 live photos” yields similar results, with all of the “related topics” related to Apple. (52 TTABUVE 536.)

Extending the period of time searched through 2020, Google Trends data continues to show a strong association between Apple and the phrase “live photos.” (49 TTABVUE 30–31 ¶ 66.) Given this data, unsurprisingly, the first page of search results from a Google search for “live photos” conducted on August 27, 2018 brings up only results for Apple’s LIVE PHOTOS software feature. (49 TTABVUE 29 ¶ 62; 49 TTABVUE 53–72.)

D. Multiple Entities Have Copied Apple’s LIVE PHOTOS Mark

Since the high-profile release of the Live Photos software feature, several third party entities in the United States and elsewhere have intentionally tried to copy Apple’s LIVE PHOTOS mark by adopting trademarks containing the words “Live Photos” for their own products. (49 TTABVUE 31 ¶

68.) [REDACTED]. (64 TTABVUE 200–201 at 197:20–198:8.)

Intentional copying further shows that Apple’s LIVE PHOTOS mark has acquired secondary meaning. *Sally Beauty Co., Inc. v. Beautyco., Inc.*, 304 F.3d 964, 978, 64 U.S.P.Q.2d 1321, 1328 (10th Cir. 2002) (finding “proof of intentional copying as relevant to whether a trademark has acquired secondary meaning”).

E. Cao’s Evidence on Third Party Use Is Fatally Flawed

Apple’s use of the LIVE PHOTOS mark since 2015 has been substantially exclusive. Cao asserts that substantial concurrent third-party use dictates against secondary meaning. (72 TTABVUE 45.) The law and the facts simply do not bear out his assertion. With respect to the law, the Board specifically makes allowances for “use by others which may be inconsequential or infringing” and such inconsequential third party use does not necessarily invalidate a claim of secondary meaning. *L.D. Kichler Co. v. Dovoil, Inc.*, 192 F.3d 1349, 1352, 59 U.S.P.Q. 1307, 1352 (Fed. Cir. 1999). That *some* third-party use exists is not fatal to secondary meaning. *Royal Palm*, 950 F.3d at 786.

With respect to the facts, as detailed below and in Appendix A, the evidence submitted by Cao to support his position on concurrent third party use is fatally flawed in one or more aspects: not relevant, inadmissible hearsay, admitted late, not specific to the U.S., duplicative entries, actually refers to Apple’s product, or not probative. Cao’s attempt to make it look like there is more meaningful third-party use of the term “Live Photos” than actually exists is misleading. Once these inadmissible and/or irrelevant documents are excluded, nothing is left. (*See* 49 TTABVUE 42–45 ¶¶ 101-106; App’x A hereto.)

Further, to the extent the Board admits some of the evidence, it is inconsequential and de minimis anyway. Cao’s opening trial brief cited only ten third party apps with the phrase LIVE PHOTO(S) in the name. (39 TTABVUE 16 ¶ 26, first bullet & 39 TTABVUE 29-30 ¶ 35.) Six of these are no longer available or have changed their names. (49 TTABVUE 43–44 ¶ 105.) The seventh and eighth appear to have launched only after Apple announced its LIVE PHOTOS software feature. (34 TTABVUE 168; 34 TTABVUE 202–203) The final two do not appear to offer the same product as Apple, instead providing an app for recording a video that can be used as a lock or home screen (39 TTABVUE 16 ¶ 26, first

bullet) and a children’s app for animating characters (34 TTABVUE 172). A handful of insignificant or infringing third party uses are not enough to invalidate a claim of secondary meaning. *Royal Palm*, 950 F.3d at 786. In addition, the probative value of Cao’s few remaining inconsequential uses that are not barred by rules of evidence are of low probative value, as random internet quotes and the repute of these little known sources cannot be verified.

VII. APPLE’S LIVE PHOTOS MARK IS NOT GENERIC

Cao’s attempt to couch the LIVE PHOTOS mark as generic defies common sense. Cao falls woefully short of meeting his burden of establishing by a preponderance of the evidence that LIVE PHOTOS is generic, rather than suggestive as the examiner found. A generic mark is “the name of a class of products or services,” *i.e.*, “the name of the good itself” such as “wine.” *Booking.com*, 140 S.Ct. at 2301, 2303. Moreover, a term is only generic if the “relevant purchasing public understands” it “*primarily* as the common or class name for the goods or services.” TMEP § 1209.01(c) (citing *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1344–45, 57 U.S.P.Q.2d 1807, 1810–11 (Fed. Cir. 2001)) (emphasis added). The public’s understanding of the primary significance of a term can be determined from “consumer surveys, dictionaries, newspapers and other publications.” *Id.* (citation omitted). Evidence of occasional generic usage does not render a mark generic. *In re Merrill Lynch*, 828 F.2d at 1571, 4 U.S.P.Q.2d at 1143–44 (mark not generic where evidence showed both generic and proper usage).

A. The Correct Genus Is “Computer Software for Recording and Displaying Images, Video, and Sound,” As Set Forth in Apple’s Application

To start, “the proper genus of goods or services is almost always determined by the description contained in the application or registration.” McCarthy § 12:23; *see also* TMEP 1209.01(c)(i); *cf. Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 640, 19 U.S.P.Q.2d 1551, 1552 (Fed. Cir. 1991) (“a proper genericness inquiry focuses on the description of services set forth in the certificate of registration”). Thus, the genus here is “computer software for recording and displaying images, video and sound.” This is consistent with Apple’s specimen and evidence of use, which show that Apple’s software

simultaneously records an image (photograph) and video with sound, and allows users to display the simultaneously recorded image/video file. (49 TTABVUE 4 ¶ 11; 52 TTABVUE 45–51; 63 TTABVUE 248–254.)

Cao ignores the TMEP instructions to argue that the genus should be a strangely narrow definition of “a software feature that adds animation or life to still photos.” (72 TTABVUE 20.) Cao’s unnatural genus definition makes no sense, as no consumer would see Apple’s software or applied-for goods according to Cao’s self-serving definition. There also is no animation in Apple’s LIVE PHOTOS feature. Instead, simultaneously *recording* or capturing an image and video (with sound) is central to Apple’s product. (49 TTABVUE 4 ¶ 11; 52 TTABVUE 45–51.) Cao’s attempt to redefined the genus and eliminate the recording and video/sound elements from the relevant goods is improper. *See In re STEELBUILDING.COM*, 415 F.3d 1293, 1298–99, 75 U.S.P.Q.2d 1420, 1422–23 (Fed. Cir. 2005) (Board overturned for leaving out aspects of applicant’s services from genus). The Board should follow the TMEP and look at the goods as stated in Apple’s LIVE PHOTOS application in its assessment of this issue.

B. Cao’s Evidence of Genericness Is Fatally Flawed

Since Cao relies on the same evidence to support his descriptiveness, genericness, and lack of secondary meaning arguments, his genericness evidence suffers from the same fatal flaws previously mentioned: not relevant, belated, inadmissible as hearsay, not specific to the U.S., duplicative entries, actually refers to Apple’s product, and/ or not probative. Each of these objections is described below and the particular documents to which each objection applies are detailed in Appendix A hereto. Each is a basis for excluding such evidence.

1. Cao’s Belated Evidence Should be Excluded

First, Cao tries to support his genericness argument with **86 documents submitted during his rebuttal period**. By contrast, he relies on only 17 documents submitted during his opening trial period. The numbers unmistakably show that Cao, upon reading Apple’s submissions that methodically explained the deficiencies in Cao’s evidence, (49 TTABVUE 41–45 ¶¶ 100–107; 54 TTABVUE 3–12), realized he

had failed to establish his case-in-chief during his opening trial period, and therefore belatedly tried to shore-up his position on rebuttal without giving Apple the opportunity to submit contrary evidence. This is exactly the kind of improper belated evidence that should be stricken. *Dans Un Jardin v. Le Jardin Des Plantes*, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985); *Am. Meat Inst.*, 211 U.S.P.Q. at 719; *see also* App’x A hereto. These 86 documents, as well as all of the other documents Cao submitted on rebuttal to support his genericness and descriptiveness arguments, should be stricken.

2. Cao’s Hearsay Evidence Should be Excluded

Second, Cao relies on numerous documents that were submitted without supporting testimony and, thus, are hearsay. *Optimal Chem. Inc. v. Srills LLC*, Cancellation No. 92063200, 2019 WL 4316700, at *3 n.13 (T.T.A.B. Sept. 10, 2019) (website printouts are hearsay and admissible for what they show on their face, but not the truth of the matters asserted, unless supported with testimony); *Gange v. Agility Sports LLC*, Opposition No. 91194831, 2013 WL 6858021, at *5 (T.T.A.B. Dec. 23, 2013) (opposer’s Internet evidence constituted “hearsay and [could] not be relied upon for the truth of the matter asserted”) (non-precedential); TBMP 704.08(b); *see also* App’x A hereto. For example, every exhibit Cao submitted during his rebuttal period is hearsay because Cao did not submit a declaration with those exhibits. *See* App’x A hereto. Several of the documents submitted in the opening trial period are hearsay as well, either because they were not discussed in Cao’s declaration or because Cao did not show that he had personal knowledge of the information contained in these documents. App’x A hereto.

Because these documents are hearsay, Cao cannot rely on them for the truth of the matter asserted therein. Fed. R. Evid. 801, 802. This includes the date of publication, the date when the products discussed in these documents purportedly were released, and statements in these documents concerning whether products were distributed in the United States. *See Optimal Chem.*, 2019 WL 4316700, at *3 n.13; *Gange*, 2013 WL 6858021, at *5. This is for good reason. As just one example, a review on Amazon.com purports to have been made “in the United States,” yet the reviewer “Sxm caribbean” states, “I live all the way in the Caribbean . . .” (71 TTABVUE 76.) Similarly, Cao’s documents contain at least two different launch dates for the ZTE Obsidian, one listing December 21, 2015, after Apple’s

announcement, and the other, a Canadian website, listing August 13, 2015. (*Compare* 71 TTABVUE 90 *with* 71 TTABVUE 170.) The document Cao relies on to show the launch date of the Lenovo A7 Tab 2 product similarly shows two conflicting dates—a launch date of October 2015, after Apple’s announcement, but a purported review in July 2015. (71 TTABVUE 109–108.) Hearsay rules are always important, but they are particularly essential here given the facial unreliability of Cao’s evidence. This hearsay evidence should be excluded to the extent Cao relies on it for the truth of the information stated therein.

3. The Evidence Cao Submits Without Circulation Data Should Be Excluded

Third, Cao provides no data concerning viewership or circulation for the documents on which he relies, aside from install numbers for a few apps and views for a handful of YouTube videos that, per the face of the documents, garnered just a few hundred views. (*See, e.g.*, 36 TTABVUE 88, 96; 66 TTABVUE 152–154; 71 TTABVUE 58–60; *see also* App’x A hereto.) Thus, they are of limited to no persuasive value:

The mere fact that one can do a search on the Internet and find, for example, a photograph on the flickr website, does not mean that consumers will be aware of this photograph. As Judge Rich said in connection with NEXIS searches, “It is indeed remarkable to see the thoroughness with which NEXIS can regurgitate a placename casually mentioned in the news.” *In re Societe Generale des Eaux Minerales de Vittel S.A.*, 824 F.2d 957, 3 U.S.P.Q.2d 1450, 1451 (Fed. Cir. 1987). The same is certainly true for words that can be retrieved by an Internet search.

Baroness Small Ests., 104 U.S.P.Q.2d at 1228 (criticizing websites lacking information as to “what extent there has been public exposure to them.”); *In re Country Music Ass’n Inc.*, 100 U.S.P.Q.2d 1824, 1830 (T.T.A.B. 2011) (“comparative obscurity of the third-party uses raises doubt about whether the relevant public will perceive the phrase as generic or as an element of various trade names”); *Zimmerman v. Nat’l Ass’n of Realtors*, 70 U.S.P.Q.2d 1425, 1435 (T.T.A.B. 2004) (use of term in legal opinions not persuasive “given their limited circulation among members of the public”).

4. Documents from Non-U.S. Sources Should Be Excluded

Fourth, much of Cao’s evidence comes from sources located outside the United States or from unknown geographic origins. For example, Apple determined that at least 39 of the documents Cao

submitted in his opening trial period came from a non-U.S. source and that another seven came from a source whose location could not be determined. (49 TTABVUE 42–43 ¶ 104.) Documents from non-U.S. sources should be excluded as well. *In re Thermo LabSys, Inc.*, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007) (“This webpage is from a foreign website; information about how common ‘Watson’ is in a foreign country has no probative value as to how ‘Watson’ would be perceived in the United States.”); *In re Schwan’s IP LLC*, Serial No. 78/527,306, 2007 WL 1276972, at *2 (T.T.A.B. Apr. 25, 2007) (foreign web page had “no probative value in determining how United States consumers w[ould] perceive the word ‘Fresch’” as there was “no evidence that internet users in the United States would access this website”) (non-precedential); *In re Allman II*, Serial No. 75/762,517, 2001 WL 1182755, at *2 (T.T.A.B. Oct. 5, 2001) (“it is the policy of this Board to give very little, if any, evidentiary weight to foreign publications”) (non-precedential); *see* App’x A hereto.

5. Cao’s Remaining Evidence Is Irrelevant or Lacks Probative Value

Finally, to the extent any evidence remains, it is irrelevant or lacks probative value for the following remaining reasons: *First*, many of the documents Cao cites do not contain the phrase “live photo(s),” so are irrelevant for this reason. (App’x A hereto.) The evidence from Cao’s opening trial period, for example, includes at least 22 exhibits that do not contain the term “live photos.” (49 TTABVUE 41 ¶ 101.) *Second*, many of the documents Cao cites contain no information about the underlying product, so it is not clear that the product falls into the relevant class of goods. (App’x A hereto.) For other products, the face of the document indicates that the product does *not* fall into the relevant class. For example, the app in 34 TTABVUE 172–174 appears to help children bring characters to life on their devices. Other products are purely editing tools. (*See, e.g.* 34 TTABVUE 200–203.) At least 38 documents submitted in Cao’s opening trial period, and myriad more of the late-submitted rebuttal documents, fall into this category. (49 TTABVUE 42 ¶ 103.) *Third*, several documents use “live photo(s)” to refer *to Apple*. (App’x A hereto.) Therefore, rather than showing generic use, they show that the author understood “LIVE PHOTO(S)” as the name of Apple’s app and the files that app creates. (49 TTABVUE 41 ¶ 102.) *Finally*, Cao’s evidence is riddled with dupes, some direct dupes with the same

document being submitted twice under different exhibit numbers, and others indirect dupes, where Cao pads his submission with multiple documents all showing that just one third party has used the phrase “live photos.” (App’x. A hereto.) For example, he submits more than 40 documents all of which merely show that one third party entity, LG, has used the phrase “Live Photo” (albeit in a non-generic, referential way). This is misleading and deceptive.

C. Cao Fails To Meet His Burden Of Establishing That The LIVE PHOTOS Mark Is Understood By The Relevant Public Primarily As The Generic Name For A Category Of Goods

Even accepting Cao’s evidence, which the Board should not, Cao has failed to establish that the LIVE PHOTOS mark is generic. Cao has not shown that the relevant public understands software that records video, image, and sound together as “Live Photos.” See *Booking.com*, 140 S. Ct. at 2304–05 (if “‘Booking.com’ were generic, we might expect consumers to understand Travelocity—another such service—to be a ‘Booking.com.’”).

As discussed above, the examiner has already approved Apple’s application for LIVE PHOTOS and determined the mark is suggestive. The burden in challenging Apple’s application as generic lies with Cao. Yet Cao has not introduced any consumer evidence to support his position, such as letters, testimony from consumers, or affidavits from consumers showing generic use or understanding of the mark LIVE PHOTOS. *Magic Wand*, 940 F.2d at 641, 19 U.S.P.Q. at 1553 (upholding TTAB decision finding mark not generic where TTAB noted the lack of survey evidence, testimony, or affidavits from consumers). Instead, he relies on dictionary definitions of “live” and “photo” *separately*, as there is no definition of the *composite* phrase “live photos,” then contorts the definitions to try to get to his point; the irrelevant and inadmissible third party use evidence just described; and evidence of Apple’s own use. At the end, none of this is availing.

1. Dictionary Evidence Establishes That “LIVE PHOTOS” Is Not Generic

To make his genericness argument, Cao first cites to one of the 22 dictionary definitions of the word “live” found in the Merriam-Webster Dictionary, then cross-references that definition with one of the 20 definitions of the word “life” to concoct a definition for “live photos.” This dictionary evidence

does not help Cao’s case. Instead, as discussed above, dictionary evidence overwhelmingly shows that LIVE PHOTOS is *not* generic because “live photos” is *not defined* in the vast majority of dictionaries, and those that do define the phrase do so *by reference to Apple*. (Compare 49 TTABVUE 378–439 with 49 TTABVUE 440–442.) *Baroness Small Ests.*, 104 U.S.P.Q.2d at 1228 (mark not generic where the vast majority of referenced works listed no meaning for applicant’s mark). Cao’s cherry picking among the more than 40 definitions of “live” and “life,” none of which are connected to photography, does not satisfy his burden.

2. Cao Has Not Shown That the Phrase “LIVE PHOTOS” Was Generic When Apple Adopted It

Relying entirely on the irrelevant, inadmissible evidence described above, Cao next claims that the LIVE PHOTOS mark was generic before Apple began using the term. (72 TTABVUE 15–16.) The evidence is to the contrary.

First, in the months following Apple’s launch, press reporting on Apple’s LIVE PHOTOS feature regularly included explanations about what Apple’s LIVE PHOTOS feature did and/or how the resulting LIVE PHOTO hybrid video/photographs functioned. There would have been no need to do this if “live photos” was a generic, commonly understood term. *Baroness Small Ests.*, 104 U.S.P.Q.2d at 1230 (evidence that articles “spell[ed] out the connection between CMS and the names of the varieties” indicated that consumers “would not immediately understand” the mark). For example,

- A *Verge* article from September 9, 2015 explains that the “camera app captures a second and a half on either side of the photo that you take, and when you tap the photo it will animate.” (53 TTABVUE 34.)
- A *The Wall Street Journal* article from September 23, 2015 explains that the Live Photos feature “captures a three-second burst of video around a photo.” (53 TTABVUE 150.)
- A *Tech Crunch* article from September 2015 explains that “a Live Photo is two files in one -- a 12 megapixel still image and a 15 fps video file that are combined by iOS.” (53 TTABVUE 51.)

See also, e.g., 53 TTABVUE 129, 131, 138, 141, 147, 153, 155, 167.

Second, Apple’s witness Thomas La Perle, Apple’s Senior Director in Apple’s Legal Department and manager of Apple’s Trademark and Copyright Group, testified that Apple “coined the term ‘Live Photos’ for its software feature” and that, although Apple conducted a clearance search for LIVE PHOTOS, there was “*no evidence whatsoever* that [LIVE PHOTOS] was a generic term.” (63 TTABVUE 106-107 at 102:8-103:18) (emphasis added.) The only prior use he was aware of was the HP LIVE PHOTO trademark, which had been registered without disclaiming LIVE PHOTO and was not an example of generic use of the phrase, as it was a registered trademark. (63 TTABVUE 106 at 102:11–23.)¹⁴

Third, Google Trends data from a replication of a Google Trends search that Mr. La Perle conducted for the time period January 1, 2015 to September 23, 2020 shows there were “virtually no” Google searches for the phrase “‘live photos’ before Apple’s announcement in September of 2015,” but that afterward, there was a “large spike” followed by continued searching for this phrase. (63 TTABVUE 310;¹⁵ 63 TTABVUE 213–215 at 209:17–211:19.) The dearth of search traffic for the phrase “live photos” prior to Apple’s announcement shows that it was not generic in 2015 (nor is it now, as related queries and topics in the Google trends report show a continued association between Apple and the phrase). (63 TTABVUE 310.)

The limited evidence Cao cites in his trial brief to support his position that LIVE PHOTOS was generic when Apple adopted it is insufficient to meet his burden. Specifically, Cao cites 12 documents submitted for the first time on rebuttal to support this argument, and two documents submitted in his opening trial period that, among other things, do not appear to relate to goods in the relevant genus. In addition to these overarching evidentiary issues already mentioned, and the fact that the dates on these documents are all hearsay, the cited documents are not probative for the following reasons:

¹⁴ Apple and HP entered into a coexistence agreement to allow Apple’s LIVE PHOTOS mark to register.

¹⁵ Apple used the document during its redirect of Mr. La Perle during Mr. La Perle’s cross, as it related to evidence Cao offered during that exam, and Cao’s counsel had the opportunity to question Mr. La Perle about the document. (63 TTABVUE 213-215 at 209:17–211:19.)

a. **Article re HTC Zoe.** Four of the documents relate to software from HTC. Two are from the same little-known website, gottabemobile.com, and do not use “live photos” as a generic term for HTC Zoe’s software or the photo/video files the software creates. Instead, they use “live photo” to describe HTC’s photo gallery in the phrase “live photo gallery.” (38 TTABVUE 6–12, 25–35.) The third article comes from the similarly unfamiliar source, hothardware.com, and uses the generic phrase “living photo” to refer to HTC Zoe’s photo/video files, not “live photo.” (71 TTABVUE 42–47) The word “live” in this document appears only as an adjective to refer to an active photo, *i.e.*, one that has Zoe functionality working. The fourth document is a YouTube video with only 862 views, which contains a caption with the phrase “Live photo feature,” with a capital “L,” indicating that the author may have viewed “Live” as a coined term in this context, rather than a generic phrase. *In re Country Music*, 100 U.S.P.Q.2d at 1831.

b. **User Manuals:** Seven of the documents are purportedly user manuals printed from the Internet in 2020 for devices from Acer, ZTE, Lenovo, and Best Buy. (71 TTABVUE 78–86, 99–101, 112–114, 127–130, 138–141, 153–156.) These also do not prove Cao’s position. *First*, accepting the dates on the manuals, which this Board **should not** as they are hearsay, only **two** of the cited manuals contain a date that pre-dates Apple’s launch. (71 TTABVUE 78–86.) (Lenovo Tab 2 manual has no date (71 TTABVUE 99–101, 112–114) and Best Buy manuals say “copyright 2015,” so could have been created after Apple’s announcement (71 TTABVUE 127–130, 138–141, 153–156).) *Second*, the User Manuals capitalize either “Live” or “Live” and “Photo,” suggesting the third parties are using the terms as brands, rather than generic terms. *In re Country Music*, 100 U.S.P.Q.2d at 1831. *Third*, the manuals contain no information about the purported “Live Photo” or “Live photo” products, so it is impossible to tell if the products are in the relevant genus. *Fourth*, there is no proof that any of these purported user manuals were distributed in the United States. Amazon.com and BestBuy.com reviews for the devices in the manuals are classic hearsay and, in any case, do not prove that the versions of the manuals currently available online in 2021 were distributed in 2015.

c. Single Customer Review of Blue Studio G: One document is an Amazon review from an unknown individual called “scsq” claiming that the Blue Studio G has a “live photo mode.” (67 TTABVUE 24–25.) It is the quintessence of unreliability. The Board has no idea who this person is, where she is actually located, how many people saw this post, or what this supposed “live photo mode” is and whether it falls into the relevant genus.

d. Product Description in an Android App. One document is a posting for the app “Autumn Leaves,” which purportedly allows users to “create your live photo wallpaper with effects.” (38 TTABVUE 117.) The post uses “live photo” descriptively to describe wallpaper, not as a generic term, and had only around 1,000 installs. The product also is not in the correct genus, as there is no evidence the app records images, video, and sound.

e. Lenovo A10 Product Review. The final document Cao cites to support his argument that the LIVE PHOTOS mark was generic prior to Apple’s announcement is a review from the website “laptopmag.com” with the phrase “live photo” on page 8. (38 TTABVUE 33.) It contains no information about what “live photo” is, where the product was distributed, how many people viewed the review, or whether any of those people were located in the United States.

Nothing about Cao’s evidence indicates that “Live Photos” was *primarily* understood as a generic term when Apple adopted it.

3. There Is No Rule That A Mark Is Generic If Used As A Noun

Cao next argues that the LIVE PHOTOS mark is generic because Apple uses “Live Photos” as a noun to refer to both its software and the video/photo files it creates. (72 TTABVUE 27–28.) Cao is wrong as a matter of law and fact. There is no rule that a trademark is generic if it is used as a noun. As the Federal Circuit explained over thirty years ago, “it is not destructive of the trademark function to identify a product by the name coined by its purveyor.” *In re Montrachet S.A.*, 878 F.2d 375, 377, 11 U.S.P.Q.2d 1393, 1395 (Fed. Cir. 1989). The Ninth Circuit recently agreed, stating:

When Congress amended the Lanham Act to specify that the primary significance test applies to claims of genericide, it specifically acknowledged that a speaker might use a

trademark as the name for a product, i.e., as a noun, and yet use the mark with a particular source in mind, i.e., as a trademark. It further explained that:

A trademark can serve a dual function—that of [naming] a product while at the same time indicating its source. Admittedly, if a product is unique, it is more likely that the trademark adopted and used to identify that product will be used as if it were the identifying name of that product. But this is not conclusive of whether the mark is generic.

In this way, Congress has instructed us that a speaker might use a trademark as a noun and still use the term in a source-identifying trademark sense

Elliott v. Google, Inc., 860 F.3d 1151, 1157–58, 123 U.S.P.Q.2D 1037, 1040 (9th Cir. 2017) (quoting S. Rep. No. 98–627, at 5 (1984)); *see also In re DC Comics, Inc.*, 689 F.2d 1042, 1054, 215 U.S.P.Q. 394, 404 (C.C.P.A. 1982) (concurring) (“trademark concepts do not require the condemnation of normal commercial language”); *CPC Int’l, Inc. v. Balzola Foods Corp.*, 224 U.S.P.Q. 85, 87 (S.D. Fla. 1984) (“It is not mandatory that a trademark owner engage in redundancy in its advertising or promotional literature by following every use of its trademark with the generic words for the product.”).

Cao’s authority is not to the contrary. It stands only for the unremarkable proposition that a trademark owner using a word as a **generic** noun for a class of goods indicates that the term is generic. In other words, the words used refer to a category of products, not the trademark owner’s specific product. The cites say nothing about using a trademark as a **proper noun** to refer to the trademark owner’s particular goods. *See, e.g., Retail Servs., Inc. v. Freebies Publ’g*, 364 F.3d 535, 545, 70 U.S.P.Q.2d 1603, 1611 (4th Cir. 2004) (trademark owners used the phrase “fabulous freebies offered by your own special team” and testified that this use was “consistent with the commonly understood meaning of the word”); *Colt Def. LLC v. Bushmaster Firearms, Inc.*, 486 F.3d 701, 705–06, 82 U.S.P.Q.2d 1759, 1762–63 (1st Cir. 2007) (trademark owner used its trademark as the common word for a type of rifle); McCarthy § 12:13 (trademark owner’s use of the term “as a *generic* name [] is strong evidence of genericness”) (emphasis added).¹⁶ The cites say nothing about using a trademark as a **proper noun** to refer to the trademark owner’s particular product.

¹⁶ *In re Gould Paper Corp.* is similarly unhelpful to Cao, as it has nothing to do with noun usage. 834 F.2d 1017, 5 U.S.P.Q.2d 1110 (Fed. Cir. 1987). Rather, the applicant admitted its product called

Nor would Cao’s part-of-speech rule make sense, as it is common practice to use trademarks as nouns. (63 TTABVUE 60-61 at 56:11–14; 57:3–16.) Coca-Cola famously used the slogan “Drink Coca-Cola” (63 TTABVUE 61 at 57:3–7), TikTok refers to “videos on TikTok” (34 TTABVUE 203), Samsung promotes its Galaxy phone stating, “Discover more about Galaxy for yourself” (52 TTABVUE 538). (*See, e.g.*, 52 TTABVUE 45–48.) Even Cao uses his trademark SPIN EXPLORER as a noun. (48 TTABVUE 262 at 247:8–19; 48 TTABVUE 494 (“Open Spin Explorer”).) It cannot be that each of these brands has somehow lost trademark protection or cannot serve as a source identifier.

With this background, Apple’s use of the LIVE PHOTOS mark, whether as a noun or otherwise, is plainly trademark usage, and consumers would understand it as such. *First*, Apple’s materials surrounding the launch of LIVE PHOTOS include phrases like “called Live Photos,” Apple “announces Live Photos!” and the “new feature for the camera is Live Photos,” which indicate LIVE PHOTOS is a proper name. (72 TTABVUE 27.) *Second*, Apple dedicated television commercials and a portion of its website to the LIVE PHOTOS feature, announced it on the main stage at Apple’s Special Event, and included it as a key feature of the iPhone 6s release, something it would not do for a mere generic term. (49 TTABVUE 4, 10–17 ¶¶ 10, 24–38; 63 TTABVUE 99, 103 at 95:12–16, 99:9–15.) *Third*, LIVE PHOTOS appears on Apple’s “non-exhaustive list of Apple’s trademarks and service marks” with instructions for third parties to use the phrase with a TM symbol. (49 TTABVUE 12 ¶ 28.) *Fourth*, Apple uses phrases *other than* LIVE PHOTOS as the generic term for its products, such as “feature” for the software and “still photos with motion and sound” (51 TTABVUE 17) or “a moment captured with movement and sound” for the resulting hybrid video/photo file. (52 TTABVUE 49.)

In addition to his part-of-speech rule, Cao argues that consumers would not perceive Apple’s use of LIVE PHOTOS as trademark usage because Apple capitalizes some non-brand names like Ultra Wide and Depth Control. (72 TTABVUE 31.) This argument is also a stretch. As just described, Apple’s extensive advertising and promotion of its LIVE PHOTOS brand distinguishes that mark from these other

SCREENWIPE was “a . . . wipe . . . for . . . screens,” so the name combined the “two most pertinent and individually generic terms applicable to its product.” *Id.* at 1112. That is not what Apple has done here.

terms. (63 TTABVUE 97-98 at 94:24–95:1.) Also, contrary to Cao’s claim, Mr. La Perle testified that capitalization *is* one relevant “factor” in determining whether a word is a trademark. (63 TTABVUE 75 at 71:12–16.)

Cao also argues that consumers would not perceive Apple’s use of LIVE PHOTOS as a trademark use because “Apple uses the term ‘live photos’ in the exact same manner that it uses the generic terms ‘traditional photo’ and ‘still photo.’” (72 TTABVUE 30.) Cao is wrong. “Traditional photo” and “still photo” were not the subject of ads, not the subject of dedicated pages of Apple’s website, and not capitalized. Apple, thus, treated “Live Photos” different from these other terms.

Cao’s reliance on Apple’s patent application is misplaced as well. In this application, Apple used the phrase “live photo(s)” just four times, the first time in quotes (“Stored ‘live photos’”) with the explanation that the term means “assets that have both still image portions and video portions.” (34 TTABVUE 159.) If “Live Photos” were a generic term, there would have been no reason to put it in quotes or to explain what the phrase means. ((49 TTABVUE 47 ¶ 113.) Apple then used “live photo” three times as an adjective, not generic noun (“live photo assets”).

In short, Cao has not shown that consumers would understand Apple’s use of the phrase LIVE PHOTO(S) as referring to a generic hybrid photo/video software or generic hybrid photo/video. Nor could it, as Apple uses this term specifically and exclusively to refer to its own software and the file *that software* creates. *Elliott*, 860 F.3d at 1162, 123 U.S.P.Q.2d at 1043 (evidence that a Google co-founder told people to “keep googling” did not show the mark was generic, as it was not, and likely could not, be shown that the founder “had no particular search engine in mind” when he made this statement).

4. Evidence Showing Public Usage of LIVE PHOTOS Does Not Establish that the Mark Is Generic

Finally, Cao argues that “bloggers, journalists, Apple’s competitors, and the relevant public” use “‘live photos’ in a generic manner with respect to both a digital still image with animation added and the software that produces such an image.” (72 TTABVUE 31.) The evidence does not support this conclusion. As shown *supra* VI.B.4, numerous articles connect the LIVE PHOTOS trademark

specifically to Apple, and use it with a capital “L” and capital “P” and other language indicating they understand “Live Photos” as a product name. (See, e.g., 53 TTABVUE 155 (*The Boston Herald*: “dubbed Live Photos”); 53 TTABVUE 158 (*Biloxi Sun*: “Apple calls this ‘Live Photos’”); 53 TTABVUE 159 (*Charlotte Business Journal*: “transformative new approach to photography called Live Photos”); 53 TTABVUE 169 (*The Delta Discovery*: “Another feature called ‘Live Photos’”); 53 TTABVUE 189 (*WKG - 101.5*, Columbus, Indiana: “capture what Apple calls ‘Live Photos.’”).) Such “recognition in a substantial number of publications that the source of the [Live Photos feature] was [Apple]” weighs against a finding that the mark is generic. *In re Merrill Lynch*, 828 F.2d at 1571, 4 U.S.P.Q.2d at 1143; see also *Zimmerman*, 70 U.S.P.Q.2d at 1434 (finding it “instructive that in a majority of” press articles, the trademark is “capitalized and used in a manner consistent with respondent’s position that this term functions as an identifier for its members”).

Cao attempts to counter this evidence with the same inadmissible, irrelevant documents previously discussed, most of which were submitted only on rebuttal. The Board should exclude the evidence. (App’x A hereto.) But if it does not, the evidence is nonetheless insufficient to carry Cao’s burden. As an initial matter, in considering the evidence, it is important to note that Apple submitted articles from at least *nine* of the top-25 U.S. daily newspapers from Fall 2019 and discussed articles from several more in Mr. La Perle’s declaration. (53 TTABVUE 262–264; 49 TTABVUE 8, 24–25, 28 ¶¶ 22 n.1, 56, 60 n. 3.) The contrast in evidence is telling. *In re Country Music*, 100 U.S.P.Q.2d at 1830 (“comparative obscurity of the third-party uses raises doubt about whether the relevant public will perceive the phrase as generic or as an element of various trade names”).

Cao’s evidence also suffers from myriad flaws that undermine its persuasiveness:

a. **User Manuals and Related Product Specifications/Reviews.** Cao cites a series of user manuals and related product specifications and reviews regarding LG, ZTE, and Ematic devices and a promotion from Blu Studio One Plus. Cao offers no evidence about circulation, viewership, or sales for any of these documents or devices. TBMP § 704.08(b). In any case, it is commonly known that Apple is one of the most innovative and admired companies in the world and a leader in technology (especially

mobile phone products). As such, competitors often refer to Apple’s features in a comparative advertising sense, but that is *not* generic use. That is a direct reference to Apple’s feature, precisely because Apple’s features are among the most recognized by consumers due to the popularity of the iPhone.

The CNET and Tech Radar reviews that Cao cites make this comparison explicit, as they both *mention Apple* in reviewing the ZTE Blade’s gif-photo feature. (67 TTABVUE 80–100.) Other articles suggest referential usage as well. For example, when “bdphotovideo.com” says the ZTE phone has “Live Photo capabilities,” this could be a reference to Apple’s feature as a point of comparison. (67 TTABVUE 7–9; *see also* 67 TTABVUE 101–114 (article by “Mriceline Q” on “hayksakian.com” explaining that ZTE’s phone has a “Live Photo mode”).) At the very least, the ambiguity weighs in Apple’s favor, not Cao’s. *In re Federated Dep’t Stores Inc.*, 3 U.S.P.Q.2d 1541, 1543 (T.T.A.B. 1987) (“Since there is no way to determine what motivated the writer to so use the term, we have not given a great deal of weight to that reference.”).

The other purported press coverage and chat posts Cao cites about LG and ZTE (from sources “zdnet.com,” “eweek.com,” “bhphotovideo.com,” “hardreset.info,” and an unnamed community blogger)¹⁷ is similarly unpersuasive. There is no indication that the authors of these articles used the phrase “live photo(s)” because they believe “live photos” is a generic term. Instead, these articles appear to merely parrot the product listings from LG and ZTE. The documents do not show generic use of “live photos,” but instead show third party manufacturers trying to use Apple as a reference point for their own products.

b. Articles About Android Apps. Cao also relies on articles describing Android apps to support his position. But these articles *correctly* use the phrase “Live Photos” to refer to *Apple’s* product. For example, Cao relies heavily on an article of unknown geographic origin from a website called “pocketmeta.com.” (72 TTABVUE 38.) The *opening sentence* states, “When the **new iPhones 6S and**

¹⁷ Cao also cites 66 TTABVUE 161–170, which is an LG press release, not an independent news article.

6S Plus started shipping with the 12-megapixel cameras and **Live Photos**, it was crystal clear the live shots are becoming the next big thing in the world of mobile cameras.” (34 TTABVUE 38 (emphasis added).) Similarly, the article Cao cites from beebom.com begins, “**Apple** introduced a new feature with the new **iPhone 6s and 6s Plus** this year **dubbed, ‘Live Photos,’** which are basically GIF images with sound.” (34 TTABVUE 47 (emphasis added).) These authors obviously understand that “Live Photos” refers to an Apple product and are using Apple’s product as a point of reference. They do not show generic usage. McCarthy § 12:8.

c. **Third Party Apps.** Cao also cites twelve third party apps with the phrase “Live Photos” in their names or text descriptions. (72 TTABVUE 39.) These apps do not show “generic” use of “live photos.” *First*, seven of the apps are no longer available or have changed their names to no longer include “Live Photos,” due at least in part to Apple’s enforcement efforts. (49 TTABVUE 43–44 ¶¶ 105–106.) Therefore, if anything, this evidence shows that third parties have tried to trade off Apple’s goodwill by offering apps under infringing names. (49 TTABVUE 44–45 ¶ 106.) *Second*, to the extent any of these apps continue to use the phrase “Live Photo(s)” in either the product name or product descriptions, it is not clear that they are using the phrase generically (as opposed to with Apple’s product in mind) or that the products fall into the relevant genus.

c. **Google Pixel Community Posts.** Finally, Cao cites two posts with a total of 40 “upvotes” from the Google Pixel Phone Community board that use the phrase “live photos,” both of which were submitted only on rebuttal. (72 TTABVUE 40.) Cao offers no evidence regarding what these individuals were thinking when they used the phrase “live photos,” or whether they understood the phrase as a generic term. Consumers often use words loosely in casual speech, even though they actually “are fully aware of the trademark significance of the term.” McCarthy § 12:8.

In sum, the overwhelming evidence from reliable sources shows that Live Photos is a proper name that refers to Apple. Even if the Board admits Cao’s evidence, which it should not, the evidence falls well short of establishing that consumers primarily understand LIVE PHOTOS as a generic term. “Mixed” usage does not satisfy Cao’s burden. *Baroness Small Ests.*, 104 U.S.P.Q.2d at 1228.

D. LIVE PHOTO Is the Coined Brand Name for the Hybrid Photo/Videos That Apple’s Software Creates

Faced with evidence showing that Apple’s LIVE PHOTOS mark is not generic for Apple’s software, Cao pivots to arguing that “live photo” is the generic name for “a still image with animation” and that the name LIVE PHOTOS is, therefore, generic for Apple’s software because the software’s purpose is to create these “live photos.” (72 TTABVUE 21–23.) The entire premise of this argument is wrong. For all the reasons just described, the evidence does not show that “live photo” is the generic name for photographs with animation. Instead, LIVE PHOTO refers specifically to the hybrid video/photograph file that *Apple’s software* creates. (63 TTABVUE 19-20, 32, 55-56 at 15:18–23, 16:13–22, 28:2–6, 51:13–52:5.) As Apple’s witness Mr. La Perle explained, “[T]here’s no such thing . . . as Live Photo outside of Live Photos.” (63 TTABVUE 23 at 19:15–16.) It is the “trademark” for the “file format-type” created by the Live Photos software. (63 TTABVUE 43 at 39:8–13; *see also* 63 TTABVUE 49 at 45:22–25.)

Cao’s position seems to be that a trademark cannot function as both the name of software and a trademark for the file that software creates. This theory is ludicrous, as it would invalidate myriad trademarks in the software space. Excel software creates an Excel file. The QuickTime software creates a QuickTime file format. (63 TTABVUE 55-56 at 51:24–52:2.) PowerPoint creates a PowerPoint slide deck. Uber software allows consumers to call an UberX car. HTC even called the photo/videos created by its Zoe software “Zoe’s.” (*See* 39 TTABVUE 35 at 27:33–45.) Consumers would understand that Apple has done the same thing with its LIVE PHOTOS software feature.

Because LIVE PHOTO is not generic, this case is markedly different from the cases Cao cites. In *Hunt Masters, Inc. v. Landry’s Seafood Restaurant, Inc.*, THE CHARLOTTE CRAB HOUSE restaurant served the *generic* dish “crab,” so was a generic name for the restaurant. 240 F.3d 251, 254, 57 U.S.P.Q.2d 1884, 1885 (4th Cir. 2001). In *In re Cordua Restaurants, Inc.*, the mark CHURRASCOS for restaurant services was generic because, as dictionaries confirmed and applicant admitted, “churrasco” was a generic term for “grilled meat” or “grilled steak” cooked over an open fire, one of the main dishes

the CHURRASCOS restaurant served. 823 F.3d 594, 603–04, 118 U.S.P.Q.2d 1632, 1637 (Fed. Cir. 2016). Here, by contrast, the output of Apple’s LIVE PHOTOS product is not a generic file of the same name, it is a file *branded* “LIVE PHOTO.” (63 TTABVUE 23 at 19:15–16.)¹⁸

In re LHS Productions, Inc. dba Video Bank is irrelevant for similar reasons. In that case, a dictionary and various websites defined the proposed trademark VIRTUAL MEETING ROOM as the name for all rooms where users could meet and collaborate online. Serial No. 87/060,327, 2018 WL 3585249, at *4–12 (T.T.A.B. June 26, 2018) (non-precedential). Here, no such dictionary evidence exists and the weight of the evidence from well-known, heavily circulated, U.S. sources shows use of LIVE PHOTOS to refer specifically to Apple’s product.

VIII. CAO LACKS STANDING TO OPPOSE APPLE’S REGISTRATION OF LIVE PHOTOS

Cao’s opposition also fails because Cao lacks standing to oppose the registration of Apple’s LIVE PHOTOS mark. In order to have standing, an opposer must have both “a real interest in the proceeding [as well as] a reasonable basis for [its] belief of damage.” *Ritchie v. Simpson*, 170 F.3d 1092, 1095–96, 50 U.S.P.Q.2d 1023, 1025–26 (Fed. Cir. 1999) (internal quotation marks omitted); TBMP § 309.03(b). A “real interest” is a “direct and personal stake” in the outcome of the proceeding. *Ritchie*, 170 F.3d at 1095, 50 U.S.P.Q.2d at 1026.¹⁹ Where, as here, genericness or descriptiveness of the mark is at issue, an opposer may plead, but must “later prove” its standing “by alleging that it is engaged in the sale of the same or related products or services (or that the product or service in question is within the normal expansion of [opposer’s] business) and that the [opposer] has an interest in using the term descriptively in its business. (That is, [opposer] may plead that it is a competitor.)” TBMP § 309.03(b). Cao did not meet his burden.

¹⁸ Cao’s reliance on various .com cases is misplaced for similar reasons. (72 TTABVUE 22.) Unlike “hotel,” or “lawyer,” the underlying phrase “LIVE PHOTOS” is not generic. These cases also are of limited value given the Supreme Court’s recent holding in *Booking.com*.

¹⁹ In *Syngenta Crop Protection, Inc. v Bio-Chek, LLC*, on which Cao relies, there was testimony in the record that the opposer actually *used* the trademark at issue. 90 U.S.P.Q.2d 1112, 1118 (T.T.A.B. 2009). Cao has not shown actual use.

As an initial matter, Cao has failed to establish that he has a direct personal stake in the outcome of these proceedings. Cao does not engage in the sale of products that compete with Apple’s LIVE PHOTOS software feature or serve as substitutes for Apple’s software feature. (49 TTABVUE 38 ¶ 92.) That is because, unlike Apple’s products, Cao’s products do not simultaneously take still photographs and short video clips and store them together as a hybrid medium. (*Id.*; 39 TTABVUE 5–8 ¶ 6–12.) In fact, they do not take photographs or videos at all. Rather, Cao’s apps allow users to scan through a series of distinct photographs and/or fast forward and rewind video with a spinning gesture. (48 TTABVUE 490–497.) This is presumably why Cao named his apps using the word “spin.” By contrast, Cao has never used “live photos” for these Spin Apps or *any other product*.

Cao also does not use LIVE PHOTOS in connection with his Spin Apps, (*see* 39 TTABVUE 9 ¶ 15), or any other product (48 TTABVUE 247 at 232:13–23). Nor does he have any business cards, advertising, letterhead, or other public-facing materials using this term. (48 TTABVUE 246–253 at 231:10–238:12.) Aside from a single-page, never acted upon “marketing plan,” self-servingly created after Apple’s announcement, he also has no proof, such as advertising or product mock-ups, that he plans to use the term in the future. (48 TTABVUE 226–228, 232, 234–236 at 211:25–213:11, 217:16–25, 219:4–221:18.) This type of self-serving, after the fact created evidence is of low probative value.

Further, although Cao owns two domain names containing the phrase “live photo,” his treatment of these domains is telling. Cao has owned the domains since 2011, yet these websites *did not exist*, *i.e.*, had no content, until after Apple’s high-profile announcement of the LIVE PHOTOS feature. (48 TTABVUE 146, 148–149 at 131:13–20; 133:23–134:5.) Instead, they automatically redirected visitors to a different website, create.ca, owned by a different entity, where they were listed *for sale*. (48 TTABVUE 152–153 at 137:14–138:4; 48 TTABVUE 471; 51 TTABVUE 5–11.) This is in spite of the fact that Cao purportedly created his spin browser feature in or around 2012. (39 TTABVUE 5–6 ¶ 6.) In other words, if Cao truly cared about using the Live Photo Domains to promote his Spin products, he could have started using the domains for that very purpose years before Apple’s announcement. But he did not, severely undercutting his current position.

Then, after Apple’s announcement, Cao, for the first time, began using the Live Photo Domains “temporarily” to “display static photos,” before inactivating both websites in December of 2017. (48 TTABVUE 2018–214 at 193:17–194:6; 196:17–19; 199:7–8; 39 TTABVUE 9 ¶ 14.) The Live Photo Domains remain inactive today. (48 TTABVUE 213, 215 at 198:4–11; 200:4–24; 48 TTABVUE 487–488; 49 TTABVUE 40 ¶ 98.) Cao never offered his products for sale, download, or otherwise through these domains. (53 TTABVUE 20 at RFA 15–16.)

Cao’s only other purported evidence of his interest in the phrase LIVE PHOTOS is a confidential patent application [REDACTED]. (72 TTABVUE 17; 70 TTABVUE 65-75.) Much like Cao’s decision to redirect the Live Photo Domains away from the “for sale” page after Apple’s announcement, this too is contrived. Cao did not file this patent application until November 2015, months after Apple’s announcement. (69 TTABVUE 11–13.) Importantly, the one patent application he filed *before* Apple’s announcement [REDACTED] (70 TTABVUE 5–39.) Cao’s attempts to manufacture a “real interest” in this proceeding should be rejected, as it is an abuse of, and a burden on, the TTAB process.

Cao also does not have a reasonable basis for belief of damage. Cao has been offering his Spin Apps since 2017 without using the phrase “live photo(s),” yet identifies no ways in which his sale or promotion of those apps has been harmed or hindered by his choice not to use this phrase to promote them. Cao has only claimed to wish to use “live photo(s)” descriptively or generically. (39 TTABVUE 9, 32–33 ¶ 14, 37.) As Apple explained, it has no interest in interfering with anyone’s use of the phrase “live photos” descriptively in a manner that constitutes descriptive fair use. (49 TTABVUE 39 ¶ 95.) Without proof of Cao’s business activities or a real interest in the LIVE PHOTOS mark, he lacks standing to bring this opposition. The Board has found no standing in cases where the opposer has presented much more evidence than Cao has presented. *See Blue Collar Brewery, Inc. v. Blue Collar Brewery, LLC*, Opposition No. 91219820, 2017 WL 3446799, at *5 (T.T.A.B. July 18, 2017) (no standing where Opposer did not offer proof of its business activities) (non-precedential); *Automattic, Inc. v. Pearson*, Cancellation No. 92061714, 2017 WL 2297914, at *5 (T.T.A.B. Apr. 20, 2017) (no standing where the

record was “devoid of any evidence concerning the nature of Petitioner’s commercial activities and its interest in” the mark) (non-precedential).

Dated: March 16, 2021

Respectfully submitted,

/s/ Dale M. Cendali

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Appendix A

Pursuant to 37 C.F.R. § 2.128(b), Apple submits this appendix of evidentiary objections to Cao's evidence, referenced in Section VII.B of Apple's trial brief. The appendix first addresses documents Cao submitted during his rebuttal period, as those are the main documents cited in his trial brief, and then addresses documents submitted in Cao's opening trial period. Specifically:

- Chart 1 on pages 2 to 8 contains a checklist of Apple's objections to documents submitted in Cao's rebuttal period.
- Pages 9 to 42 describe the objections to each document Cao submitted during the rebuttal period in greater detail.
- Chart 2 on pages 43 to 50 contains a checklist of Apple's objections to documents submitted in Cao's opening trial period.
- Pages 51 to 67 describe the objections to documents Cao submitted during his opening trial period in greater detail.

CHART 1
Summary of Objections to Cao's Rebuttal Evidence (NOR 7 through 11)

NOR No.	Ex. No.	TTABVUE - Source - Title	Improper Rebuttal Evidence (pg. # of Cao Trial Brief)	Hearsay (FRE 802)	No Circulation Data (FRE 401/403)	Unclear if U.S. source or distributed in U.S. (FRE 401/403)	Duplicative/ Cumulative (FRE 401/403)	Not clear product is in the relevant genus (FRE 401/403)	Foreign Proceeding Evidence (FRE 401/403)	Other Rule 401/403 Objection
7	1	65 TTABVUE 6 - EUIPO - Decision of the Second Board of Appeal of 12 January 2018	x pg. 36						x	
7	2	65 TTABVUE 22 - Canadian Intellectual Property Office - 2017 Trade-marks Journal 2017-03-22 - Vol. 64 No. 3256	x						x	
7	3	65 TTABVUE 25 - Canadian Intellectual Property Office - Trademark Application No. 1979565 for "LIVE PHOTOS"	x						x	
7	4	65 TTABVUE 27 - Canadian Intellectual Property Office - Trademark Application No. 1971887 for "LIVE PHOTOS"	x						x	
7	5	65 TTABVUE 30 - Canadian Intellectual Property Office - Trademark Application No. 1971886 for "LIVE PHOTOS"	x						x	
7	6	65 TTABVUE 32 - Canadian Intellectual Property Office - Trademark Application No. 1971885 for "LIVE PHOTOS"	x						x	
7	7	65 TTABVUE 35 - Canadian Intellectual Property Office - Trademark Application No. 1971884 for "LIVE PHOTOS"	x						x	
7	8	65 TTABVUE 37 - Canadian Intellectual Property Office - Trademark Application No. 1971883 for "LIVE PHOTOS"	x						x	
7	9	65 TTABVUE 40 - Canadian Intellectual Property Office - Trademark Application No. 1971882 for "LIVE PHOTOS"	x						x	
7	10	65 TTABVUE 42 - Canadian Intellectual Property Office - Trademark Application No. 1745321 for "LIVE PHOTOS"	x						x	
7	11	65 TTABVUE 46 - Canadian Intellectual Property Office - Trademark Application No. 1995940 for "LivePhotosKit"	x						x	

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7	12	65 TTABVUE 48 - Canadian Intellectual Property Office - Trademark Application No. 1853995 for "LivePhotosKit"	x						x	
8	1	66 TTABVUE 9 - Cricket Wireless - LG K92 5G User Guide	x pg. 26	x	x		x			
8	2	66 TTABVUE 12 - AT&T - LG K92 5G 128 GB in Titan Gray	x pg. 26	x	x		x			
8	3	66 TTABVUE 24 - LG - LG G8X ThinQ for Sprint	x pg. 26	x	x		x			
8	4	66 TTABVUE 29 - LG - LG Wing for T-Mobile	x pg. 26	x	x		x			
8	5	66 TTABVUE 34 - LG (via AT&T) - LG Wing LM-F100VM User Guide	x pg. 26	x	x		x			
8	6	66 TTABVUE 37 - AT&T - LG Wing 5G 256 GB in Aurora Gray	x pg. 26	x	x		x			
8	7	66 TTABVUE 49 - LG - LG Velvet for Verizon	x pg. 26	x	x		x			
8	8	66 TTABVUE 55 - LG (via AT&T) - LM-G900UM User Guide	x pg. 26	x	x		x			
8	9	66 TTABVUE 58 - LG (via AT&T) - LM-G820UM User Guide	x pg. 26	x	x		x			
8	10	66 TTABVUE 61 - LG - LG V60 ThinQ 5G	x pg. 27	x	x		x			
8	11	66 TTABVUE 66 - AT&T - LG V60 ThinQ 5G	x pg. 27	x	x		x			
8	12	66 TTABVUE 79 - LG (via Sprint) - LG G8X ThinQ LM-G850UM User Guide	x pg. 27	x	x		x			
8	13	66 TTABVUE 82 - LG - LG G8X ThinQ for AT&T	x pg. 27	x	x		x			
8	14	66 TTABVUE 87 - LG - LG V50 ThinQ for Verizon	x pg. 27	x	x		x			
8	15	66 TTABVUE 92 - LG - LG G8 ThinQ for Verizon	x pg. 27	x	x		x			
8	16	66 TTABVUE 97 - LG (via Sprint) - LG G8 ThinQ LM-G820UM User Guide	x pg. 27	x	x		x			
8	17	66 TTABVUE 100 - ZD Net - T-Mobile LG G8 ThinQ review: An affordable, customizable flagship worth considering	x pg. 25	x	x		x			
8	18	66 TTABVUE 110 - B&H Foto & Electronics - LG G8 ThinQ 128GB Smartphone (Unlocked, Aurora Black, Alexa Edition)	x pg. 25	x	x		x			

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8	19	66 TTABVUE 120 - Wikipedia - LG G8 ThinQ	x pg. 27	x	x		x			
8	20	66 TTABVUE 126 - LG - LG V40 ThinQ for AT&T	x pg. 27	x	x		x			
8	21	66 TTABVUE 133 - AT&T - LG V40 ThinQ	x pg. 27	x	x		x			
8	22	66 TTABVUE 145 - ZD Net - Five camera shootout: LG V40 vs Galaxy S10 Plus	x pg. 25	x	x		x			
8	23	66 TTABVUE 151 - YouTube - How to Enable Live Photo in LG V40 ThinQ - Turn On/Off Live Photo	x pg. 25	x		x	x			x
8	24	66 TTABVUE 155 - LG (via T-Mobile) - LG G7 ThinQ LM-G710TM User Guide	x pg. 28	x	x		x			
8	25	66 TTABVUE 158 - Verizon - LG G7 ThinQ User Guide	x pg. 28	x	x		x			
8	26	66 TTABVUE 161 - LG Newsroom - LG G7 ThinQ Offers Deep AI Integration for Maximum User Convenience	x pg. 25	x	x	x	x			
8	27	66 TTABVUE 171 - Sprint - LG G7 ThinQ - More Than Just A Camera	x pg. 25	x	x	x				x
8	28	66 TTABVUE 178 - T-Mobile - Tech specs: LG G7 ThinQ	x pg. 28	x	x		x			
8	29	66 TTABVUE 185 - LG (via Cricket Wireless) - LM-V350ULM User Guide	x pg. 28	x	x		x			
8	30	66 TTABVUE 188 - Cricket Wireless - LG V35 ThinQ	x pg. 28	x	x		x			
8	31	66 TTABVUE 191 - LG - LG Wing for AT&T	x pg. 28	x	x		x			
8	32	66 TTABVUE 196 - LG - LG Wing for Verizon	x pg. 28	x	x		x			
8	33	66 TTABVUE 201 - AT&T - LG V60 ThinQ 5G	x pg. 28	x	x		x			
8	34	66 TTABVUE 214 - LG - LG V50 ThinQ for Verizon	x pg. 28	x	x		x			
8	35	66 TTABVUE 219 - LG (via Verizon) - LG G8 ThinQ User Guide	x pg. 28	x	x		x			
8	36	66 TTABVUE 222 - LG - LG V40 ThinQ	x pg. 29	x	x		x			
9	1	71 TTABVUE 8 - Gotta Be Mobile - iPhone 5 vs. HTC One (aka HTC M7)	x	x	x					
9	2	71 TTABVUE 23 - Gotta Be Mobile - HTC One vs. Samsung Galaxy S3	x	x	x		x			

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9	3	71 TTABVUE 41 - Hot Hardware - HTC One Smartphone Review: Android Empowered	x	x	x					
9	4	71 TTABVUE 48 - BBC - Apple's iPad Pro launch event: the online reaction	x	x	x	x				
9	5	71 TTABVUE 57 - YouTube - HTC Desire 616 dual sim (Live photo demo)	x	x		x				x
9	6	71 TTABVUE 61 - The Singju Post - Apple Special Event September 9, 2015 (Full Transcript)	x	x						x
9	7	71 TTABVUE 74 - Amazon - Customer reviews: HTC Desire 616 Dark Grey Dual Sim Unlocked Octa Core 5" GSM WiFi Android Smartphone	x pg. 17	x						x
9	8	71 TTABVUE 78 - Acer (via B&H Foto & Electronics) - Iconia One 7 User's Manual	x	x	x	x		x		
9	10	71 TTABVUE 82 - ZTE (via T-Mobile) - ZTE Obsidian User Manual and Safety Information	x	x	x	x		x		
9	11	71 TTABVUE 87 - Amazon - T-Mobile ZTE Obsidian Z820 8GB Black 4G LTE Smartphone	x pg. 18	x						x
9	12	71 TTABVUE 95 - T-Mobile - ZTE Obsidian Support	x pg. 18	x						x
9	13	71 TTABVUE 99 - Lenovo (via User Manual Wiki) - Lenovo TAB 2 A7-30 User Guide V1.0	x	x	x	x		x		
9	14	71 TTABVUE 102 - Amazon - Lenovo Tab 2 A7 59445601 7-Inch 16 GB Tablet (Black)	x pg. 18	x						x
9	15	71 TTABVUE 112 - Lenovo (via User Manual Wiki) - Lenovo TAB 2 A10-70 User Guide V1.0	x	x	x	x	x	x		
9	16	71 TTABVUE 115 - Amazon - Lenovo TAB2 A10 - 10.1" Tablet (ARM Cortex A53 Quad-Core, FHD IPS, 2GB SDRAM, 16GB SSD, Android 4.4 KitKat) ZA000001US	x pg. 18	x						x
9	17	71 TTABVUE 127 - Insignia (via Bby Static) - Insignia Flex Elite 7.85" Wi-Fi Android Tablet User Guide	x	x	x	x		x		
9	18	71 TTABVUE 131 - Best Buy - Insignia - Flex Elite - 7.85" - 16GB -	x pg. 18	x						x

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9	19	71 TTABVUE 138 - Insignia (via Bby Static) - Insignia Flex 8"/10.1" Wi-Fi Android Tablet	x	x	x	x	x	x		
9	20	71 TTABVUE 142 - Best Buy - Customer Reviews: product name unavailable	x pg. 19	x						x
9	21	71 TTABVUE 151 - Best Buy - Insignia High-Tech Holiday Promotions	x	x						x
9	22	71 TTABVUE 153 - Insignia (via Best Buy) - Insignia Flex 10.1" Android Tablet User Guide	x	x	x	x	x	x		
9	23	71 TTABVUE 157 - Best Buy - Flex - 10.1" - 32GB - White/Silver	x pg. 19	x						x
9	24	71 TTABVUE 166 - Cellphones.ca - ZTE Obsidian Review	x pg. 18	x		x				x
9	25	71 TTABVUE 175 - Tom's Guide - Is ZTE's \$99 Obsidian Smartphone a Good Deal?	x	x						x
9	26	71 TTABVUE 187 - Amazon - Customer reviews: Lenovo Tab 2 A7 59445601 7-Inch 16 GB Tablet (Black)	x	x						x
10	1	67 TTABVUE 7 - Ematic (via FFC ID) - Ematic Funtab Parent's Guide	x pg. 29	x	x	x		x		
10	4	67 TTABVUE 10 - Amazon - Ematic PBS Playtime Pad 7" HD w/ Plug and Play Streaming Stick	x pg. 29	x						x
10	6	67 TTABVUE 18 - B&H Foto & Electronics - BLU Studio One Plus	x pg. 29	x	x	x		x		
10	7	67 TTABVUE 21 - Amazon - Customer reviews: BLU Studio G - Unlocked - White	x pgs. 19, 29	x	x			x		x
10	8	67 TTABVUE 28 - Amazon - BLU Studio XL Android Smartphone - GSM Unlocked - White - Customer Questions & Answers	x pg. 29	x	x			x		x
10	9	67 TTABVUE 31 - ZTE (via The Informr) - Axon 7 Mini User Manual	x pg. 29	x	x	x		x		
10	10	67 TTABVUE 35 - eWeek - ZTE Unveils Smaller Axon 7 Mini Smartphone	x pg. 29	x	x		x	x		
10	11	67 TTABVUE 39 - Newegg - ZTE Axon 7 Mini 32GB 4G LTE Gray Unlocked Smartphone 5.2" 3GB RAM (North American Warranty)	x pg. 29	x	x		x	x		

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10	12	67 TTABVUE 48 - eWeek - ZTE's Axon 7 All-Metal Flagship Smartphone Coming to U. S.	x pg. 29	x	x		x	x		
10	13	67 TTABVUE 52 - Newegg - Axon 7 by ZTE	x pg. 30	x	x		x	x		
10	14	67 TTABVUE 61 - Business Wire - ZTE Shakes Up the U. S. Smartphone Market with Axon 7 Arriving Stateside for #399.98	x pg. 30	x	x		x	x		
10	15	67 TTABVUE 66 - B&H Foto & Electronics - In the Field: The ZTE Axon 7 and 7 Mini Smartphones	x pg. 30	x	x		x			
10	16	67 TTABVUE 74 - Newegg - ZTE Blade V8 Pro Dual Camera Unlocked Smartphone (5.5" Black, 32GB Storage 3GB RAM) US Warranty	x pg. 30	x	x		x	x		
10	17	67 TTABVUE 80 - CNET - ZTE Blade V8 Pro review	x pg. 30	x	x		x			x
10	18	67 TTABVUE 88 - TechRadar - ZTE Blade V8 Pro review	x pg. 30	x	x		x			x
10	19	67 TTABVUE 101 - Hayk Saakian - The Best ZTE Phone In 2020	x pg. 30	x	x		x			
10	20	67 TTABVUE 115 - ZTE (via AT&T) - ZTE Axon M User Guide	x pg. 30	x	x		x	x		
10	21	67 TTABVUE 119 - ZTE - ZTE Blade 10 User Guide	x pg. 30	x	x		x	x		
10	22	67 TTABVUE 122 - ZTE - ZTE Axon 10 Pro User Manual	x pg. 31	x	x		x			
10	23	67 TTABVUE 125 - SnowBrains - How To Take The Best Skiing Photos Using Just Your Smartphone	x pg. 34	x	x			x		
10	24	67 TTABVUE 133 - Counterpoint Research - ZTE & Blu Were The Fastest Growing Smartphone Brands in USA in Q3 2015	x	x						
11	1	68 TTABVUE 5 - Google Play Store - TikTok Wall Picture	x pg. 33	x				x		
11	2	68 TTABVUE 9 - Yahoo Style Canada - You can make TikTok videos into live wallpaper for your phone—here's how	x	x	x	x				
11	3	68 TTABVUE 16 - Google - I can't set just my home screen wallpaper when I have a live wallpaper set to the lockscreen	x pg. 33	x	x			x		

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11	4	68 TTABVUE 22 - Google Play Store - animated gif live wallpaper - Lite	x pg. 33	x		x				
11	5	68 TTABVUE 27 - Google Play Store - VIMAGE - Cinemagraph, Live photos, Moving pictures	x pg. 33	x		x		x		
11	6	68 TTABVUE 32 - Google Play Store - XEFX - D3D Camera & Photo Animator & Wallpaper	x pg. 33	x		x		x		
11	7	68 TTABVUE 37 - Google - How can I put my own live picture as my wallpaper using my Google pixel 3	x pg. 33	x	x			x		

EXHIBITS SUBMITTED IN CAO'S REBUTTAL PERIOD

Cao NOR	Ex. No.	TTABVUE - Source - Title	Objections
7	1	65 TTABVUE 6 EUIPO - Decision of the Second Board of Appeal of 12 January 2018	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 43.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence on “the issue of the generic and/or descriptive nature of the term ‘live photo,’” which is the issue in his affirmative case. (65 TTABVUE 1) (Cao NOR 7). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. Decisions of foreign trademark offices are “irrelevant to the issue here before us, which is governed strictly by the trademark laws and decisions of the tribunals of the United States” and of “no probative value. <i>Puma-Sportschuhfbriken Rudolf Dassler, K.G. v. Superga S.P.A.</i>, 1979 WL 24900, 5 (T.T.A.B. 1979).</p>
7	2	65 TTABVUE 22 Canadian Intellectual Property Office - 2017 Trade-marks Journal 2017-03-22 - Vol. 64 No. 3256	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence, as Cao admits in his NOR that he is submitting the evidence on “the issue of the generic and/or descriptive nature of the term ‘live photo,’” which is the issue in his affirmative case. (65 TTABVUE 1) (Cao NOR 7). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time as it relates to a foreign trademark proceeding. <i>See Puma-Sportschuhfbriken Rudolf Dassler, K.G. v. Superga S.P.A.</i>, 1979 WL 24900, 5 (T.T.A.B. 1979).</p>
7	3	65 TTABVUE 25 Canadian Intellectual Property Office - Trademark Application No. 1979565 for "LIVE PHOTOS"	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence, as Cao admits in his NOR that he is submitting the evidence on “the issue of the generic and/or descriptive nature of the term ‘live photo,’” which is the issue in his affirmative case. (65 TTABVUE 1) (Cao NOR 7). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time as it relates to a foreign trademark proceeding. <i>See Puma-Sportschuhfbriken Rudolf Dassler, K.G. v. Superga S.P.A.</i>, 1979 WL 24900, 5 (T.T.A.B. 1979).</p>
7	4	65 TTABVUE 27 Canadian Intellectual Property Office - Trademark Application No. 1971887 for "LIVE PHOTOS"	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence, as Cao admits in his NOR that he is submitting the evidence on “the issue of the generic and/or descriptive nature of the term ‘live photo,’” which is the issue in his affirmative case. (65 TTABVUE 1) (Cao NOR 7). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time as it relates</p>

			to a foreign trademark proceeding. <i>See Puma-Sportschuhfbriken Rudolf Dassler, K.G. v. Superga S.P.A.</i> , 1979 WL 24900, 5 (T.T.A.B. 1979).
7	5	65 TTABVUE 30 Canadian Intellectual Property Office - Trademark Application No. 1971886 for "LIVE PHOTOS"	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence, as Cao admits in his NOR that he is submitting the evidence on “the issue of the generic and/or descriptive nature of the term ‘live photo,’” which is the issue in his affirmative case. (65 TTABVUE 1) (Cao NOR 7). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time as it relates to a foreign trademark proceeding. <i>Puma-Sportschuhfbriken Rudolf Dassler, K.G. v. Superga S.P.A.</i>, 1979 WL 24900, 5 (T.T.A.B. 1979).</p>
7	6	65 TTABVUE 32 Canadian Intellectual Property Office - Trademark Application No. 1971885 for "LIVE PHOTOS"	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence, as Cao admits in his NOR that he is submitting the evidence on “the issue of the generic and/or descriptive nature of the term ‘live photo,’” which is the issue in his affirmative case. (65 TTABVUE 1) (Cao NOR 7). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time as it relates to a foreign trademark proceeding. <i>Puma-Sportschuhfbriken Rudolf Dassler, K.G. v. Superga S.P.A.</i>, 1979 WL 24900, 5 (T.T.A.B. 1979).</p>
7	7	65 TTABVUE 35 Canadian Intellectual Property Office - Trademark Application No. 1971884 for "LIVE PHOTOS"	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence, as Cao admits in his NOR that he is submitting the evidence on “the issue of the generic and/or descriptive nature of the term ‘live photo,’” which is the issue in his affirmative case. (65 TTABVUE 1) (Cao NOR 7). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time as it relates to a foreign trademark proceeding. <i>Puma-Sportschuhfbriken Rudolf Dassler, K.G. v. Superga S.P.A.</i>, 1979 WL 24900, 5 (T.T.A.B. 1979).</p>
7	8	65 TTABVUE 37 Canadian Intellectual Property Office - Trademark Application No. 1971883 for "LIVE PHOTOS"	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence, as Cao admits in his NOR that he is submitting the evidence on “the issue of the generic and/or descriptive nature of the term ‘live photo,’” which is the issue in his affirmative case. (65 TTABVUE 1) (Cao NOR 7). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time as it relates to a foreign trademark proceeding. <i>Puma-Sportschuhfbriken Rudolf Dassler, K.G. v. Superga S.P.A.</i>, 1979 WL 24900, 5 (T.T.A.B. 1979).</p>
7	9	65 TTABVUE 40 Canadian Intellectual Property Office -	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence, as Cao admits in his NOR that he is submitting the evidence on “the issue of the generic and/or descriptive nature of the term ‘live photo,’” which is the issue in his affirmative case. (65 TTABVUE 1)</p>

		Trademark Application No. 1971882 for "LIVE PHOTOS"	<p>(Cao NOR 7). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time as it relates to a foreign trademark proceeding. <i>Puma-Sportschuhfabriken Rudolf Dassler, K.G. v. Superga S.P.A.</i>, 1979 WL 24900, 5 (T.T.A.B. 1979).</p>
7	10	65 TTABVUE 42 Canadian Intellectual Property Office - Trademark Application No. 1745321 for "LIVE PHOTOS"	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence, as Cao admits in his NOR that he is submitting the evidence on “the issue of the generic and/or descriptive nature of the term ‘live photo,’” which is the issue in his affirmative case. (65 TTABVUE 1) (Cao NOR 7). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time as it relates to a foreign trademark proceeding. <i>Puma-Sportschuhfabriken Rudolf Dassler, K.G. v. Superga S.P.A.</i>, 1979 WL 24900, 5 (T.T.A.B. 1979).</p>
7	11	65 TTABVUE 46 Canadian Intellectual Property Office - Trademark Application No. 1995940 for "LivePhotosKit"	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence, as Cao admits in his NOR that he is submitting the evidence on “the issue of the generic and/or descriptive nature of the term ‘live photo,’” which is the issue in his affirmative case. (65 TTABVUE 1) (Cao NOR 7). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time as it relates to a foreign trademark proceeding. <i>Puma-Sportschuhfabriken Rudolf Dassler, K.G. v. Superga S.P.A.</i>, 1979 WL 24900, 5 (T.T.A.B. 1979).</p>
7	12	65 TTABVUE 48 Canadian Intellectual Property Office - Trademark Application No. 1853995 for "LivePhotosKit"	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence, as Cao admits in his NOR that he is submitting the evidence on “the issue of the generic and/or descriptive nature of the term ‘live photo,’” which is the issue in his affirmative case. (65 TTABVUE 1) (Cao NOR 7). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time as it relates to a foreign trademark proceeding. <i>Puma-Sportschuhfabriken Rudolf Dassler, K.G. v. Superga S.P.A.</i>, 1979 WL 24900, 5 (T.T.A.B. 1979).</p>
8	1	66 TTABVUE 9 Cricket Wireless - LG K92 5G User Guide	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 33) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no</p>

			<p>information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	2	66 TTABVUE 12 AT&T - LG K92 5G 128 GB in Titan Gray	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 33.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	3	66 TTABVUE 24 LG - LG G8X ThinQ for Sprint	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 33.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	4	66 TTABVUE 29 LG - LG Wing for T-Mobile	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. 72 TTABVUE 33.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p>

			<p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	5	66 TTABVUE 34 LG (via AT&T) - LG Wing LM- F100VM User Guide	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 33.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	6	66 TTABVUE 37 AT&T - LG Wing 5G 256 GB in Aurora Gray	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 33.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG).</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	7	66 TTABVUE 49 LG - LG Velvet for Verizon	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 33.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>

8	8	66 TTABVUE 55 LG (via AT&T) - LM-G900UM User Guide	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 33.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	9	66 TTABVUE 58 LG (via AT&T) - LM-G820UM User Guide	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 33.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	10	66 TTABVUE 61 LG - LG V60 ThinQ 5G	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 34) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	11	66 TTABVUE 66	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal</p>

		AT&T - LG V60 ThinQ 5G	<p>evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 34.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	12	66 TTABVUE 79 LG (via Sprint) - LG G8X ThinQ LM-G850UM User Guide	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 34.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	13	66 TTABVUE 82 LG - LG G8X ThinQ for AT&T	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 34.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>

8	14	66 TTABVUE 87 LG - LG V50 ThinQ for Verizon	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 34.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	15	66 TTABVUE 92 LG - LG G8 ThinQ for Verizon	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 34.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	16	66 TTABVUE 97 LG (via Sprint) - LG G8 ThinQ LM- G820UM User Guide	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 34.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>

8	17	66 TTABVUE 100 ZD Net - T-Mobile LG G8 ThinQ review: An affordable, customizable flagship worth considering	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 34.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	18	66 TTABVUE 110 B&H Foto & Electronics - LG G8 ThinQ 128GB Smartphone (Unlocked, Aurora Black, Alexa Edition)	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 34.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	19	66 TTABVUE 120 Wikipedia - LG G8 ThinQ	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 34.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>

8	20	66 TTABVUE 126 LG - LG V40 ThinQ for AT&T	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 34.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	21	66 TTABVUE 133 AT&T - LG V40 ThinQ	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 34.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	22	66 TTABVUE 145 ZD Net - Five camera shootout: LG V40 vs Galaxy S10 Plus	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 34.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>

8	23	66 TTABVUE 151 YouTube - How to Enable Live Photo in LG V40 ThinQ - Turn On/Off Live Photo	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 34.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no evidence that “HardReset.Info,” which posted the YouTube video is a U.S. or U.S.-focused company. <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). There is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the video had only 486 total views, and there is no evidence that any of those were from people located in the United States. TBMP § 704.08(b). <i>Third</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	24	66 TTABVUE 155 LG (via T-Mobile) - LG G7 ThinQ LM-G710TM User Guide	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 35.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	25	66 TTABVUE 158 Verizon - LG G7 ThinQ User Guide	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 35) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p>

			<p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	26	66 TTABVUE 161 LG Newsroom - LG G7 ThinQ Offers Deep AI Integration for Maximum User Convenience	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 32.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no evidence showing the document was distributed in the United States. <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Third</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	27	66 TTABVUE 171 Sprint - LG G7 ThinQ - More Than Just A Camera	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 32.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no evidence showing the document was written by someone in the United States. <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, the post from an unknown individual to a community forum was viewed only 507 times according to the document, and there is no information about what portion of that viewership was from within the United States. TBMP § 704.08(b). <i>Third</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout of a post from an unknown individual submitted without supporting testimony. TBMP § 704.08(b).</p>
8	28	66 TTABVUE 178 T-Mobile - Tech specs: LG G7 ThinQ	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 32.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no</p>

			<p>information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	29	66 TTABVUE 185 LG (via Cricket Wireless) - LM-V350ULM User Guide	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 35.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	30	66 TTABVUE 188 Cricket Wireless - LG V35 ThinQ	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 35.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	31	66 TTABVUE 191 LG - LG Wing for AT&T	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 35.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in</p>

			<p>NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	32	66 TTABVUE 196 LG - LG Wing for Verizon	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 35.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	33	66 TTABVUE 201 AT&T - LG V60 ThinQ 5G	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 35.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG and appears to be an exact duplicate of NOR 8, Exhibit 11 (66 TTABVUE 67).</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	34	66 TTABVUE 214 LG - LG V50 ThinQ for Verizon	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 35.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG and appears to be an exact duplicate of NOR 8, Exhibit 14 (66 TTABVUE 87).</p>

			<p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p> <p>4. Incorrect Endorsement. The exhibit is inadmissible and unreliable because the URL is incorrect. It leads to a different document than the one shown in the exhibit. The URL is also facially inaccurate as it mentions “Sprint,” yet the document is not about sprint.</p>
8	35	66 TTABVUE 219 LG (via Verizon) - LG G8 ThinQ User Guide	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 35) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
8	36	66 TTABVUE 222 LG - LG V40 ThinQ	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 35.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (66 TTABVUE 1) (Cao NOR 8). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as the other exhibits in NOR 8 also relate to LG.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	1	71 TTABVUE 8 Gotta Be Mobile - iPhone 5 vs. HTC One (aka HTC M7)	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 24.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. There is no</p>

			<p>information about circulation or viewership for this document. TBMP § 704.08(b).</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	2	71 TTABVUE 23 Gotta Be Mobile - HTC One vs. Samsung Galaxy S3	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 24.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document is duplicative as it is from the same source as NOR 9, Ex. 1 (71 TTABVUE 8).</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	3	71 TTABVUE 41 Hot Hardware - HTC One Smartphone Review: Android Empowered	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 24.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. There is no information about circulation or viewership for this document. TBMP § 704.08(b).</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	4	71 TTABVUE 48 BBC - Apple's iPad Pro launch event: the online reaction	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 24.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the document is from a non-U. S. news source. <i>In re Thermo LabSys, Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b).</p>

			3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
9	5	71 TTABVUE 57 YouTube - HTC Desire 616 dual sim (Live photo demo)	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 24.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the face of the document shows that only 855 people viewed the video over seven years. <i>Second</i>, there is no evidence that “GSMarena,” which posted the video, is a U.S.-based or U.S. focused company or that any portion of the 855 viewers are from the United States.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b). .</p>
9	6	71 TTABVUE 61 The Singju Post - Apple Special Event September 9, 2015 (Full Transcript)	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. The exhibit is unreliable as it is an unofficial transcription of an Apple special event posted by a non-U.S. source.</p>
9	7	71 TTABVUE 74 Amazon - Customer reviews: HTC Desire 616 Dark Grey Dual Sim Unlocked Octa Core 5" GSM WiFi Android Smartphone	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 24.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time, as it does not contain the phrase “live photo.”</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	8	71 TTABVUE 78 Acer (via B&H Foto & Electronics) - Iconia One 7 User's Manual	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 25.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p>

			<p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no evidence (hearsay or otherwise) that the document is from a U.S. source or was distributed in the United States. <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i>, the document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	10	71 TTABVUE 82 ZTE (via T-Mobile) - ZTE Obsidian User Manual and Safety Information	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 25.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the face of the document does not show it was distributed in the United States. <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i>, the document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	11	71 TTABVUE 87 Amazon - T-Mobile ZTE Obsidian Z820 8GB Black 4G LTE Smartphone	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 25.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time, as it does not mention “live photo(s)” and does not show the user manual in NOR 9, Exhibit 10 (or any othe user manual) was available in the United States prior to Apple’s announcement. Any contrary claim is speculation.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>

9	12	71 TTABVUE 95 T-Mobile - ZTE Obsidian Support	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 25) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time, as it does not mention “live photo(s)” and does not show the user manual in NOR 9, Exhibit 10 (or any other user manual) was available in the United States prior to Apple’s announcement. Any contrary claim is speculation.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	13	71 TTABVUE 99 Lenovo (via User Manual Wiki) - Lenovo TAB 2 A7- 30 User Guide V1.0	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 25.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the face of the document does not show it was distributed in the United States. <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i>, the document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	14	71 TTABVUE 102 Amazon - Lenovo Tab 2 A7 59445601 7-Inch 16 GB Tablet (Black)	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 25.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time, as it does not mention “live photo(s)” and does not show the user manual in NOR 9, Exhibit 13 (or any other user manual) was available in the United States prior to Apple’s announcement. Any contrary claim is speculation. The exhibit also is unreliable as the dates in the document conflict with one another.</p>

			<p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	15	71 TTABVUE 112 Lenovo (via User Manual Wiki) - Lenovo TAB 2 A10-70 User Guide V1.0	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 25.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the face of the document does not show it was distributed in the United States. <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i>, it is duplicative, as NOR 9, Exhibit 13 also concerns a Lenovo product. <i>Fourth</i>, the document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b). .</p>
9	16	71 TTABVUE 115 Amazon - Lenovo TAB2 A10 - 10.1" Tablet (ARM Cortex A53 Quad- Core, FHD IPS, 2GB SDRAM, 16GB SSD, Android 4.4 KitKat) ZA000001US	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 25.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time, as it does not mention “live photo(s)” and does not show the user manual in NOR 9, Exhibit 15 (or any other user manual) was available in the United States prior to Apple’s announcement. Any contrary claim is speculation.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	17	71 TTABVUE 127 Insignia (via Bby Static) - Insignia Flex Elite 7.85" Wi-Fi Android Tablet User Guide	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 25.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses</p>

			<p>the issues, misleads the fact finder, and wastes time. <i>First</i>, the face of the document does not show it was distributed in the United States. <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i>, the document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	18	71 TTABVUE 131 Best Buy - Insignia - Flex Elite - 7.85" - 16GB - White/Silver	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 25.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time, as it does not mention “live photo(s)” and does not show the user manual in NOR 9, Exhibit 17 (or any other user manual) was available in the United States prior to Apple’s announcement. Any contrary claim is speculation.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	19	71 TTABVUE 138 Insignia (via Bby Static) - Insignia Flex 8"/10.1" Wi- Fi Android Tablet	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 26.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the face of the document does not show it was distributed in the United States. <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i>, the document is duplicative and wasteful as NOR 9, Exhibit 17 also concerns an Insignia product. <i>Fourth</i>, the document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>

9	20	71 TTABVUE 142 Best Buy - Customer Reviews: product name unavailable	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 26.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time, as it does not mention “live photo(s)” and does not show the user manual in NOR 9, Exhibit 19 (or any other user manual) was available in the United States prior to Apple’s announcement. Any contrary claim is speculation.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	21	71 TTABVUE 151 Best Buy - Insignia High-Tech Holiday Promotions	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time, as it does not mention “live photo(s)” and does not show the user manual in NOR 9, Exhibit 19 (or any other user manual) was available in the United States prior to Apple’s announcement, particularly as the document is dated November of 2015, after Apple’s announcement. Any contrary claim is speculation.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	22	71 TTABVUE 153 Insignia (via Best Buy) - Insignia Flex 10.1" Android Tablet User Guide	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 26) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the face of the document does not show it was distributed in the United States. <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i>, the document is duplicative and wasteful as NOR 9, Exhibit 17 & 19 (71 TTABVUE 127 & 138) also concern Insignia</p>

			<p>products. <i>Fourth</i>, the document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	23	71 TTABVUE 157 Best Buy - Flex - 10.1" - 32GB - White/Silver	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 26) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time, as it does not mention “live photo(s)” and does not show the user manual in NOR 9, Exhibit 22 (or any other user manual) was available in the United States prior to Apple’s announcement. Any contrary claim is speculation.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	24	71 TTABVUE 166 Cellphones.ca - ZTE Obsidian Review	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 25) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, it does not mention “live photo(s)” and does not show the user manual in NOR 9, Exhibit 10 (or any other user manual) was available in the United States prior to Apple’s announcement. Any contrary claim is speculation. <i>Second</i>, the document is from a non-.U. S. source as it has a .ca URL. <i>Third</i>, the date in the document conflicts with the date in Cao NOR 9, Ex. 11, rendering it unreliable.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	25	71 TTABVUE 175 Tom's Guide - Is ZTE's \$99 Obsidian Smartphone a Good Deal?	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time, as it does not</p>

			<p>mention “live photo(s)” and does not show the user manual in NOR 9, Exhibit 10 (or any other user manual) was available in the United States prior to Apple’s announcement. Any contrary claim is speculation</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
9	26	71 TTABVUE 187 Amazon - Customer reviews: Lenovo Tab 2 A7 59445601 7-Inch 16 GB Tablet (Black)	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (71 TTABVUE 1) (Cao NOR 9). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time, as it does not mention “live photo(s)” and does not show the user manual in NOR 9, Exhibit 13 (or any other user manual) was available in the United States prior to Apple’s announcement. Any contrary claim is speculation.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	1	67 TTABVUE 7 Ematic (via FFC ID) - Ematic Funtab Parent's Guide	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 36.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the face of the document does not show it was distributed in the United States. <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i>, the document does not contain information regarding whether the product is in the relevant genus (and such information would be hearsay anyway).</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	4	67 TTABVUE 10 Amazon - Ematic PBS Playtime Pad 7" HD w/ Plug and Play Streaming Stick	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 36.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p>

			<p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time, as it does not mention “live photo(s)” and does not show the user manual in NOR 10, Exhibit 1 (or any other user manual) was available in the United States. Any contrary claim is speculation.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	6	67 TTABVUE 18 B&H Foto & Electronics - BLU Studio One Plus	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 36.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the face of the document does not show it was distributed in the United States. <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i>, the document does not contain information about the product other than to say “live photo mode” will “give you professional style pictures” (and such information would be hearsay), so it is not clear whether the product is in the relevant genus.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	7	67 TTABVUE 21 Amazon - Customer reviews: BLU Studio G - Unlocked - White	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 26, 36) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, it does not show the user manual in NOR 10, Exhibit 6 (or any other user manual) was available in the United States or prior to Apple’s announcement. Any claim to the contrary is speculation. <i>Second</i>, document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus. <i>Third</i>, there also is no evidence about circulation for this document or the comment from the unidentified person “scsq” therein. TBMP § 704.08(b).</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted</p>

			without supporting testimony. TBMP § 704.08(b).
10	8	67 TTABVUE 28 Amazon - BLU Studio XL Android Smartphone - GSM Unlocked - White - Customer Questions & Answers	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 36.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, it does not show the user manual in NOR 10, Exhibit 6 (or any other user manual) was available in the United States or prior to Apple’s announcement. Any claim to the contrary is speculation. <i>Second</i>, document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus. <i>Third</i>, there also is no evidence about circulation for this document or the comment from the person “Dan Simpson.” TBMP § 704.08(b)</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	9	67 TTABVUE 31 ZTE (via The Informr) - Axon 7 Mini User Manual	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 36.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the face of the document does not show it was distributed in the United States. <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i>, the document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	10	67 TTABVUE 35 eWeek - ZTE Unveils Smaller Axon 7 Mini Smartphone	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 36.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p>

			<p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i>, the document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus. <i>Third</i>, the exhibit is duplicative and wasteful as NOR 10 contains other documents concerning ZTE products.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	11	67 TTABVUE 39 Newegg - ZTE Axon 7 Mini 32GB 4G LTE Gray Unlocked Smartphone 5.2" 3GB RAM (North American Warranty)	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 36.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i>, the document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus. <i>Third</i>, the exhibit is duplicative and wasteful as NOR 10 contains other documents concerning ZTE products.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	12	67 TTABVUE 48 eWeek - ZTE's Axon 7 All-Metal Flagship Smartphone Coming to U. S.	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 36.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i>, the document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus. <i>Third</i>, the exhibit is duplicative and wasteful as NOR 10 contains other documents concerning ZTE products, including other documents from the eweek.com website.</p>

			<p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	13	67 TTABVUE 52 Newegg - Axon 7 by ZTE	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 37.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i>, the document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus. <i>Third</i>, the exhibit is duplicative and wasteful as NOR 10 contains other documents concerning ZTE products, including other documents from the newegg.com website.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	14	67 TTABVUE 61 Business Wire - ZTE Shakes Up the U. S. Smartphone Market with Axon 7 Arriving Stateside for #399.98	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 37.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i>, the document does not contain information sufficient to show if the product is in the relevant genus, as the description does not mentioning recording video. <i>Third</i>, the exhibit is duplicative and wasteful as NOR 10 contains other documents concerning ZTE products.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	15	67 TTABVUE 66 B&H Foto & Electronics - In the Field: The ZTE Axon 7 and 7 Mini Smartphones	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 37.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>,</p>

			<p>226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i>, the exhibit is duplicative and wasteful as NOR 10 contains other documents concerning ZTE products.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	16	67 TTABVUE 74 Newegg - ZTE Blade V8 Pro Dual Camera Unlocked Smartphone (5.5" Black, 32GB Storage 3GB RAM) US Warranty	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 37.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i>, the document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus. <i>Third</i>, the exhibit is duplicative and wasteful as NOR 10 contains other documents concerning ZTE products, including other documents from newegg.com.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	17	67 TTABVUE 80 CNET - ZTE Blade V8 Pro review	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 37.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i>, the document refers to Apple’s iPhone when discussing the Live Photos feature. 67 TTABVUE 85. <i>Third</i>, the exhibit is duplicative and wasteful as NOR 10 contains other documents concerning ZTE products.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted</p>

			without supporting testimony. TBMP § 704.08(b).
10	18	67 TTABVUE 88 TechRadar - ZTE Blade V8 Pro review	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 37) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i>, the document refers to Apple’s iPhone when discussed the Live Photos feature. 67 TTABVUE 97. <i>Third</i>, the exhibit is duplicative and wasteful as NOR 10 contains other documents concerning ZTE products.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	19	67 TTABVUE 101 Hayk Saakian - The Best ZTE Phone In 2020	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 37.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i>, the exhibit is duplicative and wasteful as NOR 10 contains other documents concerning ZTE products.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	20	67 TTABVUE 115 ZTE (via AT&T) - ZTE Axon M User Guide	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 37.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i>, the</p>

			<p>document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus. <i>Third</i>, the exhibit is duplicative and wasteful as NOR 10 contains other documents concerning ZTE products.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	21	67 TTABVUE 119 ZTE - ZTE Blade 10 User Guide	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 37.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i>, the document does not contain information about the product (and such information would be hearsay anyway), so it is not clear whether the product is in the relevant genus. <i>Third</i>, the exhibit is duplicative and wasteful as NOR 10 contains other documents concerning ZTE products.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	22	67 TTABVUE 122 ZTE - ZTE Axon 10 Pro User Manual	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 37.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i>, the exhibit is duplicative and wasteful as NOR 10 contains other documents concerning ZTE products.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	23	67 TTABVUE 125 SnowBrains - How To Take The Best Skiing Photos Using Just Your Smartphone	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 33) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>,</p>

			<p>226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i>, the article appears to be talking about products that allow users to take a burst of photos, so it is not clear that the articles is discussing products in the relevant genus.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
10	24	67 TTABVUE 133 Counterpoint Research - ZTE & Blu Were The Fastest Growing Smartphone Brands in USA in Q3 2015	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (67 TTABVUE 1) (Cao NOR 10). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
11	1	68 TTABVUE 5 Google Play Store - TikTok Wall Picture	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 40.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (68 TTABVUE 1) (Cao NOR 11). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time, as it is not clear if the product is in the relevant genus.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
11	2	68 TTABVUE 9 Yahoo Style Canada - You can make TikTok videos into live wallpaper for your phone—here's how	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),” which is the issue in his affirmative case. (68 TTABVUE 1) (Cao NOR 11). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the document is from a non-U. S. news source. Instead, it is a Canadian website as it says “ca” in the URL and refers to “Yahoo Canada Style.” <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document,</p>

			<p>in the United States or otherwise. TBMP § 704.08(b).</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
11	3	68 TTABVUE 16 Google - I can't set just my home screen wallpaper when I have a live wallpaper set to the lockscreen	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 40.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (68 TTABVUE 1) (Cao NOR 11). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. There is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). It is merely a user post with just 7 replies. There also is no evidence regarding what the user meant when using the phrase “live photo.”</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
11	4	68 TTABVUE 22 Google Play Store - animated gif live wallpaper - Lite	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 40.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (68 TTABVUE 1) (Cao NOR 11). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. The app originates from outside the United States (Pakistan, 68 TTABVUE 26) and there is no information as to what portion of the users/visitors are from the United States.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
11	5	68 TTABVUE 27 Google Play Store - VIMAGE - Cinemagraph, Live photos, Moving pictures	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 40.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (68 TTABVUE 1) (Cao NOR 11). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the app originates from outside the United States (Hungary, 68 TTABVUE 30)</p>

			<p>and there is no information as to what portion of the users/visitors are from the United States. <i>Second</i>, the product does not appear to fall within the relevant genus, as it appears to be a photo editor, not an app for recording video and photographs.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
11	6	68 TTABVUE 32 Google Play Store - XEFX - D3D Camera & Photo Animator & Wallpaper	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 40.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (68 TTABVUE 1) (Cao NOR 11). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the app appears to originate from outside the United States (68 TTABVUE 35), and there is no information as to what portion of the users/visitors are from the United States. <i>Second</i>, the product does not appear to fall within the relevant genus, as the document talks about adding effects to photographs, not recording video and photographs.</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
11	7	68 TTABVUE 37 Google - How can I put my own live picture as my wallpaper using my Google pixel 3	<p>1. Improper Rebuttal. This exhibit constitutes improper rebuttal evidence. <i>First</i>, Cao cites the document in his trial brief. (72 TTABVUE 40.) <i>Second</i>, Cao admits in his NOR that he is submitting the evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s),’” which is the issue in his affirmative case. (68 TTABVUE 1) (Cao NOR 11). <i>Dans Un Jardin v. Le Jardin Des Plantes</i>, 226 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).</p> <p>2. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. There is no information about circulation or viewership for this document, let alone that anyone in the United States saw it. TBMP § 704.08(b). It is merely a user post with just 2 “upvotes”. There also is no evidence regarding what the user meant when using the phrase “live photo.”</p> <p>3. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>

CHART 2
Summary of Objections to Cao's Opening Trial Period Evidence (NOR 2 through 6)

NOR No.	Ex. No.	TTABVUE - Source - Title	Exact Duplicate Cross-References	Hearsay (FRE 802)	No Circulation Data (FRE 401/403)	Unclear if U.S. source or distributed in U.S. (FRE 401/403)	Duplicative/Cumulative (FRE 401/403)	Not clear product is in the relevant genus (FRE 401/403)	Does Not Contain the Phrase "Live Photo(s)" (FRE 401/403)	Other Rule 401/403 Objection
2	1	34 TTABVUE 8 - HTC Blog - Taking Photos with HTC Zoe	NOR 3, Ex. 15 CAO0681-684		x				x	
2	2	34 TTABVUE 1 - PhotographyBLOG - HTC One Review			x				x	
2	3	34 TTABVUE 19 - AT&T - Break the Mold: The New HTC One from AT&T Brings Your Mobile World to Life			x				x	
2	4	34 TTABVUE 22 - Popular Mechanics - Hands-On With the Sleek and Stunning HTC One			x				x	
2	5	34 TTABVUE 32 - LinkedIn - How HTC Invented the "Living Photo"			x					x
2	6	34 TTABVUE 37 - Pocket Meta - Live Photos on Android Are Available in These Awesome Free Apps	NOR 3, Ex. 6 CAO0541-547		x	x				x
2	7	34 TTABVUE 46 - Beebom - How To Get iPhone's Live Photos Feature on Android	NOR 3, Ex. 5 NOR 3, Ex. 13 CAO0617-625		x	x				x
2	8	34 TTABVUE 55 - Make Use Of - "Live Photos" Feature on Android	NOR 3, Ex. 14		x	x				x
2	9	34 TTABVUE 75 - Mashable - Google Clips Review: AI is not ready to be your photographer			x					
2	10	34 TTABVUE 85 - Mobile Syrup - The LG G6 features one of the best smartphone cameras			x	x		x		
2	11	34 TTABVUE 98 - Google Play - Camera MX - Free Photo & Video Camera				x				x
2	12	34 TTABVUE 103 - The Android Soul - How to get iPhone's Live Photos on Android with Google Motion Stills (and other apps)			x	x				x
2	13	34 TTABVUE 124 - Android Headlines - Exclusive: LG G7 ThinQ Features Dual 16MP Cameras, Selfie Portrait Mode, Oreo & More	NOR 3, Ex. 19		x		x			

CHART 2
Summary of Objections to Cao's Opening Trial Period Evidence (NOR 2 through 6)

NOR No.	Ex. No.	TTABVUE - Source - Title	Exact Duplicate Cross-References	Hearsay (FRE 802)	No Circulation Data (FRE 401/403)	Unclear if U.S. source or distributed in U.S. (FRE 401/403)	Duplicative/Cumulative (FRE 401/403)	Not clear product is in the relevant genus (FRE 401/403)	Does Not Contain the Phrase "Live Photo(s)" (FRE 401/403)	Other Rule 401/403 Objection
2	14	34 TTABVUE 136 - Android Headlines - Here's Another Look At The LG G7 ThinQ	NOR 4, Ex. 24		x		x			x
2	15	34 TTABVUE 143 - Business Wire - ZTE Shakes Up the U. S. Smartphone Market with Axon 7 Arriving Stateside for \$399.98			x			x		
2	18	34 TTABVUE 167 - Google Play - Live Motion Picture - Live Photo & Video Animation				x		x		
2	19	34 TTABVUE 171 - Google Play - Live Photo						x		
2	20	34 TTABVUE 175 - Google Play - Live Photo Editor				x		x		x
2	21	34 TTABVUE 180 - Google Play - Live Photo on Motion: Cinemagraph Photoloop Effect						x		x
2	22	34 TTABVUE 183 - Google Play - Live Photos - Movense								x
2	23	34 TTABVUE 188 - Google Play - musical.ly Live Photo						x		x
2	24	34 TTABVUE 192 - Google Play - PICOO Camera - Live Photo				x		x		x
2	25	34 TTABVUE 196 - Google Play - TikTok Live Photo	NOR 4, Ex. 59 CAO0441-443					x		x
2	26	34 TTABVUE 200 - Google Play - VIMAGE - cinemagraph animator & live photo editor				x		x		
3	1	35 TTABVUE 7 - PanoMoments - Create Living Photos with PanoMoments		x	x				x	
3	2	35 TTABVUE 13 - Huffington Post - The Best Fixel Pics: Coolest 'Living Photos' From Cinemagraph-Inspired iPhone App			x	x			x	
3	3	35 TTABVUE 19 - Windows - Everything you need to know about Living Images, Rich Capture, and more on your Lumia		x	x				x	

CHART 2
Summary of Objections to Cao's Opening Trial Period Evidence (NOR 2 through 6)

NOR No.	Ex. No.	TTABVUE - Source - Title	Exact Duplicate Cross-References	Hearsay (FRE 802)	No Circulation Data (FRE 401/403)	Unclear if U.S. source or distributed in U.S. (FRE 401/403)	Duplicative/Cumulative (FRE 401/403)	Not clear product is in the relevant genus (FRE 401/403)	Does Not Contain the Phrase "Live Photo(s)" (FRE 401/403)	Other Rule 401/403 Objection
3	4	35 TTABVUE 40 - Google - Enhance your Live Photos & sort albums in new ways		x	x					x
3	5	35 TTABVUE 44 - Beebom - How To Get iPhone's Live Photos Feature on Android	NOR 2, Ex. 7 NOR 3, Ex. 13 CAO0617-625		x	x	x			x
3	6	35 TTABVUE 53 - Pocket Meta - Live Photos on Android Are Available in These Awesome Free Apps	NOR 2, Ex. 6 CAO0096-103		x	x	x			x
3	7	35 TTABVUE 61 - Windows Club - Lumia Cinemagraph: Capture live photo from Windows Phone			x	x				
3	8	35 TTABVUE 70 - TechSpot - Lytro discontinues 'living pictures' image hosting service			x			x		
3	9	35 TTABVUE 75 PhoneArena - Video of Living Images up-close on the Nokia Lumia 930		x	x	x			x	
3	10	35 TTABVUE 79 - Updato - Bring photos to life: How to get Apple's Live Photos on Android			x					x
3	11	35 TTABVUE 88 - 500px - Cinemagraphs: An Introduction to Living Photos		x	x	x			x	
3	12	35 TTABVUE 96 - AndroidCentral - Live photo		x	x	x		x		
3	13	35 TTABVUE 101 - Beebom - How To Get iPhone's Live Photos Feature on Android	NOR 2, Ex. 7 NOR 3, Ex. 5 CAO0473-480		x	x	x			x
3	14	35 TTABVUE 111 - Make Use Of - "Live Photos" Feature on Android	NOR 2, Ex. 8		x	x	x			x
3	15	35 TTABVUE 131 - HTC Blog - Taking Photos with HTC Zoe	NOR 2, Ex. 1 CAO0032-35		x		x		x	
3	16	35 TTABVUE 136 - LG U.K. - What is Live Photo and how do I use it on my LG G7		x	x	x	x			
3	17	35 TTABVUE 139 - Gadget Hacks - Still Missing Live Photos on Your Android? Try These 3 Apps		x	x					x
3	18	35 TTABVUE 147 - Android Central - Zoe (live) Photos?		x	x	x				

CHART 2
Summary of Objections to Cao's Opening Trial Period Evidence (NOR 2 through 6)

NOR No.	Ex. No.	TTABVUE - Source - Title	Exact Duplicate Cross-References	Hearsay (FRE 802)	No Circulation Data (FRE 401/403)	Unclear if U.S. source or distributed in U.S. (FRE 401/403)	Duplicative/ Cumulative (FRE 401/403)	Not clear product is in the relevant genus (FRE 401/403)	Does Not Contain the Phrase "Live Photo(s)" (FRE 401/403)	Other Rule 401/403 Objection
3	19	35 TTABVUE 152 - Android Headlines - Exclusive: LG G7 ThinQ Features Dual 16MP Cameras, Selfie Portrait Mode, Oreo & More	NOR 2, Ex. 13		x		x			
3	20	35 TTABVUE 164 - Android Headlines - Featured Review: Blueboo X9		x	x		x	x		
3	21	35 TTABVUE 192 - Android Headlines - Featured Review: Cubot X15			x		x	x		
3	22	35 TTABVUE 221 - Android Headlines - Featured Review: Mlais MX Base			x		x	x		
3	23	35 TTABVUE 248 - Android Headlines - Featured Review: Zopo Speed 7			x		x	x		
4	24	36 TTABVUE 11 - Android Headlines - Here's Another Look At The LG G7 ThinQ	NOR 2, Ex. 14		x		x			x
4	26	36 TTABVUE 19 - Gear Diary - LG V40 ThinQ Picks up Five Cameras; You Can Pick up Preorder Goodies from US Cellular			x		x			
4	27	36 TTABVUE 27 - Android Headlines - UMIDIGI Z1 Pro Review: A Big Battery Without The Big Size			x		x			x
4	29	36 TTABVUE 55 - Push Interactions - Apps for Creating Living Photos		x	x	x			x	
4	30	36 TTABVUE 58 - Fstoppers - Living Photos: Fstoppers Reviews Flixel Cinemagraph Pro for Mac		x	x				x	
4	31	36 TTABVUE 60 - Flixel - Cinemagraphs vs. Still Photos in Social Advertising: Microsoft Case Study		x	x	x			x	

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Summary of Objections to Cao's Opening Trial Period Evidence (NOR 2 through 6)

NOR No.	Ex. No.	TTABVUE - Source - Title	Exact Duplicate Cross-References	Hearsay (FRE 802)	No Circulation Data (FRE 401/403)	Unclear if U.S. source or distributed in U.S. (FRE 401/403)	Duplicative/ Cumulative (FRE 401/403)	Not clear product is in the relevant genus (FRE 401/403)	Does Not Contain the Phrase "Live Photo(s)" (FRE 401/403)	Other Rule 401/403 Objection
4	32	36 TTABVUE 62 - 1. YouTube - Behind the Scenes: Pizza Hut - Living Photos spot by Michael Grecco and Flixel Studios USA. - 2. YouTube - Pizza Hut - Living Photos spot by Michael Grecco and Flixel Studios USA	Pizza Hut also NOR 4, Ex. 33	x					x	
4	33	36 TTABVUE 65 - Compendium of exhibits	Pizza Hut also NOR 4, Ex. 32	x	x	x			x	x
4	34	36 TTABVUE 78 - Flixel - The History of Cinemagraphs Includes David Bowie		x	x	x				x
4	35	36 TTABVUE 87 - YouTube - HTC Desire 616 dual sim (Live photo demo)		x		x		x		x
4	36	36 TTABVUE 89 - Mashable - Cliplets Lets You Make Your Own Moving 'Harry Potter' Photos			x				x	
4	37	36 TTABVUE 93 - YouTube - Cinemagraphs - Living Photos		x		x			x	x
4	38	36 TTABVUE 95 - YouTube - woman with glasses - living photo		x		x			x	x
4	39	36 TTABVUE 97 - xda - How to backup live photos from the G7			x	x		x		
4	40	36 TTABVUE 102 - Android Forums - Live Photos		x	x			x		
4	41	36 TTABVUE 106 - xda - P9 Lite - Live Photos?		x	x	x				x
4	42	36 TTABVUE 111 - Mobile Phone Advisor - 10 Best Android Fun Apps for Phones and Tablets		x	x			x		
4	43	36 TTABVUE 115 - Mobile Phone Advisor - Camera Fun Pro 4.0 for Android		x	x	x		x		
4	44	36 TTABVUE 119 - Economic Times - ET review: InFocus M680		x	x	x		x		
4	45	36 TTABVUE 122 - London Evening Standard - Google picks the best Android apps of 2018; The apps to download now			x	x	x	x		

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4	46	36 TTABVUE 128 - Android Headlines - Intex Launch 4.5-Inch Aqua Speed With A Focus On Photography And Performance			x		x	x		
4	47	36 TTABVUE 131 - Web newswire - Karbonn redefines the 'Art of Selfie' with the launch of Titanium S19 - the Selfie Smartphone			x	x		x		
4	48	36 TTABVUE 134 - EFY Times - Launching an Exclusive 4G Tablet - iBall Slide Cuddle 4G		x	x	x		x		
4	49	36 TTABVUE 137 - EFY Times - LAVA Launches X10 with 3GB RAM and 4G LTE Support for Blazing Fast Performance			x	x				
4	50	36 TTABVUE 140 - Economic Times - new in tech A ROUND UP OF THE BEST SMARTPHONES LAUNCHED THIS WEEK		x	x	x		x		
4	51	36 TTABVUE 143 - BGR: Your Mobile Life - Panasonic Eluga Z1, Eluga Z1 Pro launched, prices start from Rs 14,490		x	x	x		x		
4	52	36 TTABVUE 147 - Times of India - UMI Zero review			x	x				
4	53	36 TTABVUE 153 - Gear Diary - ZTE Axon M: The Dual Screen Foldable phone I've Been Wishing For?		x	x		x	x		
4	56	36 TTABVUE 177 - Google Play - Loopsie - Motion Video Effects & Living Photos		x		x			x	
4	57	36 TTABVUE 181 - App Store - SWNG - Living Photos		x	x					x
4	58	36 TTABVUE 184 - App Store - Cinegraph - Living Photos		x	x					x
4	59	36 TTABVUE 187 - Google Play - TikTok Live Photo	NOR 2, Ex. 25 CAO0754-756				x	x		x
5	1	37 TTABVUE 5 - YouTube - How to Make Normal Photo to Live Photo Live Effect PixaLoop				x		x		

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5	2	37 TTABVUE 8 - Google Photos - Live photo from samsung nor works			x	x				
5	3	37 TTABVUE 11 - Android Portal - Missing live photos on your phone? Go With This Live Photos Android Guide!			x	x				
5	4	37 TTABVUE 16 - Google Play - PixaMotion Loop Photo Animator & Photo Video Maker				x		x		
5	5	37 TTABVUE 21 - APKPure - VUO - Cinemagraph, Live Photo & Photo in Motion			x	x		x		
5	6	37 TTABVUE 25 - TechCrunch - Apple's new App Store website takes aim at antitrust, anti-competitive claims		x	x				x	
6	1	38 TTABVUE 6 - Live Animations - Marketing			x		x	x		
6	2	38 TTABVUE 8 - YouTube - mobile camera ---- live photo mode				x				
6	3	38 TTABVUE 10 - Gadgets 360 - Intex Aqua Power With 4000mAh Battery, Octa-Core SoC Launched at Rs. 8,444			x	x		x		
6	4	38 TTABVUE 13 - Mobile Indian - Micromax Canvas Unite 2 Review: A good buy for Rs. 6,999			x	x				
6	5	38 TTABVUE 25 - Laptop Mag - Lenovo A10 Tablet Review		x	x			x		
6	6	38 TTABVUE 36 - Gadgets 360 - Karbonn Titanium Octane Plus Review: Specifications Aren't Everything			x	x				
6	7	38 TTABVUE 47 - Indian Express - Launch: Micromax Unite 2 has 21 languages. Is it as good as Moto E?			x	x		x		
6	8	38 TTABVUE 52 - Prestigio - MultiPad PMP7070C3G Manual			x	x		x		

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6	9	38 TTABVUE 77 - Gizchina - REVIEW: THE CUBOT S168 IS THE \$90 PHONE YOU HAD BEEN WAITING FOR			x	x		x		
6	10	38 TTABVUE 92 - Dspecs - Symphony Xplorer W75 Features and Specifications			x	x		x		
6	11	38 TTABVUE 11 - APKPure - Live Photo LWP			x	x				
6	12	38 TTABVUE 116 - Google Play - Autumn Leaves Live Wallpaper				x		x		

EXHIBITS SUBMITTED IN CAO'S OPENING TRIAL PERIOD			
Cao NOR	Ex. No.	TTABVUE - Source - Title	Objections
2	1	34 TTABVUE 8 HTC Blog - Taking Photos with HTC Zoe	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i> , the document does not contain the phrase "live photo(s)."
2	2	34 TTABVUE 13 PhotographyBLOG - HTC One Review	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i> , the document does not contain the phrase "live photo(s)."
2	3	34 TTABVUE 19 AT&T - Break the Mold: The New HTC One from AT&T Brings Your Mobile World to Life	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i> , the document does not contain the phrase "live photo(s)."
2	4	34 TTABVUE 22 Popular Mechanics - Hands-On With the Sleek and Stunning HTC One	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i> , the document does not contain the phrase "live photo(s)."
2	5	34 TTABVUE 32 LinkedIn - How HTC Invented the "Living Photo"	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i> , the document uses "Live Photo(s)" to refer to Apple's product. 34 TTABVUE 33.
2	6	34 TTABVUE 37 Pocket Meta - Live Photos on Android Are Available in These Awesome Free Apps	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information regarding whether the document comes from a U.S. news source. <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Third</i> , the document uses "Live Photo(s)" to refer to Apple's product. 34 TTABVUE 38.
2	7	34 TTABVUE 46 Beebom - How To Get iPhone's Live Photos Feature on Android	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document is from a non-U.S. news source. <i>La Perle App'x. A</i> (54 TTABVUE 1); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i> , the document uses "Live Photo(s)" to refer to Apple's product. 34 TTABVUE 47.

2	8	34 TTABVUE 55 Make Use Of - "Live Photos" Feature on Android	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document is from a non-U.S. news source. La Perle App'x. A (54 TTABVUE 1); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i> , the document uses "Live Photo(s)" to refer to Apple's product. 34 TTABVUE 56.
2	9	34 TTABVUE 75 Mashable - Google Clips Review: AI is not ready to be your photographer	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. There is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b).
2	10	34 TTABVUE 85 Mobile Syrup - The LG G6 features one of the best smartphone cameras	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document is from a non-U.S. news source. La Perle App'x. A (54 TTABVUE 1); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i> , the document does not contain information about the product, so it is not clear whether the product is in the relevant genus.
2	11	34 TTABVUE 98 Google Play - Camera MX - Free Photo & Video Camera	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the app appears to be from a non-U.S. source (Germany, 34 TTABVUE 101) and there is no information regarding whether anyone in the United States downloaded the app. <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , the reference to "Live Photos" appears to be a reference to Apple's feature, as the author is explaining that the app allows users to get the same functionality as Apple's app on an Android device. At the very least, any other interpretation would be speculation as there is no testimony from the author.
2	12	34 TTABVUE 103 The Android Soul - How to get iPhone's Live Photos on Android with Google Motion Stills (and other apps)	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document is from a non-U.S. news source. La Perle App'x. A (54 TTABVUE 1); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i> , the document uses "Live Photo(s)" to refer to Apple's product. 34 TTABVUE 103.
2	13	34 TTABVUE 124 Android Headlines - Exclusive: LG G7 ThinQ Features Dual 16MP Cameras, Selfie Portrait Mode,	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i> , the document is duplicative and wasteful as NOR 2, Ex. 10 (34 TTABVUE 85) already discusses LG.

		Oreo & More	
2	14	34 TTABVUE 136 Android Headlines - Here's Another Look At The LG G7 ThinQ	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i> , the document is duplicative and wasteful as other documents in NOR 2 already discuss LG and NOR 2, Ex. 13 (34 TTABVUE 124) also is from the same source. <i>Third</i> , the document says “Live Photos” is a “popular offering[] on other smartphones from different brands,” which appears to be a reference to Apple. 34 TTABVUE 138.
2	15	34 TTABVUE 143 Business Wire - ZTE Shakes Up the U.S. Smartphone Market with Axon 7 Arriving Stateside for \$399.98	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i> , the document does not contain information about the product, so it is not clear whether the product is in the relevant genus.
2	18	34 TTABVUE 167 Google Play - Live Motion Picture - Live Photo & Video Animation	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the app appears to be from a non-U.S. source (Belgium, 34 TTABVUE 170) and there is no information regarding whether anyone in the United States downloaded the app. <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , the product appears to allow consumers to edit photos and videos, not record photos and video, so it appears the product is not in the relevant genus.
2	19	34 TTABVUE 171 Google Play - Live Photo	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. The product appears to make children’s characters come to life on the screen, not record video, sound, and photographs, so the product is not in the relevant genus.
2	20	34 TTABVUE 175 Google Play - Live Photo Editor	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the app appears to be from a non-U.S. source (Mandvi, 34 TTABVUE 178) and there is no information regarding whether anyone in the United States downloaded the app. <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , the product appears to allow users to edit photographs, so is not in the correct genus. <i>Third</i> , the app is no longer available, so the evidence is irrelevant and confusing. 49 TTABVUE 42 ¶ 105.
2	21	34 TTABVUE 180 Google Play - Live Photo on Motion: Cinemagraph Photolooop Effect	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the product appears to allow users to edit photographs, not record photographs and video, so is not in the correct genus. <i>Second</i> , the app is no longer available, so the evidence is irrelevant and confusing. 49 TTABVUE 42 ¶ 105. <i>Third</i> , the app was installed fewer than 1000 times.
2	22	34 TTABVUE 183 Google Play - Live Photos - Movense	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. The app is no longer available, so the evidence is irrelevant and

			confusing. 49 TTABVUE 44 ¶ 105.
2	23	34 TTABVUE 188 Google Play - musical.ly Live Photo	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the product appears to allow users to convert videos to wallpaper, so it is not clear it is in the correct genus. <i>Second</i> , the app is no longer available under the name “musical.ly Live Photo,” so the evidence is irrelevant and confusing. 49 TTABVUE 43 ¶ 105.
2	24	34 TTABVUE 192 Google Play - PICOO Camera - Live Photo	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the app appears to be from a non-U.S. source (China, 34 TTABVUE 195) and there is no information regarding whether anyone in the United States downloaded the app. <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , the product appears to allow users to edit photographs, not record photographs and video, so is not in the correct genus. <i>Third</i> , the app is no longer available, so the evidence is irrelevant and confusing. 49 TTABVUE 43 ¶ 105.
2	25	34 TTABVUE 196 Google Play - TikTok Live Photo	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the product appears to allow users to convert video to wallpaper, not record photographs and video, so is not in the correct genus. <i>Second</i> , the app is no longer available under the name “Tik Tok Live Photo,” so the evidence is irrelevant and confusing. 49 TTABVUE 43 ¶ 105.
2	26	34 TTABVUE 200 Google Play - VIMAGE - cinemagraph animator & live photo editor	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the app appears to be from a non-U.S. source (Hungary, 34 TTABVUE 203) and there is no information regarding whether anyone in the United States downloaded the app. <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , the product appears to allow users to edit photographs, not record video and photographs, so is not in the correct genus.
3	1	35 TTABVUE 7 PanoMoments - Create Living Photos with PanoMoments	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , it does not contain the phrase “live photo(s).” <i>Second</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). 2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
3	2	35 TTABVUE 13 Huffington Post - The Best Flixel Pics: Coolest 'Living Photos' From Cinemagraph- Inspired iPhone App	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document is from a non-U.S. news source. La Perl, App’x A (54 TTABVUE 3); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Third</i> , the document does not include the phrase “live photo(s).”

3	3	35 TTABVUE 19 Windows - Everything you need to know about Living Images, Rich Capture, and more on your Lumia	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, it does not contain the phrase “live photo(s).” <i>Second</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b).</p> <p>2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
3	4	35 TTABVUE 40 Google - Enhance your Live Photos & sort albums in new ways	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, it uses the phrase “Live Photos” to refer to Apple’s product.</p> <p>2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
3	5	35 TTABVUE 44 Beebom - How To Get iPhone's Live Photos Feature on Android	<p>1. FRE 401, 403. This exhibit is a duplicate of NOR 2, Exhibit 7 (34 TTABVUE 46). It, therefore, is cumulative and wasteful, and all the same objections apply.</p>
3	6	35 TTABVUE 53 Pocket Meta - Live Photos on Android Are Available in These Awesome Free Apps	<p>1. FRE 401, 403. This exhibit is a duplicate of NOR 2, Exhibit 6 (34 TTABVUE 37). It, therefore, is cumulative and wasteful and all the same objections apply.</p>
3	7	35 TTABVUE 61 Windows Club - Lumia Cinemagraph: Capture live photo from Windows Phone	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the document is from a non-U.S. news source. <i>La Perle App’x. A</i> (54 TTABVUE 3); <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b).</p>
3	8	35 TTABVUE 70 TechSpot - Lytro discontinues 'living pictures' image hosting service	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document says the product allows users to manipulate photographs after the fact, not record photos and video, so it is not clear whether the product is in the relevant genus.</p>
3	9	35 TTABVUE 75 PhoneArena - Video of Living Images up- close on the Nokia Lumia 930	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the document is from a non-U.S. news source. <i>La Perle App’x. A</i> (54 TTABVUE 3); <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i>, the document does not contain the phrase “live photo(s).”</p>

			2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
3	10	35 TTABVUE 79 Updato - Bring photos to life: How to get Apple's Live Photos on Android	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i> , the document uses “Live Photo(s)” to refer to Apple’s product.
3	11	35 TTABVUE 88 500px - Cinemagraphs: An Introduction to Living Photos	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document is from a non-U.S. news source. La Perle App’x A; (54 TTABVUE 3); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Third</i> , the document does not contain the phrase “live photo(s).” 2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
3	12	35 TTABVUE 96 AndroidCentral - Live photo	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document is from a non-U.S. source. La Perle App’x A; (54 TTABVUE 3); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). The document is merely a post by an unknown individual. <i>Third</i> , it is not clear what “live photo” is referring to in the post, so the document does not show use for the relevant genus. 2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
3	13	35 TTABVUE 101 Beebom - How To Get iPhone's Live Photos Feature on Android	1. FRE 401, 403. This exhibit is a duplicate of NOR 2, Exhibit 7 (34 TTABVUE 46) and NOR 3, Exhibit 5 (35 TTABVUE 44). It, therefore, is needlessly cumulative and all the same objections apply.
3	14	35 TTABVUE 111 Make Use Of - "Live Photos" Feature on Android	1. FRE 401, 403. This exhibit is a duplicate of NOR 2, Exhibit 8 (34 TTABVUE 55). It, therefore, is needlessly cumulative and all the same objections apply.
3	15	35 TTABVUE 131 HTC Blog - Taking Photos with HTC Zoe	1. FRE 401, 403. This exhibit is a duplicate of NOR 2, Exhibit 1 (34 TTABVUE 8). It, therefore, is needlessly cumulative and all the same objections apply.
3	16	35 TTABVUE 136 LG U.K. - What is Live Photo and how do I use it on my LG G7	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document is from a non-U.S. source, as the website URL refers to the UK. La Perle App’x. A (54 TTABVUE 4); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or

			<p>viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i>, the document is duplicative or cumulative as there are other documents in NOR 2 concerning LG.</p> <p>2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
3	17	35 TTABVUE 139 Gadget Hacks - Still Missing Live Photos on Your Android? Try These 3 Apps	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, the document uses “Live Photos” to refer to Apple. 35 TTABVUE 140.</p> <p>2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
3	18	35 TTABVUE 147 Android Central - Zoe (live) Photos?	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the document is from a non-U.S. news source. La Perle App’x A (54 TTABVUE 4); <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b).</p> <p>2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
3	19	35 TTABVUE 152 Android Headlines - Exclusive: LG G7 ThinQ Features Dual 16MP Cameras, Selfie Portrait Mode, Oreo & More	<p>1. FRE 401, 403. This exhibit is a duplicate of NOR 2, Exhibit 13 (34 TTABVUE 124). It, therefore, is needlessly cumulative and all the same objections apply.</p>
3	20	35 TTABVUE 164 Android Headlines - Featured Review: Blueboo X9	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, there is no information about the product, so it is not clear that it is in the relevant genus. <i>Third</i>, the document is duplicative as Cao submitted multiple articles from the source “Android Headlines” in NOR 3.</p> <p>2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
3	21	35 TTABVUE 192 Android Headlines - Featured Review: Cubot X15	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i>, there is no information about the product, so it is not clear that it is in the relevant genus. <i>Third</i>, the document is duplicative as Cao submitted multiple articles from the source “Android Headlines” in NOR 3.</p>

3	22	35 TTABVUE 221 Android Headlines - Featured Review: Mlais MX Base	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i> , the document says the product allows users to take “a bunch of fast shots at once,” so it is not clear that it records video or sound or is in the relevant genus. <i>Third</i> , the document is duplicative as Cao submitted multiple articles from the source “Android Headlines” in NOR 3.
3	23	35 TTABVUE 248 Android Headlines - Featured Review: Zopo Speed 7	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i> , there is no information about the product, so it is not clear that it is in the relevant genus. <i>Third</i> , the document is duplicative as Cao submitted multiple articles from the source “Android Headlines” in NOR 3.
4	24	36 TTABVUE 11 Android Headlines - Here's Another Look At The LG G7 ThinQ	1. FRE 401, 403. This exhibit is a duplicate of NOR 2, Exhibit (1434 TTABVUE 136). It, therefore, is cumulative and wasteful and all the same objections apply.
4	26	36 TTABVUE 19 Gear Diary - LG V40 ThinQ Picks up Five Cameras; You Can Pick up Preorder Goodies from US Cellular	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i> , the document is duplicative as Cao submitted other documents concerning LG.
4	27	36 TTABVUE 27 Android Headlines - UMIDIGI Z1 Pro Review: A Big Battery Without The Big Size	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i> , the document refers to “live photo(s)” as a product that had been available only on an iPhone. <i>Third</i> , the document is duplicative as Cao submitted multiple articles from the source “Android Headlines” in NOR 3.
4	29	36 TTABVUE 55 Push Interactions - Apps for Creating Living Photos	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document is from a non-U.S. source. <i>La Perle App’x. A</i> (54 TTABVUE 5); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i> , the document does not contain the phrase “live photo.” 2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
4	30	36 TTABVUE 58 Fstoppers - Living Photos: Fstoppers Reviews Flixel	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this

		Cinemagraph Pro for Mac	document. TBMP § 704.08(b). <i>Second</i> , the document does not contain the phrase “live photo(s).” 2. FRE 802 (Hearsay) . This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
4	31	36 TTABVUE 60 Flixel - Cinemagraphs vs. Still Photos in Social Advertising: Microsoft Case Study	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document is from a non-U.S. source. <i>La Perle App’x. A</i> (54 TTABVUE 5); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i> , the document does not contain the phrase “live photo.” 2. FRE 802 (Hearsay) . This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
4	32	36 TTABVUE 62 1. YouTube - Behind the Scenes: Pizza Hut - Living Photos spot by Michael Grecco and Flixel Studios USA. 2. YouTube - Pizza Hut - Living Photos spot by Michael Grecco and Flixel Studios USA	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. The documents do not contain the phrase “live photo(s)” and had under 2,300 collective views. 2. FRE 802 (Hearsay) . This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
4	33	36 TTABVUE 65 Compendium of exhibits	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the Betaki, NBIF, Flixel documents, and several YouTube posts are from a non-U.S. source. <i>La Perle App’x. A</i> (54 TTABVUE 5); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for most of the documents, except YouTube videos, which do not say whether anyone in the United States saw the documents. TBMP § 704.08(b). <i>Third</i> , the documents do not contain the phrase “live photo.” <i>Fourth</i> , the Pizza Hut document is a direct duplicate of NOR 4, Ex.32. 2. FRE 802 (Hearsay) . This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
4	34	36 TTABVUE 78 Flixel - The History of Cinemagraphs Includes David Bowie	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document is from a non-U.S. source. <i>La Perle App’x. A</i> (54 TTABVUE 7); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document, let alone whether

			<p>anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i>, the document uses “Live Photo” to refer to Apple’s product. 36 TTABVUE 83.</p> <p>2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
4	35	36 TTABVUE 87 YouTube - HTC Desire 616 dual sim (Live photo demo)	<p>FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the face of the document shows that only 793 people viewed the video over seven years. <i>Second</i>, there is no evidence that “GSMarena,” which posted the video, is a U.S.-based or U.S. focused company or that any portion of the 855 viewers are from the United States. <i>Third</i>, it is not clear what the phrase “Live photo” refers to in the document.</p> <p>2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
4	36	36 TTABVUE 89 Mashable - Cliplets Lets You Make Your Own Moving 'Harry Potter' Photos	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i>, the document does not contain the phrase “live photo(s).”</p>
4	37	36 TTABVUE 93 YouTube - Cinemagraphs - Living Photos	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the document is from a non-U.S. source. <i>La Perle App’x. A</i> (54 TTABVUE 7); <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, the video had only 873 views, and there is no information as to what portion of those were in the United States. <i>Third</i>, the document does not contain the phrase “live photo.”</p> <p>2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
4	38	36 TTABVUE 95 YouTube - woman with glasses - living photo	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the document is from a non-U.S. source. <i>La Perle App’x. A</i> (54 TTABVUE 7); <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, the video received only 810 views, and there is no information regarding the portion of those that were in the United States. TBMP § 704.08(b). <i>Third</i>, the document does not contain the phrase “live photo.”</p> <p>2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
4	39	36 TTABVUE 97 xda - How to backup live photos from the G7	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about where the person posting the</p>

			statement is located. La Perle App'x. A (54 TTABVUE 7); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Third</i> , there is no information about the product, so it is not clear that it is in the relevant genus.
4	40	36 TTABVUE 102 Android Forums - Live Photos	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i> , the app is described as a way to view photos on wallpaper, so does not appear to be in the correct genus. 2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
4	41	36 TTABVUE 106 xda - P9 Lite - Live Photos?	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the source appears to be from outside the United States. La Perle App'x. A (54 TTABVUE 7); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document, which is a post to an online forum. TBMP § 704.08(b). <i>Third</i> , the post refers to Live Photos in connection with Apple's iPhone. 2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
4	42	36 TTABVUE 111 Mobile Phone Advisor - 10 Best Android Fun Apps for Phones and Tablets	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Third</i> , the description of the product is unclear, so it is not clear that it is in the relevant genus. 2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
4	43	36 TTABVUE 115 Mobile Phone Advisor - Camera Fun Pro 4.0 for Android	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document appears to be from a non-U.S. source. La Perle App'x. A (54 TTABVUE 7); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i> , the description of the product is unclear, so it is not clear that it is in the relevant genus. 2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
4	44	36 TTABVUE 119 Economic Times - ET review: InFocus	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document is from a non-U.S. source. La Perle App'x. A

		M680	<p>(54 TTABVUE 7); <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i>, there is no information about the product, so it is not clear that it is in the relevant genus.</p> <p>2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
4	45	36 TTABVUE 122 London Evening Standard - Google picks the best Android apps of 2018; The apps to download now	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the document is from a non-U.S. source. La Perle App'x. A (54 TTABVUE 7); <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i>, the description of the product refers to an "editor," so it is not in the relevant genus. <i>Fourth</i>, this document refers to the Vimage app already discussed in NOR 2, Ex. 26 (34 TTBVUE 85), so is duplicative.</p>
4	46	36 TTABVUE 128 Android Headlines - Intex Launch 4.5-Inch Aqua Speed With A Focus On Photography And Performance	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Second</i>, the document is duplicative because Mr. Cao submitted other documents from Android Headlines. <i>Third</i>, the document does not contain any description of the document, so it is not clear that it is in the relevant genus.</p>
4	47	36 TTABVUE 131 Web newswire - Karbonn redefines the 'Art of Selfie' with the launch of Titanium S19 - the Selfie Smartphone	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the document is from a non-U.S. source. La Perle App'x. A (54 TTABVUE 8); <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Third</i>, there is no information about the product, so it is not clear that it is in the relevant genus.</p>
4	48	36 TTABVUE 134 EFY Times - Launching an Exclusive 4G Tablet - iBall Slide Cuddle 4G	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the document appears to be from a non-U.S. source. La Perle App'x. A (54 TTABVUE 8); <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i>, there is no information about the product, so it is not clear that it is in the relevant genus.</p> <p>2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>

4	49	36 TTABVUE 137 EFY Times - LAVA Launches X10 with 3GB RAM and 4G LTE Support for Blazing Fast Performance	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document is from a non- U.S. Source. La Perle App’x. A (54 TTABVUE 8); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b).
4	50	36 TTABVUE 140 Economic Times - new in tech A ROUND UP OF THE BEST SMARTPHONES LAUNCHED THIS WEEK	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document is from a non-U.S. source. La Perle App’x. A (54 TTABVUE 8); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i> , there is no information about the product, so it is not clear that it is in the relevant genus. 2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
4	51	36 TTABVUE 143 BGR: Your Mobile Life - Panasonic Eluga Z1, Eluga Z1 Pro launched, prices start from Rs 14,490	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document appears to be from a non-U.S. source. La Perle App’x. A (54 TTABVUE 8); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document, let alone whether anyone in the United States saw it. TBMP § 704.08(b). <i>Third</i> , there is no information about the product, so it is not clear that it is in the relevant genus. 2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
4	52	36 TTABVUE 147 Times of India - UMI Zero review	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document is from a non- U.S. source. La Perle App’x. A (54 TTABVUE 52); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b).
4	53	36 TTABVUE 153 Gear Diary - ZTE Axon M: The Dual Screen Foldable phone I've Been Wishing For?	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i> , there is no information about the product, so it is not clear that it is in the relevant genus. <i>Third</i> , the document is duplicative or cumulative as other documents from Gear Diary and other documents concerning ZTE have been submitted. 2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).

4	56	36 TTABVUE 177 Google Play - Loopsie - Motion Video Effects & Living Photos	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the app appears to be from a non-U.S. source (Milano, 36 TTABVUE 179) and there is no information regarding whether anyone in the United States downloaded the app. <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, the exhibit does not contain the phrase “live photo(s).”</p> <p>2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
4	57	36 TTABVUE 181 App Store - SWNG - Living Photos	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the exhibit appears to use “Live Photo(s)” to refer to Apple’s product. <i>Second</i>, the app is no longer available, so the evidence is irrelevant and confusing. 49 TTABVUE 42 ¶ 105. <i>Third</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b).</p> <p>2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
4	58	36 TTABVUE 184 App Store - Cinegraph - Living Photos	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the exhibit appears to use uses “Live Photo(s)” to refer to Apple’s product. <i>Second</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b).</p> <p>2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).</p>
4	59	36 TTABVUE 187 Google Play - TikTok Live Photo	<p>1. FRE 401, 403. This exhibit is a duplicate of NOR 2, Exhibit 25 (34 TTABVUE 196). It, therefore, is cumulative and wasteful all the same objections apply.</p>
5	1	37 TTABVUE 5 YouTube - How to Make Normal Photo to Live Photo Live Effect PixaLoop	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, the video was posted by a non- U.S. entity. La Perle App’x. A (54 TTABVUE 9); <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, the description of the app does not include recording view, so it is not clear that the app in the relevant genus. <i>Third</i>, the video has been viewed only 843 and there is no evidence that any of those views came from the United States.</p>
5	2	37 TTABVUE 8 Google Photos - Live photo from samsung nor works	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, there is no evidence that whoever posted the message in this exhibit is located in the United States. La Perle App’x. A (54 TTABVUE 9); <i>In re Thermo LabSys. Inc.</i>, 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i>, there is no information about circulation or viewership for this document. TBMP § 704.08(b).</p>
5	3	37 TTABVUE 11 Android Portal - Missing live photos	<p>1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i>, this document comes from a non-U.S. source. La Perle App’x. A</p>

		on your phone? Go With This Live Photos Android Guide!	(54 TTABVUE 9); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b).
5	4	37 TTABVUE 16 Google Play - PixaMotion Loop Photo Animator & Photo Video Maker	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the app appears to be from a non-U.S. source (India, 37 TTABVUE 19) and there is no information regarding whether anyone in the United States downloaded the app. <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , the app is described as a “motion on image editor,” so does not appear to be in the relevant genus.
5	5	37 TTABVUE 21 APKPure - VUO - Cinemagraph, Live Photo & Photo in Motion	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no evidence the source of this document is located in the United States or that people in the United States use this website. La Perle App’x A (54 TTABVUE 9); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Third</i> , the document does not contain information indicating that the app allows users to record video, with sound, and photographs, so it is not clear whether the product is in the relevant genus.
5	6	37 TTABVUE 25 TechCrunch - Apple’s new App Store website takes aim at antitrust, anti-competitive claims	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. The document does not contain the phrase “live photo” and has no bearing on the claims in this dispute. 2. FRE 802 (Hearsay). This exhibit is a website printout submitted without supporting testimony. TBMP § 704.08(b).
6	1	38 TTABVUE 6 Live Animations - Marketing	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , here is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i> , the product appears to relate to virtual reality and bringing children’s characters to life. <i>Third</i> , this document is duplicative because NOR 2, Exhibit 19 already discussed the Live Animations app.
6	2	38 TTABVUE 8 YouTube - mobile camera ---- live photo mode	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no evidence the source of this YouTube video is located in the United States or that people in the United States viewed the video. 48 TTABVUE 49 (48:17-25); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , the video received only 489 views and there is no evidence regarding the portion of those, if any, that were in the United States. 2. Hearsay/Speculation. Cao testified that he did not know the date when the reference to “live photo” was added to this

			document. 48 TTABVUE 47, 49 (46:22-24, 48: 2-5). Therefore, it is speculation or hearsay to say the phrase “live photo” was posted prior to Apple’s announcement.
6	3	38 TTABVUE 10 Gadgets 360 - Intex Aqua Power With 4000mAh Battery, Octa-Core SoC Launched at Rs. 8,444	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document comes from a non- U.S. source. La Perle App’x. A (54 TTABVUE 9); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Third</i> , the document does not contain information about the product, so it is not clear whether the product is in the relevant genus.
6	4	38 TTABVUE 13 Mobile Indian - Micromax Canvas Unite 2 Review: A good buy for Rs. 6,999	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document comes from a non-U.S. source. La Perle App’x. A (54 TTABVUE 9); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b).
6	5	38 TTABVUE 25 Laptop Mag - Lenovo A10 Tablet Review	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b). <i>Second</i> , the document does not contain information about the product, so it is not clear whether the product is in the relevant genus. 2. Hearsay. This document is hearsay as Cao does not appear to have personal knowledge regarding when the app was posted or updated and instead appears to merely be reciting what appears on the face of the document. (Cao Testimony Declaration at 11.)
6	6	38 TTABVUE 36 Gadgets 360 - Karbonn Titanium Octane Plus Review: Specifications Aren't Everything	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document comes from a non-U.S. source. La Perle App’x. A (54 TTABVUE 10); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document, in the United States or otherwise. TBMP § 704.08(b).
6	7	38 TTABVUE 47 Indian Express - Launch: Micromax Unite 2 has 21 languages. Is it as good as Moto E?	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document comes from a non-U.S. source. La Perle App’x. A (54 TTABVUE 10); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document, in the United States or otherwise. TBMP § 704.08(b). <i>Third</i> , the document does not contain information about the product, so it is not clear whether the product is in the relevant genus.
6	8	38 TTABVUE 52 Prestigio - MultiPad PMP7070C3G Manual	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document comes from a non-U.S. source. La Perle App’x. A (54 TTABVUE 10); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information

			about circulation or viewership for this document, in the United States or otherwise. TBMP § 704.08(b). <i>Third</i> , the document does not contain information about the product, so it is not clear whether the product is in the relevant genus.
6	9	38 TTABVUE 77 Gizchina - REVIEW: THE CUBOT S168 IS THE \$90 PHONE YOU HAD BEEN WAITING FOR	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document comes from a non-U.S. source. La Perle App'x. A (54 TTABVUE 10); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document, in the United States or otherwise. TBMP § 704.08(b). <i>Third</i> , the document does not contain information about the product, so it is not clear whether the product is in the relevant genus.
6	10	38 TTABVUE 92 Dspecs - Symphony Xplorer W75 Features and Specifications	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the document comes from a non-U.S. source. La Perle App'x. A (54 TTABVUE 10); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document, in the United States or otherwise. TBMP § 704.08(b). <i>Third</i> , the document does not contain information about the product, so it is not clear whether the product is in the relevant genus.
6	11	38 TTABVUE 11 APKPure - Live Photo LWP	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , there is no evidence this document comes from a U.S. source. La Perle App'x. A (54 TTABVUE 10); <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , there is no information about circulation or viewership for this document. TBMP § 704.08(b).
6	12	38 TTABVUE 116 Google Play - Autumn Leaves Live Wallpaper	1. FRE 401, 403. This exhibit is irrelevant, unfairly prejudicial, confuses the issues, misleads the fact finder, and wastes time. <i>First</i> , the app appears to come from a non-U.S. source (Dierzhavina, 38 TTABVUE 118) and there is no evidence regarding the number of U.S. consumers that downloaded the app or viewed the webpage, if any. <i>In re Thermo LabSys. Inc.</i> , 85 U.S.P.Q.2d 1285, 1290 n.6 (T.T.A.B. 2007). <i>Second</i> , the app allows consumers to create wallpaper, so is not in the relevant genus. Cao admits that the app does not allow users to record photographs that also have animation. 48 TTABVUE 68 (67:15-20). 2. Hearsay/Speculation. This document is hearsay as Cao does not appear to have personal knowledge regarding when the app was posted or updated and instead appears to merely be reciting what appears on the face of the document. 39 TTABVUE 16-17.

APPENDIX B - Unreported and Non-Precedential Cases

In re Allman II,
Serial No. 75/762,517, 2001 WL 1182755 (T.T.A.B. Oct. 5, 2001)..... 1–2

Automattic, Inc. v. Pearson,
Cancellation No. 92061714, 2017 WL 2297914 (T.T.A.B. Apr. 20, 2017)..... 3–7

Blue Collar Brewery, Inc. v. Blue Collar Brewery, LLC,
Opposition No. 91219820, 2017 WL 3446799 (T.T.A.B. July 18, 2017)..... 8–13

Exxonmobil Oil Corp. & Exxon Mobil Corp. v. Bartels Mangold Elec. GmbH,
Opposition No. 91152334, 2007 WL 2344690 (T.T.A.B. Aug. 2, 2007) 14–23

Gange v. Agility Sports LLC,
Opposition No. 91194831, 2013 WL 6858021 (T.T.A.B. Dec. 23, 2013)..... 24–28

In re LHS Productions, Inc. dba Video Bank,
No. 87/060,327, 2018 WL 3585249 (T.T.A.B. June 26, 2018)..... 29–39

In re Lynn,
Serial No. 76/470,354, 2005 WL 548049 (T.T.A.B. Mar. 1, 2005) 40–44

In re Minky Couture,
Serial No. 87/589,711, 2020 WL 1873064 (T.T.A.B. Apr. 2, 2020) 45–51

Optimal Chem. Inc. v. Srills LLC,
Cancellation No. 92063200, 2019 WL 4316700 (T.T.A.B. Sept. 10, 2019)..... 52–75

In re Schwan’s IP LLC,
Serial No. 78/527,306, 2007 WL 1276972 (T.T.A.B. Apr. 25, 2007) 76–81

In re Scripps Networks, Inc.,
Serial No. 77/418,854, 2010 WL 1920470 (T.T.A.B. Apr. 27, 2010) 82–94

In re Simon Property Group, L.P.,
Serial No. 86/341,571, 2016 WL 3912938 (July 7, 2016) 85–92

In re Transit Audio & Techs., Inc.,
Serial No. 75/534,346, 2001 WL 315034 (Mar. 30, 2001) 93–97

2001 WL 1182755 (Trademark Tr. & App. Bd.)

THIS DISPOSITION IS NOT CITABLE AS PRECEDENT OF THE T.T.A.B.

Trademark Trial and Appeal Board

Patent and Trademark Office (P.T.O.)

IN RE KENNETH H. ALLMAN II

[Serial No. 75/762,517](#)

October 5, 2001

*1 [Andrew B. Mayfield](#) for Kenneth H. Allman II.

Jessie W. Billings, Trademark Examining Attorney

Law Office 103

([Michael Hamilton](#), Managing Attorney)

Before Hanak, [Hairston](#) and [Rogers](#)

Administrative Trademark Judges

Opinion by Hanak

Administrative Trademark Judge

Kenneth H. Allman II (applicant) seeks to register in typed drawing form WEB-CV for “consulting services, namely, providing information about employment opportunities in the health care field by means of a web site and electronic mail.” The application was filed on July 28, 1999 with a claimed first use date of March 30, 1999.

The Examining Attorney has refused registration on the basis that applicant's mark, as applied to applicant's services, is merely descriptive pursuant to Section 2(e)(1) of the Trademark Act.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

A mark is merely descriptive pursuant to Section 2(e)(1) of the Trademark Act if it immediately conveys information about a significant quality or characteristic of the relevant goods or services. [In re Gyulay](#), 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); [In re Bed & Breakfast Registry](#), 791 F.2d 157, 229 USPQ 818, 819 (Fed. Cir. 1986).

The Examining Attorney argues that applicant's mark WEB-CV is merely descriptive of applicant's services in the following manner: “The term ‘web’ refers to the applicant's web site and the acronym CV means ‘curriculum vitae’ ... The mark WEB-CV describes the nature of applicant's services, which is to distribute CVs via the web.” (Examining Attorney's brief page 2).

Applicant argues that the initialism CV has many meanings, and that the Examining Attorney has not established that users of applicant's services would understand the initialism CV to mean “curriculum vitae.”

Obviously, applicant is not seeking to register WEB-CURRICULUM VITAE. If he were, then we would find this “mark” to be merely descriptive of applicant's services. Rather, applicant seeks to register WEB-CV. Thus, the issue before us is whether the initialism CV is generally understood as representing the descriptive words “curriculum vitae” so as to be substantially synonymous therewith. This test for determining whether an initialism is merely descriptive was established by the predecessor to our primary reviewing Court in [Modern Optics, Inc. v. Univis Lens Co.](#), 234 F. 2d 504, 110 USPQ 293 (CCPA 1956). This test is as follows:

It does not follow, however, that all initials of combinations of descriptive words are ipso facto unregistrable. While each case must be decided on the basis of the particular facts involved, it would seem that, as a general rule, initials cannot be considered descriptive unless they have become so generally understood as representing descriptive words as to be accepted as substantially synonymous therewith. 110 USPQ at 295 (emphasis added).

*2 The Modern Optics rule for determining whether initials are merely descriptive has been favorably received by other Courts of Appeal. See Anheuser-Busch, Inc. v. Stroh Brewery Co., 750 F.2d 631, 224 USPQ 657, 659 (8 Cir. 1984) (“We find the reasoning of Modern Optics persuasive.”); G. Heileman Brewing Co. v. Anheuser-Busch Inc., 873 F.2d 985, 10 USPQ2d 1801, 1808 (7 Cir. 1989). Of course, this Board would be bound to follow the rule of Modern Optics regardless of its favorable reception by other Circuits.

In an effort to establish that the initialism CV is so generally understood as representing the words “curriculum vitae” so as to be substantially synonymous therewith, the Examining Attorney has made of record only two pieces of evidence. The first is a page from the Acronym Finder which shows that there are 23 definitions for the initialism CV, one of which is “curriculum vitae.” The second piece of evidence is from the AND Concise Dictionary which is published in the United Kingdom. This foreign dictionary, in defining the word “curriculum,” makes reference to the term “curricula vitae” and the abbreviation CV.

Based upon this extremely limited evidence, we find that the Examining Attorney has simply failed to establish that the initialism CV is so generally understood as meaning “curriculum vitae” so as to be substantially synonymous therewith. At the outset, we note that it is the policy of this Board to give very little, if any, evidentiary weight to foreign publications. The fact that the Examining Attorney apparently could find only a foreign dictionary to equate the initialism CV with the term “curricula vitae” (not “curriculum vitae”) is quite telling. This panel has consulted over ten dictionaries published in the United States, and not one of these dictionaries defines the initialism CV (if it defines it at all) as meaning “curriculum vitae.” Moreover, under the listing for “curriculum vitae,” none of these ten dictionaries includes any reference to the initialism CV.

As for the Examining Attorney's reliance on the Acronym Finder, we simply note that this is a very comprehensive work in that it lists 23 different meanings for the initialism CV. These meanings are extremely varied in nature as demonstrated by the following examples: calorific value, cargo variant, cash value, clandestine vulnerability, computer virus, multipurpose aircraft carrier and Republic of Cape Verde. Given the extremely in-depth nature of this Acronym Finder, the fact that an initialism appears in this work and is defined in numerous varied manners does not establish that purchasers of applicant's services would be familiar with any particular meaning of CV.

Finally, we note that the Examining Attorney has failed to make of record any newspaper or magazine articles where the initialism CV appears, let alone any article which uses CV to mean curriculum vitae. Examining Attorneys have easy access to the vast NEXIS data base, and this failure of proof is telling.

*3 We hasten to add that our decision that the Examining Attorney has failed to prove that the mark WEB-CV is merely descriptive of applicant's services is, of course, based upon this extremely limited evidentiary record. A different, more comprehensive record could well have resulted in a different result. Finally, we note that it is the practice of this Board in determining whether a mark is merely descriptive to resolve doubts in favor of the applicant. In re Gourmet Bakers, Inc., 173 USPQ 565 (TTAB 1972).

Decision: The refusal to register is reversed.

2001 WL 1182755 (Trademark Tr. & App. Bd.)

2017 WL 2297914 (Trademark Tr. & App. Bd.)

THIS OPINION IS NOT A PRECEDENT OF THE TTAB

Trademark Trial and Appeal Board

Patent and Trademark Office (P.T.O.)

AUTOMATTIC, INC.

v.

PEARSON, CHRIS

Cancellation No. 92061714

April 20, 2017

*1 [Marina A. Lewis](#) of Procopio Cory Hargreaves & Savitch LLP, for Automattic, Inc.
Chris Pearson, pro se

Before [Cataldo](#), [Bergsman](#) and [Ritchie](#)

Administrative Trademark Judges

Opinion by [Cataldo](#)

Administrative Trademark Judge:

Automattic, Inc. (Petitioner) has petitioned to cancel the following marks issued to Chris Pearson (Respondent) on the Principal Register in standard characters:

DIYTHEMES for “web site development software” in International Class 9; and “computer software installation and maintenance; technical support services, namely, troubleshooting of computer software problems; website design and development for others” in International Class 42;¹

THESIS THEME for “web site development software” in International Class 9;² and

THESIS for “web site development software” in International Class 9.³

As grounds for cancellation, Petitioner alleges that: (1) the intent-to-use applications underlying the involved registrations are void *ab initio* inasmuch as they were filed by Respondent rather than DIY Themes LLC, which is the owner of the mark and the entity that possessed the requisite bona fide intent to use the marks in commerce as of the applications' filing dates; and (2) the mark THESIS in Registration No 4039583 is merely descriptive under Trademark Act Section 2 (e)(1), [15 U.S.C. § 1052\(e\)\(1\)](#).

In his answer, Respondent denied the salient allegations of the petition for cancellation. Petitioner introduced testimony and evidence and filed a brief. Respondent did not introduce any testimony or evidence, nor did he file a brief.

A. The Record

The record consists of the pleadings and the file of the involved registrations. [Trademark Rule 2.122](#); [37 C.F.R. § 2.122](#). Petitioner introduced into the record the testimony deposition of Respondent, and documents submitted therewith.⁴ In addition, Petitioner submitted by notice of reliance the following materials:⁵

Certain of Petitioner's second set of interrogatories and requests for production of documents and Respondent's responses thereto;

Portions of the April 12, 2016 discovery deposition of Respondent;

*2 Printed copies of official records of the State of Texas regarding DIY Themes LLC;

Printouts from the Internet webpage of DIY Themes LLC;

Dictionary definitions of the terms "theme" and "thesis;"

Printouts from the Internet webpages of third parties; and

Copies of third-party registrations for marks containing the term "theme(s)."

B. Petitioner's Standing

Standing is a threshold issue that must be proved in every *inter partes* case. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). In order to meet the standing requirement, a plaintiff need only show that it has a real interest, *i.e.*, a personal stake, in the outcome of the proceeding. See *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1026 (Fed. Cir. 1999); *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2012, 2023-24 (Fed. Cir. 1987). For example, a plaintiff may establish standing as a competitor. See *Books on Tape, Inc. v. The Booktape Corp.*, 836 F.2d 519, 5 USPQ2d 1301, 1302 (Fed. Cir. 1987).

The purpose of the standing requirement, which is directed solely to the interest of the plaintiff, is to prevent litigation when there is no real controversy between the parties. In the case of a cancellation proceeding, the standing requirement has its basis in Section 14 of the Trademark Act which provides in relevant part that "[a]ny person who believes that he is or will be damaged ... by the registration of a mark upon the principal register" may file upon payment of the prescribed fee, a petition to cancel stating the grounds therefor. 15 U.S.C. § 1064. Our primary reviewing court, the U.S. Court of Appeals for the Federal Circuit, has enunciated a liberal threshold for determining standing, namely that a plaintiff must demonstrate that he possesses a "real interest" in a proceeding beyond that of a mere intermeddler, and "a reasonable basis for his belief of damage." See *Ritchie v. Simpson*, 50 USPQ2d at 1025-26. A "real interest" is a "direct and personal stake" in the outcome of the proceeding. *Id.* at 1026. "The facts regarding standing ... are part of a petitioner's case and must be affirmatively proved. Accordingly, [petitioner] is not entitled to standing solely because of the allegations in its petition." *Lipton Industries*, 213 USPQ at 189. See also *Ritchie v. Simpson*, 50 USPQ2d at 1027.

In its petition for cancellation, Petitioner alleges that Respondent filed the applications underlying the challenged registrations claiming a bona fide intent to use the marks in commerce and, subsequently, use in commerce.⁶ Petitioner further alleges that DIY Themes LLC, an entity of which Respondent presently is the sole shareholder, is the party possessing the requisite bona fide intent to use the marks in commerce, and that, as a result, the applications underlying the involved registration were filed by the wrong applicant.⁷ Petitioner alleges in addition that the term "thesis" merely describes the goods in involved Registration No. 4039583.⁸ With regard to standing, Petitioner alleges as follows:

*3 18. Mr. Pearson has filed a Uniform Domain Name Dispute Resolution Policy proceeding, challenging ownership by Petitioner of the domain name <thesis.com>, which domain was acquired by Petitioner in 2014.

19. For each and every reason stated above, Petitioner believes that it will be damaged by continued registration and maintenance of Pearson Registrations as protested of herein.⁹

However, the petition to cancel does not contain any allegations regarding the nature of Petitioner's business or the marks under which such business is conducted. Further, Petitioner does not explain, either in its petition to cancel or otherwise, how it is or will be damaged by continued registration of Respondent's marks. Respondent's answer to the petition for cancellation does not include any admissions regarding Petitioner's alleged business activities or Petitioner's interest in any of the marks in Respondent's challenged registrations. To the contrary, in its answer Respondent asserts:

18. Respondent admits to the allegations contained in Paragraph 18 insofar that he did file the UDRP proceeding. However, that case has been resolved and Respondent is unaware of any other on-going litigation between the parties except for this Trademark cancellation.

19. Respondent denies the allegations in Paragraph 19. Respondent questions how Petitioner has standing to attempt to cancel Respondent's marks. Petitioner in particular makes no allegation of how it will be harmed, particularly regarding DIYTHEMES. Thus Petitioner lacks standing to bring these claims. Petitioner has failed to allege anything that gives it any direct or personal stake in the registration of DIYTHEMES and the claims against that trademark appear to be brought in bad faith. *See Petroleos Mexicanos v. Intermix S.A.*, 97 U.S.P.Q.2d 1403 (T.T.A.B. 2010) (quoting *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1027 (Fed. Cir. 1999)).¹⁰

In its brief, Petitioner does not address its standing to bring the instant cancellation. Petitioner's only arguments in its brief regarding its asserted business activities are as follows under its Statement of Facts:

A. Automattic and the WordPress® Platform

Petitioner Automattic Inc. is a Delaware corporation having a principal place of business at 132 Hawthorne Street, San Francisco, California 94107. Since 2005, Petitioner has continuously commercialized and marketed WordPress.com, a hosted version of the most popular online Content Management System (CMS), WordPress®. WordPress.com allows nearly anyone, from bloggers, to photographers, artists, plumbers, doctors and restaurant owners to easily create and maintain websites which Petitioner hosts and supports. Petitioner also offers a number of other products and services related to WordPress software, and actively contributes to the WordPress® open source project. WordPress users can easily choose the look or feel of their websites by incorporating one of hundreds of available WordPress® themes. A WordPress® theme is a collection of files that work together to produce a graphical interface with an underlying unifying design for a website. These underlying files are called template files, and modify the way the site is displayed, without modifying the underlying software. Because WordPress is highly customizable, and the code is open sourced, anyone can develop and provide themes for WordPress users; many businesses have been built around creating WordPress themes.¹¹

B. DIY Themes LLC and its Company History

*4 One such entity in the business of providing WordPress® themes is DIY Themes LLC, a Texas limited liability company that offers website design software and services under the marks THESIS, THESIS THEME, and DIY THEMES. (See Pet. First Not. Rel., Exhibit E.) On July 10, 2008, Respondent -- together with another individual named Brian Clark -- formed DIY Themes LLC. (Pet. First Not. Rel., Exhibit C.) The Company Agreement filed with the Texas Secretary of State listed the ownership of DIY Themes LLC as follows: 60% by Respondent, and 40% by Brian Clark. *Id.*¹²

However, Petitioner does not allege that is a competitor of Respondent or has engaged in its asserted business activities, and neither party introduced any testimony or evidence regarding trademarks used, registered or applied for by Petitioner.¹³ Thus, none of Petitioner's statements in its brief, either individually or as a whole, support Petitioner's allegation of its standing.

We must therefore examine the testimony and evidence submitted by Petitioner to ascertain whether Petitioner has proven its standing to bring the instant cancellation against Respondent's registered marks.

The testimony of Respondent discusses Respondent, its business, and DIY Themes, LLC. Neither the testimony nor the attached exhibits mention Petitioner.¹⁴

Exhibit A to Petitioner's notice of reliance consists of Petitioner's second set of interrogatories and requests for production of documents and Respondent's responses thereto.¹⁵ These exhibits make no mention of Petitioner, any trademarks owned, registered or applied for by Petitioner, or its asserted business activities.

Exhibit B consists of portions of the April 12, 2016 discovery deposition of Respondent. The deposition testimony makes no mention of Petitioner.¹⁶

Exhibits C and D consist of official documents from the State of Texas regarding Respondent and DIY Themes LLC and make no mention of Petitioner.¹⁷

Exhibit E consists of printouts from the Internet webpage of DIY Themes LLC.¹⁸ Some of these documents mention WordPress, but make no mention of Petitioner or its asserted relationship thereto.

Exhibits F -- H consist of printouts from Internet dictionaries and provide definitions of "theme" and "thesis."¹⁹ These exhibits make no mention of Petitioner or its asserted business activities.

Exhibits I -- L consist of third-party websites discussing various WordPress themes available for sale.²⁰ These documents make no mention of Petitioner, its asserted relationship to WordPress, or its asserted business activities.

Exhibits M -- Q consist of third party registrations for marks that include the term "THEME(S)."²¹ None of these registrations are issued to Petitioner or discuss Petitioner.

*5 We note in addition that even if any of the Internet website evidence made of record by Petitioner via notice of reliance discussed its business activities, such evidence would not be admissible for the truth of the matters asserted therein. *See* 37 C.F.R. § 2.122(e); *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031 (TTAB 2010); TBMP § 704.08(b) and authorities cited therein. *See also Syngenta Crop Protection Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1117 n.7 (TTAB 2009); *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1717 n.2 (TTAB 2007); *Midwest Plastic Fabricators Inc. v. Underwriters Laboratories Inc.*, 12 USPQ2d 1267, 1270 n.5 (TTAB 1989), *aff'd*, 906 F.2d 1568, 15 USPQ2d 1359 (Fed. Cir. 1990). The rule against hearsay mandates that an out-of-court statement cannot be offered as evidence of the truth of the matter asserted in that statement. Insofar as none of the exceptions to the hearsay rule apply, we would not consider such submissions to prove the truth of any matter stated therein.

The record is devoid of any evidence concerning the nature of Petitioner's commercial activities and its interest in Respondent's registered marks. "Proof of standing in a Board proceeding is a low threshold." *Syngenta Crop Protection Inc. v. Bio-Check LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009). For example, Petitioner could have submitted testimony or competent documentary evidence as to its asserted need to use the terms comprising the marks and nature of its business activities to establish its standing. *See, e.g., Panda Travel Inc. v. Resort Option Enterprises Inc.*, 94 USPQ2d 1789, 1793 (TTAB 2009) (testimony that opposer has used the mark PANDA TRAVEL continuously since June 1981 to identify its travel agency services sufficient to prove standing to bring Section 2(d) claim); *Automedx Inc. v. Artivent Corp.*, 95 USPQ2d 1976, 1978 (TTAB 2010) (testimony that opposer has been manufacturing and selling portable ventilators sufficient to prove standing to bring 2(d) claim). Petitioner neglected to do so. Thus, on the record before us, Petitioner has failed to establish a "real interest" and "reasonable belief in damage."

Accordingly, the cancellation proceeding is dismissed for Petitioner's lack of standing. *See, e.g., Lumiere Productions, Inc. v. International Telephone and Telegraph Corp.*, 227 USPQ 892, 893 (TTAB 1985).

1 Registration No. 4010482 issued on August 9, 2011.

2 Registration No. 4061171 issued on November 22, 2011.

3 Registration No. 4039583 issued on October 11, 2011.

4 14 TTABVUE.

5 13 TTABVUE.

6 1 TTABVUE 3-4.

7 *Id.* at 4.

8 *Id.* at 5.

9 *Id.*

10 4 TTABVUE 5.

11 16 TTABVUE 7.

12 *Id.* at 8.

13 We note that the Board does not take judicial notice of applications or registrations; they must be proved by competent evidence. *See, e.g., In re Johnathan Drew Inc.*, 97 USPQ2d 1640, 1644 n. 11 (TTAB 2011) (stating that “the Board’s well-established practice is not to take judicial notice of registrations that reside in the USPTO”); *Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290, 1293 (TTAB 1986) (“[W]e do not take judicial notice of application and registration files that reside in the Patent and Trademark Office on the basis of their mere identification in briefs, pleadings and evidentiary submissions.”). *Cf. In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681 (Fed. Cir. 2010) *See also* Trademark Board Manual of Procedure (TBMP) § 1208.02 (2015) and authorities cited therein.

14 14 TTABVUE.

15 13 TTABVUE 7-23.

16 *Id.* at 24-42.

17 *Id.* at 43-50.

18 *Id.* at 51-60.

19 *Id.* at 61-71.

20 *Id.* at 72-97.

21 *Id.* at 98-111.

2017 WL 2297914 (Trademark Tr. & App. Bd.)

2017 WL 3446799 (Trademark Tr. & App. Bd.)

THIS OPINION IS NOT A PRECEDENT OF THE TTAB

Trademark Trial and Appeal Board

Patent and Trademark Office (P.T.O.)

BLUE COLLAR BREWERY, INC.

v.

BLUE COLLAR BREWERY, LLC

Opposition No. 91219820 to [Application Serial No. 86238657](#)

July 18, 2017

*1 [Charles H. Knull](#) and [Kate E. Rieber](#) of Knull PC, for Opposer, Blue Collar Brewery, Inc.
[Brian S. Malkin](#) of Ference & Associates LLC, for Applicant, Blue Collar Brewery, LLC

Before [Cataldo](#), [Shaw](#) and [Kuczma](#)

Administrative Trademark Judges

Opinion by [Kuczma](#)

Administrative Trademark Judge:

Blue Collar Brewery, LLC (“Applicant”) filed an application to register the mark BLUE COLLAR BREWERY (standard character mark) for:

Beer making kit; Beer wort; Extracts of hops for making beer; Hop extracts for manufacturing beer; Malt extracts for making beer; Processed hops for use in making beer, in International Class 32.¹

Blue Collar Brewery, Inc. (Opposer) opposes registration of Applicant's mark under Section 2(e)(1), [15 U.S.C. § 1052\(e\)\(1\)](#), on the ground that the use of “brewery” in Applicant's mark is deceptively misdescriptive of Applicant's goods because Applicant is not a brewery.²

Applicant denied the salient allegations of the Notice of Opposition and asserted as affirmative defenses that Opposer's claims are barred by the doctrines of unclean hands, laches and acquiescence, which were not pursued at trial. Accordingly, the affirmative defenses are therefore waived. [Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.](#), 107 USPQ2d 1750, 1753 (TTAB 2013) *aff'd* 565 Fed. App'x 900 (Fed. Cir. 2014) (mem.); Trademark Board Manual of Procedure (“TBMP”) § 801.01 (Jan. 2017).

I. Evidentiary Objections

Opposer objects to Applicant's Notices of Reliance Nos. 4 (website listing of Applicant's items sold on eBay) (27 TTABVUE 28-30), 5 (website listing of Applicant's items sold on Etsy) (27 TTABVUE 33-35), 7 (website pages of Applicant's competitors and their products) (27 TTABVUE 40-42) and 8 (website definitions or descriptions of “wort”) (27 TTABVUE 44-53).³ “[I]f a document obtained from the Internet identifies its date of publication or date that it was accessed and printed, and its source (e.g., the URL), it may be admitted into evidence pursuant to a notice of reliance.” [Safer, Inc. v. OMS Investments, Inc.](#), 94 USPQ2d 1031, 1039 (TTAB 2010) (emphasis in original). However, Applicant's failure to identify the sources of the Internet information and/or the retrieval dates for the foregoing evidence it introduced are procedural deficiencies to which Opposer did not raise timely objections. Because the deficiencies could have been cured if Opposer had timely objected, Opposer's

objections are deemed waived. See *City National Bank v. OPGI Management GP Inc./Gestion OPGI Inc.*, 106 USPQ2d 1668, 1672 (TTAB 2013) (petitioner's objection to respondent's submission via notice of reliance of a business brochure prepared by a third party overruled; “[a]ny shortcomings in respondent's original submission ... under notice of reliance, such as its failure to identify the URL and when the document was actually accessed (either printed out or downloaded), are procedural deficiencies that were not timely raised by petitioner and thus have been waived); TBMP § 704.08(b) (June 2016).⁴ Accordingly, Opposer's objection is overruled.

II. The Record

*2 In light of the foregoing, the record consists of Applicant's application file and the pleadings. [Trademark Rule § 2.122 \(b\)](#), [37 CFR § 2.122 \(b\)](#).

Additionally, Opposer introduced the following evidence:

Notice of Reliance on a search on the Trademark Electronic Search System (“TESS”) for the term “brewery” listing the first 100 results. (Notice of Reliance 4) (15 TTABVUE);

Notice of Reliance on Applicant's Responses to Interrogatory No. 5 and Request to Admit Nos. 8-12, 19-20, 25, 27-29, 32-35 (Notice of Reliance 1) (16 TTABVUE);

Notice of Reliance on online definitions provided by Merriam-Webster and Macmillan Dictionary submitted as Exhibit 6 to Applicant's Motion for Summary Judgment (Notice of Reliance 2) (17 TTABVUE);

Notice of Reliance on Office Action of April 24, 2014 for Serial No. 86238657 showing definition of “brewery” cited by Examiner (Notice of Reliance 3) (18 TTABVUE);

Notice of Reliance on website printouts containing information of businesses cited by Applicant in its Motion for Summary Judgment attempting to claim such businesses as evidence of use of “brewery” by non-breweries (Notice of Reliance 5) (19 TTABVUE);

Notice of Reliance on of copy of §1203.02 of the TMEP (Notice of Reliance 6) (20 TTABVUE);

Notice of Reliance on Applicant's response to October 21, 2014 Office Action showing Applicant's removal of “beer” from goods and services listed in its Application (Notice of Reliance 7) (21 TTABVUE);

Notice of Reliance on copy of Applicant's Exhibit No. 7 from Applicant's Reply Brief filed in connection with its Motion for Summary Judgment (Notice of Reliance 8) (22 TTABVUE);⁵

Notice of Reliance on online definition of “wort” from Merriam-Webster.com (Notice of Reliance 9) (23 TTABVUE);

Notice of Reliance on pages from Sixth Edition of the Shorter Oxford English Dictionary showing definition of “brewery” (Notice of Reliance 10) (24 TTABVUE);

Notice of Reliance on Second Edition of the Oxford English Reference Dictionary showing definition of “brewery” (Notice of Reliance 11) (25 TTABVUE);

Notice of Reliance on Second Edition of the Oxford English Reference Dictionary showing definition of “wort” (Notice of Reliance 12) (26 TTABVUE);

Rebuttal Notice of Reliance on copy of the website www.howtobrew.com/book/glossary defining “wort” (First Supplemental Notice of Reliance) (28 TTABVUE);

Rebuttal Notice of Reliance on portion of Applicant's website <http://www.bluecollarbrewery.com/about-us.html> (Second Supplemental Notice of Reliance) (29 TTABVUE);

Rebuttal Notice of Reliance on copy of the website www.craftbeer.com/beer/beer-glossary defining various terms associated with the brewing of beer and defining “wort” (on p. 17 of website) (Third Supplemental Notice of Reliance) (30 TTABVUE);

*3 Rebuttal Notice of Reliance on copies of Applicant's eBay page and Applicant's eBay Feedback profile (Fourth Supplemental Notice of Reliance) (31 TTABVUE).

And, Applicant submitted the following evidence:

Applicant's Notice of Reliance on 3 random examples of word mark trademarks, including the word “brewery,” where there is a disclaimer: “NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE ‘BREWERY’ APART FROM THE MARK AS SHOWN,” which Applicant submits is standard practice for trademarks containing the word BREWERY, by examining attorneys (27 TTABVUE 2-4);

Applicant's Notice of Reliance on 9 examples of Live Registered Trademarks (from TESS) where the term BREWERY is part of the word mark and is used by a company that is not a brewery and/or for a class of goods and services that is not a beer (27 TTABVUE 6-24);

Applicant's Notice of Reliance on TMEP § 1203.02(a) citing language of 1203.02(a) and providing “live” link to http://www.bitlaw.com/source/tmep/1203_02_a.html (27 TTABVUE 25-26);⁶

Applicant's Notice of Reliance on screenshot of eBay Feedback profile for “bluecollarbrewery” (27 TTABVUE 28-30);⁷

Applicant's Notice of Reliance on screenshot of BlueCollarBrewing Homepage showing items sold on Etsy (27 TTABVUE 33-35);

Applicant's Notice of Reliance on production of beer for personal consumption set forth in [27 CFR 25.205](#) Production with “live” link to Code of Federal Regulations at <https://www.law.cornell.edu/cfr/text/27/25.205> (27 TTABVUE 37-38);⁸

Applicant's Notice of Reliance on “Trade Name, Product Name, Website and Webpage Screenshots of Blue Collar Brewery LLC's competitors with brewery in the trade or product name” (27 TTABVUE 40-42);

Applicant's Notice of Reliance on website screenshots from websites offering general information or for brewing beer, where “wort” is defined or referred to as “unfermented beer.” (27 TTABVUE 44-53);

Applicant's Notice of Reliance on Opposer's Responses to Requests for Admission 1-2, 5-7 (27 TTABVUE 55-59).

In addition to the foregoing, both Opposer and Applicant submitted trial briefs.

III. Standing

Standing is a threshold issue that must be proved in every *inter partes* case. [Lipton Indus., Inc. v. Ralston Purina Co.](#), 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). In an opposition proceeding, the standing requirement has its basis in § 13 of the

Trademark Act which provides in relevant part that “[a]ny person who believes that he is or will be damaged by the registration of a mark upon the principal register” may file upon payment of the prescribed fee, an opposition stating the grounds therefor. 15 U.S.C. § 1063. Our primary reviewing court, the U.S. Court of Appeals for the Federal Circuit, has enunciated a liberal threshold for determining standing, namely that a plaintiff must demonstrate that he possesses a “real interest” in a proceeding beyond that of a mere intermeddler, and “a reasonable basis for his belief of damage.” *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014) (quotation omitted), *cert. denied*, 135 S. Ct. 1401 (2015); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 213 USPQ at 189. “The facts regarding standing ... are part of a [petitioner’s] case and must be affirmatively proved. Accordingly, [petitioner] is not entitled to standing solely because of the allegations in its petition.” *Lipton Industries*, 213 USPQ at 189. See also *Ritchie v. Simpson*, 50 USPQ2d at 1027.

*4 In order to establish its standing to object to the registration of an allegedly merely descriptive or deceptively misdescriptive term, a plaintiff need only show that it is engaged in the manufacture or sale of the same or related goods as those listed in the defendant’s involved application or registration and that the product in question is one which could be produced in the normal expansion of plaintiff’s business; that is, that plaintiff has a real interest in the proceeding because it is one who has a present or prospective right to use the term descriptively in its business. See *Saint-Gobain Corp. v. 3M Co.*, 90 USPQ2d 1425, 1428 (TTAB 2007) citing *Federal Glass Co. v. Corning Glass Works*, 162 USPQ 279, 282-83 (TTAB 1969) (party need not be a manufacturer or seller of the goods in connection with which a descriptive, misdescriptive, or merely ornamental designation is used in order to object to the registration thereof. It is sufficient that the party objecting to such registration be engaged in the manufacture and/or sale of the same or related goods and that the product in question be one that could be produced in the normal expansion of that person’s business); *Binney & Smith Inc. v. Magic Markers Industries, Inc.*, 222 USPQ 1003, 1010 (TTAB 1984) (allegations that a petitioner is engaged in the manufacture or sale of the same or related products as those listed in respondent’s involved registration, or that the product in question is one which could be produced in the normal expansion of petitioner’s business, constitute a sufficient pleading of standing); *Southwire Co. v. Kaiser Aluminum & Chemical Corp.*, 196 USPQ 566, 572-73 (TTAB 1977). Additionally, Opposer does not need to own a pending application for the mark, does not have to be using the term as a mark, or even use the term at all, in order to establish its standing. See, e.g., *Eastman Kodak Co. v. Bell & Howell Document Management Products Co.*, 23 USPQ2d 1878, 1879 (TTAB 1992), *aff’d* 994 F.2d 1569, 26 USPQ2d 1912 (Fed. Cir. 1993) (party challenging mark on descriptiveness grounds may establish standing by pleading and proving it is engaged in manufacture or sale of related products).

Because Opposer opposes registration of Applicant’s mark BLUE COLLAR BREWERY on the grounds that “BREWERY” is deceptively misdescriptive of the goods, it need only assert an equal right to use the mark or that term for the goods. Proprietary rights in Opposer are not required. *Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2024 (Fed. Cir. 1987); *Dewalt, Inc. v. Magna Power Tool Corp.*, 289 F.2d 656, 129 USPQ 275, 280 (CCPA 1961).

*5 The Notice of Opposition alleges that Opposer is a New York corporation doing business in Poughkeepsie, New York, operating a brewery where it makes beer. Opposer has allegedly obtained all the necessary federal and state permits to operate the brewery under the name Blue Collar Brewery including a Certificate of Label Approval from the Alcohol and Tobacco Tax and Trade Bureau for BLUE COLLAR BREWERY, and uses the name Blue Collar Brewery on labels applied to the containers in which its alcoholic beverages are offered. (1 TTABVUE 3). In addition to not offering any evidence of proof of the foregoing, Opposer does not explain, either in its Notice of Opposition or otherwise, how it is or will be damaged by registration of Applicant’s mark. Neither does Applicant’s Answer and Affirmative Defenses include any admissions regarding Opposer’s alleged business activities or Opposer’s interest in either BREWERY or the mark BLUE COLLAR BREWERY. Likewise, Opposer does not address its standing to bring the instant opposition in its Trial Brief.

Although “[p]roof of standing in a Board proceeding is a low threshold.” *Syngenta Crop Protection Inc. v. Bio-Check LLC*, 90 USPQ2d 1112, 1118 n.8 (TTAB 2009), the record lacks any evidence concerning the nature of Opposer’s commercial activities or its interest in Applicant’s BLUE COLLAR BREWERY mark. Thus, on the record before us, Opposer has failed to establish a “real interest” and “reasonable belief in damage,” *i.e.*, that it is not wholly without merit. Accordingly, the opposition proceeding

is dismissed for Opposer's lack of standing. *See, e.g., Lumiere Productions, Inc. v. International Telephone and Telegraph Corp.*, 227 USPQ 892, 893 (TTAB 1985).

Even if Opposer had proved standing, the Opposition would be dismissed on its merits. Opposer's position that the term "BREWERY" is deceptively misdescriptive stops short. In order for Applicant's mark to be found deceptively misdescriptive within the meaning of § 2(e)(1), and thus unregistrable, it must immediately convey an idea about the goods, but that idea, though plausible, must be false. *Anheuser-Busch Inc. v. Holt*, 92 USPQ2d 1101, 1108 (TTAB 2009); *In re Woodward & Lothrop Inc.*, 4 USPQ2d 1412, 1413 (TTAB 1987). The test for determining whether Applicant's applied-for mark is deceptively misdescriptive as applied to its goods involves a two-part determination of: (1) whether the matter sought to be registered misdescribes the goods, and (2) whether anyone is likely to believe the misrepresentation. *See Anheuser-Busch Inc. v. Holt*, 92 USPQ2d at 1108; *In re Quady Winery, Inc.*, 221 USPQ 1213, 1214 (TTAB 1984).

*6 Marks, like Applicant's mark, that contain registrable matter in addition to deceptively misdescriptive components can be registered with a disclaimer of the deceptively misdescriptive matter, when appropriate. *See In re Aluminum Co. of America*, 197 USPQ 761, 762 (TTAB 1978) (§ 6 of the Trademark Act allows registration of deceptively misdescriptive matter as part of composite mark on Principal Register if such matter is disclaimed); TMEP § 1209.04. As noted above, the word "BREWERY," whether it is considered to be descriptive or deceptively misdescriptive of Applicant's goods, is disclaimed and Opposer has made no claim that the application may not proceed to registration absent a disclaimer for the words BLUE COLLAR.

Accordingly, Opposer has failed to show that Applicant's mark as a whole is deceptively misdescriptive or that consumers are likely to believe any misrepresentation occasioned by the wording BREWERY, BLUE COLLAR or BLUE COLLAR BREWERY contained in Applicant's mark.

Decision: The opposition to registration of the applied-for mark BLUE COLLAR BREWERY shown in Serial No. 86238657 is dismissed.

1 Application Serial No. 86238657 was filed on April 1, 2014, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging March 10, 2009 as the date of first use of the mark and March 10, 2014 as the date of first use of the mark in commerce. "BREWERY" is disclaimed.

2 Applicant's Motion for Summary Judgment was partially granted and judgment entered in Applicant's favor on Opposer's fraud claim (14 TTABVUE).

3 Record citations are to TTABVUE, the Board's publically available docket history system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

4 The June 2016 edition of the Trademark Trial and Appeal Board Manual of Procedure (TBMP) is the version applicable to the evidence which was submitted in this case between September 29, 2016 and January 10, 2017.

5 The Notice of Reliance states that copies of Applicant's Exhibits 7 and 8 to Applicant's Reply to Opposition to Construed Motion for Summary Judgment filed November 12, 2015 (13 TTABVUE) are attached. However, Applicant's Reply brief regarding Summary Judgment Motion only contained Exhibit 7 and only Exhibit 7 was attached to Opposer's Notice of Reliance. Thus, the reference to "Exhibit 8" is in error.

6 Providing a "live" link to a website without attaching a copy of the material appearing on the website is not sufficient to introduce the text of what is shown in the link into the record. *See TBMP* § 704.07.

7 While the Notice of Reliance indicates that it contains "Applicant's Homepage and Items Sold on ebay," the Notice of Reliance contains an eBay Feedback profile for Applicant's Blue Collar Brewery listing 14 entries.

8 *See* footnote 6.

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2007 WL 2344690 (Trademark Tr. & App. Bd.)

THIS OPINION IS NOT A PRECEDENT OF THE T.T.A.B.

Trademark Trial and Appeal Board

Patent and Trademark Office (P.T.O.)

EXXONMOBIL OIL CORPORATION AND EXXON MOBIL CORPORATION

v.

BARTELS MANGOLD ELECTRONIC GMBH

OPPOSITION 91152334 TO APPLICATION SERIAL 75434996 FILED ON FEBRUARY 17, 1998

August 2, 2007

*1 Paul F. Kilmer, Anthony R. Masiello and Stephen J. Jeffries of Holland & Knight LLP for ExxonMobil Oil Corporation and Exxon Mobil Corporation

P. Jay Hines and Rebecca L. Roby of Baker & Hostetler LLP for Bartels Mangold Electronic GmbH

Before Bucher, Holtzman and Zervas

Administrative Trademark Judges

Opinion by Zervas

Administrative Trademark Judge:

On February 17, 1998, applicant, Bartels Mangold Electronic GmbH, filed an application for registration of the mark IQMOBIL (in standard character form) on the Principal Register for the following goods and services, as amended:

vehicle and aircraft on-board electronic instruments for measuring and controlling air pressure in tires, namely, an electronic data processing system comprised of air pressure sensors located within the tires of a vehicle or aircraft, transmitters and control units; vehicle and aircraft on-board electronic instruments for measuring the components of exhaust gases and then making corrections, if necessary, to the mixture of fuel, comprised of exhaust sensors, actuators, transmitters and control units; electronic diesel engine exhaust particles filters; vehicle and aircraft on-board electronic instruments, namely, sensors to detect micromechanical pressure, rain, engine revolutions per minute, engine and cockpit temperature, rack travel, acceleration and vibration, sensors for differential monitoring, ignition triggering, compression chamber knock, and oxygen concentration in fuel; electronic data processing devices, namely, CPUs, personal computers, laptops, palmtops, modems, printers, displays, disks and tapes; fax machines, fax machines combined with digital cameras, scanners and digital cameras” in International Class 9;

telecommunication services, namely, providing multiple-user access to a global computer information network; telecommunication services, namely, providing telecommunications connections to a global computer network” in International Class 38; and

Scientific research, research and development of new products for others; technical consultation and research in the field of customized programs for measuring and control system operations in vehicles and aircraft, CAD-CAM programs, and picture processing programs” in International Class 42.

Applicant has asserted a bona fide intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b), and has claimed priority under Section 44(d) of the Trademark Act, 15 U.S.C. §1126(d), based on its ownership of a German application, filed on August 25, 1997.

*2 Opposers, ExxonMobil Oil Corporation and Exxon Mobil Corporation, have filed a timely notice of opposition to registration of applicant's mark. In the notice of opposition, opposers pleaded ownership of “a host of U.S. trademark and service

mark registrations for ... MOBIL ... for a wide variety of goods and services” without identifying the “host” of registrations; and that long prior to the filing date of applicant's application, opposers and their predecessors in interest have continuously used in commerce the MOBIL names and marks; that the MOBIL names and marks have become famous prior to the filing date of applicant's application; and that consumers are likely to believe, falsely, that the goods and services of applicant originate with, are sponsored by, are endorsed by, or are otherwise affiliated with opposers in violation of Section 2(d) of the Trademark Act, [15 U.S.C. §1052\(d\)](#). Further, opposers alleged that the registration of applicant's mark will dilute the distinctive quality of opposers' MOBIL names and marks in violation of Section 43(c) of the Trademark Act, [15 U.S.C. §1125\(c\)](#).

Applicant has denied the salient allegations of the notice of opposition. The parties have fully briefed this case.

The Record

Of course, the record includes the file of application Serial No. 75434996 and the pleadings. It does not, however, include the exhibits to the pleadings because exhibits attached to pleadings are not evidence on behalf of the party to whose pleading they are attached unless identified and introduced in evidence as an exhibit during the period for the taking of testimony, and opposers did not do so in this case. [Trademark Rule 2.122\(c\)](#); TBMP § 317 (2d ed. rev. 2004). Additionally, the record includes the following submitted by opposers' notices of reliance; (i) various status and tile copies of opposers' U.S. registrations comprising or containing the term MOBIL; (ii) various web pages; (iii) opposers' requests for admissions and exhibits thereto, and opposers' attorney's statement that applicant did not respond to opposers' requests for admission; (iv) two “Mobile Travel Guide[s]”; (v) a decision involving the MOBIL mark from a foreign tribunal; and (v) various newspaper and magazine articles. The record also includes various web pages from opposers' website of record submitted by applicant's notice of reliance.

Preliminary Matters

The parties have raised several evidentiary objections which we discuss below.

Requests for Admissions

Applicant has objected to opposers' reliance on opposers' requests for admissions which stand admitted pursuant to [Fed. R. Civ. P. 36\(a\)](#) due to applicant's failure to respond, and Exhibits A — F to the requests for admission. According to applicant, the information admitted is not consistent and contains inherent contradictions. Because [Trademark Rule 2.120\(j\)\(3\)\(i\)](#) allows for the introduction of requests for admissions into evidence under the notice of reliance procedure, the unanswered requests are properly in evidence. Applicant's objection is hence overruled. The Board, however, has considered any inconsistencies in the admissions and has given them the weight that they are due.

Decision of European

Office for Harmonization in the Internal Market (“OHIM”)

*3 Applicant has objected to opposers' reliance on OHIM's decision sustaining opposers' objection to applicant's Community trademark application for IQMOBIL. According to applicant, the Board has stated that “decisions of foreign courts in lawsuits involving a different evidentiary record and based upon different laws are irrelevant to the issue before us,” citing [Miles Labs, Inc. v. Int'l Diagnostic Tech., Inc.](#) 220 USPQ 438 (TTAB 1983); and [Puma-Sportschuhfabriken Rudolf Dassler, K.G. v. Superga S.p.A.](#), 204 USPQ 688 (TTAB 1979) (decisions of German courts are “irrelevant” and “are of no probative value” and not considered in the evaluation of the marks in controversy). Opposers respond that the OHIM decision is “relevant evidence regarding the disinterested perceptions of specialized and knowledgeable judges as to the factual issue of the similarity of the marks.” Reply at p. 6.

Trademark Rule 2.122(e), 37 C.F.R. §2.122(e), provides that "... official records, if ... competent evidence and relevant to an issue, may be introduced in evidence by filing a notice of reliance on the material being offered." Because the decisions of foreign courts are "irrelevant" or "of no probative value," the OHIM decision is not relevant to any issue before the Board, including the issue of the similarity of the marks. Thus, we sustain applicant's objection and do not further consider the OHIM decision.

Applicant's German

National Applications for IQMOBIL

Opposers have objected to applicant's request that we take judicial notice of two of its German applications, submitted with applicant's main brief. Because the Board does not take judicial notice of applications, applicant's objection is sustained and we do not further consider the two German applications.

Wire Service Articles

Opposers have relied on articles taken from wire services, such as *Financial Wire*, *PR Newswire*, *Newswire* and *Business Wire*. Wire service articles generally have limited evidentiary value because we cannot determine whether or to what extent they have been broadcast or otherwise distributed so as to reach appreciable members of the relevant public. *In re Squaw Valley Development Co.*, 80 USPQ2d 1264 (TTAB 2006). Accordingly, we have given the wire service articles introduced into the record by opposers limited weight in arriving at our decision.

Priority

Opposers have made status and title copies of the following registrations of record, showing that they are in full force and effect and are owned by opposer ExxonMobil Oil Corporation:¹

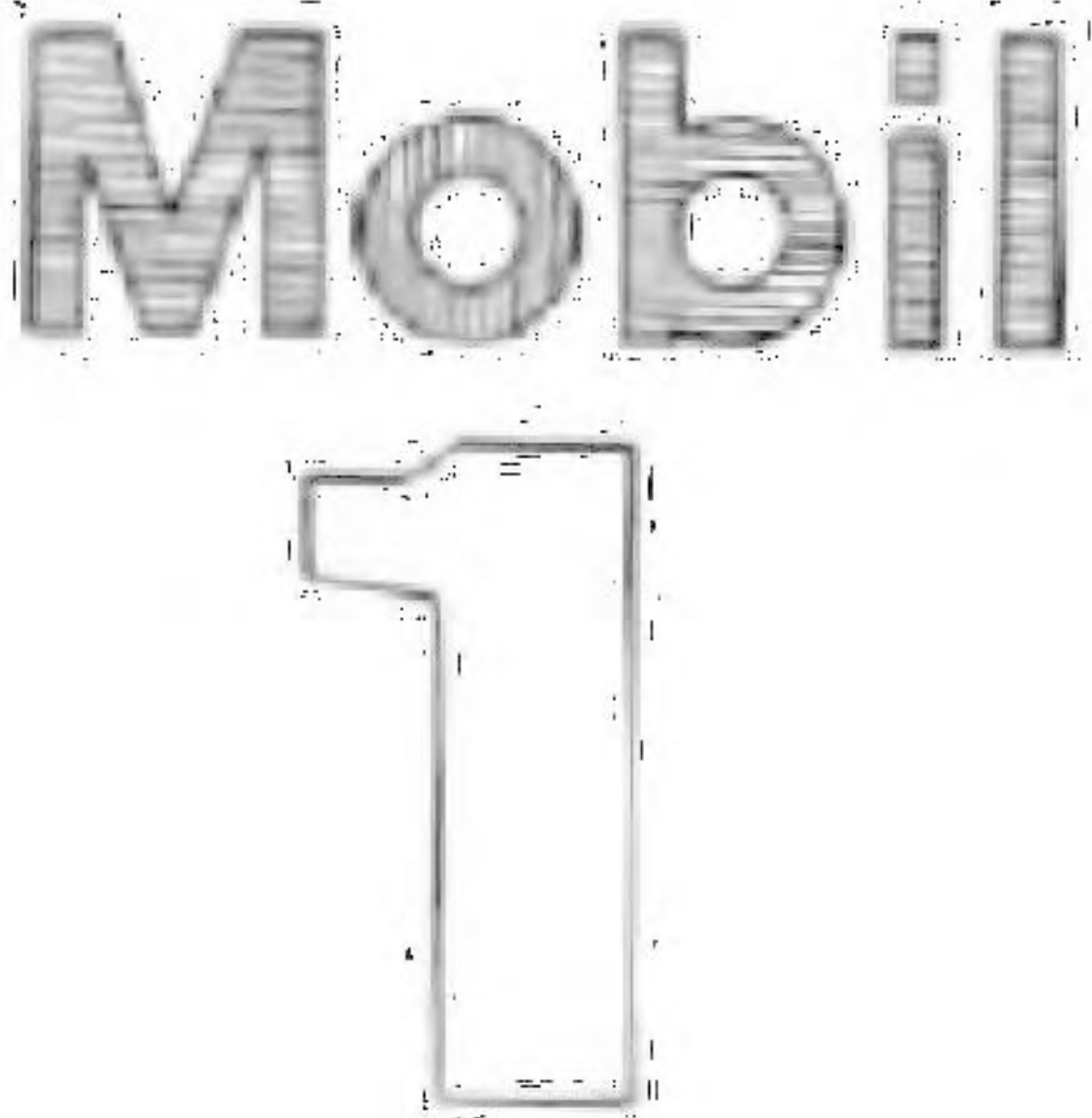
1. Registration No. 1046513, registered August 17, 1976 and renewed, for the mark MOBIL (in typed form) for "automotive service station services" in International Class 37;

*4 2. Registration No. 1049824, registered October 5, 1976 and renewed, for the mark



(lined for the colors red and blue) for "automotive service station services including car wash services and emergency road services" in International Class 37;

3. Registration No. 2133386, registered January 27, 1998, for the mark



for “high performance oil filters for motors and engines” in International Class 7, Section 8 accepted and Section 15 acknowledged;

4. Registration No. 2538994, registered February 19, 2002, for the mark MOBIL MONITOR (in typed form, and with MONITOR disclaimed) for “computer software used in connection with industrial lubricant analysis and testing” in International Class 9, and “testing, analysis, evaluation, and reporting services in connection with industrial lubricants” in International Class 42; and

5. Registration No. 2557896, registered April 9, 2002, for the mark MOBIL 1 E-STORE (in typed form and with E-STORE disclaimed) for “electronic retailing services via computer featuring motor and motorcycle oil, grease, gear lubricants, spray lubricants, oil filters and automatic transmission fluid; promoting the sale of goods and services of others through the distribution of printed material and promotional contests via the global computer network; products merchandising via the global computer network; dissemination of advertising for others via an on-line electronic communications network” in International Class 35.²

Collectively, we refer to the marks of the above-identified registrations as “Opposers' Marks.” Because opposers have made the registrations summarized above properly of record, opposers have established their standing to oppose registration of applicant's mark and their priority is not in issue. See *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). We add too, that applicant has not contested opposers' standing or priority.³

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The Marks

*5 In considering the similarity between Opposers' Marks and applicant's mark, we determine whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

The evidence shows that IQ has a particular meaning and would be recognized as a term separate from MOBIL. Specifically, applicant has admitted that “IQ is an acronym that stands for the expression ‘intelligence quotient’ and that it is commonly recognized as such by persons in the United States marketplace.” Request for admission no. 12. Further, IQ would be pronounced by articulating the “I” and the “Q” separately from MOBIL. See definition of “IQ” submitted by opposers with their main brief from *Webster's Ninth New Collegiate Dictionary* (1986), showing the pronunciation of “IQ” as “x'3b'i-'kyü.”⁴ Thus, the MOBIL portion of applicant's mark would be articulated in the same manner as in Opposer's Marks, and, as in opposers' multi-term marks, remains as a distinct term. Consequently, when we consider the marks as a whole, we find that the marks are highly similar when spoken, with no apparent meaning in the context of the goods and/or services.

Applicant's mark may be depicted in a manner so that it is highly similar in appearance to opposers' marks. Because applicant's mark is in typed form, applicant may use any reasonable stylization of lettering, including the stylization used by opposers. See, e.g., *Phillips Petroleum Co. v. C. J. Webb, Inc.* 442 F.2d 1376, 170 USPQ 35 (CCPA 1971) (a mark registered in typed format is not limited to the depiction thereof in any special form); *INB National Bank v. Metrohost Inc.*, 22 USPQ2d 1585, 1588 (TTAB 1992) (“[a]s the Phillips Petroleum case makes clear, when [an] applicant seeks a typed or block letter registration of its word mark, then the Board must consider all reasonable manners in which ... [the word mark] could be depicted”). Applicant's mark may be depicted in a manner that highlights the MOBIL portion of the mark or that minimizes the impression created by the IQ portion of the mark. By emphasizing MOBIL, and/or by depicting MOBIL in the same manner as opposers, applicant heightens the visual similarity between Opposers' Marks and applicant's mark.

We find that the commercial impressions of the marks are also similar. IQ, which is an initialism having a well-understood meaning, would be pronounced separately and would create a separate impression from MOBIL, which is not an English language term. As such, it stands apart from MOBIL. Hence, we find that the distinctive term, MOBIL, plays a significant role in forming the commercial impression of applicant's mark. Also, in Opposers' Marks, because MOBIL forms the entirety of some of opposer's marks, or because it is the dominant term in those of opposers' marks with additional terms (see discussion below), the commercial impression of both applicant's mark and Opposers' Marks is similar.

*6 The differences noted by applicant in the cadence and length of the marks, and the visual impression created by the IQ at the beginning of applicant's mark including in the manner depicted in applicant's web page (made of record in connection with opposers' requests for admissions), are outweighed by the similarities noted above. Also, there is no evidentiary support for

applicant's contention that “when the public sees the term MOBIL, they may have reason to see this as slang for autoMOBILE,” brief at p. 9, and it appears unlikely to us that this would be the case.

Several of opposers' marks contain terms in addition to MOBIL such as MONITOR, 1 or 1 E-STORE. The addition of these terms does not yield a different conclusion; applicant's mark is also similar in sound, appearance, meaning and commercial impression to such marks. MOBIL is the term which dominates in these marks largely because of its positioning as the top, first or only word in each of these marks, and because the terms MONITOR and E-STORE are descriptive of a feature of the underlying goods or services and have been disclaimed. (“e-” is defined as “computer or computer network” in *The American Heritage Dictionary of the English Language* (4th ed. 2006); E-STORE thus refers to an on-line vendor; and MONITOR describes a feature of opposers' research and development services.) “[T]he ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’” *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), quoting, *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985). See also *M2 Software Inc. v. M2 Communications Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1948-49 (Fed. Cir. 2006) (“When comparing the similarity of marks, a disclaimed term, here ‘COMMUNICATIONS,’ may be given little weight, but it may not be ignored”). Thus, even when considering each of these marks as a whole, MOBIL forms the dominant part of each mark. See *In re Chatam Intern. Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (it is proper to give each term in the conflicting marks “more or less weight depending on its effect on the overall commercial impression.”).

In view of the foregoing, and because opposers' and applicant's marks are highly similar in appearance, sound, and commercial impression, we conclude that applicant's mark is highly similar to Opposers' Marks when considered in their entirety. The *du Pont* factor regarding the similarity of the marks is therefore resolved in opposers' favor.

The Goods, Services and Trade Channels

*7 We now consider the similarity of the goods, services and established, likely-to-continue trade channels, beginning with applicant's International Class 9 goods. Opposers focus on the following goods in the application in arguing that a relationship exists between applicant's goods and opposers' goods and services:

sensors for monitoring the level of oxygen in the fuel, the triggering of the ignition, and “compression chamber knock”;

exhaust filters for diesel engines;

electronic instruments for measuring and controlling tire pressure, and exhaust; and

electronic processing devices, namely, CPUs.

As indicated by specific limitations in applicant's identification of goods, and as reinforced by the information on applicant's web site made of record in connection with opposers' requests for admissions, the sensors and the electronic instruments mentioned above are intended for use in connection with vehicles. Applicant's “exhaust filters for diesel engines,” which contain no use restrictions, would also be used in vehicles, albeit only those with diesel engines. Because vehicles require lubricants, we find that applicant's above-listed goods are related to the goods of opposers' registrations in that both parties' goods may be used in the same vehicles. Further, applicant's vehicle parts are related to opposers' service station services in that repairs to applicant's goods, or the installation of applicant's goods as replacements, may be made in opposers' service stations.⁵ Also, the “electronic data processing devices” are related to opposers' goods and services; applicant's web page indicates that they are intended to provide a “display on the dashboard” for applicant's devices for monitoring tire pressure. See Exhibit B to opposers' requests for admissions stating that “RDKS® prototype systems come with a CAN bus LCD display unit and provide options for passing RDKS® readouts to a PC or Laptop thorough a CAN and/or V24 interface”

The Board has found in the past that vehicle parts are related to lubricants and service station services. See *International Harvester Co. v. BP Corp.*, 181 USPQ 595, 597 (TTAB 1974) (gasoline, diesel fuel and automotive service stations are closely

related to construction vehicles, trucks and parts therefor, stating “there is some relationship between the goods and services of the parties in that purchasers and/or operators of construction equipment and trucks bearing one or more of opposer's marks may well encounter or use one of applicant's ‘PAY-LO’ service stations selling diesel fuel”); *Permatex Co., Inc. v. California Tube Products, Inc.*, 175 USPQ 764, 765 (TTAB 1972) (“engine exhaust system components, namely, headers, header extensions, header flanges, header collectors, mufflers, tail pipes, scavengers and brackets, blocking plates, and header bolts for assembly of such components” are closely related to lubricants — “while the goods of the parties are different in physical characteristics and function, they nevertheless comprise automotive parts, supplies, and accessories that would generally move through the same channels of trade for use by mechanics and others in the automotive after-market field. Under these circumstances, these products would be encountered by the same individuals under conditions and circumstances that could give rise to confusion as to source if the marks in question are confusingly similar”).

*8 In addition, a relationship between the goods may be shown by demonstrating that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could because of the similarity of the marks used therewith, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978). Because there are no specific limitations in the identifications of goods in the application or the identifications of goods and services in the registrations, the issue of likelihood of confusion must be determined by looking at all the usual channels of trade and methods of distribution for the respective goods and services. See *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983). Each party's goods therefore must be presumed to be available to vehicle manufacturers, third party retailers of vehicle after-market parts and retailers who offer vehicle maintenance and repair services, such as opposers.⁶ This presumption is reasonable, in view of the fact that applicant has admitted that its goods and opposers' goods and services “travel in some of the same channels of trade” and “are sold to some of the same classes of consumers.” Requests for Admissions Nos. 30 and 31. Therefore, and in view of the similarity of the marks, we find that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could because of the similarity of the marks used therewith, give rise to the mistaken belief that they originate from or are in some way associated with the same producer; and that a relationship exists between applicant's International Class 9 goods and opposers' goods and services.

Applicant's International Class 38 services are “telecommunication services, namely, providing multiple-user access to a global computer information network; telecommunication services, namely, providing telecommunications connections to a global computer network.” Exhibit F to opposers' requests for admissions describes vehicle systems that provide data to an automobile manufacturer for coordinating the necessary maintenance work, and a “drive-and-fly function” in which an airline ticket is read and the airline is informed when the passenger is due to reach the airport. The system guides the passenger's car to the departure terminal and a reserved parking space. Additionally, Exhibit F provides that the on-board computer will search for a restaurant, reserve a table or ticket and guide the vehicle to the nearest parking space. From these descriptions, it is apparent that applicant envisions its services as including Internet connections from vehicles. The question thus presented is whether there is a relationship between the goods and services identified in opposers' registrations and such telecommunications services to the extent that they relate to vehicles.

*9 In arguing that the services are similar, opposers contend that “[c]ustomers would readily assume a connection between Opposer and any kind of automotive product or service, regardless of sophistication or nature, if it includes the famous MOBIL designation as part of its name or mark.” We disagree. Opposers have not established on the record in this case that MOBIL is a famous mark. See discussion of fame, *infra*. Also, opposers have not introduced any credible evidence showing any similarity between the goods and services of opposers' registrations and applicant's International Class 38 services.

We next consider applicant's International Class 42 services, namely, “scientific research, research and development of new products for others; technical consultation and research in the field of customized programs for measuring and control system operations in vehicles and aircraft, CAD-CAM programs, and picture processing programs.” Because applicant's “scientific research, research and development” services are not limited to any particular field, they may concern lubricants and may

include the testing, analysis and evaluation of lubricants. Thus, we find that opposers' testing, analysis, evaluation and reporting services involving lubricants - and hence the trade channels too - overlap with applicant's International Class 42 services. Further, to the extent that applicant's "technical consultation and research services in the field of customized programs for measuring and control systems operations" concern lubricants, such services are related to opposers' lubricants and "computer software used in connection with industrial lubricant analysis and testing." Thus, we find that there is a relationship between applicant's International Class 42 services and the services of opposers' registrations.

Fame

While opposers maintain that Opposers' Marks are famous, they have not introduced evidence directed to any of the usual indicia of fame, such as advertising figures, sales figures, revenues, critical acclaim of any of opposers' products or services, or even survey evidence. See *Kenner Parker Toys, Inc. v. Rose Art Industries Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992); *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002). Rather, opposers rely on articles containing references to the renown or fame of opposers' MOBIL mark. The statements regarding fame in such articles are hearsay and hence of limited probative value.

Opposers rely on *Fossil Inc. v. Fossil Group*, 49 USPQ2d 1451 (TTAB 1998) in arguing that their evidence of fame is sufficient. Opposers states that *Fossil* "indicates that the 'better practice' is to submit 'newspaper and magazine articles discussing Opposer's ... products.' ... This is exactly what Opposer has done in this case." Reply at pp. 11 - 12. Opposers misquote *Fossil*, a case in which the plaintiff offered sales and advertising figures without offering evidence that placed such figures in perspective by comparing them to sales and advertising figures for similar goods. The case actually states, "Of course, the better practice is not to rely merely upon sales and advertising figures, but also to submit, for example, consumer and trade testimony as well as newspaper and magazine articles discussing opposer's FOSSIL products." *Fossil*, 49 USPQ2d at 1457. (Emphasis added.) *Fossil* does not state that "consumer and trade testimony" alone is sufficient to establish fame.

*10 Because opposers have not established the fame of any of their marks, the *du Pont* factor concerning fame is neutral.

Conditions of Sale

As noted above, applicant has admitted that opposers' and applicant's goods and services "are sold to some of the same classes of consumers." Request for Admissions No. 31. Applicant argues that its goods and services are expensive, and that its customers are discriminating purchasers such as automobile manufacturers that can be expected to exercise "greater care" in purchasing applicant's goods and services. Brief at p. 10. Opposers do not contest applicant's contention regarding its purchasers, but counter with "there is no reason to presume that Applicant's goods and Applicant's Mark would be invisible to consumers. Ordinary consumers use sophisticated goods ... [and] [o]ne of the main functions of Opposer's service stations is to assist consumers in maintaining and repairing such sophisticated goods." Further, opposers argue that "even if Applicant's goods and customers are sophisticated, there is no reason to believe that sophisticated customers would never have heard of Opposer's MOBIL trademark." Reply at pp. 8 - 9.

Opposers' arguments miss the mark. First, even if ordinary consumers use sophisticated goods, there is no evidence that ordinary consumers are involved in purchasing decisions regarding such goods. Second, the question before us is not whether sophisticated consumers such as those identified by applicant ever have heard of opposers' marks — which we cannot presume because opposers have not proven fame of their marks — but rather whether purchasers of applicant's goods will likely confuse the source of applicant's goods, believing them to be those of opposers.

Because opposers do not contest applicant's contention regarding its purchasers, and due to the electronic nature of applicant's International Class 9 goods and the technical nature of its International Class 42 services, we presume that purchasers of those of applicant's goods and services which have a connection to vehicles would not include the general public but rather would comprise vehicle manufacturers, mechanics and vehicle repair facilities, and that such purchasers take care and have some level

of sophistication in their purchasing decisions. However, even those purchasers who are sophisticated or knowledgeable in a particular field and deliberate in their purchasing decisions are not immune from source confusion. See *Wincharger Corporation v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289 (CCPA 1962); *In re Total Quality Group Inc.*, 51 USPQ2d 1474 (TTAB 1999); *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988). In view of the shared term MOBIL in both parties' marks, we find that the sophistication of purchasers would not diminish the likelihood of confusion with respect to applicant's International Class 9 and 42 goods and services.

*11 Turning to applicant's International Class 38 services, such services of course could be purchased by the general public. Accordingly, we do not presume any sophistication in those who purchase such services. This *du Pont* factor with respect to such International Class 38 services favors opposers.

Variety of Goods and Services on Which the Mark is Used

Opposers argue that they have used their marks on a wide variety of goods and services and that “it is probable that consumers will attribute the source of other varied products to Opposer.” Brief at p. 34. In support of their argument, opposers rely on several of opposers' web pages and registrations, as well as two “Mobil Travel Guides” dated 2000 and 2003.⁷ Opposers' evidence — to the extent that it is probative — does not reflect use of opposers' marks on a wide variety of goods and services; such evidence reflects that opposers' uses have largely been in the automotive field and in related fields. Consequently, this *du Pont* factor only weighs slightly in opposers' favor.

Absence of Confusion

Opposers have pointed out that applicant has admitted that it is aware of “instances of actual confusion among members of the relevant purchasing public between Applicant's Mark and Opposer's Mark.” Request for Admissions No. 29. In its brief, applicant has pointed out that its application is an intent-to-use application and that it has not yet used its mark in commerce. Because there is no evidence of actual use in the United States of applicant's mark, we find that applicant's admission is of limited probative value. This *du Pont* factor hence is neutral in the likelihood of confusion analysis.

Conclusion

After weighing each of the relevant *du Pont* factors, and considering the marks in their entireties, we find that there is a likelihood of confusion as to applicant's International Class 9 and 42 goods and services. Opposers have established that the marks are sufficiently similar, that there is a sufficient relationship between the goods, services and trade channels so that confusion as to source is likely to occur. With respect to the International Class 38 services, we find that opposers have not established a likelihood of confusion, largely because the record does not support a finding that the services are similar to those goods and services of opposers' registrations or that there is a relationship between the trade channels of applicant's services and opposers' goods and services.

Dilution

In order to make out a claim of dilution, a plaintiff must establish that its mark is famous. Section 43(c)(1) of the Lanham Act, 15 U.S.C. §1125(c)(1), provides, so far as pertinent, that “The owner of a famous mark shall be entitled ... to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark.” In fact, fame for likelihood of confusion purposes and for dilution is not the same, and fame for dilution purposes requires a more stringent showing. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164 (TTAB 2001). In this case, as discussed above, opposers have not established that their marks are famous even for purposes of likelihood of confusion. Opposers' dilution claim is therefore dismissed.

*12 DECISION: With respect to the International Class 9 and 42 goods and services, the opposition is sustained and registration to applicant is refused. With respect to the International Class 38 services, the opposition is dismissed and the application will move forward to registration for the identified services in International Class 38. Opposers' dilution claim is dismissed.

1 Two registrations for which opposers filed status and title copies have been cancelled under Section 9 of the Trademark Act. Specifically, the Office cancelled Registration No. 1364058 on July 22, 2006 and cancelled Registration No. 1930758 on August 5, 2006. We therefore do not further consider these registrations.

2 We treat these registrations not specifically mentioned in the notice of opposition as having been tried by the implied consent of the parties and we deem opposers' pleading amended to assert the registrations. [Fed. R. Civ. P. 15\(b\)](#).

3 Opposers' evidence of common law use is dated after the filing date of applicant's application and does not assist opposers in establishing priority.

4 Because opposers did not submit the definition during their testimony period, we take judicial notice of the definition of "IQ." See [University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.](#), 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983) (the Board may take judicial notice of dictionary definitions).

5 Opposers have submitted a dictionary definition of "service station" with their reply brief. The definition, taken from *Webster's New World Dictionary* (1982), of which we take judicial notice, states in relevant part that a service station is "a place providing maintenance service, parts, supplies, etc. for mechanical or electrical equipment[;] 2. a place providing such service, and selling gasoline and oil, for motor vehicles; gas station." Thus, we find that opposers' service station services include vehicle repair services.

6 Opposers maintain that their lubricants are sold to retail consumers through automotive service stations and automotive parts and accessory stores, and they "are also offered and sold to automotive service stations, automotive repair, installation and maintenance shops and to businesses which own or operate commercial vehicle fleets." Brief at pp. 31 - 32.

7 We do not accept opposers' contention that they have used their marks on other goods and services described in the Nexis articles of record. Opposers have only relied on hearsay statements contained within such Nexis articles in support of their contention and no other evidence.

2007 WL 2344690 (Trademark Tr. & App. Bd.)

2013 WL 6858021 (Trademark Tr. & App. Bd.)

This Opinion is Not a Precedent of the TTAB

Trademark Trial and Appeal Board

Patent and Trademark Office (P.T.O.)

DONALD A. GANGE

v.

AGILITY SPORTS LLC

Opposition No. 91194831
to [application Serial No. 77885955](#)
December 23, 2013

*1 Donald A. Gange, appearing pro se.¹
[Terence J. Linn](#) of Gardner Linn Burkhardt & Flory LLP for Agility Sports LLC.

Before [Mermelstein](#), [Lykos](#) and Adlin
Administrative Trademark Judges
Opinion by [Lykos](#)
Administrative Trademark Judge:

On December 4, 2009, Agility Sports LLC (“applicant”) filed an application to register the mark SUN BUM in standard character format for “stickers” in International Class 16, “footwear; headwear; shorts; sweat shirts; t-shirts” in International Class 25 and “toy animals” in International Class 28,² alleging a bona fide intent to use the mark in commerce pursuant to Section 1(b) of the Trademark Act.

Donald A. Gange (“opposer”), by his first amended notice of opposition, opposed the registration of applicant's mark for the goods listed in International Class 25 only on the grounds of priority of use and likelihood of confusion under Section 2(d) of the Trademark Act, [15 U.S.C. § 1052\(d\)](#), with opposer's previously used mark SUNBUM. In addition to pleading ownership of a federal registration for the mark SUNBUM in typed characters³ for “lounge chairs” in International Class 20,⁴ opposer also alleged prior common law usage of the mark SUNBUM in connection with lounge chairs and shirts since 1993 as well as ownership of a Michigan trademark registration for the mark SUNBUM for clothing. Opposer's Amended Notice of Opposition, ¶¶ 2, 3 and 5.⁵ Opposer further alleged that he markets and sells SUNBUM lounge chairs and shirts via Facebook as well as two web sites he owns and operates, [www.sunbum.net](#) and [www.sunbum.biz](#), and that he has marketed and sold his products via the web sites “during the last 10 years.” *Id.* at ¶ 4.

In its answer to the amended notice of opposition, applicant denied the salient allegations therein, and asserted various affirmative defenses⁶ including that “[o]pposer has abandoned any rights he may have had in the mark SUNBUM for clothing and/or lounge chairs.” Answer to Opposer's Amended Notice of Opposition ¶17. To the extent that applicant has argued in its brief that opposer's pleaded federal registration should be cancelled based on abandonment, we have not considered this argument. An attack on the validity of opposer's pleaded registration is a compulsory counterclaim that will not be heard unless a counterclaim or separate petition seeking the cancellation of such registration is filed. *See Trademark Rule 2.106(b)(2)*. Applicant may not collaterally attack opposer's federal registration via this opposition proceeding. That being said, applicant's assertion of abandonment as an affirmative defense to opposer's pleaded prior common law rights in the mark SUNBUM was properly pled. Both opposer and applicant filed briefs.

*2 The record includes the pleadings, and pursuant to [Trademark Rule 2.122\(b\)](#), applicant's application file. Applicant introduced the testimony deposition of Thomas Edward Rinks, President of Sun Bum LLC (applicant's affiliated distributor company) with exhibits attached thereto. Applicant also submitted a notice of reliance on March 6, 2013, consisting of (1) a certified report from the State of Michigan Department of Licensing and Regulatory Affairs showing opposer's state trademark registration for the mark SUNBUM as cancelled, (2) a printout from the United States Patent and Trademark Office ("USPTO") Trademark Electronic Search System ("TESS") database showing the current status of opposer's Registration No. 1278996 for the composite mark SUN BUM and design for "portable beach lounge chairs" as cancelled, and (3) printouts from the USPTO TESS database showing the current status of three third-party registrations incorporating the term SUN BUM or a plural version thereof as cancelled.

Opposer did not take any testimony in this proceeding. Rather, opposer submitted via notice of reliance the following: Notice of Reliance No. 1 (filed December 11, 2012) comprised of a photocopy of opposer's pleaded Registration No. 1958322, a photocopy of papers from the *ex parte* prosecution file of said registration, a printout from the USPTO assignment database of said registration; and a copy of the certificate of registration for Michigan Trademark Registration No. M06860 with a copy of the prosecution file history and status pages;

Notice of Reliance No. 2 (filed December 19, 2012) comprised of the proceeding history of Cancellation No. 92024493 in which opposer was in the position of plaintiff in the proceeding; a printout of the assignment records for [U.S. Patent Registration No. 5322342](#); and documents from the file for opposer's application Serial No. 85185645 (filed November 27, 2010) for the mark SUNBUN for "athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms" in International Class 25;

Notice of Reliance No. 3 (filed December 24, 2012) comprised of copies of the articles of incorporation for Gako, Inc., a company affiliated with opposer as well as copies of five newspaper articles from the years 1992-94 discussing opposer's apparel and chair;

Notice of Reliance No. 4 (filed December 31, 2012) comprised of copies of photographs and transcripts from radio and television shows featuring opposer's SUNBUM chair and apparel obtained from opposer's Facebook page in 2012; a copy of a contract with a third-party obtained from opposer's Facebook page in 2012;

Notice of Reliance No. 5 (filed January 1, 2013) comprised of archived screenshots from opposer's web sites [www.sunbum.net](#) and [www.sunbum.biz](#) from the years 2001, 2002, 2005, 2007, and 2008, then serving as opposer's "placeholder" and later displaying information about opposer's chair; and a screenshot from [www.godaddy.com](#);

*3 Notice of Reliance No. 6 (filed January 6, 2013) comprised of copies of opposer's Facebook and Twitter fan pages, eBay store page, Facebook Internet Twitter link, and opposer's Twitter advertisements; and

Notice of Reliance No. 7 (filed January 7, 2013) comprised of consumer posts on opposer's Facebook and Twitter pages as well as Google and Internet search engine results for "SUNBUM."

Applicant has objected to substantially all of the evidence submitted by opposer on numerous grounds such as hearsay, opposer's failure to produce the information during discovery, failure to comply with the Trademark Rules governing the submission of evidence via notice of reliance, and failure to comply with the guidelines for submission of evidence obtained from the Internet as set forth in the case of *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031 (TTAB 2010) ("*Safer*"). We need not address each and every objection specifically, but instead only address applicant's objections to the extent it is necessary to do so. Except as otherwise explained below, we have considered the entire record, keeping in mind applicant's various objections, and have

accorded the evidence whatever probative value it merits. In reaching our decision, we have not considered the statements made by either opposer or applicant in their respective briefs that are not supported by evidence in the record.

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 ... and not abandoned....” Trademark Act § 2, 15 U.S.C. § 1052. In the absence of a registration, a party must establish its prior proprietary rights in a mark through actual use or through use analogous to trademark use, such as use in advertising brochures, trade publications, catalogues, newspaper advertisements and Internet web sites, which create a public awareness of the designation as a trademark identifying the party as a source. *See* Trademark Act §§ 2(d) and 45, 15 U.S.C. §§ 1052(d) and 1127; *T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879 (Fed. Cir. 1996), *vacating* *Pactel Teletrac v. T.A.B. Systems*, 32 USPQ2d 1668 (TTAB 1994); and *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981). A plaintiff seeking to prove priority via analogous use must plead such use in its complaint. *See Cent. Garden & Pet Co. v. Daskocil Mfg. Co.*, 108 USPQ 1134, 1142 (TTAB 2013); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1537-38 (TTAB 2007).

*4 Opposer, in his amended notice of opposition, did not plead priority by analogous use. Furthermore, the issue of analogous use was not tried by implied consent. Thus, in order for opposer to prevail on his Section 2(d) claim, he must first either introduce his pleaded registration in evidence or prove by a preponderance of the evidence that he has a proprietary interest in his pleaded common-law SUNBUM mark and that he obtained that interest, i.e. used his pleaded mark in interstate commerce, prior to the actual or constructive first use by applicant, in this case applicant's filing date of December 4, 2009. *See Herbko International Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002); *Otto Roth & Co., Inc. v. Universal Corp.*, 209 USPQ at 43.⁷

Typically, when an opposer in a Board proceeding pleads ownership of a federal registration, it establishes its priority by properly making of record either (1) a printout obtained from a USPTO database showing that it is the owner of its pleaded registration and that the registration is valid and subsisting or (2) an “original or photocopy of the registration prepared and issued by the United States Patent and Trademark Office showing both the current status and current title to the registration.” *See Trademark Rule 2.122(d)(1)*. *See King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). In this instance, opposer did neither. Instead, opposer submitted a copy of its federal registration as originally issued and the *ex parte* prosecution history thereof. Although opposer's evidence shows that a registration was issued to it in 1996, opposer has not offered evidence to establish the *current* status of the pleaded registration and thus this evidence does not satisfy opposer's initial burden.⁸ *See id.* *See also Syngenta Crop. Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1116-17 (TTAB 2009) (copy of the original certificate of registration issued by the USPTO is not competent evidence to show the current status of and current title to the registration).⁹

Furthermore, applicant's answer does not include any admissions regarding opposer's ownership of its pleaded federal registration or the validity thereof. Nor does applicant's answer include any admissions regarding opposer's alleged common law use of the mark SUNBUM. In addition, we have no testimony from opposer in this case. We must therefore examine the remaining evidence submitted by opposer under notice of reliance to ascertain whether opposer has proven priority through its asserted use of its mark.

*5 First we consider the newspaper articles as well as the radio and television transcripts featuring opposer's SUNBUM products. Although these materials are admissible for what they show on their face, they constitute hearsay as per *Federal Rules of Evidence* 801 and 802, if they are offered for the truth of the matter asserted, i.e., that opposer was using its pleaded mark SUNBUM on the dates that the articles were written or the dates that the television or radio shows were broadcasted. *See Syngenta Crop.*, 90 USPQ2d at 1117 n.7 (printed publications made of record by notice of reliance are admissible and probative only for what they show on their face, not for the truth of the matters contained therein, unless a competent witness has testified to the truth of such matters). The rule against hearsay mandates that an out-of-court statement cannot be offered as evidence of the truth of the matter asserted in that statement. Insofar as none of the exceptions to the hearsay rule apply, we cannot consider the submissions to prove the truth of any matter stated therein. *See id.*

Similarly, opposer's remaining evidence obtained from the Internet (for example, opposer's Twitter advertisements and archived web sites), although admissible for what they show on their face under *Safer*, also constitute hearsay and may not be relied upon for the truth of the matter asserted, i.e., that opposer was using its pleaded SUNBUM mark in commerce. As further explained in Trademark Board Manual of Procedure (“TBMP”) Section 704.08(b) (3d ed. rev. 2013) discussing *Safer, supra*, the seminal case on Internet evidence:

The probative value of Internet documents is limited. They can be used to demonstrate what the documents show on their face; however, documents obtained through the Internet may not be used to demonstrate the truth of what has been printed. A printout from a webpage may have more limitations on its probative value than traditional printed publications. A party may increase the weight the Board will give website evidence by submitting testimony and proof of the extent to which a particular website has been viewed. Otherwise, the document may not be considered to have much probative value.

See also 7-Eleven Inc. v. Wechsler, 83 USPQ2d 1715, 1717 n.2 (TTAB 2007) (materials made of record by notice of reliance under 37 C.F.R. § 2.122(e) not admissible for the truth of the matters contained therein, unless a competent witness has testified to the truth of such matters); *Midwest Plastic Fabricators Inc. v. Underwriters Laboratories Inc.*, 12 USPQ2d 1267, 1270 n.5 (TTAB 1989) (annual report in evidence only for what it showed on its face), *aff'd*, 906 F.2d 1568, 15 USPQ2d 1359 (Fed. Cir. 1990). Under the hearsay rule, we cannot accept as true any of the dates associated with opposer's materials submitted under notice of reliance to prove opposer's priority. Thus, in the absence of credible testimony from opposer, he has failed to establish, through competent, admissible evidence, use of his pleaded word mark SUNBUM in connection with lounge chairs or apparel prior to applicant's constructive use date.

*6 Opposer could have testified as to his use of his pleaded mark to establish priority, preferably corroborated with documentary evidence authenticated by opposer (for example, sales figures or invoices). *See e.g., National Bank Book Co. v. Leather Crafted Products, Inc.*, 218 USPQ 826, 828 (TTAB 1993) (oral testimony may be sufficient to prove the first use of a party's mark when it is based on personal knowledge, it is clear and convincing, and it has not be contradicted); *Liqwacon Corp. v. Browning-Ferris Industries, Inc.*, 203 USPQ 305, 316 (TTAB 1979) (oral testimony may be sufficient to establish both prior use and continuous use when the testimony is proffered by a witness with knowledge of the facts and the testimony is clear, convincing, consistent, and sufficiently circumstantial to convince the Board of its probative value); *GAF Corp. v. Anatox Analytical Services, Inc.*, 192 USPQ 576, 577 (TTAB 1976) (oral testimony may establish prior use when the testimony is clear, consistent, convincing, and uncontradicted). Opposer neglected to do so. Thus, the record is devoid of evidence establishing opposer's prior rights in the mark SUNBUM. Accordingly, the opposition must be dismissed for opposer's failure to establish priority. *See e.g., Lumiere Productions, Inc. v. International Telephone and Telegraph Corp.*, 227 USPQ 892, 893 (TTAB 1985).

We acknowledge that opposer entered the trial phase of this proceeding without the benefit of legal counsel. Nonetheless, the rule against hearsay is a long-established safeguard of the common-law system, serving to exclude evidence which cannot be tested by cross-examination. *Olson v. Ford Motor Co.*, 410 F. Supp. 2d 855, 860 (D.N.D. 2006).

Decision: The opposition is dismissed.

Footnotes

- 1 Opposer was previously represented by legal counsel in this proceeding. On September 30, 2012, following his counsel's death, opposer informed the Board he would act *pro se* in this case.
- 2 Application Serial No. 77885955.
- 3 In 2003, Trademark Rule 2.52(a) was amended to refer to “typed” drawings as “standard character” drawings. *See Trademark Rule 2.52(a)*. A typed mark is the legal equivalent of a standard character mark. TMEP § 807.03(i) (Oct. 2013).
- 4 Registration No. 1958322, registered on February 27, 1996 on the Principal Register. The registration alleges April 8, 1993, as the date of first use anywhere and July 18, 1993, as the date of first use in commerce; renewed.

- 5 To the extent, if any, that opposer was attempting to assert a claim of dilution pursuant to Section 43(c) of the Trademark Act of 1946, 15 U.S.C. § 1125(c), the claim was neither properly pled nor tried by implied consent, and therefore has not been considered. *See* Opposer's Amended Notice of Opposition, ¶ 13; *Polaris Indus., Inc. v. DC Comics*, 59 USPQ2d 1798 (TTAB 2000).
- 6 Applicant asserted as its first affirmative defense failure to state a claim upon which relief may be granted. Insofar as applicant neither filed a formal motion to dismiss pursuant to Fed R. Civ. P. 12(b)(6) during the interlocutory phase of this proceeding, nor argued this asserted affirmative defense in its brief, it is hereby deemed waived. *See Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1752 n.6 (TTAB 2013).
- 7 Applicant is entitled to rely on the filing date of its application as its constructive date of first use. *See Syngenta Crop. Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009)
- 8 Nonetheless, opposer's submission of printouts from the USPTO assignment database for his pleaded registration suffices to establish his current ownership thereof. *See* Notice of Reliance No. 1.
- 9 Even assuming that opposer's Michigan state trademark registration remained active, a state registration by itself is insufficient to establish priority since it does not carry the same presumptions as a federal registration. *See Faultless Starch Co. v. Sales Producers Assocs., Inc.*, 530 F.2d 1400, 189 USPQ 141, 142 n.2 (CCPA 1976). *See also W. Fla. Seafood Inc. v. Jet Rests. Inc.*, 31 USPQ2d 1660, 1664-65 (Fed. Cir. 1994).

2013 WL 6858021 (Trademark Tr. & App. Bd.)

2018 WL 3585249 (Trademark Tr. & App. Bd.)

THIS OPINION IS NOT A PRECEDENT OF THE TTAB

Trademark Trial and Appeal Board

Patent and Trademark Office (P.T.O.)

IN RE LHS PRODUCTIONS, INC. DBA VIDEO BANK

Serial Nos. 87060327; 87060330¹

June 26, 2018

*1 [Ira Stickler](#) of Stickler Law, for LHS Productions, Inc.

Claudia Garcia

Trademark Examining Attorney

Law Office 111

[Robert L. Lorenzo](#), Managing Attorney

Before [Wellington](#), Greenbaum and Heasley

Administrative Trademark Judges

Opinion by Greenbaum

Administrative Trademark Judge:

Applicant LHS Productions, Inc. DBA Video Bank (“Applicant”) filed two applications seeking registration on the Supplemental Register of the proposed marks VIRTUAL MEETING ROOM and VMR, both in standard characters, for goods identified as

Software for processing images, graphics and text; Computer programmes for document management in International Class 9.²

The Trademark Examining Attorney has refused registration on the ground that VIRTUAL MEETING ROOM and VMR are generic and therefore incapable of distinguishing the identified goods under Sections 23(c) and 45 of the Trademark Act, 15 U.S.C. §§ 1091(c) and 1127. When the Examining Attorney made the refusal final in each application, Applicant appealed to this Board. The cases are fully briefed.

I. Evidentiary Issue

The Examining Attorney has objected to new evidence in Applicant's appeal brief for application Serial No. 87060330 in the form of an embedded hyperlink to “thefreedictionary.com” website,³ and information purportedly from the Associated Press Stylebook (47th ed. 2012) concerning the appropriate method of introducing an acronym.⁴ We sustain the objection. Only evidence filed during examination is timely, [Trademark Rule 2.142\(d\)](#), [37 C.F.R. § 2.142\(d\)](#), and it should not be submitted on appeal. Applicant cannot rely on these materials, and we have not considered them.

II. Genericness

“In order to qualify for registration on the Supplemental Register, a proposed mark ‘must be capable of distinguishing the applicant's goods or services.’” *In re Emergency Alert Sols. Grp., LLC*, 122 USPQ2d 1088, 1089 (TTAB 2017) (quoting 15 U.S.C. § 1091(c)). “Generic terms do not so qualify.” *Id.* “[G]eneric terms by definition are incapable of indicating a unique source.” *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1267 (Fed. Cir. 2015) (citing *In re Merrill Lynch*,

Pierce, Fenner, & Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987) (“Generic terms, by definition incapable of indicating source, are the antitheses of trademarks, and can never attain trademark status.”); see also *Clairol, Inc. v. Roux Distrib. Co.*, 280 F.2d 863, 126 USPQ 397, 398 (CCPA 1960) (“The generic name by which a product is known is not a mark which can be registered on the Supplemental Register under [S]ection 23 because such a name is incapable of distinguishing applicant's goods from goods of the same name manufactured or sold by others.”).

*2 A term is generic if it refers to the class or category of goods or services on or in connection with which it is used. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001) (citing *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986) (“*Marvin Ginn*”)); see also *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016). The test for determining whether a term is generic is its primary significance to the relevant public. *Emergency Alert*, 122 USPQ2d at 1089 (citing *In re Am. Fertility Soc'y*, 188 F.3d 1341, 51 USPQ2d 1832, 1837 (Fed. Cir. 1999)); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991); *Marvin Ginn*, 228 USPQ at 530. “The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question.” *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015) (“*Princeton Vanguard*”) (quoting *Marvin Ginn*, 228 USPQ at 530). Making this determination “involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?” *Marvin Ginn*, 228 USPQ at 530. “A registration is properly refused if the word is the generic name of any of the goods or services for which registration is sought.” *Cordua Rests.*, 118 USPQ2d at 1638.

The Examining Attorney must establish with “clear evidence” that a proposed mark is generic. *La. Fish Fry Prods.*, 116 USPQ2d at 1264 (citing *Merrill Lynch*, 4 USPQ2d at 1143). Evidence of the public's understanding of a term may be obtained from “any competent source, such as consumer surveys, dictionaries, newspapers and other publications.” *Princeton Vanguard*, 114 USPQ2d at 1830 (quoting *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985) (BUNDT is not registrable for “ring cake mix,” citing numerous cookbook recipes and newspaper articles)). “[A] term can be generic for a genus of goods or services if the relevant public ... understands the term to refer to a **key aspect** of that genus.” *Royal Crown Co. v. Coca-Cola Co.*, ___ F.3d ___, ___ USPQ2d ___, 2018 WL 3040163, *5 (Fed. Cir. June 20, 2018) (quoting *Cordua Rests.*, 118 USPQ2d at 1637-38); see also *Emergency Alert*, 122 USPQ2d at 1091.

*3 We consider the proposed mark VIRTUAL MEETING ROOM as a whole. See *Princeton Vanguard*, 114 USPQ2d at 1831 (citing *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005)). With respect to the proposed mark VMR, as a general rule, an abbreviation, initialism or acronym is not generic unless the wording it stands for is generic of the goods or services, and the abbreviation, acronym or initialism is readily understood by relevant purchasers to be “substantially synonymous” with the generic wording which it represents.⁵ See, e.g., *Baroness Small Estates, Inc. v. Am. Wine Trade, Inc.*, 104 USPQ2d 1224, 1226 (TTAB 2012) (in analyzing whether CMS is generic for wine comprising grape varietal names cabernet, merlot and syrah, the Board reiterated that “The question to be answered is whether the initials for generic or merely descriptive terms, or a combination thereof, are also generally recognized and used as an accepted abbreviation for the term itself.”); *In re Council on Certification of Nurse Anesthetists*, 85 USPQ2d 1403, 1411 (TTAB 2007) (“it is not automatically the case that the initial letters of a generic term are recognized as being substantially synonymous with such term”); *Capital Project Mgmt. Inc. v. IMDISI Inc.*, 70 USPQ2d 1172 (TTAB 2003) (“TIA” is substantially synonymous with generic term “time impact analysis” and thus is generic for type of construction project schedule analysis services); *In re Gen. Aniline & Film Corp.*, 136 USPQ 306, 306-07 (TTAB 1962) (holding “PVP” substantially synonymous with generic term “polyvinylpyrrolidone” and therefore generic for the synthetic resin polyvinylpyrrolidone).

A. The genus of Applicant's goods

Because the identification of goods or services in an application defines the scope of rights that will be accorded the owner of any resulting registration, generally “a proper genericness inquiry focuses on the description of [goods or] services set forth in the [application or] certificate of registration.” *Magic Wand*, 19 USPQ2d at 1552 (citing *Octocom Sys., Inc. v. Hous. Computs.*

Servs., Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)). The present applications identify the goods as “Software for processing images, graphics and text; Computer programmes for document management,” which adequately defines the genus at issue in these cases.⁶ See *Magic Wand*, 19 USPQ2d at 1552. This genus encompasses software for processing images, graphics and text and computer programs for document management to facilitate collaboration during online meetings. Applicant did not address this issue during prosecution or in its briefs.

B. Public understanding of the terms VIRTUAL MEETING ROOM and VMR

*4 We next consider whether the relevant public understands the term VIRTUAL MEETING ROOM and the acronym VMR primarily to refer to software for processing images, graphics and text, and computer programs for document management to facilitate collaboration during online meetings. *Cordua Rests.*, 118 USPQ2d at 1637 (citing *In re 1800Mattress.com IP, LLC*, 586 F.3d 1359, 92 USPQ2d 1682, 1684 (Fed. Cir. 2009)).

1. Relevant public

The “relevant public” is limited to actual or potential purchasers of the identified goods. *Magic Wand*, 19 USPQ2d at 1552-53. Because Applicant's identification of goods has no restrictions as to the class of customers to whom the goods would be offered, the relevant public consists of ordinary consumers seeking the identified goods, which would include anyone who is interested in organizing or attending online meetings. As with the relevant genus, Applicant did not address this issue during prosecution or in its briefs.

2. Evidence of relevant public's understanding

The Examining Attorney has submitted a number of news items and web pages from the Internet to show that the relevant public understands that (1) the term VIRTUAL MEETING ROOM refers to an online, rather than physical, location for conferencing and collaborating, where attendees can share images, graphics, text, and documents in real time, (2) the ability to share such materials in real time is an a key aspect of a “virtual meeting room,” and (3) VMR is a recognized acronym for VIRTUAL MEETING ROOM. In addition to the entry in the Acronym Finder,⁷ which lists VMR as an acronym for “Virtual Meeting Room (conferencing),” we note in particular the following:

1. According to the “definition” of “virtual meeting room” on the Search Unified Communications website,⁸ “[a] virtual meeting room is a unique identifier that allows a meeting organizer to invite[] attendees from disparate geographical locations to collaborate in real time over the Internet” through video or chat, often using a variety of online collaboration tools such as “instant messaging, application sharing, recording, screen sharing and document sharing capabilities.”

The website explains that

Virtual meeting rooms are seen as cost-effective because they allow people to collaborate anywhere at any time. The ability to create virtual meeting rooms are [sic] a feature of conferencing and collaboration services like Cisco WebEx, Microsoft Skype for Business and Citrix GoToMeeting. There are also subscription-based virtual meeting room services like Join.me and Pexip. Some services, like WebEx, offer permanent virtual meeting rooms, while other services, like Join.me, generate one-time-use virtual meeting rooms.

*5 2. According to the April 11, 2017 “Buyer's Guide” by Rebekah Carter on the CommsTrader website,⁹

Virtual Meeting Rooms are very similar to physical meeting rooms. Everyone knows where to go to communicate, there are various collaboration tools available, and a screen where you share documents, presentations, and other information. The only real difference with Virtual Meeting Room (VMR) software, is that instead of inviting people into a physical location, you have the flexibility and convenience from anywhere with an internet connection.

Instead of a physical address, VMR software comes with a virtual address known as a “Uniform Resource Identifier,” which is formatted like an email address. With cloud based solutions like UCi2i's Gateway service you can dial in from Cisco, Polycom, Lifesize, as well as Skype for Business, Web RTC, and even ISDN platforms. In other words, everyone can communicate in one reliable shared space. Here, we'll take a look at the features, and benefits of VMR software.

The guide then lists several benefits of VMR software, including:

Benefit 1: Ease of Use ... VMR makes it simple to connect on a video or audio call where you can share presentations, projects, and collaborate at any time, from anywhere. ...

VMR software can be accessed from a host of different devices, regardless of whether you're using a videoconferencing system, Skype, web browsers, or a smart phone or tablet, and once you're set up in the system, you can see the other people in the room, collaborate over various topics, and enjoy an unrestricted meeting place that isn't confined by geographical location.

Benefit 2: Wider Collaboration ... one of the biggest benefits of VMR software is that it integrates perfectly with the changing business landscape in relation to mobile and remote working. How people collaborate has changed drastically over the years, and the availability of new technology has made it far more convenient for us to consumer and access information over smartphones, tablets, and computers.

VMR software removes the restrictions of the traditional meeting room and ensures that members within a team can collaborate together from anywhere, at any time, with the same collaboration tools and equipment.

Benefit 3: Share Documents and Presentations ... VMR software comes with unique document and presentation solutions where you can share screens and information with other people in your team.

That way, you can get real-time feedback on projects within groups, and access the details that you need most wherever you are -- whether in office, or on the train to work. ...

The guide concludes:

VMR: A Dynamic Solution for the Changing Business Environment

VMR software is a useful and dynamic way for businesses in the modern age to adjust their style of working and drive simpler communication between teams. You can invite people to a meeting whenever you need to, and personalise the collaboration experience to your specific requirements.

*6 3. A March 24, 2015 article by Anders Lokke on the Pexip.com website¹⁰ titled “What is a Virtual Meeting Room, and how can you benefit from having one?” states:

You can think of a Virtual Meeting Room (VMR) as you would think of a physical one: Everyone knows where it is, it has a name, and perhaps even some collaboration tools in it -- a few chairs and a table you can sit around and discuss. And of course, it has a screen where you can share information, documents, presentations, and much more.

A Virtual Meeting Room is much the same. But instead of having a physical location, it has a virtual address in the form of a URI (Uniform Resource Identifier), formatted just like an email address. This address is unique. A VMR is a personal static resource, just like your email address. So perhaps, if your email address is name@company.com, your personal VMR would be meet.name@company.com.

But how do you use it and how can you benefit from having one?

How do I use a VMR?

A Pexip VMR is a simple and easy way to meet on video or audio, and in which you can share presentations and collaborate. It is always available and always accessible for ad-hoc or scheduled meetings. And, because it is a static resource with a unique name and address, it is easy to invite people to it.

You can access a VMR from nearly any type of device. ...

The article outlines other Pexip VMR capabilities, such as sharing documents and presentations and hosting an unlimited number of participants, and concludes:

Bottom line -- you can use VMRs actively and to fit your way of working ... A Pexip Virtual Meeting Room is simply a meeting room in your pocket that you can invite meeting participants to. It is your personal meeting room, and it supports participants from a near unlimited number of devices and endpoints. You can use it to share presentations, collaborate in, and make decisions in. Just like you would in a normal meeting room.

4. LifeSize posted a video on its website¹¹ titled “How to Create a Virtual Meeting Room,” which explains how to “Create a Virtual Meeting Room with LifeSize Cloud Video Conferencing.” In a question posted on the LifeSize discussion board on February 26, 2015,¹² one user asked “When do we get desktop and content sharing?” expressing through several posts his extreme dissatisfaction with his inability to share content in a LifeSize virtual meeting room. He summarized his complaint in a March 20, 2015 post: “The answer at this point should be straight forward. It should be ‘we have (or are) creating a new cloud experience that is a virtual meeting room where anyone can share content”

5. A March 17, 2016 post by David Penn on the Finovate Blog¹³ titled “Finovate Debuts: SuiteBox Introduces Virtual Meeting Rooms for Financial Professionals” profiles SuiteBox virtual meeting rooms:

*7 With just a smartphone, tablet, or laptop, professionals can build and manage secure, virtual meeting rooms and use these private, virtual spaces for conference calls, document collaboration, screen sharing, embedded web forms, e-signatures and more.

6. A March 27, 2015 blog post by Edon Abdulovski on Telepresence24¹⁴ titled “The Concept of Virtual Meeting Rooms and the Challenges” explains that “A Virtual Meeting Room (VMR) is an online collaboration place where people can communicate over video.” User “Steve Dosan” commented: “Virtual meetings are real-time interactions that take place over the Internet using integrated audio and video, chat tools, and application sharing. Tools like R-HUB web conferencing servers, webex, gotomeeting etc. are used for conducting virtual meetings.”

7. Videxio¹⁵ offers “Virtual Meeting Room subscriptions” explaining that “A virtual meeting room enables you to hold a video meeting ... as well as share a presentation.”

8. GoToMeeting¹⁶ advertises “The Easy Way to Create Your Own Personal Meeting Room” where “The software generates a session -- or virtual meeting room -- that exists for the duration of the meeting ...” “GoToMeeting generates a customizable virtual meeting room,” one benefit of which is that you can “Hold a video conference while simultaneously sharing screen content, either from your computer or that of another participant.”

9. The U.S. Election Assistance Commission Advisory Board webpage for the “EAC Virtual Meeting Room”¹⁷ allows users to “conduct business between meetings in an efficient and transparent manner that is accessible to the public,” and allows members

to post and view comments, exchange ideas, and ask questions about draft documents. It also provides a link to “Previous Virtual Meeting Room Documents and Comments.”

10. The Stony Brook University Division of Information Technology posted policies for “Internet Videoconferencing and Virtual Meeting Rooms,”¹⁸ and explains the “Purpose” as follows: “This system enables multiple users to meet in a virtual conference room and share and record video, voice and data.”

11. The “Virtual Meeting Room” landing page on the Masergy website¹⁹ explains that a Virtual Meeting Room (VMR) is a secured collaboration space where people can meet at any time. VMR offers multiple video conferencing participants incredible interoperability from anywhere, on any device leveraging WebRTC technology. VMR enables users to seamlessly join a video conference, connecting desktop computers, tablets, room systems, smartphones, softphones, and video phones.

*8 Listed among the features are “Consistent user experience across all your screens -- phone calls, video calls, and content sharing are the same on any device” and “Unified Communications features including presence indicating, instant messaging, content sharing[.]”

12. Cereno²⁰ offers “Video Conferencing -- Virtual Meeting Rooms (VMR)” ... “Built to suit your needs, your Virtual Meeting Room will give you content and desktop sharing as well as real-time activity reporting.”

13. The banner on the landing page for the AstraZeneca VMR support portal²¹ states “Welcome to the Virtual Meeting Room portal” with a button labeled “Introduction to VMR” immediately below, including tutorials on how to join VMR meetings.

14. The webpage for Indiana University’s videoconferencing services²² explains that “A ‘23’ virtual meeting room (VMR) allows multiple participants to meet and collaborate with full two-way HD video and audio, screen sharing, and chat[.]” and that “[a]ny IU faculty or staff member can create their own ‘23’ VMR using the automated form[.]” which requires a “[v]irtual meeting room name of your choice[.]” among other things.

15. A February 23, 2015 article on the Glowpoint website²³ titled “Glowpoint Bridges the Gap between Managed and Self-Service Video Conferencing” reports the release of a new “Innovative Hybrid Videoconferencing service” which allows customers to easily accommodate a variety of video meeting scenarios that were previously unavailable through a self-service virtual meeting room (VMR) solution. By taking advantage of VMR technologies’ ‘self-service’ capabilities ... business users ... ensure that everyone and every endpoint connects to the VMR meeting securely, easily, and reliably.

16. TaraSpan²⁴ offers a webinar titled “Why Virtual Meeting Room (VMR) is the future of video conferencing[.]”

17. A May 27, 2015 blog post titled “How Virtual Meeting Rooms Can Improve Your Business” on the Summit website²⁵ explains “Virtual meeting rooms (VMR) help facilitate cost-effective and spontaneous meetings in your organization.” ... “As VMRs are meeting rooms in the Cloud, employees can arrange meetings right from their desktops or even while they are traveling.” The post further explains that “Given its huge potential, VMR offers significant advantages for employees and organizations” and identifies “Supports Easy and Flexible Content Sharing” as one such advantage.

*9 18. Progressive²⁶ advertises “A Unify ME virtual meeting room (or VMR)” that is “as powerful as being there in person.” The listed features include a “unique VMR code” and “Native content sharing[.]” The website also provides a link to “Download Unify ME VMR Data Sheet.”

19. The AVI-SPL landing page for Virtual Meeting Rooms²⁷ advertises the ability to “Connect instantly with anyone” and provides a link to “SEE OUR VMR SERVICES.” The webpage provides the following “Overview”:
AVI-SPL's Virtual Meeting Room (VMR) collaboration services consolidate real-time conferencing tools -- voice, video, content, and web -- into a single solution, allowing users to connect anytime, anywhere using any device. We provide a suite of vendor-agnostic VMR solutions designed to fit each client's unique use and system infrastructure needs. You select the technology partner, deployment model, and payment options that are right for you. Get more information about your virtual meeting room project by filling out our online VMR request form.

The next page touts “The Value of VMR,” including “[s]ingle solution for video-web-audio collaboration” and “[i]t's your personal conference room without walls -- available 24/7[.]” ... “See our VMR overview sheet for more information. To bring the Virtual Meeting Room service into your business, call us

20. Polycom²⁸ offers “[p]owerful video collaboration software” that “brings every site around the world together in virtual meeting rooms, putting video conferencing at your fingertips. ... During the meeting, anyone can share and interact with documents or use a whiteboard for ad-hoc brainstorming sessions.”

21. Zultys²⁹ announced a new video webcast feature for its web conferencing and collaboration solution:
MXmeeting now combines video, voice, desktop web interaction, instant messaging, virtual meeting rooms, online presentations, file sharing, training and demonstration tools into a single system to help companies slash travel costs and respond more quickly to customer needs -- all with easy to use controls.

One main feature is the ability to upload files to “directly distribute files to conference attendees.”

22. A November 13, 2015 blog post by Chip Manning on the VDO360 website³⁰ titled “How Virtual Meeting Rooms Are Beating Traditional Boardrooms” extols “The Benefits of Virtual Meeting Rooms” including “Sharing written or visual content (like documents and slideshows).” ... “In sum, virtual meeting rooms take the best of what today's business IT has to offer and combines those features -- like audio, video, messaging and file sharing -- into a suite that fits nicely into business plans and budgets.”

*10 23. A January 9, 2015 post on the VCA News & Blog webpage³¹ titled “Are Virtual Meeting Rooms the Future of Enterprise Video Communication?” explains that
Cloud-based virtual meeting rooms (VMRs) offer the right blend of simple, one-touch set up and good quality visual communication. Because a VMR cuts down the hassle of expensive hardware installations, cloud-based VMRs are a cost effective way to meet an organization's video-collaboration needs. With a range of powerful features including 2D and 3D video broadcasting, mobile support, file sharing, IMs, VOIP, call recording, etc., VMRs are a step ahead of the traditional video conferencing systems.

24. The landing page for 5LINX Business Elite Web Connect³² explains various features and benefits of this service, such as virtual whiteboard, video and document sharing, meeting chat and note tools, and video postcards, concluding that “All of this functionality exists in a secure virtual meeting room that gives the host complete control over attendee permissions and interactions.”

25. The overview webpage for ReadyTalk Hosted Voice³³ explains that “ReadyTalk Hosted Voice is a cloud-based business phone service, plus a suite of communications and collaboration solutions: messaging and presence, audio and video conferencing, screen sharing, file sharing, and virtual meeting rooms.”

In addition to the evidence outlined above, Applicant submitted specimens showing that Applicant's use of the terms VIRTUAL MEETING ROOM and VMR is consistent with the many third-party uses of record. One such specimen consists of a photograph of a smart phone display of Applicant's app for “Virtual Meeting Room (VMR) for Architects & Engineers,”³⁴ which allows the user to “[v]iew live streaming video and presentation content on your mobile device [.]” This specimen explains that The VideoBank Virtual Meeting Room (VMR) is a full-featured communication platform that enables geographically disparate construction and design teams to collaborate with each other in real time, even under low-bandwidth conditions. It offers cross-platform browser access for the sharing and distribution of project data and presentations.

The VMR facilitates the processing, examination and dissemination of media and data for project teams via a browser interface, enabling content sharing, research and analysis:

- Live and post-event capture of video, audio, images, documents and other media file types

- Data, graphics, video and digital resources are linked into a secure, virtual, interactive interface

- Rich media functionality that includes live and recorded video streaming, map and image capture and distribution

- Import photos, videos, messaging, or emails from your mobile device gallery

- *11 •Capture photos and videos from your mobile device while in the app

- Analyze and review up-to-the minute project status

Finally, the Examining Attorney submitted a printout from the Soft112.com website,³⁵ which “lists downloads from various software publishers” and provides a link to Applicant's “Virtual Meeting Room (VMR) 2.0.412” software. Soft112.com describes Applicant's product as “Server-Hosted Virtual Meeting Room (VMR) technology” that allows users to “instantly capture and contribute digital content to any VMR session folder...” Soft112.com lists the following “Features” of Applicant's identified goods:

- Become a fully active participant in dynamic Virtual Meeting Room events.

- VideoBank VMR Web Services handle all remote access & content sharing functionality for your mobile participation in VMR collaboration sessions.

- Comprehensive file and folder management of both Local and VMR Server-based digital asset clip bins.

- Capture of photo & videos from within the App.

- View live streaming video presentation & content share canvas.

The comprehensive evidence submitted by the Examining Attorney demonstrates that many types of customers, including businesses, educational facilities, and governmental entities, use virtual meeting rooms as an alternative to face-to-face meetings in physical meeting rooms, and that the ability to share documents, images, graphics, and text is a key aspect of virtual meeting rooms. The evidence further shows that the relevant public uses and understands VMR as an acronym for and substantially synonymous with the generic term “virtual meeting room.” Indeed, the bulk of the evidence discussed above uses the terms “virtual meeting room” and “VMR” interchangeably to refer to a location for an online meeting in which organizers and participants collaborate by sharing documents, images, graphics, and text in real time. Applicant's own specimens demonstrate that Applicant is using the terms VIRTUAL MEETING ROOM and VMR in a manner consistent with the various third-party uses, and the Soft112.com website evidence provides further support for this finding. The evidence and Applicant's specimens clearly demonstrate that the functions of Applicant's identified software and computer programs are key aspects of virtual meeting rooms, which also are known as VMRs.

3. Applicant's arguments

In both briefs,³⁶ Applicant relies on the following language from Judge Posner in *Ty Inc. v. Softbelly's Inc.*, 353 F.3d 528, 69 USPQ2d 1213, 1215 (7th Cir. 2003), to restate the test for determining whether a term is generic: “To determine that a trademark is generic and thus pitch it into the public is a fateful step” and “ordinarily is not taken until the trademark has gone so far toward becoming the exclusive descriptor [sic] of the product that sellers of competing brands cannot compete effectively without using the name to designate the product they are selling.” However, in making our determination of genericness, we follow the test set forth in *Marvin Ginn*, discussed above. Under this test, a term need not be “the exclusive descriptor of the product” in order to be found generic. Thus, while we agree with Applicant³⁷ that the record includes evidence that a virtual meeting room also might be referred to as a “virtual meeting space,” that does not make the term “virtual meeting room” any less generic. *1800Mattress.com*, 92 USPQ2d at 1685 (Fed. Cir. 2009) (“any term that the relevant public understands to refer to the genus ... is generic”). There is nothing unusual about a product or a service having more than one generic name. *Roselux Chem. Co. v. Parsons Ammonia Co.*, 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962) (“Consider, however, that the product commonly known as tooth paste is also commonly known as dentifrice and dental cream. A gravestone is also commonly known as a headstone, a tombstone and a monument.”). “There is usually no one, single and exclusive generic name for a product. Any product may have many generic designations. Any one of those is incapable of trademark significance.” *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d 1184, 1201 (TTAB 2017) (quoting 2 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 12:9 (4th ed. June 2017 Update).

*12 Referring to the definition of “virtual meeting room” from Search Unified Communications, listed above, Applicant also contends³⁸ that “the mere fact that a term is defined in a dictionary is insufficient evidence that the term is generic.” Even assuming, arguendo, that Applicant is correct, the Examining Attorney presented, and we listed above, significant other evidence to support a finding that the term “virtual meeting room” is generic for the goods identified in the application.

Finally, with respect to the term VMR, Applicant argues that the Examining Attorney presented insufficient evidence to support a finding that the relevant public understands the term to refer to “virtual meeting room.” Applicant points out that in every instance, the term VMR is “introduced by being spelled out in full,”³⁹ which, according to Applicant, demonstrates that the public otherwise would not understand the meaning of the term. We do not find these arguments persuasive. The evidence of record is clear, and more than ample to support a finding that VMR is a recognized acronym for and substantially synonymous with the generic designation “virtual meeting room.” While Applicant correctly notes that the term VMR does not appear without having first been “spelled out in full,” we consider this nomenclature to be simply a writing convention, rather than evidence to support the conclusion Applicant urges.

III. Conclusion

Having considered all of the arguments and evidence of record, including those not specifically discussed herein, we find that (1) Applicant's proposed mark VIRTUAL MEETING ROOM is a generic term that is understood by the relevant public primarily to refer to an online, rather than physical, location for conferencing and collaborating, where attendees can share images, graphics, text, and documents in real time, (2) the ability to share such materials in real time is a key aspect of a "virtual meeting room," such that the term "virtual meeting room" is generic for software for processing images, graphics, and text, and computer programs for document management that facilitate collaboration during online meetings, and (3) VMR is an acronym for and substantially synonymous with the generic term VIRTUAL MEETING ROOM, and would be readily understood as such by the relevant public. Accordingly, the proposed marks are not entitled to registration on the Supplemental Register.

Decision: The refusal of registration under Section 23(c) of the Trademark Act on the ground that the proposed marks are generic is AFFIRMED as to each application.

Footnotes

- 1 The Board consolidated the appeals on February 18, 2018. 7 TTABVUE (both applications). All references to the record are to the Trademark Status & Document Retrieval database ("TSDR") in .pdf format.
- 2 Applications Serial Nos. 87060327 ("327 application") and 87060330 ("330 application"), respectively, were filed on June 4, 2016, requesting registration on the Principal Register on the basis of Applicant's asserted use of the marks in commerce under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), and stating November 15, 2014 as the date of first use and first use in commerce. On January 7, 2017, Applicant amended its applications to seek registration on the Supplemental Register. The applications also included the following services in International Class 42, which Applicant deleted in its June 28, 2017 Responses to Office Actions: "Computer services, namely, hosting on-line web facilities for others for organizing and conducting online meetings, gatherings, and interactive discussions."
- 3 In addition, providing only a link to the website without the material attached is not sufficient to introduce the material into the record. *In re Olin Corp.*, 124 USPQ2d 1327, 1332 n.15 (TTAB 2017) ("Because the information displayed at a link's Internet address can be changed or deleted, merely providing a link to a website is insufficient to make information from that site of record.>").
- 4 Applicant referred to but did not submit this material with its brief. Accordingly, any argument associated therewith is without evidentiary support.
- 5 The same analysis applies when we determine whether an abbreviation, initialism or acronym is merely descriptive of the wording for which it stands. *Modern Optics, Inc. v. Univis Lens Co.*, 234 F.2d 504, 110 USPQ 293, 295 (CCPA 1956) ("as a general rule, initials cannot be considered descriptive unless they have become so generally understood as representing descriptive words as to be accepted as substantially synonymous therewith").
- 6 In this decision, we have modified the genus only to reflect the American, rather than British, spelling of the wording "computer programs."
- 7 January 28, 2017 Office Action pp. 7-9 ('330 application).
- 8 August 17, 2017 Final Office Action pp. 13-18 (both applications).
- 9 August 17, 2017 Final Office Action pp. 7-10 (both applications) (the "VMR software" discussed in this guide is used to connect to a virtual meeting room/VMR, and is different from Applicant's identified software).
- 10 September 19, 2016 Office Action pp. 25-29 ('330 Application).
- 11 September 16, 2016 Office Action pp. 15-16 ('327 application) and September 19, 2016 Office Action pp. 38-39 ('330 application).
- 12 August 17, 2017 Final Office Action pp. 19-27 (both applications).
- 13 September 16, 2016 Office Action pp. 17-22 ('327 application) and September 19, 2016 Office Action pp. 40-45 ('330 application).
- 14 September 16, 2016 Office Action p. 6 ('327 application) and September 19, 2016 Office Action pp. 7-11 ('330 application).
- 15 January 28, 2017 Office Action pp. 10-14 ('327 application).
- 16 January 28, 2017 Office Action pp. 15-18 ('327 application).
- 17 January 28, 2017 Office Action pp. 19-20 ('327 application).
- 18 January 28, 2017 Office Action pp. 21-23 ('327 application).
- 19 January 28, 2017 Office Action p. 13 ('330 application).
- 20 January 28, 2017 Office Action p. 14 ('330 application).
- 21 January 28, 2017 Office Action pp. 15-16 ('330 application).

- 22 January 28, 2017 Office Action pp. 17-19 ('330 application).
- 23 January 28, 2017 Office Action p. 27 ('330 application).
- 24 January 28, 2017 Office Action pp. 28-31 ('330 application).
- 25 January 28, 2017 Office Action pp. 32-35 ('330 application).
- 26 September 19, 2016 Office Action pp. 12-14 ('330 application).
- 27 September 19, 2016 Office Action pp. 15-19 ('330 application).
- 28 August 17, 2017 Final Office Action p. 11 (both applications).
- 29 August 17, 2017 Final Office Action pp. 28-30 (both applications).
- 30 August 17, 2017 Final Office Action pp. 31-34 (both applications).
- 31 August 17, 2017 Final Office Action pp. 35-38 (both applications).
- 32 August 17, 2017 Final Office Action pp. 45-47 (both applications).
- 33 August 17, 2017 Final Office Action p. 48 (both applications).
- 34 Specimen submitted with Applicant's January 7, 2017 Response to Office Action, which Applicant describes as "a screenshot of what Applicant's customers see when they access the computer services" ('330 application).
- 35 August 17, 2017 Final Office Action pp. 53-56.
- 36 4 TTABVUE 4 (both applications).
- 37 4 TTABVUE 5 (both applications).
- 38 4 TTABVUE 4 (both applications).
- 39 4 TTABVUE 5-7 ('330 application).

2018 WL 3585249 (Trademark Tr. & App. Bd.)

2005 WL 548049 (Trademark Tr. & App. Bd.)

THIS DISPOSITION IS NOT CITABLE AS PRECEDENT OF THE TTAB

Trademark Trial and Appeal Board

Patent and Trademark Office (P.T.O.)

IN RE JOANNA LYNN

Serial No. 76470354

March 1, 2005

*1 [Sherrill Hondorf](#) of Grubbs Hondorf Tabar Denham PLLC for JoAnna Lynn
M. Catherine Faint, Trademark Examining Attorney
Law Office 103
([Michael Hamilton](#), Managing Attorney)

Before [Seeherman](#), [Hairston](#) and [Drost](#)
Administrative Trademark Judges
Opinion by [Seeherman](#)
Administrative Trademark Judge:

JoAnna Lynn, an individual, has appealed from the final refusal of the Trademark Examining Attorney to register METAPHYSICAL EXERCISE as a mark for the following goods and services:
Pre-recorded compact discs (CDs) featuring meditations and recorded music (Class 9);

Newsletters, training manuals, notebooks and workbooks in the areas of exercise, fitness and mental, spiritual and physical health (Class 16); and

Educational services, namely, seminars, workshops, classes and training programs all in the areas of exercise, fitness and mental spiritual and physical health (Class 41).¹

Registration has been refused on two grounds: (1) that applicant's mark so resembles the mark METAPHYSICAL, previously registered for "providing an online computer database in the field of evangelistic and ministerial services, namely information regarding religious or spiritual practices and beliefs"² that, if used on applicant's identified goods and as used in connection with applicant's identified services, it is likely to cause confusion or mistake or to deceive (Section 2(d) of the Trademark Act, [15 U.S.C. §1052\(d\)](#)); and (2) that applicant's mark is merely descriptive of her goods and services (Section 2(e)(1) of the Trademark Act, [15 U.S.C. §1052\(e\)\(1\)](#)).

Applicant and the Examining Attorney filed appeal briefs.³ Applicant did not request an oral hearing.

We turn first to the refusal based on Section 2(e)(1) of the Trademark Act. A mark is merely descriptive, and therefore prohibited from registration by Section 2(e)(1), if it immediately conveys knowledge of the ingredients, qualities or characteristics of the goods or services in connection with which it is used. However, if a mark is suggestive, i.e., imagination, thought or perception is required to reach a conclusion on the nature of the goods or services, it is registrable. See [In re Gyulay](#), [820 F.2d 1216](#), [3 USPQ2d 1009 \(Fed. Cir. 1987\)](#).

It is the Examining Attorney's position that applicant's mark is merely a combination of two descriptive terms that indicate the subject matter of applicant's goods and services, namely spiritual exercises. In support of the refusal, the Examining Attorney has made of record a definition of "metaphysical" as meaning "of or relating to the transcendent or to a reality beyond what is perceptible to the senses."⁴ The Examining Attorney asserts that the term "metaphysical" is often associated in the minds of the public with spiritual practices, pointing to excerpts of articles taken from the NEXIS database, including the following (emphasis added):

*2 New Hope **Metaphysical** Society Group meets to promotes [sic] & support **spiritual** teachers, psychics, mediums & channelers. Pebble Hill Church, [address] ...

"Philadelphia Inquirer," October 26, 2003

Headline: Shirley MacLaine discusses her dog Terry and new book "Out On A Leash"

MacLaine: ...And the experience with—with sleeping with the dog puts you into a **spiritual** kind of **metaphysical** other place.

"Today," October 21, 2003, NBC News Transcripts

Headline: One Man's Moving Memorial; Ron Broyles dedicated his bike ride across the U.S. to two men he never knew who had started such a trip, but were cut down

"...So maybe in some **metaphysical** and **spiritual** way, they did complete the trip."

"Los Angeles Times," October 15, 2003

Headline: Film Festival Review; Drowning In the Wake Of a Loss ... who discourses knowledgeably on chance, order and chaos theory. If his **metaphysical** speculations have the most intellectual substance, the movie suggests that they, too are little more than **spiritual** fishing expeditions.

"The New York Times," October 11, 2003

As such there is a **spiritual**, though it's unspecified—call it **metaphysical** if you will—aspect to individual works, and to the overall exhibition, that transports the visitor from the minutiae of daily concerns and draws him to transcendent considerations.

"Pittsburgh Post-Gazette," October 11, 2003

In addition, the Examining Attorney states that some of the third-party registrations that include the word METAPHYSICAL, and which were made of record by applicant, show that the USPTO has treated METAPHYSICAL as a descriptive term. In the following two registrations the word METAPHYSICAL has been disclaimed, and the registration for METAPHYSICAL CELEBRATION not only has a disclaimer of this word, but it is a Supplemental Register registration:

METAPHYSICAL CELEBRATION for "educational and entertainment services, namely, arranging and conducting metaphysical lectures and holistic healing or psychic reading demonstrations and workshops" (Registration No. 2149915)

METAPHYSICAL DNA for "educational and entertainment services, namely providing seminars to help people better understand themselves and others by using a person's birth date and time of birth to determine the personality traits of the individual later in life (Registration No. 2701632)

The Examining Attorney also states that no disclaimer of METAPHYSICAL in the stylized mark ASTRO DEPOT (shown below) was required because it appears as part of a unitary phrase.⁵

ASTRO DEPOT

HOME OF YOUR METAPHYSICAL NEEDS

Finally, we note that applicant's "class syllabus," which she submitted as a specimen in support of her application in Class 41, references certain spiritual aspects to the training, e.g., it begins with the quote, "When we exercise our body with a Divine purpose in mind, we allow all of God's good to move in and through us"; and during Week 2 it lists, as topics, Charles Fillmore's Interpretation of the Body (with a quote from [Jesus Christ Heals](#)), Emily Cady's Interpretation of the Body (with a quote from [Lessons in Truth](#)) and A Course in Miracles' Interpretation of the Body (with a quote from [A Course in Miracles](#)). According to the syllabus, each class ends with "Song and Meditation." Further, in Week 4, which is entitled "Strengthening the 'Body Temple'; Practical Application of Weight Lifting Exercise, a subhead under "Introduction to Weight Lifting Exercise," along with "basic principles of weight lifting" and "physiological benefits of weight lifting," is "metaphysical view of weight lifting." A similar subhead, "metaphysical view of cardiovascular exercise," appears in Week 5's "Increasing the flow of 'God Life': Cardiovascular Exercise and Exercise Affirmations."

*3 Given the statements in applicant's own specimens, and applicant's identifications in Classes 16 and 41, which state that the respective printed materials and educational outlets are in the areas of exercise and spiritual health, the individual words METAPHYSICAL and EXERCISE are descriptive of aspects of the goods and services. However, when the words are combined in the mark METAPHYSICAL EXERCISE, we think that the combination creates a certain incongruity. Normally exercise is thought of as involving physical exertion, especially when it involves health and fitness. The concept of the word METAPHYSICAL—"relating to the transcendent or to a reality beyond what is perceptible to the senses"—is not normally related to the traditional notion of exercise and fitness, so that when it is combined with the word EXERCISE the combined phrase METAPHYSICAL EXERCISE causes a mental pause for the consumer to correlate the two ideas. It is because of that pause that we find METAPHYSICAL EXERCISE to be suggestive, rather than merely descriptive of applicant's goods and services.

It has often been said that there is but a thin line of distinction between a suggestive and a merely descriptive term. [In re Recovery, Inc., 196 USPQ 830 \(TTAB 1977\)](#). Where reasonable people may differ, it has long been the practice of this Board to resolve doubt in applicant's favor and publish the mark for opposition. See [In re The Gracious Lady Service, Inc., 175 USPQ 380 \(TTAB 1972\)](#). Thus, we reverse the refusal of registration on the ground that the mark is merely descriptive of the goods and services in Classes 16 and 41.

As for the goods in Class 9, nothing in the identification indicates that the compact discs involve exercise. Thus, in addition to the incongruity of the phrase METAPHYSICAL EXERCISE discussed above, with respect to the application in this class, we cannot even say that both of the individual words in the mark can be considered merely descriptive.

Accordingly, for all three classes, we reverse the refusal of registration based on Section 2(e)(1) of the Act.

We turn now to the refusal based on the ground of likelihood of confusion in view of the registration for METAPHYSICAL for "providing an online computer database in the field of evangelistic and ministerial services, namely information regarding religious or spiritual practices and beliefs." In discussing the issue of descriptiveness, the Examining Attorney had essentially taken the position that METAPHYSICAL is a merely descriptive term for goods and services involving spiritual concerns, and pointed to the third-party registrations in which METAPHYSICAL was disclaimed an indicating an Office practice that supported that position. Here, of course, the mark is METAPHYSICAL per se, and the services involve providing information regarding spiritual practices and beliefs. Although METAPHYSICAL was registered on the Principal Register without resort to the provisions of Section 2(f) and although we must give the registrations all the presumptions that are accorded to it by

Section 7(b) of the Act, we cannot simply ignore the evidence of the meaning of the term “metaphysical” that was submitted in connection with the Section 2(e)(1) refusal. Thus, we must consider that the registered mark is highly suggestive of the identified services, and entitled to a very limited scope of protection.

*4 In view thereof, we find that presence of the word EXERCISE in applicant's mark is sufficient to distinguish METAPHYSICAL EXERCISE from METAPHYSICAL. Specifically, METAPHYSICAL EXERCISE, because of the word EXERCISE, differs from METAPHYSICAL in appearance, pronunciation and, most especially, in connotation and commercial impression. We recognize that the word EXERCISE has a descriptive significance with respect to the goods in Class 16 and the services in Class 41. However, because of the incongruous effect, discussed above, the word EXERCISE has a stronger impact in the mark than a merely descriptive word normally would. Because of that incongruity, consumers are likely to treat the mark as a whole and remember the element EXERCISE as part of it. Thus, METAPHYSICAL EXERCISE must be viewed as a unitary mark, rather than a mark consisting of the dominant word METAPHYSICAL and the descriptive word EXERCISE. Therefore, comparing the marks in their entireties, we find that they are dissimilar.

In determining the issue of likelihood of confusion, we look to the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). Each of the thirteen elements may from case to case play a dominant role. *DuPont*, 476 F.2d at 1361, 177 USPQ at 567. Further, in a particular case, a single *duPont* factor may be dispositive. *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

In this case, we find that the factor of the similarity or dissimilarity of the marks in their entireties, coupled with the very limited scope of protection to which the cited registration is entitled, is dispositive. Therefore, even though we agree with the Examining Attorney that applicant's goods and services would be considered legally related to those identified in the registration, this factor is not sufficient to outweigh the dissimilarity of the marks factor. Nor is the factor of the channels of trade. In this respect we have assumed that applicant's goods, if not services, could be offered through the Internet, and therefore would be offered in the same channel of trade as the registrant's online database services. The only remaining *duPont* factor the applicant or the Examining Attorney has discussed is the lack of any evidence of actual confusion. However, because applicant has not yet begun to offer her goods, and because her services have been offered only since 2002, and in a relatively limited geographic area, the fact that she is unaware of any confusion has very little probative value. We cannot conclude, based on this evidence, that this *duPont* factor weighs in her favor.

*5 Accordingly, despite the *duPont* factors of relatedness of goods/services and channels of trade that weigh in favor of a finding of likelihood of confusion, we find that applicant's mark, if used on the identified goods and services, is not likely to cause confusion with the cited registration.

Decision: The refusals of registration on the grounds of Sections 2(d) and 2(e)(1) is reversed as to all classes of the application.

¹ Application Serial No 76470354, filed November 25, 2002. The application in Classes 9 and 16 is based on an asserted bona fide intention to use the mark in commerce (Section 1(b) of the Trademark Act); the application in Class 41 is based on a claimed date of first use and first use in commerce of May 2002 (Section 1(a) of the Trademark Act).

² Registration No. 2655026, issued November 26, 2002.

³ Applicant also filed a reply brief that was untimely. Because applicant did not provide a satisfactory explanation as to why she filed the reply brief more than one month after it was due, applicant was advised, in a Board action mailed January 27, 2005, that the reply brief would not be considered.

⁴ Merriam-Webster Dictionary, www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=Metaphysical.

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The only other current registration for a METAPHYSICAL mark in which METAPHYSICAL was not disclaimed is for METAPHYSICAL JONES for “entertainment services, namely, live musical performances by a musical band.” Reg. No. 2671216. Three of the third-party registration submitted by applicant, and which did not contain a disclaimer of METAPHYSICAL, were cancelled or expired. They are GEOPHYSICAL TO METAPHYSICAL for “retail store services providing maps, books, flags, jewelry and crystals,” (Reg. No. 1922666); REANISSANCE OF METAPHYSICAL IMAGERY for “works of fine art; original prints in mixed media” (Reg. No. 1721095) and ASTROMETAPHYSICAL SERVICES for “providing metaphysical and astrological consulting and counseling services (Reg. No. 1592484). In the latter registration, because METAPHYSICAL appears as part of the larger term ASTROMETAPHYSICAL, under Office practice it would not be disclaimed even if it were considered merely descriptive.

2005 WL 548049 (Trademark Tr. & App. Bd.)

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2020 WL 1873064 (Trademark Tr. & App. Bd.)

THIS OPINION IS NOT A PRECEDENT OF THE TTAB

Trademark Trial and Appeal Board

Patent and Trademark Office (P.T.O.)

IN RE MINKY COUTURE

Serial No. 87589711

April 2, 2020

*1 [Bretton L. Crockett](#) of TechLaw Ventures, PLLC for Minky Couture

Andrew Leaser

Trademark Examining Attorney

Law Office 117

[Hellen M. Bryan-Johnson](#), Managing Attorney

Before [Kuhlke](#), [Wolfson](#), and Coggins

Administrative Trademark Judges

Opinion by [Wolfson](#)

Administrative Trademark Judge:

Minky Couture (“Applicant”) seeks registration on the Principal Register of the mark MINKY COUTURE (in standard characters, “Minky” disclaimed) for “Baby blankets; Bed blankets; Children’s blankets, all made using minky fabric” in International Class 24.¹

The Examining Attorney refused registration of the application under Section 2(e)(1) of the Trademark Act, [15 U.S.C. §1052\(e\) \(1\)](#), on the ground that the mark “immediately and directly conveys to consumers that Applicant offers designer blankets made of minky fabric,” and because “Applicant has failed to meet its burden in establishing that the proposed mark has acquired distinctiveness.” Examining Attorney’s Brief, 9 TTABVUE 11 and 5-6.² After the Examining Attorney issued a final descriptiveness refusal, Applicant filed a Request for Reconsideration, which was denied. Both Applicant and the Examining Attorney have filed briefs, and Applicant filed a Reply brief.

I. Evidentiary Matters

In its opening Brief, Applicant quoted from a law review article identified in a footnote, purporting to support its position that “social media followings and ‘likes’ are distinguishable from ordinary website visits as they require additional action on the part of a customer or potential customer.” Applicant’s Reply brief, 4 TTABVUE 11. Neither the law review article nor the quote taken from the article are properly of record. We note the Board has long held that the inclusion of hyperlinks is not sufficient to introduce the underlying information into the record, and likewise, while the information contained in the article is static, unlike a hyperlink, Applicant’s mere reference to the article does not make it of record. Moreover, as with other traditional forms of evidence, Applicant’s reference to text from the article, provided for the first time with its brief, is untimely. [Trademark Rule 2.142\(d\)](#), [37 C.F.R. § 2.142\(d\)](#); see *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018); *In re Fiat Grp. Mktg. & Corp. Commc’ns S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014).

*2 Accordingly, we give no consideration to the law review reference included in Applicant’s brief or take judicial notice of the quote taken from the article. See, e.g., *In re Sela Prods., LLC*, 107 USPQ2d 1580, 1584 (TTAB 2013) (“However, regardless of the fact that [Fed. R. Evid. 201\(c\)\(2\)](#) requires that the party desiring a tribunal to take judicial notice supply the material

to the tribunal, it is simply common sense to do so; an applicant cannot simply contend that certain statements were made in material that has not been provided, and expect the Board to consider the contention established.”). As for taking judicial notice of Applicant's assertion of a difference between social media sites and websites, although we may agree that “social media followings and likes” require affirmation action on the part of the viewer, we are not convinced that simply because someone follows or “likes” a social media platform, they are a potential consumer, or that such actions are inherently different from ordinary website visits where users take additional action to pursue their interest in the advertised goods or services. We also point out that the number of likes or followers should be put into context, and that user comments appearing on an applicant's social media sites may provide insight into consumers' perceptions of the mark.

II. Analysis

The Examining Attorney first argues that Applicant has admitted that MINKY COUTURE is merely descriptive by virtue of the mark's registration on the Supplemental Register for the same goods for which Applicant presently seeks registration on the Principal Register (“Baby blankets; Bed blankets; Children's blankets comprised of minky fabric.”).³ Although registration of a mark on the Supplemental Register constitutes an admission that the mark was merely descriptive at the time of registration (i.e., July 3, 2012), it is not an admission that the mark has not acquired distinctiveness. Trademark Act § 27, 15 U.S.C. § 1095. Accordingly, Applicant is not precluded by its earlier registration from seeking a Principal Register registration for MINKY COUTURE. See *In re Future Ads LLC*, 103 USPQ2d 1571, 1574 (TTAB 2010) (“Registration on the Supplemental Register is prima facie evidence that, at least at the time of registration, the registered mark was merely descriptive. ... However, prima facie evidence can be rebutted.”). Here, the Examining Attorney points to Applicant's prior Supplemental Registration as prima facie evidence that the proposed mark is merely descriptive and Applicant seeks to rebut that evidence.

The Examining Attorney also argues that Applicant's mark has not acquired distinctiveness. The Examining Attorney properly considered Applicant's amendment to claim acquired distinctiveness to be a concession that the proposed mark is not inherently distinctive. Applicant's amendment to claim acquired distinctiveness was not made in the alternative, but rather was an unconditional Section 2(f) claim. December 17, 2018 Request for Reconsideration. See *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.”); *Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988). Nonetheless, in its brief, Applicant argues both that its mark is not merely descriptive and that it has acquired distinctiveness. The Examining Attorney also treated the claim as an alternative one in his brief. Accordingly, we have considered the claim of acquired distinctiveness as having been made in the alternative. See *In re Ride, LLC*, 2020 USPQ2d 39644, (TTAB 2020) (construing the applicant's Section 2(f) claim in response to a failure to function refusal as being “in the alternative” despite its original claim of acquired distinctiveness not having been so conditioned); *In re Binion*, 93 USPQ2d 1531, 1538 (TTAB 2009).

A. Whether Applicant's Mark is Merely Descriptive

*3 A mark is “merely descriptive” within the meaning of Trademark Act Section 2(e)(1) “if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought.” *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017) (citing *In re Bayer A.G.*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *In re Yarnell Ice Cream, LLC*, 2019 USPQ2d 265039, 5 (TTAB 2019). “A mark need not recite each feature of the relevant goods or services in detail to be descriptive, it need only describe a single feature or attribute.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (citation and internal quotation omitted).

As noted above, the Examining Attorney relies on Applicant's prior Supplemental Registration as prima facie evidence that its proposed mark is merely descriptive. In addition, the Examining Attorney argues that Applicant's mark is merely descriptive because it is made up of two merely descriptive terms that have been combined in a manner which results in a combination that is itself merely descriptive. Applicant does not contest the Examining Attorney's characterization of “minky” as descriptive of the material from which Applicant's blankets are made but disagrees that the word “couture” is merely descriptive due to the

“wide range of uses for the term “COUTURE.” 7 TTABVue 5. Applicant contends that the combination MINKY COUTURE is suggestive and thus inherently distinctive.

Both Applicant and the Examining Attorney submitted definitions of the term “couture.” Applicant’s definition, from Merriam-Webster, focuses on the word as a noun, that is, the business of designing fashionable custom-made women’s clothing. June 11, 2018 Response to Office Action, TSDR 2. The Examining Attorney’s definition, from Dictionary.com, focuses on the word as an adjective, that is, as “being, having, or suggesting the style, quality, etc., of a fashion designer; very fashionable.” The definition of “couture” used as a noun is defined in Dictionary.com as “the occupation of a couturier; dressmaking and designing.” Given these nuances, we find the word “couture” may be perceived as referring to the business of designing fashionable clothes and related articles, especially those made to order. Based on its definition alone, “couture” would not be viewed as referring to Applicant’s baby, bed, and children’s blankets, none of which are clothing or related articles. Our analysis does not stop there, however.

Third-party registrations can be used to demonstrate that a term may have a commonly accepted meaning. “Such third party registrations show the sense in which the word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services.” *Institut National Des Appellations D’Origine v. Vintners Int’l Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992). To support its assertion that “couture” is merely descriptive, the Examining Attorney submitted copies of three third-party registrations for marks containing the term “couture” that have been registered for, inter alia, “bed blankets” wherein the term “couture” has been disclaimed.⁴ These are: JUICY COUTURE (Reg. No. 3941099); SUITE COUTURE (Reg. No. 4114112); and CUDDLE COUTURE (Reg. No. 4502516).⁵

*4 The Examining Attorney also submitted copies of excerpts from six online retailer websites that use “couture” descriptively in advertising: Hastens advertises “for the ultimate in bed couture”; Bearington Baby Collection shows a “Mink Couture Blanket” (currently discontinued); Keiki Co. sells “luxury couture throws”; The Tot sells a “couture crib sheet”; and Posh Tots sells “couture baby bedding.” June 15, 2018 Office Action, TSDR 3-7. Bella Notte sells baby sheets, advertising that “the end result is an offering of couture textiles for everyday living.” January 7, 2019 Office Action, TSDR 4. Six third-party online retailers selling blankets use “Couture” as part of their company name: Classy Cameo Couture, Komfy Couture, Luxe House of Couture, Patricia’s Couture, Wool Couture, and Zandino Couture. July 22, 2019, Reconsideration Letter, TSDR 2-15. The term couture is used to describe the goods as being of a fashionable quality and characteristic.

Applicant’s mark as a whole combines two merely descriptive terms and the resulting combination does not have a non-descriptive meaning. The evidence supports a finding that Applicant’s mark MINKY COUTURE immediately informs the consumer that the goods are made from minky fabric and have a fashionable quality, and therefore is merely descriptive.

C. Whether Applicant’s Mark has Acquired Distinctiveness

“Under Section 2(f) of the Trademark Act, matter that is merely descriptive under Section 2(e)(1) may nonetheless be registered on the Principal Register if it ‘has become distinctive of the applicant’s goods . . . in commerce.’” *In re Virtual Indep. Paralegals, LLC*, 2019 USPQ2d 111512, *9-10 (TTAB 2019) (quoting 15 U.S.C. § 1052(f)). “An applicant seeking registration of a mark under Section 2(f) bears the ultimate burden of establishing acquired distinctiveness.” *Id.* (citing *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1264 (Fed. Cir. 2015)). “To show that a mark has acquired distinctiveness, an applicant must demonstrate that the relevant public understands the primary significance of the mark as identifying the source of a product or service rather than the product or service itself.” *Virtual Indep. Paralegals*, 2019 USPQ2d at *11 (quoting *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005)).

1. The Degree of Descriptiveness of the Applied-For Mark

We begin by assessing the degree of descriptiveness of Applicant’s mark because that bears on the sufficiency of the evidence required to prove acquired distinctiveness. *See, e.g., Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041,

1048 (Fed. Cir. 2018) (“[H]igher levels of descriptiveness require a more substantial showing of acquired distinctiveness.”); *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1378 (Fed. Cir. 2018) (same). “The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case and the nature of the mark sought to be registered.” *In re Gen. Mills IP Holdings II, LLC*, 124 USPQ2d 1016, 1018 (TTAB 2017). Accordingly, the Board “must make an express finding regarding the degree of [a] mark’s descriptiveness on the scale ranging from generic to merely descriptive, and it must explain how its assessment of the evidentiary record reflects that finding.” *Royal Crown*, 127 USPQ2d at 1048.

*5 The MINKY COUTURE mark as a whole conveys the immediate idea of fashionable blankets made to order from minky fabric. Applicant’s website shows that its blankets can be customized from fabric selected by the consumer. December 11, 2017 Office Action, TSDR 11. The term “minky” is disclaimed in recognition of its generic nature; it merely names the type of fabric from which Applicant’s blankets are made. Nonetheless, the combination of “minky” and “couture” is not highly descriptive. “Couture” typically signifies clothing fashion, as evidenced by the dictionary definitions. The use of the term in the marketplace and in three registrations shows that the term has a meaning in connection with goods other than clothing; that is, that blankets can be fashionable, made by design, or stylish. But the mark is not so highly descriptive in connection with the goods at issue that an elevated showing of acquired distinctiveness is required.

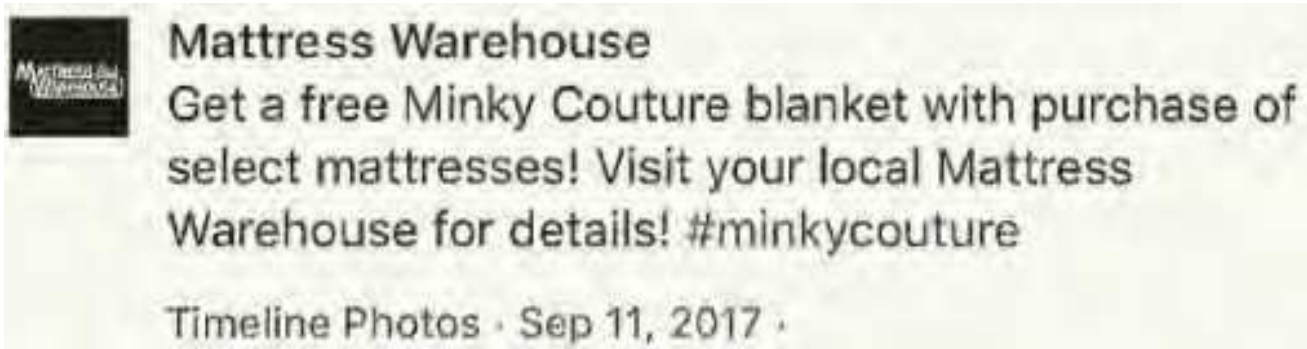
2. Evidence of Acquired Distinctiveness

Applicant has used MINKY COUTURE continuously and substantially exclusively since at least as early as June 30, 2010. See Sandi Hendry Declaration, attached to December 17, 2018 Request for Reconsideration, TSDR 7 (“First Hendry Decl.”). Ms. Hendry, Applicant’s founder and owner, testified that she has grown her initially home-based business into a chain of five physical retail stores located across Utah as well as into an online business. *Id.* at 8. Applicant submitted an example of one such location’s storefront:



Exhibit 5 to Second Hendry Declaration, attached to July 8, 2019 Response to Office Action, TSDR 41 (“Second Hendry Decl.”).

Applicant's goods are also sold in a third-party boutique in Atlanta, Georgia. First Hendry Decl., TSDR 10. In addition, Applicant partners with other companies in promotional drives; including furniture stores such as RC Willey and Mattress Warehouse. Second Hendry Decl., TSDR 15. For example:



Id., Exhibit 6 at TSDR 45. Sales of MINKY COUTURE blankets have exceeded one million units. First Hendry Decl., TSDR 8. There are six sizes offered, four of which have a sales price of over \$100 (ranging from \$69 for an infant size to \$249 for a monster size). Second Hendry Decl., TSDR 13.

The company's advertising budget for 2018 included \$50,000 for direct mail advertising; in 2017 it included \$14,000 for broadcast radio advertising. First Hendry Decl., TSDR 9. Four examples of billboards that have appeared near major interstate highways demonstrate Applicant's use of such advertising. *Id.* One such advertisement is shown below:



*6 First Hendry Decl., Exhibit 4 at TSDR 29.

Applicant also uses television advertisements to promote its brand. Ms. Hendry testified that in 2017, during the NFL football season, Applicant advertised at least 83 times in NFL football game broadcasts. In 2018, Applicant “paid for multiple television advertisement to be broadcast around the 2018 Superbowl game, including an advertisement run during the Superbowl which was broadcast in the Intermountain West [region] by KSL TV.” *Id.* at 9.

Applicant's sales revenues in its first year were over \$500,000. Second Hendry Decl., TSDR 14. By 2018, revenues had increased to nearly \$15 million. *Id.* In recognition, Ms. Hendry was awarded an “Entrepreneur of the Year 2019 Utah Region Award.” *Id.* at 13. Attached to her declaration are copies of two newspaper articles regarding the award and Applicant's business. *Id.*, Exhibit 5 at TSDR 32-39.

Applicant currently produces 6,000 to 8,000 blankets each month. *Id.* at 14. Applicant donates about 1,000 blankets each month through its associated charity organization, The Heart of Minky. *Id.* Blankets are donated to neonatal intensive care units. To date, blankets have been donated in 19 states. *Id.*

Applicant has a social media presence on Facebook and Instagram. Applicant's official Facebook page has over 100,000 "likes" and more than 100,000 "followers." Its Instagram account has more than 85,000 followers. First Hendry Decl., TSDR 9.

3. The Acquired Distinctiveness Factors

The considerations to be assessed in determining whether a mark has acquired distinctiveness can be described by the following six factors: (1) association of the mark with a particular source by actual purchasers (typically measured by consumer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark. *Virtual Indep. Paralegals*, 2019 USPQ2d 111512 at *11. All six factors are to be weighed together in determining the existence of secondary meaning. *In re Tires, Tires, Tires Inc.*, 94 USPQ2d 1153, 1157 (TTAB 2009) ("On this list, no single factor is determinative.").

Factor One -- There is no direct evidence of consumer recognition such as consumer surveys, customer declarations, or posts from Facebook or other social media expressing a potential or actual customer's perception as to the source of "minky couture" blankets.

Factor Two - Applicant has been in business for nearly a decade, selling blankets under the mark, and Applicant's use is substantially exclusive. On the other hand, a number of third parties also use the term "couture" to describe their business as being one selling designer or highly fashionable blankets or bedding.

*7 **Factor Three** - Applicant's advertising has been multi-leveled. Applicant utilizes social media as well as traditional forms such as print, radio and television broadcasting, but also more unusual avenues such as billboard advertising and partner promotions using Applicant's blankets as sales incentives.

Factor Four - Sales have been steadily increasing and reached approximately \$15 million in 2018. Although the record does not contain specific customer numbers, the number of blankets sold averages 7,000 per year, with the average price of a blanket being about \$100.

Factor Five - There is no evidence of intentional copying.

Factor Six - A modest amount of unsolicited media coverage has been produced. Applicant's founder/owner was recognized as a regional "Entrepreneur of the Year" and she has been interviewed in the news, where Applicant's product embodying the mark was publicized.

Balancing the factors, we find that Applicant satisfied its burden of establishing that the term "MINKY COUTURE" has acquired distinctiveness among its target audience. Applicant's showing of increasing sales over nearly a decade, its expansion to five retail outlets, as well as its multi-level advertising and unsolicited media recognition provide sufficient circumstantial evidence of acquired distinctiveness despite the absence of direct evidence of consumer recognition.

III. Conclusion

Applicant's mark MINKY COUTURE is merely descriptive of "Baby blankets; Bed blankets; Children's blankets, all made using minky fabric." However, Applicant has shown that the term has acquired distinctiveness.

Decision: The refusal to register the designation MINKY COUTURE is reversed.

¹ Serial No. 87589711, filed August 30, 2017 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a) on the basis of Applicant's alleged first use and first use in commerce of the mark at least as early as June 30, 2010.

- 2 Citations to the briefs refer to TTABVUE, the Board's online docketing system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding "TTABVUE" corresponds to the docket entry number, and any number(s) following "TTABVUE" refer to the page number(s) of the docket entry where the cited materials appear. Citations to the examination record refer to the entries in the USPTO Trademark Status and Document Retrieval system (TSDR), by document, date and page number.
- 3 Registration No. 4169444 issued July 3, 2012, Section 8 declaration accepted. Applicant claimed ownership of this registration in the application.
- 4 A fourth registration has been cancelled. A cancelled registration is not evidence of anything except that it issued; any benefits conferred by the registration, including the evidentiary presumptions afforded by Section 7(b) of the Trademark Act were lost when the registration expired. *See, e.g., Action Temporary Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("[A] cancelled registration does not provide constructive notice of anything"); *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1606 (TTAB 2018).
- 5 Attached to December 11, 2107 Office Action at TSDR 13-22.

2020 WL 1873064 (Trademark Tr. & App. Bd.)

2019 WL 4316700 (Trademark Tr. & App. Bd.)

THIS OPINION IS A PRECEDENT OF THE TTAB

Trademark Trial and Appeal Board

Patent and Trademark Office (P.T.O.)

OPTIMAL CHEMICAL INC.

v.

SRILLS LLC

Cancellation No. 92063200

September 10, 2019

*1 Adam S. Goldman of The Concept Law Group PA, for Optimal Chemical Inc.

Kenneth L. Kunkle of Kunkle Law PLC, for Srills LLC

Before Shaw, Goodman, and Pologeorgis

Administrative Trademark Judges

Opinion by Pologeorgis

Administrative Trademark Judge:

Srills LLC (“Respondent”) is the owner of a registration on the Principal Register for the mark BULLY, in standard characters, as well as registrations for a number of other BULLY-formative marks (also in standard characters), all for various insecticides, pesticides, fungicides and herbicides for home and professional use, as identified below:

- BULLY for “Agricultural pesticides; Aquatic herbicides; Biological herbicides; Domestic pesticides; Herbicide for agricultural use; Herbicides, insecticides, pesticides and fungicides for home, garden and lawn use and for professional use; Insect exterminating agents; Insect repellent agents; Insect repellent in candle form; Insect repellent in the nature of a lamp oil; Insect repellent incense; Insect repellents; Preparations for repelling animals, birds and insects”;¹
- BED BUGS BULLY (BED BUGS disclaimed) for “Herbicides, insecticides, pesticides and fungicides for home, garden and lawn use and for professional use”;²
- BUG BULLY (BUG disclaimed) for “Herbicides, insecticides, pesticides and fungicides for home, garden and lawn use and for professional use; Pesticides for agricultural use”;³
- FRUIT FLY BULLY (FRUIT FLY disclaimed) for “Agricultural pesticides; Domestic pesticides; Herbicides, insecticides, pesticides and fungicides for home, garden and lawn use and for professional use”;⁴
- FLEA BULLY (FLEA disclaimed) for “Herbicides, insecticides, pesticides and fungicides for home, garden and lawn use and for professional use”;⁵
- SPIDER BULLY (SPIDER disclaimed) for “Agricultural pesticides; Domestic pesticides; Herbicides, insecticides, pesticides and fungicides for home, garden and lawn use and for professional use”;⁶ and
- BOX ELDER BULLY (BOX ELDER disclaimed) for “Agricultural pesticides; Herbicides, insecticides, pesticides and fungicides for home, garden and lawn use and for professional use.”⁷

*2 Optimal Chemical Inc. (“Petitioner”) has petitioned to cancel each of the above-identified registrations on the ground of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on Petitioner's alleged prior common law use of the marks BULLY, BED BUG BULLY, ROACH BULLY, SPIDER BULLY, FLEA BULLY, ANT BULLY, SILVERFISH BULLY, and TICK BULLY, all for pest-control products.

In its amended answer to the petition, Respondent denied most of the salient allegations;⁸ but, Respondent admitted the allegations regarding the identification of goods recited in its subject registrations, as well as the filing dates and claimed dates of use set forth in the corresponding underlying applications of its subject registrations.⁹

Additionally, Respondent asserted two purported affirmative defenses: (1) the petition to cancel fails to state a claim upon which relief may be granted, and (2) Petitioner's claims are barred by the principles of unclean hands based on Petitioner's alleged violations of health and safety laws governing the labeling and sale of pesticides.¹⁰ Insofar as Respondent neither filed a formal motion to dismiss for failure to state a claim during the interlocutory phase of this proceeding, nor argued this asserted affirmative defense in its brief, it is hereby deemed waived. *Alcatraz Media, 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). Likewise, since Respondent did not pursue its unclean hands affirmative defense based on alleged health and safety labeling violations at trial or argue the defense in its trial brief, this affirmative defense is also deemed waived.

Respondent, however, asserted in its trial brief for the first time a purported additional unpleaded “affirmative defense” of unclean hands based on allegations of spoliation and fabrication of evidence submitted by Petitioner.¹¹ Petitioner addressed this unpleaded “affirmative defense” on the merits in its reply trial brief.¹² As explained below, spoliation and fabrication typically do not fall under the penumbra of an unclean hands affirmative defense. Thus, we treat the spoliation and fabrication allegations as separate contested motions for sanctions, including entry of judgment, based on evidentiary issues. *SFM, LLC v. Corcamore, LLC*, 129 USPQ2d 1072, 1075 (TTAB 2018) (when alleged misconduct does not squarely fall within reach of the Federal Rules of Civil Procedure or Board rules, the Board may invoke its inherent authority to enter sanctions); *see generally Atl. Richfield Co. v. U.S. Dep't of Energy*, 769 F.2d 771, 794 (D.C. Cir. 1984) (“We think the broad congressional power to authorize agencies to adjudicate ‘public rights’ necessarily carries with it power to authorize an agency to take such procedural actions as may be necessary to maintain the integrity of the agency's adjudicatory proceedings.”) (citation omitted).

I. The Record

*3 The record includes the pleadings and, pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the files of each of Respondent's subject registrations. The record also comprises the evidence summarized below.¹³

A. Petitioner's Evidence

1. A notice of reliance on the following exhibits:¹⁴

- Testimony Declaration of Markus Skupeika, Petitioner's founder, owner, and President (Exhibit A);¹⁵
- Testimony Declaration of David Johnson, currently a regional manager for Quest Specialty Corporation (Exhibit B);¹⁶
- Testimony Declaration of Earl Blough, General Manager and Vice President of ConSeal International, Inc. (Exhibit C);¹⁷
- Invoices of sales of Petitioner's pesticides (Exhibits D-G);¹⁸

- Collection of screenshots of JPEG images of Petitioner's BULLY products, including the metadata of these images (Exhibit H);¹⁹
- Screenshot from the website www.mold-removal.biz purportedly dated October 2, 2006 offering for sale Petitioner's Bed Bug Bully, Roach Bully, Spider Bully, Flea Bully, Ant Bully, Silver Fish Bully, and Tick Bully pesticide products (Exhibit I);²⁰
- Screenshots of the metadata for the images posted on Petitioner's website purportedly on October 2, 2006 demonstrating that the images were created in 2005 and/or uploaded to the website in 2006 (Exhibit J);²¹
- Screenshot of the JPEG image of a promotion/advertisement of Petitioner's BED BUG BULLY product for Memorial Day 2005 on www.propertyperfections.net, wherein the metadata purportedly shows the image posted to the website was created on June 13, 2005 (Exhibit K);²²
- Screenshots from Petitioner's website, www.propertyperfections.net and its e-commerce website offering Roach Bully and Bed Bug Bully for sale purportedly in 2005 (Exhibit L);²³
- Copy of the executed Assignment of Petitioner's pleaded marks from Markus Skupeika to Petitioner (Exhibit M);²⁴ and
- Respondent's response to Petitioner's Interrogatory No. 2 regarding Respondent's first use in commerce of its subject marks (Exhibit N).²⁵

2. Testimony deposition of Nick Ciske, a web developer employed at Cimbura.com Inc.;²⁶

3. Testimony Deposition of Jeremy K. Rounsville, a corporate member of Respondent, Srills, LLC.²⁷

4. Rebuttal notice of reliance on the following exhibits:²⁸

- Rebuttal Testimony Declaration of Markus Skupeika (Exhibit A);²⁹

*4 • Email communications between Petitioner and Petitioner's web hosting company regarding purported hacks of Petitioner's websites mold-removal.biz, propertyperfections.net and mycleaningproducts.com (Exhibit B);³⁰

- Document produced by Respondent titled "Pest Control Product Review Box Elder B-Gone," which purportedly depicts a blog posting dated November 4, 2008 for Respondent's BOX ELDER B-GONE product (Exhibit C);³¹ and

- Screenshot of a Wayback Machine search of Respondent's November 4, 2008 blog posting (Exhibit D).³²

B. Respondent's Evidence

1. A notice of reliance on the following exhibits:³³

- Domain name registration information for Petitioner's websites propertyperfections.com and mold-removal.biz obtained through a WHOIS search;³⁴
 - Petitioner's press releases obtained from the Internet and screenshots of Petitioner's websites;³⁵
 - Petitioner's responses to certain interrogatory requests propounded by Respondent;³⁶
 - Copy of portions of the declaration of Markus Skupeika submitted in support of Petitioner's motion for summary judgment; and³⁷
 - Petitioner's response in opposition to Respondent's motion to reopen discovery.³⁸
2. Testimony Declaration of Kevin Ressler and accompanying exhibits;³⁹
 3. Testimony Declaration of Vic Winik and accompanying exhibits;⁴⁰
 4. Testimony Declaration of Respondent's expert witness, Nick Ciske, Chief Technology Officer of Cimbura.com and accompanying exhibits, including Mr. Ciske's expert report submitted in support of Respondent's opposition to Petitioner's motion for summary judgment;⁴¹
 5. Cross-Examination Testimony Deposition of Earl Blough;⁴² and
 6. Cross-Examination Testimony Deposition of Markus Skupeika.⁴³

II. Respondent's Claims of Fabrication and Spoliation of Evidence by Petitioner

In its brief, Respondent makes allegations pertaining to fabrication and spoliation of evidence by Petitioner during the course of this proceeding. Respondent's allegations were made in the context of what purports to be an “affirmative defense of unclean hands.” In light of the serious nature of these allegations, we address them first.

We initially note that courts typically treat spoliation as an evidentiary matter, not as an affirmative defense. *See Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155-156 (4th Cir. 1995) (“Under the spoliation of evidence rule, an adverse inference may be drawn against a party who destroys relevant evidence. Even though application of the rule could prove to be critical to a party's recovery on a claim, it is not an affirmative defense, but a rule of evidence, to be administered at the discretion of the trial court. Consequently, a party need not indicate its intent to invoke the spoliation rule in the pleadings.”); *BCOWW Holdings, LLC v. Collins*, SA 17-CA-379, 2017 WL 4082686, at *4 (W.D. Tex. Sept. 15, 2017) (citing *Vodusek*, 71 F.3d at 155-56); *Travelers Prop. Cas. Co. of Am. v. All Seasons Roofing Inc.*, No. 4:15-CV-412, 2016 WL 8730570, at *1 (E.D. Ark. Sept. 9, 2016) (holding that spoliation is not an affirmative defense but rather an evidentiary doctrine which can be used as a “spear” by seeking the sanction of dismissal (citing *Sherman v. Richem Co.*, 687 F.3d 996, 1006 (8th Cir. 2012)); *Donohoe v. Am. Isuzu Motors, Inc.*, 155 F.R.D. 515, 520 (M.D. Pa. 1994) (spoliation rule is not an affirmative defense preventing recovery, but only “leads to the exclusion of evidence or the admission of negative evidence”); *see also In re Lorillard Tobacco Co.*, 370 F.3d 982, 989, 70 USPQ2d 1865 (9th Cir. 2004) (denying ex parte seizure motion pursuant to Trademark Act Section 34(d), stating: “The district court has other vehicles available to address disappearing evidence, including sanctions for spoliation of

evidence.”). Accordingly, we construe Respondent's claim of spoliation as a motion for sanctions, particularly since Petitioner has addressed the spoliation claim on the merits in its reply trial brief.

*5 As to fabrication of evidence, this also is usually treated as an evidentiary issue, not as an affirmative defense. *See Gilmer v. Colo. Inst. of Art*, 12 Fed. Appx. 892, 895, 2001 WL 686406 at *3 (10th Cir. 2001) (court has the discretion to decide factual disputes regarding the fabrication of evidence even when that issue also goes to the merits of the case) (citing *Gonzalez v. Trinity Marine Grp., Inc.*, 117 F.3d 894, 898-99 (5th Cir. 1997) (affirming court's use of evidentiary hearing for motion to dismiss and sanctions in order to determine the validity of a claim of willful and bad faith fabrication of evidence and an abuse of the judicial process)). We therefore also construe Respondent's purported “unclean hands defense” based on the alleged fabrication of evidence as a motion for sanctions predicated on litigation misconduct or fraud on the Board engaged in during the course of this proceeding.⁴⁴ Petitioner addressed the merits of Respondent's allegations of fabrication of evidence in its reply trial brief.

In order to prevail on either of its construed motions for sanctions predicated on spoliation or fabrication of evidence, Respondent must do so by clear and convincing evidence. *See, e.g., Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 98 USPQ2d 1693, 1706 (Fed. Cir. 2011) (spoliation must be established with clear and convincing evidence); *Gupta v. Walt Disney World Co.*, 482 F. App'x 458, 459 (11th Cir. 2012) (“[C]lear and convincing evidence of egregious conduct [is] required to establish fraud on the court.”); *King v. First Am. Investigations, Inc.*, 287 F.3d 91, 95 (2d Cir. 2002) (“Fraud upon the court must be established by clear and convincing evidence.”); *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985) (the party alleging fraud on the court bears a heavy burden to prove the fraud by clear and convincing evidence); *Landmark Legal Found. v. Envtl. Prot. Agency*, 82 F. Supp. 3d 211 (D.D.C. 2015) (spoliation must be demonstrated by clear and convincing evidence).

A. Spoliation of Evidence -- Exhibits H and I of Petitioner's notice of reliance

We first turn to Respondent's spoliation of evidence claim. Spoliation refers to “the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.” *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001); *see also Micron Tech.*, 98 USPQ2d at 1700. Generally, where a party seeks sanctions based on the spoliation of evidence, it must establish:

*6 (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Moody v. CSX Transp., Inc., 217 F. Supp. 3d 410, 424-25 (W.D.N.Y. 2017) (citation omitted) (collecting cases). This general rule applied to the destruction of both tangible and electronic evidence until December 1, 2015, at which time *Fed. R. Civ. P. 37* was amended to provide a different standard for destruction of electronically stored information (“ESI”). Specifically, *Fed. R. Civ. P. 37(e)* now provides:

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e).⁴⁵ This amended section advises that four threshold requirements must be satisfied before a tribunal decides whether spoliation sanctions are appropriate: (1) the ESI should have been preserved; (2) the ESI was lost; (3) the loss was due to a party's failure to take reasonable steps to preserve the ESI; and (4) the ESI cannot be restored or replaced through additional discovery. Fed. R. Civ. P. 37(e); see also *Steves & Sons, Inc. v. JELDWEN, Inc.*, 327 F.R.D. 96, 104 (E.D. Va. 2018).

Respondent maintains that Petitioner has failed to preserve vital business records and requests that the Board consider all available remedies in response to Petitioner's actions. Specifically, with regard to Exhibits H & I submitted under Petitioner's notice of reliance, namely, (1) a collection of screenshots of JPEG images of Petitioner's BULLY products, including the metadata of these images (Exhibit H), and (2) screenshot from the website www.mold-removal.biz purportedly dated October 2, 2006, offering for sale Petitioner's Bed Bug Bully, Roach Bully, Spider Bully, Flea Bully, Ant Bully, Silver Fish Bully, and Tick Bully pesticide products (Exhibit I), Respondent maintains that the identified webpages were removed from the Internet just prior to the filing of Petitioner's summary judgment motion.⁴⁶ Respondent contends that the removal of these pages from the Internet was confirmed by both Respondent's counsel and through the testimony of Respondent's expert, Mr. Ciske.⁴⁷ As a result, Respondent argues that it could not examine these webpages for their authenticity. Respondent's expert, Mr. Ciske, also observed the inclusion of coding within the website's architecture that appears to be intended to cause the removal of information from the Internet Archives Project.⁴⁸

*7 In response, Petitioner explains that, due to ongoing hacks, the website www.mold-removal.biz has not been functioning properly for more than a year, including issues with subpages automatically redirecting to the website's homepage.⁴⁹ Petitioner further maintains that this is not a new issue identified over the past few weeks, as Respondent claims.⁵⁰ More importantly, Petitioner contends that no information from its website has been deleted, and that although subpages of the website are not currently accessible, the homepage can still be accessed, as can the page from which Respondent and Mr. Ciske have purportedly examined the product file images (<http://moldremoval.biz/wpcontent/uploads>).⁵¹ Petitioner concedes that Mr. Ciske's claim that Petitioner intended to cause the removal of information from the Internet Archives Project is accurate.⁵² However, in order to rebut Mr. Ciske's accusation of culpable intent and in response to certain admission requests, Petitioner admits that, in or around 2007, it excluded portions of its website from recordation and archival (and thus, those portions would likely not have been captured by archiving websites such as the Wayback Machine) by placing a robots.txt file on the webpage in order to prevent or minimize security risks to the website.⁵³ Petitioner further maintains that several of its websites, including mold-removal.biz, have been hacked on several occasions, which is evidenced, in part, by the communications between Petitioner and Stable Host, Petitioner's web hosting company.⁵⁴ Thus, Petitioner argues that no spoliation has occurred, and Respondent's "telling attempt" to fabricate such accusations should be rejected.

The testimony of Respondent's expert, Mr. Ciske, however, indicates otherwise. Mr. Ciske specifically stated the following in his expert report.⁵⁵

I ran a search for "site:mold-removal.biz" in Google on 1/10/2017. This shows the pages in Google's index for a given domain. At the time of my search, Google ha[d] no record of the pages in Exhibit I in its index which, in my professional opinion, means that it is highly unlikely they have existed since 2005/2006, unless they were intentionally hidden from Google by a robots.txt file or a noindex tag, which would be counterproductive to a page advertising a product for sale. I found no indication these files had been excluded from being indexed by Google in the robots.txt file.

What I did find was this in the robots.txt file:

<http://mold-removal.biz/robots.txt>

Disallow User-Agent: ia_archiver

Disallow: /cgi-bin/

The Disallow User-Agent: ia_archiver line is an attempt to block the Internet Archive (Wayback Machine) robot from archiving web pages and images on the site and instructs it to remove previous archives -- which I'd expect to see on a site attempting to pass off new posts as old ones by seeking to remove the site history from the Internet Archive -- essentially getting rid [of] the evidence.

*8 Petitioner filed its summary judgment motion on December 15, 2016.⁵⁶ As an exhibit to the motion, Petitioner included a screenshot of the same webpage at issue, i.e., Exhibit I of Petitioner's notice of reliance. Clearly, this portion of Petitioner's mold removal.biz website was accessible shortly before Petitioner filed its summary judgment motion since it submitted the webpage with its motion, notwithstanding that Petitioner admitted to including a robots.txt file on the website which precluded the capturing of certain segments of the website. However, by the time Respondent's response to the motion for summary judgment was due, Exhibit I was no longer accessible. From this fact, corroborated by the testimony of Respondent's expert, Mr. Ciske, the Board concludes that Petitioner blocked access to this particular webpage.

With regard to the four threshold requirements under [Rule 37\(e\)](#), there is no doubt that Petitioner had control over this evidence and had an obligation to preserve it, particularly since Petitioner itself was relying upon this evidence in support of its motion, meeting the first threshold requirement. Moreover, contrary to Petitioner's assertion, we see no difference between destroying or losing evidence and blocking accessibility to -- essentially hiding -- evidence, particularly in the nature of specific webpages on a party's website. *See e.g., OmniGen Research, LLC v. Wang*, 321 F.R.D. 367, 371 (D. Or. 2017) (“Default Judgment and terminating sanctions for the spoliation of evidence is warranted in instances wherein a party has intentionally hidden or destroyed evidence to the extent it severely undermines the Court's ability to render a judgment based on the evidence and threatens the ‘orderly administration of justice’”) (citation omitted). We therefore find that Petitioner precluded access to this evidence, and deprived Respondent, to its prejudice, of the use of the information subject to this evidence. [Fed. R. Civ. P. 37\(e\)\(1\)](#). Accordingly, we find that the ESI was lost due to Petitioner's failure to take reasonable steps to preserve it, meeting the second and third threshold requirements. As to the fourth requirement, we further find that the information stored on the subject webpages, including any metadata associated with the webpages, could not be restored or replaced through additional discovery. Accordingly, we find that blocking access to this portion of Petitioner's mold-removal.biz website is a form of spoliation of evidence. Thus, we grant Respondent's construed motion for sanctions for spoliation of evidence solely under [Fed. R. Civ. P. 37\(e\)\(1\)](#)⁵⁷ and only to the extent that we have given no consideration to Exhibits H and I regarding Petitioner's claim of likelihood of confusion.⁵⁸

B. Fabrication of Evidence

*9 We next turn to Respondent's construed motion for sanctions predicated on litigation misconduct or fraud on the Board based on allegations of fabrication of evidence.

Many courts have found the fabrication of evidence to be an abusive litigation practice, or even a type of fraud on the court. *See, e.g., Oliver v. Gramley*, 200 F.3d 465, 466 (7th Cir. 1999); *Gonzalez*, 117 F.3d at 898-99; *Pope v. Fed. Express Corp.*, 974 F.2d 982, 984 (8th Cir. 1992); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118-19 (1st Cir. 1989); *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 916-17 (9th Cir. 1987).

Fraud upon the court is “typically confined to the most egregious cases ... in which the integrity of the court and its ability to function impartially is directly impinged.” *Broyhill Furniture Indus., Inc. v. Craftmaster Furniture Corp.*, 12 F.3d 1080, 29 USPQ2d 1283, 1287 (Fed. Cir. 1993) (quoting *Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982)). *See also Aoude*, 892 F.2d at 1118 (fraud on the court occurs where “a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by ... unfairly

hampering the presentation of the opposing party's claim or defense.”); *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir. 1988) (“[F]raud upon the court’ is limited to fraud which seriously affects the integrity of the normal process of adjudication”).

If a party is found to have manufactured evidence by fabrication or alteration of preexisting evidence, or to have intentionally provided false testimony in a deposition or at trial, dismissal of that party's claims or defenses can be the proper sanction as an exercise of the Board's inherent authority to protect the integrity of the judicial process. Cf. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991) (describing a federal court's inherent powers to address litigation misconduct that undermines the judicial process, including the power to dismiss the proceeding before it).

“[C]ourts are free to sanction bad faith conduct that arises during the course of litigation. These ‘inherent powers’ to punish bad faith conduct during litigation are ‘necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’” *Aptix Corp. v. Quickturn Design Sys., Inc.*, 269 F.3d 1369, 60 USPQ2d 1705, 1710-1711 (Fed. Cir. 2001) (quoting *Chambers*, 501 U.S. at 44). “[T]he power to punish for contempts is inherent in all courts.” *Chambers*, 501 U.S. at 44 (quoting *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874)). Although a particularly severe sanction, outright dismissal of a proceeding is within our discretion. *Chambers*, 501 U.S. at 45 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980)).⁵⁹ When dismissing a case for fraudulent litigation conduct, the court does so not only as a remedy for harm incurred by other parties, but also as a deterrent to future litigants who might consider engaging in similar conduct. See, e.g., *Jimenez v. Madison Area Tech. Coll.*, 321 F.3d 652, 657 (7th Cir. 2003) (citing deterrence rationale for affirming dismissal in Fed. R. Civ. P. 11 context); *Aoude*, 892 F.2d at 1118 (holding that courts should consider the “deterrence of] future misconduct” when determining appropriate sanction).⁶⁰

*10 Respondent calls into question or maintains that Petitioner fabricated the following evidence of record:

1. Exhibit F of Petitioner's notice of reliance.

Exhibit F, submitted under Petitioner's notice of reliance, comprises a number of invoices purportedly from Penek Chemical to Property Perfections related to the manufacturing of Bully-branded products from June 2005 until January 2006. Pursuant to his testimony declaration, Mr. Skupeika, Petitioner's owner, declared that these invoices “were generated for the purposes of [this] litigation from Quickbooks data in my computer, which computer had been purchased from Penek Chemical. To generate these invoices, I accessed the data from the Quickbooks database and sent it to print in invoice format.”⁶¹

During his cross-examination, however, Mr. Skupeika could not identify from which exact computer he retrieved the data to generate the Penek Chemical invoices, i.e., whether it was a computer Petitioner acquired from the asset purchase of Penek Chemical or another computer from his company. Initially, Mr. Skupeika testified that the Penek invoices were “generated from the same computer which was acquired from [the] Penek Chemicals purchase, the asset purchase.”⁶² He then testified that because the computers acquired from Penek Chemical “had issues, there's a chance that it could be from a different computer or the same computer. I'm not sure exactly.”⁶³ He also testified that “[i]n order to produce these documents, they had to be on some sort of device. I don't know or recall the exact specifics of which device that was, but I wanted to make sure -- I wanted to make sure I generated all the invoices we could and show all the data we could that we had first used since 2005.”⁶⁴ Mr. Skupeika also testified that the computers acquired from Penek are not operational.⁶⁵

Respondent points to the undisputed testimony of Mr. Vic Winik and Mr. Kevin Ressler, owners and associates of Penek Chemical, to refute Petitioner's claim that Penek Chemical was ever involved with the manufacturing of Bully-branded products or any form of a pesticide product. Specifically, Mr. Ressler testified as follows:⁶⁶

I have reviewed the attached invoices (Exhibit 1)⁶⁷ which I understand were provided by Mr. Skupeika of Optimal Chemical, Inc., in relation to a trademark cancellation action before the USPTO and which identify Penek Chemical as the seller of the goods being sold. I am unaware of any circumstance that would result in these invoices being created.

Penek Chemicals began operations in September 2006, and did not exist in 2005.

At no point during my ownership and operation of Penek did Penek produce or sell the type of material indicated on the documents to Property Perfections, Dream Ware Enterprise,⁶⁸ Marcus Skupeika or anyone else for that matter. We specifically provided cleaning and sealing products for natural stone, tile and other hard surfaces.

*11 On or about June 27 of 2016 I was contacted by Mr. Marcus Skupeika via telephone. During my call with Mr. Skupeika, Mr. Skupeika informed me that an attorney would be contacting me. An attorney will be contacting you about this bed bug bully product that you were making for me. I said we never made that product and Marcus said just tell them you did, it's no big deal.

Mr. Winik testified as follows:⁶⁹

Sometime after the passing of Bob Novak (before 2005 I believe), I became part owner of his company Compliance Specialists Inc (which we renamed Compliance Specialist International). This company mainly operated from a location on Powerline Road, in Pompano Beach Florida. This company is now closed.

When the assets of Kevin Ressler's company Penek Chemicals were sold to Marcus Skupeika I personally worked directly for Marcus for several months assisting with the manufacturing of products.

I do not recall ever manufacturing any products using BULLY as a part of its branding while working for Compliance Specialist, Compliance Specialists International, or Markus Skupeika. I also do not recall manufacturing any type of pesticide for Marcus Skupeika.

Petitioner did not cross-examine either Mr. Ressler or Mr. Winik. Instead, Petitioner submitted the rebuttal testimony declaration of Petitioner's owner, Mr. Skupeika. With regard to Mr. Winik's testimony, Mr. Skupeika testified as follows:⁷⁰

Vic Winik served as an independent contractor for [Petitioner] for a very short period of time, before substantial issues were uncovered concerning Mr. Winik's past and his activities while working for [Petitioner] (including material representations to [Petitioner] regarding his qualifications), at which time he was fired. As a limited example, Mr. Winik presented himself as a chemist, but it was quickly uncovered that he was not. Thus, it is understandable that Mr. Winik does not recall manufacturing the Bully Products while working for me because he was not permitted to participate in the manufacturing of any [of Petitioner's] product [sic], let alone the Bully products.

With regard to Mr. Ressler's testimony, Mr. Skupeika testified as follows:⁷¹

I do not recall contacting Mr. Ressler during the pendency of this case, but I certainly would never have made the statement referenced in Paragraph 5, wherein Mr. Ressler accuses me of telling Mr. Ressler to lie about manufacturing Bully Products.

In fact, Mr. Ressler and I have not been on comfortable speaking terms since we had verbal disputes regarding Mr. Ressler's stated beliefs concerning how I should run my business after I purchased his company. Although all the details are not relevant to (or appropriate for) this proceeding, based on our contentious history, it is not surprising that he would fabricate such a statement.

Petitioner does not dispute Mr. Ressler's testimony that Penek Chemicals was not in operation in 2005 and that it only began operations in September 2006. Petitioner also does not dispute Mr. Ressler's testimony that Penek Chemicals did not manufacture

or sell pesticide products. Yet, Petitioner introduced, as Exhibit F, purported invoices from Penek Chemicals to Petitioner for BULLY-branded pesticide products that are dated between June 2005 and January 2006.

*12 Further, even if Mr. Winik was not a chemist, that does not necessarily undermine the truthfulness of Mr. Winik's testimony that he does not recall Petitioner ever manufacturing pesticides under the BULLY marks during his employment with Petitioner. Even if Mr. Winik was not intimately involved with the actual manufacturing process of Petitioner's BULLY pesticides, clearly, as Petitioner's employee, he would likely have knowledge of whether or not Petitioner was in the business of manufacturing such goods under the BULLY marks. Indeed, it would be reasonable to conclude that employees of a particular company would usually possess the general knowledge of the goods or services offered by that company.

Based upon (1) Mr. Ressler's uncontroverted testimony that Penek Chemicals only began operations in September 2006, did not exist in 2005, and never produced pesticides, (2) Mr. Skupeika's inconsistent and vague testimony regarding the source of the information used to generate the Penek invoices, and (3) the fact that the invoices submitted were neither originals nor created by Penek Chemicals, the seller of the alleged pesticides to Petitioner, we conclude that the Penek Chemicals invoices were fabricated by Petitioner.

We also find extremely troubling the testimony of Mr. Ressler regarding the request by Mr. Skupeika for Mr. Ressler to lie about manufacturing pesticides for Petitioner. Mr. Ressler's position concerning the authenticity of the Penek invoices, as well as Mr. Skupeika's conversation with him, were made known to Petitioner at the end of October 2016.⁷² Petitioner was advised of this position, as well as statements from Mr. Ressler that he had been directly contacted several months before by Mr. Skupeika.

Although Petitioner was put on notice of this alleged conversation, instead of cross-examining Mr. Ressler, Petitioner submitted an affidavit denying that the conversation ever took place. We acknowledge that Mr. Skupeika has testified that he does not recall contacting Mr. Ressler during this proceeding, but that if he did, he did not request that Mr. Ressler lie about manufacturing BULLY-branded pesticides for Petitioner. We do not find Mr. Skupeika's testimony credible, particularly since Petitioner does not dispute Mr. Ressler's testimony that Penek Chemicals began operations in September 2006, did not exist in 2005, and never produced pesticides.

2. Exhibit K of Petitioner's notice of reliance.

Exhibit K submitted under Petitioner's notice of reliance consists of an advertisement for, among other things, its BED BULLY-branded pesticide and corresponding JPEG metadata regarding the creation date of the advertisement. Petitioner states in its notice of reliance that Exhibit K consists of “[s]creenshots of the metadata of image files of a promotion for Memorial Day on www.propertyperfections.net, wherein the metadata shows the image posted on the website was created on June 13, 2005, which supports Petitioner's priority of use of the Bully marks.”⁷³ Both are displayed below:



Keep Your Home Cleansed

Property Perfections
Cleaning and Perfecting the Earth's Properties

MEMORIAL DAY SALE
Ends Jun 30th, 2005

Got Mold?

Got Bugs?

PropertyPerfections.net
Click or Call
(954) 678-1541

10% OFF
Use Code:
MemDay10

10% OFF
Use Code:
MemDay10

100% SATISFACTION GUARANTEED
30 Day Money Back Guarantee!

*13 Respondent argues that this exhibit purports to be an online advertisement for a Memorial Day sale ending on June 30, 2005, yet according to evidence submitted by Respondent, Petitioner's website domain name www.propertyperfections.net was not registered until January 30, 2006.⁷⁴ In response, Petitioner contends that the company Property Perfections was formed in 2004 and that the image was used on physical marketing materials, prior to being uploaded to the website.⁷⁵

Petitioner does not identify with specificity what it means by “image,” i.e., whether it means the image of the particular products displayed in the advertisement or the advertisement as a whole. If the latter, then Petitioner's argument is suspect because the advertisement clearly advises consumers to either “click” or call the number provided to place an order for the products displayed in the advertisement. If the image was first used on physical marketing media before Petitioner's domain name propertyperfections.net was registered in January 2006, and the advertisement is for a Memorial Day sale ending on June 30, 2005, a consumer could not “click” to order any of the products shown in the advertisement. We find it implausible that Petitioner would create an advertisement for use in physical media, before the existence of its website, urging customers to “click” on the advertisement. The advertisement also does not state that the website will become operational at some date in the future.

If Petitioner meant that the term “image” related solely to images of the products displayed in the advertisement, Petitioner did not submit copies of its “physical marketing materials” into the record to substantiate its claim that the image appeared on these materials prior to posting on its website. Further, Petitioner's owner, Mr. Skupeika, testified that Exhibit K “comprises

screenshots of image files of a promotion for Memorial Day 2005 on www.propertyperfections.net, wherein the metadata shows the image posted to the website was created on June 13, 2005, which supports Petitioner's priority of use of the Bully marks.”⁷⁶

The advertisement, however, purports to be a Memorial Day sale in 2005 but the JPEG meta tag states that it was created in mid-June 2005. This is well after Memorial Day 2005, which, as it does every year, fell in May. Most telling, however, is that Respondent's expert, Mr. Ciske, stated in his expert report that although the metadata displayed in Exhibit K indicates that the JPEG image was created on June 13, 2005, the image was in fact created much later. This is evidenced by the true metadata within the JPEG file showing it could not have been created in the time period specified by Petitioner because the software used to create the JPEG image, namely Adobe Creative Suite 4, was released in October 2008 -- 3 years after the image was claimed to have been created.⁷⁷

*14 Mr. Ciske also opined that the software that was used to create these images was released three years after the claimed date of their creation and “strongly implies that the file system timestamps were intentionally altered by the [Petitioner], as there is no other way I know of to ‘create’ files in 2005/2006, using software released in 2008, with XMP meta data claiming a creation date of 2014 ... other than owning a time machine.”⁷⁸ Although Petitioner submitted the testimony declaration of Mr. Ciske,⁷⁹ this testimony does not contradict or undermine Mr. Ciske's statements made in his expert report that the Adobe software program used to create the images comprising Exhibit K only became available three years after Petitioner's alleged creation date of such images.⁸⁰ In view of the foregoing, we find that Exhibit K is a fabricated or altered document.

3. Exhibits I and J of Petitioner's notice of reliance.

Exhibits I and J were submitted by Petitioner under its notice of reliance to support Petitioner's alleged priority of use of its pleaded BULLY marks. As identified by Petitioner, (1) Exhibit I is a “screenshot of [an] October 2, 2006 website posting of ‘mold-removal.biz’ offering for sale Bed Bug Bully, Roach Bully, Spider Bully, Flea Bully, Ant Bully, Silver Fish Bully, and Tick Bully,” and (2) Exhibit J is comprised of “Screenshots of the metadata for the images posted in the October 2, 2006 posting, demonstrating that the images were created in 2005 and/or uploaded to the website in 2006.”

Respondent argues that Petitioner's Exhibits I and J contain a number of questionable claims, that when viewed in their entirety, demonstrate a high likelihood that the exhibits were fabricated.⁸¹ Specifically, Respondent refers to the expert report of Mr. Ciske, who, after reviewing the source code for the blog posts represented in Petitioner's Exhibits I and J, opines that there is significant evidence to demonstrate that these webpages were not posted to the website www.mold-removal.biz on the dates listed on the documents, namely, in the 2005/2006 timeframe, but rather at a much later time.⁸²

Specifically, Mr. Ciske determined that the image files indicate that the images were created much later, in 2014. This is evidenced by true metadata within those files. Mr. Ciske also determined that the images were most likely uploaded to Petitioner's www.mold-removal.biz website in 2016 because the upload folders for the website indicate that between 2006 and 2016, there were only mold-related product uploads and nothing pertaining to pest control or “Bully” products.⁸³ We find Mr. Ciske's testimony credible, particularly because Petitioner did not submit any evidence to contradict or undermine Mr. Ciske's opinions and conclusions. As such, we find that the evidence shows clearly and convincingly that the creation dates of the images in Exhibits I and J were fabricated or altered.

4. Exhibit L of Petitioner's notice of reliance.

*15 As testified by Petitioner's owner, Mr. Skupeika, Petitioner's Exhibit L submitted under its notice of reliance consists of a “collection of screenshots from Propertyperfections.net and its e-commerce website offering Roach Bully and Bed Bug Bully for sale in 2005, which supports Petitioner's priority of use of the Bully marks.”⁸⁴ Some of the screenshots are displayed below:

2005 Product Images On 2005 Ecommerce Cart Property Perfections:

Property Perfections
About Us View Cart My Account Help

Home Bed Bug Bully Bed Bug Bully 330z

Click for Live Chat
FREE and by phone

Home > Bed Bugs >
Bed Bug Spray- Bed Bug Bully 330z

List Price: \$49.00 Qty: 1
Our Price: \$26.00
You Save \$23.00

add to cart

Quantity in Stock: 892
Add to Wish List

Availability:
Usually Ships in 3 to 5 Business Days
Product Code: 330z-1732

volusion
SECURE SITE

Enlarge Photo Email a Friend

Features Specs Extended Information

Features

- Features: Get Professional Results** - Commercial hotels, health care and hospital facilities use Green Bean Bed Bug Bully line to cut labor costs and make sure their patients and guests are 100% satisfied with the stay. Now you have the same product!
- Saves You Money** - Do you know Green Bean products manufactured in our own Green Bean facility. This means our products are concentrated and not cut back with water, like most large distributors will do to make a profit. You are getting a 10x more powerful bed bug eliminator that is concentrated so one application will equal to 10 applications of your other bed bug products.
- No Exterminator Needed, More Time For You** - By not having to hire an exterminator, our Bed Bug Bully does all the work for you. You simply spray and let dry, and vacuum area if needed (We recommend to repeat process monthly).
- Patent Pending Green Bean Better Wellness Ingredients** - If you have not heard, our products are developed to improve wellness. Green ingredients that are found in remote locations around the globe that infuse your home with natural smells that promote stress free living and energy. This is our mission... as a Green Bean!



Respondent contests the veracity of Mr. Skupeika's testimony that the screenshots submitted under Exhibit L demonstrate use of Petitioner's pleaded BULLY marks in 2005 because Petitioner's website www.propertyperfections.com was not created until January 2006.⁸⁵ For the same reason, Respondent also disputes the truthfulness of the annotations above the screenshots that state that the particular BULLY product displayed in the screenshot was available on Petitioner's website in 2005.⁸⁶

In response, Petitioner concedes that the images are not from 2005, but rather as correctly stated in Petitioner's notice of reliance, were taken for the purposes of this proceeding on or around November 12, 2015, and thus reflect the cited images and websites as of that date -- not 2005.⁸⁷ Petitioner further contends that, although it regrets this mistake, had Respondent asked Mr. Skupeika about these images during his cross-examination testimony deposition, he would have clarified this issue at that time. Respondent chose not to ask about this "obvious scrivener's error" and, instead, has sought to use it here in a "gotcha" manner.⁸⁸

Petitioner's argument is unconvincing. While Petitioner contends that the images submitted under its notice of reliance were captured on or about November 12, 2015, the notice of reliance specifically states that Exhibit L "is a collection of screenshots from Propertyperfections.net and its e-commerce website offering Roach Bully and Bed Bug Bully **for sale in 2005**, which supports Petitioner's priority of use of the Bully marks." (emphasis added). Accordingly, the testimony of Mr. Skupeika is untruthful to the extent that that website www.propertyperfections.com was not in operation in 2005. Similarly, the annotations at the top of the screenshots indicating that the displayed BULLY goods were pictured on Petitioner's website in 2005 also is, under the circumstances, a false statement. Moreover, Petitioner's argument that it was Respondent's burden to verify the accuracy of the

dates of use of these screenshots is unavailing. It is a party's affirmative duty and obligation under Fed. R. Civ. P. 11 to submit testimony and evidence that is accurate and truthful and not submitted for any improper purpose.⁸⁹ See Fed. R. Civ. P. 11(b)(2).

5. Petitioner's Press Releases, YouTube video and websites for its BULLY pesticides.

*16 In further support of its assertions that Petitioner's evidence purportedly showing that it began using its BULLY marks in association with its pesticide products in 2005/2006 are based on fabricated evidence, Respondent submitted various press releases from Petitioner indicating the launch of Petitioner's BULLY pesticide products, as well as a YouTube video and screenshots from Petitioner's websites mold-removal.biz, propertyperfections.net and bedbugbully.com.⁹⁰ Respondent contends this evidence contradicts and calls into question Petitioner's testimony and supporting documents that it began using its BULLY pesticides in 2005/2006. Excerpts from the press releases are set forth below:⁹¹

- A press release dated **June 27, 2009**, states “MyCleaningProducts.com **today introduced** Bed Bug Bully **a new safe Bed Bug Killer**, its new bio-pesticide aimed at the growing bed bug problem.”⁹²

- A press release dated **June 29, 2009**, states “[a] **new natural cleaning product manufacturer** have [sic] sifted through 8 months of work **to develop a new solution** that kills **bed bugs** without using harmful chemicals.” The press release also states that “Markus [Skupeika] stated, ‘The fact that our science team has already developed natural aroma-like fragrances in our Green Bean line made it very easy for [our] chemistry team to add this must have element into a very stressful experience, plus I know from first hand experience the last thing one wants is your home to smell like a pesticide plant.’” The press release concludes “Bed Bug Bully (bedbugbully.com) is being offered with a 100% guarantee and also a free sample **during the new product launch.**”⁹³

- A press release dated **November 3, 2009**, states that “[i]f you are having problems with killing bed bugs, then you will be pleasantly surprised about Bed Bug Bully **a new bed bug product** which right now, **during the special launch...** you can receive the free trial.”⁹⁴

- A press release dated **May 21, 2012**, states that “Green online company MyCleaningProducts.com **added a new cleaner to its line of products.** It **released Silverfish Bully**, a pesticide-exempt solution, that could treat silverfish infestation safely and effectively.”⁹⁵

- A press release dated **July 21, 2012**, which states: “MyCleaningProducts **introduced a new spider repellent. Named as Spider Bully**, the spider spray promises an effective and safe pest-control treatment.”⁹⁶

- A press release dated **August 17, 2012**, states “MyCleaningProducts is reinventing spider repellent as an organic solution. The company **recently introduced** its spider spray called **Spider Bully** that promises an effective and safe way to get rid of the arachnids.”⁹⁷

*17 • A press release dated **April 29, 2013**, states “My Cleaning Products released a new guide of how to kill fleas and prevent their comeback. Along with it, the company **launched its non-pesticide flea spray Flea Bully.**” “Moreover, MCP detailed that pest-control companies and hotels have already been using Flea Bully for years.”⁹⁸

- A press release dated **June 26, 2013**, titled “**New Spider Spray Launched, My Cleaning Products Announces It's Giving It Out With 10% Discount**” states: “**A new spider spray called Spider Bully was launched by My Cleaning Products.** The company stated that it is an organic-based spray for spiders that works excellent as spider killer and repellent and is currently available with 10% off.”⁹⁹

• A press release dated **August 2, 2013**, titled My Cleaning Products Brings Out Organic Ant Repellent Product and which states: My Cleaning Products **launched its organic-based ant repellent spray**. The solution gets rid of ants effectively while providing a long-lasting protection against the pests, it explained” and “...anyone looking for a truly reliable ant repellent without having to worry about dangerous chemicals should pick it [**Ant Bully**] over others. And as it reasoned out, that’s because it is both effective and safe.”¹⁰⁰

Additionally, Respondent submitted a YouTube video published on May 11, 2012, concerning Petitioner's SILVERFISH BULLY product titled “MyCleaningProducts introduces the Silverfish Bully” and a description of the video which reads as follows: “There are various kinds of pests that can invade a house. Among those pests is the silverfish. To help control the infestation of such small and destructive insect, MyCleaningProducts.com **introduced a new non-toxic cleaning solution**. And as it joins the Mother's Day celebration, the company is also giving out [a] 17% discount.”¹⁰¹

Respondent also points to a screenshot of Petitioner's website, www.bedbugbully, where it states that “Bed Bug Bully is formulated in multiple sizes for different needs. Large pest professionals, medical facilities, and resorts have been using our non pesticide bed bug spray since 2010. Now after renewing our license agreements with these companies we can offer it to both our past clients and to the public.”¹⁰²

Finally, Respondent argues that despite Petitioner's claims that it has been using the BULLY brand mark on pesticides since 2005, Petitioner's websites, mold-removal.biz and propertyperfections.net, maintained by Petitioner during these early years fail to even mention the BULLY-branded pesticides being offered by Petitioner.¹⁰³

*18 In response, Petitioner submitted the rebuttal declaration testimony of Petitioner's owner, Mr. Skupeika, who testified, inter alia, as follows: Although the articles use language such as “launch” and “introduce” with respect to the Bully Products, such should not be implied to mean that the referenced products were being made available for the first time to the public at or around the time of the press releases.¹⁰⁴

To the contrary, over the years, the Bully Products were reformulated, and my belief is that the releases were distributed shortly after a change in formulation. In other words, the press releases highlight the new release of the Bully Products following a change in formulation.¹⁰⁵

With regard to the Bed Bug Bully June 29, 2009, press release identified above, Mr. Skupeika testified that this press release “indicates that Beg Bug Bully was being *re-released* as ‘a new solution’ designed ‘to infuse a natural aroma-like therapy in the product to infuse wellness, energy and relaxation in one's home after using Bed Bug Bully.’ I do recall adding natural aromas to the formulation around 2009 due to customer feedback indicating that the cinnamon aroma was a bit too strong.”¹⁰⁶

As to the YouTube video concerning Petitioner's SILVERFISH BULLY product, Mr. Skupeika testified that the video “was merely a marketing strategy to attract consumers to a ‘new’ product (the definition of ‘new’ is used broadly in marketing...), which I believe may have been re-formulated again shortly before that time.”¹⁰⁷

Concerning Petitioner's websites mold-removal.biz and propertyperfections.net maintained by Petitioner during its early years that fail to mention the BULLY-branded pesticides being offered by Petitioner, Petitioner contends that the absence of a mention

of the Bully Products is of no consequence and merely constitutes a “red-herring” since these website screenshots were dedicated to advertising Petitioner's mold removal products.¹⁰⁸

Finally, regarding the screenshot of Petitioner's website, www.bedbugbully.com, Mr. Skupeika testified that this portion of its website “states only that Bed Bug Bully was first used by ‘large pest professionals, medical facilities, and resorts’ since 2010. It does not state that Beg [sic] Bug Bully was first available to consumers in 2010.”¹⁰⁹

We do not find Mr. Skupeika's rebuttal testimony convincing. When relevant consumers view the press releases and YouTube video regarding Petitioner's BULLY-branded pesticides, the use of the terms “new,” “launch,” or “introduce” would clearly be understood to mean that the discussed products are being available for the first time and not that the particular product is reformulated or being re-introduced under a new and improved formula. Indeed, the terms “reformulated” or “reintroduce” appear nowhere in the press releases or the description of the YouTube video. Moreover, Petitioner has not submitted any documentary evidence to corroborate the testimony that the products subject to the press releases and YouTube video were reformulated or based on improved formulas.

*19 As to the YouTube video concerning Petitioner's SILVERFISH BULLY product, although Mr. Skupeika testified that the term “new” is broadly used in marketing to encompass re-formulated or improved products, his testimony did not include any indication that he is an expert in marketing and advertising terminology or techniques to substantiate his claim. Moreover, Petitioner did not submit any evidence to support his testimony regarding the expansive use of the term “new” in the marketing arena. Accordingly, we give little, if any, weight to Mr. Skupeika's testimony that the definition of the word “new” is used broadly in marketing materials.

Further, Petitioner's contention that the June 29, 2009, press release identified above states that the BED BUG BULLY pesticide product was being “re-released” is unavailing. Nowhere in the June 29, 2009, press release is there any indication that the product is being re-introduced or re-released. In fact, the press release specifically states that the BED BUG BULLY pesticide is a “new solution” not a reformulated one and that “Bed Bug Bully (bedbugbully.com) is being offered with a 100% guarantee and also a free sample during the **new product launch**.” (emphasis added).

Finally, with respect to the screenshot of Petitioner's website, bedbugbully.com, we find Petitioner's testimony unpersuasive. As noted above, the wording in the screenshot states as follows:

Bed Bug Bully is formulated in multiple sizes for different needs. Large pest professionals, medical facilities, and resorts have been using our non pesticide bed bug spray since 2010. Now after renewing our license agreements with these companies we can offer it to both our past clients and to the public.

A reasonable reading of the foregoing paragraph indicates that the Bed Bug Bully product was available to certain professional businesses only since 2010 and because the license agreements with these professional entities have been renewed, Petitioner can now also offer the product to these past clients and to the general public at large. While Petitioner is correct that the advertisement does not specifically state that the Bed Bug Bully was first made available in 2010, when viewing the advertisement in its entirety, we believe that the average reader would understand the advertisement to mean that the product was first available to professional entities since only 2010 and now is available to the general public.

After careful consideration of the press releases, YouTube video and screenshot of Petitioner's bedbugbully.com website submitted by Respondent, we find that this evidence casts doubt as to the veracity of the other testimony and evidence of record that allegedly supports Petitioner's claim that it commenced use of its BULLY marks since 2005/2006. Ultimately, this evidence demonstrates that the other evidence purportedly demonstrating Petitioner's trademark use since 2005/2006 is untruthful or fabricated.¹¹⁰

C. Invocation of Board's Inherent Authority to Sanction.

*20 Accusations that Petitioner fabricated evidence or submitted untruthful testimony is a serious charge. After a careful review of the parties' arguments and the totality of the evidence of record, we find Respondent has established by clear and convincing evidence that Petitioner participated in a pattern of submitting testimony and evidence which is inaccurate, fabricated, altered, and untruthful in order to demonstrate priority of use, an integral element of its claim of likelihood of confusion.

These types of actions engaged in by a party are not only prohibited, but tarnish and undermine the integrity of the Board and its proceedings. Petitioner's fabrication of evidence and untruthful testimony has tainted its entire case and has called into serious question the reliability of any remaining evidence or testimony submitted by Petitioner not subject to Respondent's construed motion for sanctions based on allegations of fabrication of evidence or litigation misconduct. Indeed, the application of the legal maxim "falsus in uno, falsus in omnibus" (false in one thing, false in everything) appears appropriate under these circumstances. We recognize that this legal maxim merely permits, but does not require, a fact finder to disregard the entirety of the testimony or documentary evidence submitted for trial. *See, e.g., Van Buren v. Cargill, Inc.*, 2016 WL 231399, at *7 & n.5 (W.D.N.Y. Jan. 19, 2016). Nevertheless, we find that the application of the doctrine under the particular circumstances in this case, where it appears to us beyond question that Petitioner has perpetrated fraud upon the Board, justifies its application. *Stewe v. Gonzales*, 480 F.3d 160, 170 (2d Cir. 2007) (holding that "a finding of fraudulent evidence redounds upon all evidence the probative force of which relies in any part on the credibility of the petitioner"); *Lamber v. Blackwell*, 387 F.3d 210, 256 (3rd Cir. 2004) (describing the falsus in uno, falsus in omnibus principle, which permits a jury to disregard part or all of a witness's testimony if the witness has testified falsely about a material fact); *United States v. Martinez*, 356 F. Supp. 2d 856, 870 (M.D. Tenn. 2005) (applying the doctrine falsus in uno, falsus in omnibus to discredit an agent's entire testimony due to certain inconsistencies with the record).

As the court stated in *Sarco Creek Ranch v. Greeson*, 167 F. Supp. 3d 835, 853 (S.D. Tex. 2016):

The civil justice system serves a vital function in our society. While far from perfect, it is the best method humankind has ever devised for determining the truth. When the system is abused as it was by [plaintiff] in this case, the risk is not just that the truth will be distorted in a single case--itself a dire result. The even graver consequence is reduced public confidence in the ability of the justice system to deliver true and fair judgments. As a result, the sanctions for such conduct must be severe.

*21 Petitioner's pattern of litigation misconduct in this proceeding constitutes fraud on the Board and is deserving of such a severe sanction. Although there is other evidence of record that is not subject to Respondent's construed motion for sanctions, the credibility and authenticity of such evidence has been severely tainted and, therefore, we do not consider it. In view of Petitioner's fraud on the Board, we invoke our inherent authority to sanction Petitioner and grant Respondent's construed motion for sanctions based on fabrication of evidence by dismissing the petition to cancel in its entirety.¹¹¹ *See e.g., Vargas v. Peltz*, 901 F. Supp. 1572, 1574-79 (S.D. Fla. 1995) (dismissal appropriate due to persistent pattern of misconduct that included fraud on the court, fabrication of evidence, perjury, and obstruction of the discovery process); *see also In re Bailey*, 182 F.3d 860, 864-65 (Fed. Cir. 1999) (non-Article III tribunals have inherent authority to control proceedings and enter sanctions); *NSM Res. Corp. v. Microsoft Corp.*, 113 USPQ2d 1029, 1038 (TTAB 2014) ("The Board has discretion to tailor sanctions appropriate to the violations and may consider **any** measure designed to serve this purpose.") (emphasis added); *Carrini Inc. v. Carla Carini S.R.L.*, 57 USPQ2d 1067, 1071 (TTAB 2000) ("Although the Board is not a court, the Board possesses the inherent authority to control the disposition of cases on its docket, which necessarily includes the inherent power to enter sanctions.").

Decision: The petition to cancel is dismissed with prejudice.

¹ Reg. No. 4804127, issued on September 1, 2015.

² Reg. No. 4821597, issued on September 29, 2015.

3 Reg. No. 4821598, issued on September 29, 2015.

4 Reg. No. 4821599, issued on September 29, 2015.

5 Reg. No. 4821600, issued on September 29, 2015.

6 Reg. No. 4821601, issued on September 29, 2015.

7 Reg. No. 4840104, issued on October 27, 2015.

8 6 TTABVUE. Citations to the record or briefs in this opinion also include citations to the publicly available documents on TTABVUE, the Board's electronic docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473 (TTAB 2014). The number preceding "TTABVUE" corresponds to the docket entry number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry.

9 6 TTABVUE 5.

10 *Id.*

11 Respondent's Trial Brief, pp. 30-31, 36 TTABVUE 31-32.

12 Petitioner's Reply Trial Brief, pp. 19-20, 37 TTABVUE 21-22.

13 We note that some of the evidence proffered by both parties has been designated confidential and filed under seal. We have discussed only in general terms the relevant evidence submitted under seal. However, to the extent the parties have improperly designated testimony and evidence as confidential, the Board may disregard the confidential designation when appropriate. [Trademark Rule 2.116\(g\)](#), [37 C.F.R. § 2.116\(g\)](#) ("[t]he Board may treat as not confidential that material which cannot reasonably be considered confidential, notwithstanding a designation as such by a party."). *See also Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, [110 USPQ2d 1458, 1461](#) (TTAB 2014).

We additionally note that both parties, by way of their respective notices of reliance, submitted printouts from various websites downloaded from the Internet. Although admissible for what they show on their face, *see Trademark Rule 2.122(e)(2)*, [37 C.F.R. § 2.122\(e\)\(2\)](#), this evidence also contains hearsay that may not be relied upon for the truth of the matters asserted unless supported by testimony or other evidence. [Fed. R. Evid. 801\(c\)](#); *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, [126 USPQ2d 1034, 1038](#) (TTAB 2018); *Safer, Inc. v. OMS Invs., Inc.*, [94 USPQ2d 1031, 1039-40](#) (TTAB 2010); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 704.08(b) (2019) ("The probative value of Internet documents is limited. They can be used to demonstrate what the documents show on their face. However, documents obtained through the Internet may not be used to demonstrate the truth of what has been printed.").

14 18 TTABVUE.

15 18 TTABVUE 5-14. We note that Exhibits D-M submitted under Petitioner's notice of reliance are exhibits to the testimony declaration of Markus Skupeika filed as Exhibit A to the notice of reliance.

16 18 TTABVUE 15-20.

17 18 TTABVUE 21-24.

18 18 TTABVUE 25-30.

19 18 TTABVUE 131-35.

20 18 TTABVUE 136-37.

21 18 TTABVUE 138-50.

22 18 TTABVUE 151-53.

23 18 TTABVUE 154-61.

- 24 18 TTABVUE 162-63.
- 25 18 TTABVUE 164-65.
- 26 23 TTABVUE.
- 27 24 TTABVUE.
- 28 29 and 30 TTABVUE. We note that Petitioner filed its rebuttal notice of reliance on the last day of its rebuttal testimony period, as last reset. The notice, however, did not include the accompanying exhibits. Petitioner filed the accompanying exhibits approximately one month after the close of Petitioner's rebuttal testimony period. The submission of the exhibits associated with Petitioner's rebuttal notice of reliance are therefore untimely. However, since Respondent did not object to the untimeliness of the submission of the exhibits, Respondent has waived the procedural objection of untimeliness. See *Genesco Inc. and Genesco Brands Inc. v. Martz*, 66 USPQ2d 1260, 1264 (TTAB 2003) (a party that fails to object to an untimely notice of reliance generally will result in a waiver of the objection). Accordingly, in our discretion, we have considered the exhibits in our determination herein.
- 29 30 TTABVUE 3-11. We note that Exhibits B-D of Petitioner's rebuttal notice of reliance identified below are exhibits to Markus Skupeika's rebuttal testimony declaration submitted as Exhibit A in the rebuttal notice of reliance.
- 30 30 TTABVUE 12-32.
- 31 30 TTABVUE 33-37.
- 32 30 TTABVUE 38-39.
- 33 21 (Confidential version) and 26 (Redacted version) TTABVUE. The designation of the exhibits, i.e., exhibit numbers, submitted by Respondent under its notice of reliance are identified differently in the notice of reliance itself as compared to the pages preceding the actual exhibits. This decision will only reference the exhibits by exhibit designation as set forth in the notice of reliance itself.
- 34 26 TTABVUE 137-44.
- 35 26 TTABVUE 13-60 and 93-136.
- 36 26 TTABVUE 61-92.
- 37 26 TTABVUE 83-85. The declaration submitted does not include Mr. Skupeika's signature (or a date). Accordingly, we have given no consideration to this evidence in our analysis.
- 38 26 TTABVUE 86-92.
- 39 22 TTABVUE.
- 40 *Id.*
- 41 *Id.*
- 42 31 TTABVUE.
- 43 32 (Redacted version) and 33 (Confidential version) TTABVUE.
- 44 We have in the past allowed a plaintiff to amend a pleading to assert a claim of fraud on the Board based upon the fabrication of evidence in a proceeding before us. In *Doctor Vinyl & Associates v. Repair-It-Industries, Inc.*, 220 USPQ 639 (TTAB 1983), we found that defendant presented false documents showing its priority during trial, that "applicant's conduct constitutes an attempted fraud on the Patent and Trademark Office and unclean hands in this proceeding" and sustained the opposition on that basis. But as these district court decisions make clear, amendment of pleadings is not required for a tribunal to have the power to address fabrication of evidence in a proceeding before it.
- 45 Inasmuch as this proceeding commenced after December 1, 2015, amended Fed. R. Civ. P. 37 is applicable to this case.

46 Respondent's Trial Brief, p. 30, 36 TTABVUE 31.

47 *Id.*

48 Ciske Decl., 22 TTABVUE 26.

49 Petitioner's Reply Trial Brief, p. 19, 37 TTABVUE 21.

50 *Id.*

51 Petitioner's Reply Trial Brief, p. 20, 37 TTABVUE 22.

52 22 TTABVUE 26.

53 30 TTABVUE 7 ¶¶ 17-19.

54 30 TTABVUE 7 ¶ 18.

55 22 TTABVUE 26.

56 8 TTABVUE.

57 We acknowledge that Respondent requested dismissal of the petition to cancel, in part, due to spoliation of evidence. *See* Respondent's Brief p. 30, 36 TTABVUE 31. However, dismissal due to spoliation (as opposed to lesser sanctions) is appropriate only where there is clear and convincing evidence of, *inter alia*, bad faith. *See, e.g., Micron Tech.*, 98 USPQ2d at 1706. We find, based on the record, that Respondent has failed to establish by clear and convincing evidence that Petitioner acted with the intent to deprive Respondent of the information contained in Exhibits H and I (including any associated metadata), as required under Fed. R. Civ. P. 37(e)(2). Accordingly, dismissal under Fed. R. Civ. P. 37(e)(2) is not warranted under the particular circumstances of this case. *See generally* Fed. R. Civ. P. 37(e) Advisory Committee notes (2015 amendment).

58 The fact that we are excluding consideration of Exhibits H and I from our analysis of Petitioner's likelihood of confusion claim based on our finding of spoliation does not preclude us from determining whether Exhibit I was also fabricated, as discussed more fully below.

59 We recognize that a more graduated approach to sanctions is encouraged in most circumstances. *See, e.g., Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1478 (D.C. Cir. 1995) (“[D]ismissal is a drastic step, normally to be taken only after unfruitful resort to lesser sanctions.” (internal quotation marks omitted)). But for reasons cogently explained by other courts, as discussed later in this opinion, this type of fraud on the Board uniquely calls for the sanction of dismissal.

60 Terminating sanctions are appropriate where the misconduct relates to a material matter before the court. *See, e.g., McMunn v. Mem'l Sloan-Kettering Cancer Ctr.*, 191 F. Supp. 2d 440, 445 (S.D.N.Y. 2002) (“[T]hus, when a party lies to the court and his adversary intentionally, repeatedly, and about issues that are central to the truth-finding process, it can fairly be said that he has forfeited his right to have his claim decided on the merits.”).

61 Skupeika Testimony Decl., ¶ 22, 18 TTABVUE 10.

62 Cross-Examination of Skupeika, 73:10-12; 32 TTABVUE 79.

63 *Id.* at 73:15-19; 32 TTABVUE 79.

64 *Id.* at 79:21-25, 80:2-4; 32 TTABVUE 86-87.

65 *Id.* at 75:5-7; 32 TTABVUE 81.

66 Ressler Testimony Decl., ¶¶ 2-5, 22 TTABVUE 4-5.

67 Exhibit 1 is comprised of the invoices submitted as Exhibit F under Petitioner's notice of reliance.

- 68 Petitioner's CEO, Mr. Skupeika, testified that Dream Ware Enterprises is a company owned by Mr. Skupeika that focuses on marketing and building brands and businesses. *See* Skupeika Cross-Examination Test., 7:21-23; 32 TTABVUE 13.
- 69 Winik Testimony Decl., ¶¶ 2-4, 22 TTABVUE 8-9.
- 70 Skupeika Rebuttal Testimony Decl., ¶ 23, 30 TTABVUE 9.
- 71 *Id.* at ¶¶ 25-26; 30 TTABVUE 9.
- 72 Respondent's Trial Brief, p. 29 fn. 2, 36 TTABVUE 30.
- 73 Petitioner's notice of reliance p. 2; 18 TTABVUE 3, 151-53.
- 74 26 TTABVUE 138-40.
- 75 Petitioner's Reply Brief, p. 12 n.7; 37 TTABVUE 14.
- 76 Skupeika Decl., ¶ 27, 18 TTABVUE 11-12.
- 77 Ciske Decl., 22 TTABVUE 25. Mr. Ciske's expert report was originally submitted as an exhibit to Respondent's response to Petitioner's motion for summary judgment in this matter. Respondent re-submitted the report during its testimony period with a declaration from Mr. Ciske affirming the accuracy of the information contained in the report in its entirety. We further note that Mr. Ciske refers to Exhibit K as Exhibit J in his report since that is how Petitioner identified the exhibit in its motion for summary judgment.
- 78 *Id.*
- 79 23 TTABVUE.
- 80 We additionally note that Petitioner did not submit its own expert report to rebut any of the opinions or conclusions made by Mr. Ciske.
- 81 Respondent's Brief, p. 13; 36 TTABVUE 14.
- 82 Ciske Decl., 22 TTABVUE 14-19.
- 83 *Id.*
- 84 Skupeika Testimony Decl., ¶ 28, 18 TTABVUE 12.
- 85 Respondent's Trial Brief, p. 17, 36 TTABVUE 18.
- 86 *Id.* at p. 18, 36 TTABVUE 19.
- 87 Petitioner's Reply Brief, p. 13, 37 TTABVUE 15.
- 88 *Id.* at pp. 13-14, 37 TTABVUE 15-16.
- 89 To be clear, we do not consider Respondent's construed motion for sanctions based on fabrication of evidence as one brought under [Fed. R. Civ. P. 11](#). We only reference [Fed. R. Civ. P. 11](#) for the purpose of identifying a party's obligations under the rule in Board proceedings.
- 90 Respondent's notice of reliance, 21 TTABVUE. We note Respondent did not submit any testimony regarding the truth of the matters asserted in this evidence. As such, this evidence would generally only be considered for what it shows on its face. *See* [WeaponX Performance Prods.](#), 126 USPQ2d at 1038; [Safer](#), 94 USPQ2d at 1039-40; *see also* fn. 13, *supra*. However, since Petitioner opined on the accuracy of the information contained in this evidence in its rebuttal testimony and rebuttal trial brief, *see* Skupeika Rebuttal Testimony, ¶¶ 2-14, 30 TTABVUE 4-6 and Petitioner's Reply Trial Brief pp. 11-20, 37 TTABVUE 13-22, and did not expressly object to the admissibility of this evidence on any grounds, we find that Petitioner has waived any objections regarding the same. Accordingly, we have considered this evidence for the truth of the matters asserted therein.
- 91 The bolded text is emphasis added by the Board.

- 92 Respondent's notice of reliance, Exh. PR007, 26 TTABVUE 124-27.
- 93 *Id.* at Exh. PR005, 26 TTABVUE 114-16.
- 94 *Id.* at Exh. PR007, 26 TTABVUE 121-123. Respondent identified this exhibit, as well as the exhibit referenced in n.69, supra, as Exh. PR007.
- 95 *Id.* at Exh. PR001, 26 TTABVUE 98-101.
- 96 *Id.* at Exh. PR008, 26 TTABVUE 128-31.
- 97 *Id.* at Exh. PR006, 26 TTABVUE 117-20.
- 98 *Id.* at Exh. PR001, 26 TTABVUE 93-97.
- 99 *Id.* at Exh. PR004, 26 TTABVUE 110-13.
- 100 *Id.* at Exh. PR002, 26 TTABVUE 102-05.
- 101 *Id.* at Exh. WEB002, 26 TTABVUE 135-36.
- 102 *Id.* at Exh. WEB001, 26 TTABVUE 132-34.
- 103 Respondent's Brief p. 21, 36 TTABVUE 22; Respondent's notice of reliance at Exhs. EX IA001-EXIA018, 26 TTABVUE 13-60.
- 104 Skupeika Rebuttal Testimony Decl. at ¶ 5, 30 TTABVUE 5.
- 105 *Id.* at ¶ 6, 30 TTABVUE 5.
- 106 *Id.* at ¶ 7, 30 TTABVUE 5.
- 107 *Id.* at ¶ 14, 30 TTABVUE 6.
- 108 *Id.* at ¶ 10, 30 TTABVUE 6.
- 109 *Id.* at ¶ 13, 30 TTABVUE 6.
- 110 We agree with Petitioner that because the screenshots from its websites moldremoval.biz and propertyperfections.net submitted by Respondent do not mention its BULLY pesticides does not necessarily mean that Petitioner's BULLY pesticides were not available since those specific screenshots are dedicated to the advertisement of Petitioner's mold removal products.
- 111 Although we are dismissing the petition pursuant to our inherent authority to sanction based on Petitioner's litigation misconduct in this proceeding, it is clear that Petitioner has failed to prove its asserted claim of likelihood of confusion inasmuch as we are not considering any evidence submitted by Petitioner during its trial period for the reasons explained above.

2019 WL 4316700 (Trademark Tr. & App. Bd.)

2007 WL 1276972 (Trademark Tr. & App. Bd.)

THIS OPINION IS NOT A PRECEDENT OF THE T.T.A.B.

Trademark Trial and Appeal Board

Patent and Trademark Office (P.T.O.)

IN RE SCHWAN'S IP LLC

SERIAL 78527306

April 25, 2007

*1 [Danielle I. Mattessich](#) of Merchant & Gould P.C. for Schwan's IP LLC
[Esther Belenker](#), Trademark Examining Attorney
Law Office 111
([Craig D. Taylor](#), Managing Attorney)

Before [Bucher](#), [Zervas](#) and [Bergsman](#)
Administrative Trademark Judges
Opinion by [Bergsman](#)
Administrative Trademark Judge:

Schwan's IP LLC filed an intent-to-use application for the mark FRESCH, in standard character format, for “frozen pizza; appetizers, namely, hand-held bread puffs and bread bowls primarily containing meat and/or vegetables and/or cheese, with or without tomato sauce; bruschetta; flatbread with or without dipping sauce,” as amended.¹ Registration was refused on the ground that FRESCH is primarily merely a surname in accordance with Section 2(e)(4) of the Lanham Act, [15 U.S.C. §1052\(e\)\(4\)](#). When the refusal was made final, applicant filed a notice of appeal. The refusal has been fully briefed. We reverse.

In support of the refusal, the examining attorney submitted the following evidence:

1. A printout from one of the LexisNexis databases comprising a nationwide directory of names displaying 131 residential listings of Fresch as a surname,² and,
2. Excerpts from 104 stories deemed “representative” by the examining attorney where the term “Fresch” is used as a surname of 895 stories located in another LexisNexis database.

In responding to the surname refusal, applicant submitted the following evidence:

1. A web page showing that Fresch is a location in Austria,³
2. A web page showing that Fresch Hazel is a location in Belgium,⁴
3. A web page promoting Fresch Shower & Bath Soap;
4. A web page promoting Fresch Iranian caviar;
5. A web page promoting the Fresch collection of rugs;
6. A web page promoting Fresch Designs, a company specializing in website design for businesses (www.freschdesigns.com);

7. Copies of applicant's federal registrations: Registration Nos. 2,114,646; 2,173,137; 2,307,630; 2,949,357; 3,046,569; 3,027,271; and 3,006,663 for various FRESCHETTA trademarks for pizza and food products and related services;
 8. A definition from the Mennonite Low German Dictionary listing “fresh” as the definition of “fresch”;
 9. A Wikipedia entry regarding the “Fresch” method of synchronization of movement and language for the promotion of LRS children;
 10. Excerpts from the Cosmoworlds Europe Style Portal (www.cosmoworlds.com) and the Tendence Lifestyle website (<http://tendence-lifestyle.messefrankfurt.com>) regarding the August, 2006 “international lifestyle and consumer-goods fair” presenting new works from German and international designers. The event was held in Frankfurt, Germany. In that document, “Fresch” is described as a combination of the German word “frech” meaning bold, daring, or innovative, and the English word “fresh.” Although these are references to a festival in Frankfurt, Germany, the website is accessible to U.S. citizens and it shows “Fresch” as a coined word; and,
- *2 11. Four (4) excerpts from publications retrieved from an unidentified database:⁵
- A. Cabinet Maker (November 25, 2005) references the “Fresch” exhibition in Frankfurt, Germany;
 - B. BusinessWorld (March 31, 2005) references “two fresch scents”;
 - C. Apollo (March 1, 2005) references “fresch” in a quotation in Latin: “in regno Hispaniae degentem pictorem egregium in picture dicta vulgariter sobre lo fresch”;
 - D. Fairfield County Woman (December, 2001) references the website fresch.com.

Applicant also submitted the following evidence which has little probative value for the reasons stated below:

1. A web page from a German website in German with no English translation (www.weserserver.de). Because we are concerned with the meaning of the mark in the United States, a German website in German has no probative value in proving the meaning of the term to consumers in the United States. *In re Isabella Fiore LLC*, 75 USPQ2d 1564, 1568 (TTAB 2005);
2. A web page from a website promoting restaurants in Tenerife, one of the Canary Islands (www.canary-holiday.com). The web page describes one restaurant's fare as “fresch fisch, tapas.” This web page, while substantially in English, uses the word “fresch” in a foreign language phrase to describe the food served in a restaurant located outside the United States. Because the reference is in a foreign language regarding food served in a restaurant outside of the United States, it has very little relevance, if any, in assessing how consumers in the United States perceive the term “Fresch”;
3. A web page from a domain name registrar in Palau, an island nation in the Pacific (www.fresch.pw). Because the web page is from a foreign website and there is no evidence that internet users in the United States would access this website, this web page has no probative value in determining how United States consumers will perceive the word “Fresch”;
4. A web page (<http://businessphilosophy.com>) with the following phrase: “We offer BG/MTNS Issue Fresch Cut With POF: Looking For Business Partners Nantucket Campfire.” This web page is essentially incomprehensible. Also, because “Cut” follows “Fresch,” it appears that the author intended to use the phrase “fresh cut,” and that “Fresch” is a typographical error;
5. An excerpt from an eBay advertisement posted from Brighton, West Sussex in the United Kingdom for “antique?pair of ice skates FRESCH!” Since someone from the United Kingdom submitted this eBay entry, it evidences the use by someone other

than a person located in the United States. On the other hand, consumers in the United States access the eBay website and may encounter this listing. Giving applicant the benefit of the doubt, a United States consumer would likely perceive this use of FRESCH as a typographical error of the word “fresh”; and,

*3 6. A copy of Registration No. 2,276,974 for the mark FRESCH for “mint candy, namely, breath mints.” Each application for registration must be decided on its own merits based on the evidence of record. The Board may not delegate its authority and duty to decide a case to an examining attorney on a different record. Moreover, we are not privy to the record in the files of the registered mark. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269- 270 (CCPA 1973); *In re Benthin Management, Inc.*, 37 USPQ2d 1332, 1333 (TTAB 1995); *In re Sunmarks Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994).

Finally, the examining attorney has asked us to take judicial notice of four (4) pages from online German-English dictionaries showing that there is no English translation for the word “Fresch,” as well as a copy of a “report” from the Scientific and Technical Information Center at the U.S. Patent and Trademark Office.⁶ These dictionary pages were submitted for the first time with the Examining Attorney's Brief. In its Reply Brief, applicant objected to the dictionary definitions because they were from online sources, and applicant did not have the opportunity to check the reliability of the evidence and offer rebuttal evidence. Applicant's objection is well taken.

As a general rule, the Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). *See also* TBMP §704.12 (2nd ed. rev. 2004). However, when the definitions have been retrieved from online sources, there must be some evidence that the sources are readily verifiable, reliable, and available in print publications. For example, we will take judicial notice of information from the Encarta Dictionary even though it is not available in print format because it is a widely known reference that is readily available online and in a CD-Rom format. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006); *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999). While the information in the online dictionaries are readily available online and verifiable as evidenced by the URL on the printouts, there is no evidence regarding their availability in print or other acceptable alternatives, or their reliability. With regard to the “report” from the Scientific and Technical Information Center at the Patent and Trademark Office, this is not the type of evidence for which we may take judicial notice. Further, in both instances, applicant has not had an opportunity to rebut this evidence.

*4 More troubling, however, is why the examining attorney waited until her appeal brief to submit this evidence. The Trademark Manual of Examining Procedure specifically identifies “dictionary definitions of the term and evidence from dictionaries showing no definition of the term” as evidence that may be relevant in determining trademark significance. TMEP §§1211.02(a) and 1211.02(b)(v). Accordingly, such evidence should be entered into the record when the examining attorney first refuses registration under Section 2(e)(4). Nevertheless, the examining attorney did not submit this evidence in her initial refusal, final refusal, or responses to two (2) requests for reconsideration.

Accordingly, we decline to take judicial notice of the four (4) pages from online German-English dictionaries and the “report” from the Scientific and Technical Information Center at the U.S. Patent and Trademark Office. We have given that information no consideration in reaching our decision.

We now turn to the merits of this case (*i.e.*, the propriety of the refusal to register FRESCH on the ground that it is primarily merely a surname). In analyzing the surname refusal, we must determine the impact FRESCH has on the purchasing public because “it is the impact or impression which should be evaluated in determining whether or not the primary significance of a word when applied to a product is a surname significance. If it is, *and it is only that*, then it is primarily merely a surname.” *In re Giger*, 78 USPQ2d 1405, 1407 (TTAB 2006), *quoting*, *In re Harris-Intertype Corp.*, 518 F.2d 629, 186 USPQ 238, 239 (CCPA 1975), *quoting*, *Ex parte Rivera Watch Corp.*, 106 USPQ 145 (Comm'r 1955)(emphasis in the original).

Our case law sets out a number of factors to be used to determine if the term is primarily merely a surname:

1. Whether the surname is rare;
2. Whether anyone connected with the applicant has the term as a surname;
3. Whether the term has any other recognized meaning; and,
4. Whether the term has the “look and feel” of a surname.

In re Giger, supra; In re United Distillers, plc, 56 USPQ2d 1220, 1221 (TTAB 2000).

A. FRESCH is not a common surname.

The record shows some use of “Fresch” as a surname. There are only 131 residential listings nationwide for Fresch and 104 excerpts from “stories” from a LexisNexis database with “Fresch.” Unlike the surname “Rogan,” the subject of *In re Gregory*, the surname “Fresch” does not appear to be the name of a public personality that routinely appears in news reports so as to be broadly exposed to the general public. *In re Gregory*, 70 USPQ2d 1792, 1795 (TTAB 2004). Many of the 104 excerpts were simply obituaries or real estate transaction listings, and as such they do not demonstrate use of “Fresch” as a surname beyond that evidenced by the entries in the residential listings. Based on the record before us that shows some surname use of FRESCH, we find that it is not a common surname.

B. FRESCH is not a surname for anyone connected with the applicant.

*5 The evidence of record does not show that anyone connected with applicant has the surname FRESCH. However, the fact that “a proposed mark is not applicant’s surname, or the surname of an officer or employee, does not tend to establish one way or the other whether the proposed mark would be perceived as a surname.” *Id.*

C. There is no probative evidence regarding the meaning or significance of FRESCH.

Words having significance other than as a surname are not “primarily merely a surname.” *Fisher Radio Corp. v. Bird Electronic Corp.*, 162 USPQ 265 (TTAB 1969)(BIRD is not primarily merely a surname); *Ex parte Omaha Cold Storage Co.*, 111 USPQ 189 (Comm’r Pat. 1956)(DOUGLAS is not primarily merely a surname); *In re Monotype Corp. PLC*, 14 USPQ2d 1070 (TTAB 1989)(CALLISTO has no surname meaning from Greek mythology); *In re BDH, Inc.*, 26 USPQ2d 1556 (TTAB 1993)(GRAINGERS for crackers and chips is not a surname because it would be perceived as suggestive of the grain-based nature of the product). *See also* TMEP §1211.01(a).

This record is devoid of any probative evidence regarding any meaning for FRESCH. Fresch, Austria and Fresch Hazel, Belgium are too obscure to have any significance in the United States. Given the handful of persons in the United States who speak Plautdietsch, we find the entry from the Mennonite Low German Dictionary has no probative value. Applicant’s references to Fresch Shower & Bath Soap, Fresch Iranian caviar, the Fresch collection of rugs, and Fresch Designs are likely uses derived from surnames or misspellings of “fresh.” In addition to any concerns we may have about the transient nature of such an entry and the general reliability of collaborative websites with permissive edits, the Wikipedia reference to the “Fresch” treatment for children having “LRS” is not only too obscure to have any significance in the United States, but there is no indication that this “method” is even practiced in the United States. On the other hand, as seen above, some of the entries suggest that “Fresch” could be a different spelling for “fresh” (e.g., the “fresch fisch” advertisement for the restaurant in the Canary Islands, the reference in the businessphilosophy.com web page stating that “We offer BG/MTNS Issue Fresch Cut With POF: Looking For Business Partners Nantucket Campfire,” and the eBay advertisement for “antique?pair of ice skates FRESCH!”).

D. FRESCH does not have the look or feel of a surname.

This is a subjective factor concerning whether FRESCH has the “structure and pronunciation” or “the look and sound” of a surname. *In re Benthin Management GmbH, supra* at 1333; *In re Sava Research Corp.*, 32 USPQ2d 1380, 1381 (TTAB 1994); *In re Industrie Pirelli*, 9 USPQ2d 1564, 1566 (TTAB 1988). As stated in *Industrie Pirelli*, “certain rare surnames look like surnames, and certain rare surnames do not and that ‘Pirelli’ falls into the former category, while ‘Kodak’ falls into the latter.” *Id.*

*6 In addition to the fact that “Fresch” is not a common surname, there is no evidence that “____sch” is a common or recognized structure or format for a surname (*e.g.*, ____berg as in Steinberg, ____man as in Bergsman, ____lov as in Orlov, etc.). Because “Fresch” does not have the appearance of a surname, and because the word “fresh” describes a desirable quality of food or ingredients in food, consumers would be more likely to recognize “Fresch,” when used in connection with the food items listed in applicant’s identification of goods, as a stylization or variation of the word “fresh,” rather than as a surname. In this respect, applicant has previously alluded to FRESCH as suggesting freshness in its Registration No. 3,046,569 for the mark FRESCHETTA THE FRESH TASTE SENSATION and Design for similar food products. Therefore, we find that the primary significance of the word FRESCH when applied to food products will be perceived as suggesting a quality of the food items listed in applicant’s identification of goods and/or their ingredients.

In reaching this finding, we are aware of the Board’s holdings *In re Woolley’s Petite Suites*, 18 USPQ2d 1810 (TTAB 1991) (WOOLLEY’S PETITE SUITES is primarily merely a surname for hotel and motel services) and *In re Pickett Hotel Company*, 229 USPQ 760 (PICKETT SUITE HOTEL for hotel, restaurant, and cocktail lounge services is primarily merely a surname). In those cases, we held that a term may be primarily merely a surname even if it is the phonetic equivalent of a word that has an ordinary meaning. However, in those cases, “Woolley” and “Pickett” were arbitrary terms when used in connection with hotel, motel, restaurant and cocktail lounge services. In this case, FRESCH is the phonetic equivalent of the descriptive word “Fresh,” and that has a profound effect on the way that consumers will perceive the word FRESCH.

Finally, on the issue of whether a mark would be perceived as primarily merely a surname, we resolve any doubts we have in favor of the applicant and pass the application to publication with the knowledge that others who have the same surname and use it or wish to use it for the same or similar goods may file a notice of opposition. *In re Benthin Management GmbH, supra* at 1334.

Because FRESCH is not a common surname, when it is used in connection with the food items identified in applicant’s identification of goods, it would be perceived as a stylization or variation of the word “fresh.” Additionally, the word FRESCH does not have the clear look and sound of a surname. We therefore find that when FRESCH is used in connection with “frozen pizza; appetizers, namely, hand-held bread puffs and bread bowls primarily containing meat and/or vegetables and/or cheese, with or without tomato sauce; bruschetta; flatbread with or without dipping sauce” it would not be perceived as primarily merely a surname.

*7 Decision: The refusal to register is reversed.

1 Application Serial No. 78527306, filed December 6, 2004.

2 The printout contains 136 listings, but three listings appeared in duplicate and one in triplicate.

3 In order to demonstrate the minor geographical significance of this entry, the examining attorney countered with a web page about Fresch, Austria, listing its population as 26,233.

4 In order to demonstrate the minor geographical significance of this entry, the examining attorney countered with a web page about Fresch Hazel, Belgium, listing its population as 4,225.

5 The examining attorney did not object to these stories despite the fact that the database is not identified. Accordingly, we accept the stories for whatever probative value they may have.

- 6 The Scientific and Technical Information Center at the Patent and Trademark Office sent the examining attorney an e-mail regarding the lack of a definition for the word “Fresch.”

2007 WL 1276972 (Trademark Tr. & App. Bd.)

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2010 WL 1920470 (Trademark Tr. & App. Bd.)

THIS OPINION IS NOT A PRECEDENT OF THE TTAB

Trademark Trial and Appeal Board

Patent and Trademark Office (P.T.O.)

In re Scripps Networks, Inc.

Serial No. 77418854

April 27, 2010

*1 [Brian J. Downey](#) and [Samantha M. Quimby](#) of Frost Brown Todd LLC for Scripps Networks, Inc.

[Darryl M. Spruill](#)

Trademark Examining Attorney

Law Office 112

([Angela Wilson](#), Managing Attorney)

Before [Seeherman](#), [Holtzman](#) and [Zervas](#)

Administrative Trademark Judges

Opinion by [Seeherman](#)

Administrative Trademark Judge:

Scripps Networks, Inc. has appealed from the final refusal of the trademark examining attorney to register CLUB DANCE, in standard character format, as a mark for restaurant and bar services. The application, Serial No. 77418854, was filed March 11, 2008, based on Section 1(b) of the Trademark Act (intent-to-use). Registration has been refused pursuant to Section 2(e)(1) of the Trademark Act, [15 U.S.C. § 1052\(e\)\(1\)](#), on the ground that applicant's mark is merely descriptive of its applied-for services. Specifically, it is the examining attorney's position that applicant's mark consists of descriptive terms that, when combined as CLUB DANCE, identify a feature, purpose or nature of applicant's services, namely, a club or venue where patrons can dance.

Before reaching the substantive issue before us, there is a procedural point that we must address. In its response to the first Office action, applicant referred to four third-party registrations, "included as Exhibit A." No registrations were submitted with applicant's response, and the examining attorney pointed this out in the next Office action, also advising applicant that the submission of only a list of registrations is not sufficient to make the registrations of record. Applicant did not submit copies of the registrations with the request for reconsideration it subsequently filed. However, as noted by applicant in its response, two of the registrations, Nos. 3284535 and 3292116, had previously been made of record by the examining attorney. Therefore, we have considered these registrations, but have not considered Registrations Nos. 3200789 and 3289302.

Section 2(e)(1) of the Trademark Act prohibits the registration of a mark that is merely descriptive of the identified goods or services. However, a term that is suggestive is registrable. A term is deemed to be merely descriptive of goods or services if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. In re [Abcor Development Corp.](#), [588 F.2d 811](#), [200 USPQ 215](#), [217-18 \(CCPA 1978\)](#). A term is suggestive if imagination, thought or perception is required to reach a conclusion on the nature of the goods or services. In re [Gyulay](#), [820 F.2d 1216](#), [3 USPQ2d 1009 \(Fed. Cir. 1987\)](#).

*2 In support of the refusal the examining attorney has made of record third-party registrations for marks containing the word CLUB or the word DANCE in which that word was disclaimed, or the mark was registered on the Principal Register upon a showing of acquired distinctiveness. These registrations include CLUB SEVILLA for restaurant services, in which CLUB has been disclaimed; SAILFISH CLUB for restaurant and bar services, in which CLUB has been disclaimed; CLUB NO MINORS

for restaurant and bar services, in which CLUB has been disclaimed and the mark as a whole registered pursuant to Section 2(f); and GOLD DIGGERS (stylized) with the single words DRINK DANCE DOWNTOWN appearing on separate circles for restaurant, bar and cocktail lounge services, in which DRINK and DANCE have been disclaimed.¹ The examining attorney has also submitted dictionary definitions of the word “dance,” and evidence of businesses that offer restaurant services and dancing.

Applicant has explained that it will provide traditional restaurant and bar services, and that “the restaurant and bar services are inspired by the theme of the television program CLUB DANCE for which applicant has other applications (former registration 1,882,585 and current ITU applications 78/436794 and 78/867945).” Response filed December 23, 2008. Applicant has argued that its customers will be familiar with applicant's television program and the mark will tie the restaurant in with the television program. Brief, p. 3. However, such an argument is not applicable to the present situation because applicant has not applied to register its mark pursuant to the provisions of Section 2(f) of the Act. See [In re Nielsen Business Media Inc.](#), 93 USPQ2d 1545, 1547 (TTAB 2010) (an intent-to-use applicant that has used the same mark on related goods or services may file a claim of acquired distinctiveness under Section 2(f) if the applicant can establish that, as a result of the applicant's use of the mark on other goods or services, the mark has become distinctive of the goods or services in the intent-to-use application, and that this previously created distinctiveness will transfer to the goods and services in the intent-to-use application when use in commerce begins). Therefore, we cannot consider whether, because of any consumer perception of CLUB DANCE as a source-identifier for a television program, CLUB DANCE has acquired distinctiveness as a trademark for restaurant and bar services.²

As we have often said, there is but a thin line of distinction between a suggestive and a merely descriptive term, and it is often difficult to determine when a term moves from the realm of suggestiveness into the sphere of impermissible descriptiveness. See [In re Recovery, Inc.](#), 196 USPQ 830 (TTAB 1977). Here, we find CLUB DANCE to fall on the suggestiveness side of that line. First, we agree with applicant that restaurants do not usually offer a place to dance. Although nightclubs generally include bar services, and often offer food as well, they are not the same as restaurants. Therefore, the evidence that the examining attorney has submitted of establishments that provide dancing and food do not persuade us that “dance” describes a characteristic of restaurant and bar services, as opposed to nightclub services.³ Moreover, the mark itself, CLUB DANCE, has an unusual syntax, since the familiar term is “dance club.” These two points--the fact that restaurants do not usually feature dancing and the reversal of the order of the words in the mark from the normal term--are sufficient to create a mental pause or hiccup for those viewing the mark. As a result, we find that CLUB DANCE is suggestive for restaurant and bar services.

*3 Finally, to the extent that there is any doubt on this issue, such doubt must be resolved in favor of applicant. [In re Intelligent Medical Systems Inc.](#), 5 USPQ2d 1674, 1676 (TTAB 1987) {“where reasonable men may differ, it is the Board's practice to resolve the doubt in applicant's favor and publish the mark for opposition”}.

Decision: The refusal of registration is reversed.

¹ We have listed only those registrations which do not include other services such as night club services or hotel services, since a disclaimer for CLUB or DANCE in connection with such registrations could reflect the descriptiveness of the term for non-restaurant services.

² We do not suggest that CLUB DANCE is distinctive or acts as a source-identifier for a television program, or that any distinctiveness that the mark may have for a television program would transfer to restaurant and bar services. Webpages that have been made of record indicate that applicant's television program was last broadcast in 1999.

³ For example, Latin Palace Restaurant and Private Club, listed in AOL cityguide for Baltimore, is described as a nightclub, as is Chapter 8 Steak House & Dance Lounge, www.opentable.com and Diva Lounge, <http://divalounge.com> (Lounge/Dance & Supper Club). With respect to the other webpages, the listing for “Bull Run Restaurant”, www.socialweb.net states that Bull Run is a place for “wonderful concerts or entertainment events.” The webpages regarding Food Dance Café, www.Greaterguide.com, on the other hand, indicate this business is a restaurant, but there is nothing to show that it has any dancing; rather, FOOD DANCE is literally the name of the restaurant, and “dance” has a suggestive meaning in connection with the food itself.

2010 WL 1920470 (Trademark Tr. & App. Bd.)

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2016 WL 3912938 (Trademark Tr. & App. Bd.)

THIS OPINION IS NOT A PRECEDENT OF THE TTAB

Trademark Trial and Appeal Board

Patent and Trademark Office (P.T.O.)

IN RE SIMON PROPERTY GROUP, L.P.

Serial No. 86341571

July 7, 2016

*1 [Daniel L. Boots](#) and Michael J. McGee of Bingham Greenebaum Doll for Simon Property Group, L.P.

Brian Pino

Trademark Examining Attorney

Law Office 114

K. Margaret Le, Managing Attorney

Before [Quinn](#), [Taylor](#), and Lynch

Administrative Trademark Judges

Opinion by [Quinn](#)

Administrative Trademark Judge:

Simon Property Group, L.P. (“Applicant”) filed an application to register on the Principal Register the mark SIMON LOOKBOOK LIVE (in standard characters) for “organizing and conducting entertainment events at shopping malls, namely, fashion shows, educational presentations and demonstrations in the field of beauty and styling techniques and fashion and beauty trends, and promotional giveaways and sweepstakes” in International Class 41.¹

The Trademark Examining Attorney refused registration on the following grounds: 1) Applicant failed to comply with a requirement under Section 6(a) of the Trademark Act, [15 U.S.C. § 1056\(a\)](#), to disclaim the wording LOOKBOOK LIVE apart from the mark; and 2) Applicant failed to fully comply with the requirement to provide information, pursuant to [Trademark Rule 2.61\(b\)](#), necessary to the proper examination of the application.

When the requirements were made final, Applicant appealed. Applicant and the Examining Attorney filed briefs.

REQUEST FOR ADDITIONAL INFORMATION

We turn first to the refusal under [Trademark Rule 2.61\(b\)](#). This rule provides that “[t]he Office may require the applicant to furnish such information, exhibit affidavits or declarations ... as may be reasonably necessary to the proper examination of the application.” If an applicant fails to comply with the Examining Attorney's requirement under [Trademark Rule 2.61\(b\)](#), registration of applicant's mark may be refused on that basis. *See In re AOP LLC*, 107 USPQ2d 1644, 1651 (TTAB 2013); *In re Cheezwhse.com Inc.*, 85 USPQ2d 1917, 1919 (TTAB 2008); *In re DTI Partnership LLP*, 67 USPQ2d 1699 (TTAB 2003). *See generally* TMEP § 814 (2016).

In the present case the Examining Attorney maintains that he should not be required to determine the registrability of Applicant's proposed mark without a clear understanding of Applicant's services or the meaning of the mark, and that Applicant is in the best position to supply that information. In his first Office action, the Examining Attorney asked whether the wording LOOKBOOK, LIVE, or LOOKBOOK LIVE has any significance as applied to the services, and in the relevant trade or industry, other than service mark significance. In addition, the Examining Attorney asked “will the services be live?” and “will the services provide

or be related to a lookbook?” Although Applicant “responded in whole or in part to several of the requirements,” the Examining Attorney issued a final refusal because “the applicant did not provide responses to the significance of the individual terms LOOKBOOK or LIVE as required.” (6 TTABVUE 7-8).

*2 Applicant then appealed, and in its appeal brief it provides additional informational statements “[i]n the event the Board considers Applicant's initial answers to [the Examining Attorney's] questions insufficient.” (4 TTABVUE 14). Applicant “further clarifies” its earlier responses. *Id.* The Examining Attorney, in his brief, objects to the additional informational statements as untimely under [Trademark Rule 2.142\(d\)](#). The Examining Attorney states that “[b]ecause the applicant did not provide the reasonably necessary information prior to the appeal as required, the applicant has robbed the Office of the opportunity to have pertinent information on which to maintain or withdraw the disclaimer requirement.” (6 TTABVUE 10). The Examining Attorney goes on to state, however, that in the event his objection is overruled, the additional informational statements made by Applicant actually lend support to the disclaimer requirement. (6 TTABVUE 14).

Accordingly, we turn to the application history to review the specifics of this disagreement. The Examining Attorney's inquiries (Office action, 9/18/14), followed by Applicant's responses (Response, 3/18/15), appear below.

1. Do LOOKBOOK, LIVE, or LOOKBOOK LIVE have any significance as applied to the goods and/or services other than trademark and/or service mark significance?

Applicant submits that LOOKBOOK LIVE does have service mark significance. However, the term LOOKBOOK LIVE does also pertain to a certain aspect of Applicant's services, that is, providing a publication featuring fashion and beauty styles available at certain retailers and providing an in-person component of this publication by putting on fashion shows and styling lounges for consumers.

2. Do LOOKBOOK, LIVE, or LOOKBOOK LIVE have any significance in the relevant trade or industry other than trademark and/or service mark significance?

LOOKBOOK LIVE is a channel for leading retailers at Applicant's retail shopping properties to promote their products to a national audience in order to drive traffic to their stores.

3. Will the services be live?

A portion of the services have been, and will continue to be, rendered in-person at certain of Applicant's retail shopping properties.

4. Will the services provide or be related to a lookbook?

As indicated in Applicant's response to the first question above, a publication sometimes known as a “lookbook” is one component of the applied-for services.

The Examining Attorney indicated, in his final refusal, that Applicant “did not provide responses to the significance of the *individual* terms LOOKBOOK or LIVE as required.” (emphasis added) (Office action, 3/30/15). The Examining Attorney reiterated his request in the final refusal (emphasis in original):

The applicant must *directly* answer the following question(s) and/or provide the information requested:

*3 1. Do LOOKBOOK or LIVE have any significance as applied to the goods and/or services other than trademark and/or service mark significance?

2. Do LOOKBOOK or LIVE have any significance in the relevant trade or industry other than trademark and/or service mark significance?

Applicant neither responded nor requested reconsideration, but rather filed a notice of appeal. In its appeal brief, Applicant made the following statements in response to the first inquiry:

The word “lookbook” does not have significance as applied to Applicant's services in the sense that the essence of Applicant's services is not the creation, selling, or distribution of lookbooks (as defined below). Lookbooks are not a necessary part of the services rendered by Applicant. However, for marketing purposes Applicant makes hardcopy lookbooks available for attendees at some of its events provided under the SIMON LOOKBOOK LIVE mark.

The word “live” has significance as applied to the Applicant's services in that the services consist of “live” fashion shows in which models display clothing and the like to a live audience, and instruction is provided by “live” instructors rather than in writing or pre-recorded. (4 TTABVUE 15)

Applicant made the following statement in response to the second inquiry:

“Lookbook” is a term used in the fashion industry. Applicant understands the current definition shown in Wikipedia to be accurate: “a collection of photographs compiled to show off a model, a photographer, a style, or stylist or a clothing line.”

Applicant is not aware of any significance of “live” in the relevant trade or industry that differs from the standard meaning, e.g. a “live” show referring to a show that is performed in person before an audience rather than prerecorded.

Id.

In its reply brief, Applicant stated, in relevant part:

There was nothing lacking from Applicant's initial response to “rob” the Office of a meaningful opportunity to consider the continuance or withdrawal of the disclaimer requirement. The information contained in Applicant's Brief only clarified the responses already offered by Applicant, and re-stated the dictionary definitions of the words “LOOKBOOK” and “LIVE” that the Examining Attorney placed into the record. In short, the Examining Attorney knew the meaning of the words, and Applicant has not disputed the definitions the Examining Attorney provided.

(7 TTABVUE 10)

We find Applicant's original responses to be sufficient. The responses address “lookbook” and “live” separately, and we therefore disagree with the Examining Attorney's contention that Applicant failed to individually address the terms. And, although Applicant could have sought to “clarify” its responses by way of a request for reconsideration before appeal, we consider the “clarifying” informational statements in its brief to confirm the acceptability of the original responses, especially given the dictionary definitions introduced earlier by the Examining Attorney. Moreover, the Examining Attorney now states in his brief that Applicant's most recent statements actually support the refusal. Thus, we see little reason to disregard these additional statements.

*4 In view thereof, the appeal based on this requirement is reversed. In deciding the remaining issue of the disclaimer requirement, we will consider all of the information of record, including Applicant's informational statements in the brief.

DISCLAIMER

The Examining Attorney maintains that the wording LOOKBOOK LIVE must be disclaimed because it is merely descriptive when used in connection with “organizing and conducting entertainment events at shopping malls, namely, fashion shows, educational presentations and demonstrations in the field of beauty and styling techniques and fashion and beauty trends, and promotional giveaways and sweepstakes.” According to the Examining Attorney, Applicant's services are provided live, and the services include providing a lookbook to patrons of Applicant's fashion shows. In support of the refusal the Examining Attorney submitted dictionary definitions of “lookbook” and “live,” and excerpts of third-party websites, which show uses of the wording “lookbook” or “live.” The Examining Attorney also introduced two third-party registrations showing disclaimers of the word “Live.”

Applicant, in its brief, states that “there is no disagreement as to the meaning of the individual words ‘lookbook’ and ‘live,’” and more importantly, “there is no dispute as to the descriptive significance of the term ‘live’ by itself.” (4 TTABVUE 8). Applicant also “does not dispute the Examining Attorney's conclusion that consumers would understand a ‘lookbook’ to mean ‘[a] set of photographs displaying a fashion designer's new collection, assembled for marketing purposes,’ as set forth in the first Office Action. Given that meaning, it is unsurprising that it would be possible to find references that use ‘lookbook’ in connection with ‘fashion show.’ But that does not establish that LOOKBOOK LIVE is merely descriptive of fashion shows.” (4 TTABVUE 11). Applicant contends that the wording LOOKBOOK LIVE in its mark is a unitary, incongruous portion that does not require a disclaimer because a “lookbook” cannot be “live”; more specifically, Applicant claims that the combination of “lookbook” and “live” suggests an inanimate object that has come to life. Applicant further argues that the wording presents an alliterative cadence that is distinctive. Applicant then goes on to criticize the Examining Attorney's evidence, contending that it is insufficient to establish mere descriptiveness of the combined wording LOOKBOOK LIVE.

Section 6(a) of the Trademark Act, [15 U.S.C. § 1056\(a\)](#), reads, in relevant part, as follows: “The Director may require the applicant to disclaim an unregistrable component of a mark otherwise registrable.” A disclaimer is a statement that the applicant or registrant does not claim the exclusive right to use a specified element or elements of the mark in a trademark application or registration. “The effect of a disclaimer is to disavow any exclusive right to the use of a specified word, phrase, or design outside of its use within a composite mark.” *In re Franklin Press, Inc.*, 597 F.2d 270, 201 USPQ 662, 665 (CCPA 1979). See *In re Wada*, 194 F.3d 1297, 52 USPQ2d 1539 (Fed. Cir. 1999); *Sprague Electric Co. v. Erie Resistor Corp.*, 101 USPQ 486, 486-87 (Comm'r Pats. 1954) (“As used in trade mark registrations, a disclaimer of a component of a composite mark amounts merely to a statement that, insofar as that particular registration is concerned, no rights are being asserted in the disclaimed component standing alone, but rights are asserted in the composite; and the particular registration represents only such rights as flow from the use of the composite mark.”).

*5 “[I]t is within the discretion of an Examining Attorney to require the disclaimer of an unregistrable component (such as a common descriptive, or generic, name) of a composite mark sought to be registered on the Principal Register.” *In re Creative Goldsmiths of Wash., Inc.*, 229 USPQ 766, 768 (TTAB 1986). Failure to comply with a requirement for a disclaimer is a basis on which to refuse registration. See *In re Slokevage*, 441 F.3d 957, 78 USPQ2d 1395, 1399-1400 (Fed. Cir. 2006); *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005); *In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Richardson Ink Co.*, 511 F.2d 559, 185 USPQ 46, 47 (CCPA 1975); *In re Nat'l Presto Indus., Inc.*, 197 USPQ 188, 190 (TTAB 1977); *In re Pendleton Tool Indus., Inc.*, 157 USPQ 114, 115 (TTAB 1968).

A term is merely descriptive of services within the meaning of Section 2(e)(1) if it forthwith conveys an immediate idea of a quality, characteristic, feature, function, purpose or use of the services. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). See also *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Whether a mark is merely descriptive is determined in relation to the services for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). A term need not immediately convey an idea of each and every specific feature of the services in order to be considered merely descriptive; it is enough if it describes one significant

attribute, function or feature of them. See *In re Gyulay*, 3 USPQ2d at 1010; *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). This requires consideration of the context in which the mark is used or intended to be used in connection with those services, and the possible significance that the mark would have to the average purchaser of the services in the relevant marketplace. See *In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219; *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007); *In re Abcor Dev. Corp.*, 200 USPQ at 218; *In re Venture Lending Assocs.*, 226 USPQ 285 (TTAB 1985). The question is not whether someone presented only with the mark could guess the services listed in the identification. Rather, the question is whether someone who knows what the services are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-1317 (TTAB 2002)). See also *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313, 1317 (TTAB 1990); *In re American Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985). The Examining Attorney bears the burden of showing that a term is merely descriptive of the relevant services. *In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987).

*6 When two or more merely descriptive terms are combined, the determination of whether the composite also has a merely descriptive significance turns on the question of whether the combination of terms evokes a non-descriptive commercial impression. If each component retains its merely descriptive significance in relation to the services, the combination results in a composite that is itself merely descriptive. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents, and for tracking the status of the records by means of the Internet). See also *In re Petroglyph Games, Inc.*, 91 USPQ2d 1332 (TTAB 2009) (BATTLECAM merely descriptive for computer game software); *In re Carlson*, 91 USPQ2d 1198 (TTAB 2009) (URBANHOUSING merely descriptive of real estate brokerage, real estate consultation and real estate listing services); *In re Tower Tech, Inc.*, 64 USPQ2d at 1318 (SMARTTOWER merely descriptive of commercial and industrial cooling towers). However, a combination of merely descriptive components is registrable if the combination of terms creates a unitary whole with a non-descriptive meaning, or if the composite has a bizarre or incongruous meaning as applied to the goods. See *In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE for “bakery products”); *In re Shutts*, 217 USPQ 363 (TTAB 1983) (SNO-RAKE for “a snow removal hand tool having a handle with a snow-removing head at one end, the head being of solid uninterrupted construction without prongs”). “If one must exercise mature thought or follow a multi-stage reasoning process in order to determine what characteristics the term identifies, the term is suggestive rather than merely descriptive.” *In re Tennis in the Round, Inc.*, 199 USPQ 496, 497 (TTAB 1978). See *In re Shutts*, 217 USPQ at 364-365; *In re Universal Water Systems, Inc.*, 209 USPQ 165, 166 (TTAB 1980).

The word “lookbook” is defined as “a set of photographs displaying a fashion designer’s new collection, assembled for marketing purposes.” (www.oxforddictionaries.com (English, U.S. ed.); Office action, 9/18/14). The word “live” means, in pertinent part, “involving performers or spectators who are physically present.” (www.education.yahoo.com; Office action, 9/18/14).

On Applicant’s website, there is a video with the caption “Shop These Fall Trends at SIMON LOOKBOOK LIVE. Get all the looks. Watch Now.” Also on the website, under the heading “Events Near You,” appears the following:

*7 Simon Lookbook Live is an interactive trend showcase from the style pros at *GQ* and *Glamour*, offering an insider’s scoop on all the hottest looks this season. With personal styling sessions, grooming and beauty how-tos, social media challenges, and giveaways, Simon Lookbook Live will have you looking fresh for fall.

The website then lists several shopping mall locations and dates for the events. (Office action, 9/18/14). Also made of record in the same Office action is a third-party website chronicling one fashion show held in the Philippines called “Lookbook Live.” The writer is a Philippine fashion blogger, Laureen, who covered the event. (www.breakmystyle.com).

The other evidence, accompanying the Office action dated March 30, 2014, comprises the following:

A third-party website with a reference to an event called “Iroquois Steeplechase” held in Nashville, Tennessee. The website includes the headline “LookBook Fashion Show,” further indicating “[t]he turnout was great, the models were gorgeous, and the star-studded crowd was entertained with fashion, music, and celebrities!” (www.iroquoisesteeplechase.org/fashion-show).

A Facebook page referring to the same event as “The Official Steeplechase LookBook Fashion Show.” (www.facebook.com).

A third-party website includes a feature captioned “International fashion summer lookbook 2015 for fashion show.” (www.newteenstyle.com).

A third-party website includes the language “[I]n this post we are presenting the Gorgeous Lookbook Fashion Show with Summer Dresses. This style is global summer design look book 2015.” (www.fashioninnstyle.com).

A third-party website detailing “OR Fashion Show Look Book. The latest styles and innovations in technical apparel came alive at OR Winter Markets Fashion Show ‘Conquering the Elements’ in January 2015.” (www.issuu.com).

A blog post on the website of Columbus College of Art & Design indicating that a “local design firm received a Gold award for the Fashion Show lookbook.” (www.ccad.edu).

Two third-party registrations covering fashion show services wherein the word “Live” is disclaimed apart from the mark as a whole. (Reg. Nos. 4334155 and 4464124).

Applicant criticizes this evidentiary record as follows:

To summarize, there is a total of nine (9) references that arguably bear on the descriptiveness of “lookbook” in the context of Applicant's mark. Two of those references are to Applicant's use of its mark, leaving seven third-party references. Two of those third-party references are to the same Nashville event (a fashion show relating to the Iroquois Steeplechase LookBook), in effect leaving six references. Of the five non-Nashville references, one is to an event in the Philippines using the same “LOOKBOOK LIVE” name for a fashion show as Applicant uses, which may evidence that “LOOKBOOK LIVE” is a good name for a fashion show but does not prove that it is merely descriptive. Two others are written in garbled English and prove little, if anything, about the understanding of U.S. consumers. Of the remaining two, one (the Issuu site) is essentially unintelligible and out of context, and the last one reflects that students simply made a lookbook relating to a fashion show.

*8 After scouring the global Internet for relevant references, the Examining Attorney was able to produce very little probative information. On balance, the cited evidence is not instructive on the issue of mere descriptiveness.

(4 TTABVUE 10-11).

As noted above, Applicant states that “there is no dispute as to the descriptive significance of the term ‘live’ by itself.” (4 TTABVUE 8). We agree, given that Applicant's entertainment events are presented live.

With respect to the word “lookbook” standing alone, Applicant also acknowledges that “at some events lookbooks are available to participants,” but that this item “is not essential to the service being provided.” (4 TTABVUE 6). According to Applicant, “any ‘lookbook’ publication associated with its in-person events is not specifically created and distributed for that particular in-person event. Rather, Applicant periodically creates the publication, which is made available to the public at-large, and not simply or exclusively to attendees at Applicant's in-person events.” (7 TTABVUE 6-7). Given that lookbooks relate to fashion collections,

and the evidence shows third-party uses of the term in connection with fashion shows, we find that the word “lookbook” by itself is merely descriptive when used in connection with Applicant's fashion shows.

Accordingly, the remaining question for us to consider is whether the combination of the two merely descriptive words results in a non-descriptive commercial impression. We find that it does.

Applicant specifically contends that even if the individual words LOOKBOOK and LIVE are considered to be merely descriptive in the context of Applicant's services, the two-word combination, taken as a whole, is not merely descriptive because it is an incongruous unitary phrase. According to Applicant, the incongruity, “results from the fact that a ‘lookbook’ is an inanimate object ... simply a picture book. The combination of ‘lookbook’ and ‘live’ suggests an inanimate object has come to life. Therefore, regardless of the meaning of the constituent terms ‘LOOKBOOK’ and ‘LIVE’ in the context of Applicant's services, they combine to fashion an incongruity.” (4 TTABVUE 13). Applicant further argues that the combination “requires a leap of reasoning and imagination to infer that ‘LOOKBOOK LIVE’ refers to an event comprising a fashion show. This is the work of an incongruity: the combining of the words ‘LOOKBOOK’ and ‘LIVE’ creates an internal contradiction ... a ‘lookbook’ cannot be ‘live.’ Nor does the term ‘LOOKBOOK LIVE’ immediately convey to the public that such events comprise of a ‘lookbook’ that is ‘live.’ This incongruous, unitary term requires consumers to pause and consider the possible meaning of ‘LOOKBOOK LIVE’ in connection with Applicant's services.” (7 TTABVUE 12).

*9 We agree with Applicant that when used together, LOOKBOOK LIVE suggests the incongruity that a book of still photographs either has come to life or is being presented live. This leads us to the conclusion that the wording LOOKBOOK LIVE is not a natural or obvious way to describe entertainment services featuring fashion. Thus, the import of the wording would not be grasped without some measure of imagination or mental pause. *In re Shutts*, 217 USPQ at 365. With the combined wording, Applicant has given the individual words an imaginative twist, that is, to juxtapose the inanimate word “lookbook” with the animate word “live.”

The Internet evidence submitted by the Examining Attorney is not particularly persuasive for the reasons expressed by Applicant. There is little evidence to indicate that prospective patrons of fashion shows regard these events as “live lookbooks.” Indeed, the only evidence of third-party use of “lookbook live” is a single use in the Philippines. Thus, the evidence is not sufficient to prove that the wording LOOKBOOK LIVE directly and immediately conveys information about the character, quality or features of Applicant's services. Based on the record herein, we find that the wording does not immediately impart with any degree of particularity information about the services. In short, it cannot be said that LOOKBOOK LIVE readily and immediately calls to mind or evokes an understanding of any quality, characteristic or feature of fashion shows. “The concept of mere descriptiveness ... must relate to general and readily recognizable word formulations and meanings, either in popular or technical usage contexts, and should not penalize coinage of hitherto unused and somewhat incongruous word combinations whose import would not be grasped without some measure of imagination and ‘mental pause.’” *In re Shutts*, 217 USPQ at 364-65.

Accordingly, we conclude that the wording LOOKBOOK LIVE possesses enough incongruity or creativity to raise doubts as to whether it is merely descriptive because its meaning would not be grasped without some measure of imagination and thought. Accordingly, the wording LOOKBOOK LIVE, when used in connection with entertainment events featuring fashion, does not readily and immediately evoke an impression and understanding of the identified services. The Board has noted on a number of prior occasions that there is a thin line of demarcation between a suggestive and a merely descriptive designation. Although we find that the wording LOOKBOOK LIVE falls in the suggestive category, to the extent that the Examining Attorney's arguments cast doubt on our finding, such doubts are to be resolved in Applicant's favor. *See, e.g., In re Atavio*, 25 USPQ2d 1361 (TTAB 1992); *In re Rank Organization Ltd.*, 222 USPQ 324, 326 (TTAB 1984).

*10 **Decision:** The refusal to register based on non-compliance with the requirement to submit more information is reversed. The refusal to register based on non-compliance with the requirement to disclaim the words “LOOKBOOK LIVE” is reversed.

¹ Application Serial No. 86341571, filed July 18, 2014 under Section 1(b) of the Trademark Act, [15 U.S.C. § 1051\(b\)](#), based on an allegation of a bona fide intention to use the mark in commerce. The application includes the following statement regarding its ownership of SIMON-formative registered marks: “Applicant is the owner of U.S. Registration Nos. 2969024, 4579078, and others.”

2016 WL 3912938 (Trademark Tr. & App. Bd.)

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2001 WL 315034 (Trademark Tr. & App. Bd.)

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Trademark Trial and Appeal Board

Patent and Trademark Office (P.T.O.)

IN RE TRANSIT AUDIO TECHNOLOGIES, INC.

[Serial No. 75/534,346](#)

March 30, 2001

*1 [Benita J. Rohm](#) of Rohm & Monsanto, P.L.C. for Transit Audio Technologies, Inc.
M. Catherine Faint, Trademark Examining Attorney
Law Office 103
(Michael A. Szoke, Acting Managing Attorney).

Before [Quinn](#), [Hohein](#) and Bottorff
Administrative Trademark Judges.
Opinion by [Hohein](#)
Administrative Trademark Judge:

Transit Audio Technologies, Inc. has filed an application to register the mark “VOCAL BUS” for “software, namely[,] software for accessing text, . TXT, or voice, .WAV, files in response to indicia of location and providing audio and/or visual output to a human in a selectable language and speech font for use in conjunction with an automatic announcement and position locator system for a vehicle based on a global positioning system.”¹

Registration has been finally refused under Section 2(e)(1) of the Trademark Act, [15 U.S.C. §1052\(e\)\(1\)](#), on the basis that, when used in connection with applicant's goods, the term “VOCAL BUS” is merely descriptive of them.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We reverse the refusal to register.

By way of background, applicant notes in its appeal brief that its software is for use in conjunction with an automatic announcement and position locator system which it has developed for use with public transportation vehicles. In particular, applicant explains that:

Applicant's automatic announcement and position locator system, incorporating the VOCAL BUS software, is, in the present prototypical models, being marketed to transit authorities and/or the manufacturers of public transportation vehicles, such as buses, to comply with the Americans with Disabilities Act (ADA). The system in which the VOCAL BUS software is employed serves as a means of communication between the driver, or the driver's main office or terminal, and the passengers. Neither the system, nor the VOCAL BUS software, are marketed directly to the passengers of public transportation who hear/see the communication.

Applicant, relying upon definitions from [Webster's New World Dictionary & Thesaurus](#) (1996),² argues that while the common meanings of the word “vocal” include “uttered or produced by the voice,” “tending to express oneself often or freely” and “relating to, or performed by singing,” applicant also observes that “the word ‘voice’ is generally interpreted as ‘sound made through the mouth, especially, by human beings.” In light thereof, applicant contends that “the word ‘vocal’ is not commonly associated with sounds emanating from ... inanimate objects, such as a vehicle.” Thus, and while applicant admits that “[t]he common meaning of the word ‘bus’ is a ‘large motor vehicle for carrying many passengers along a regular route,’” applicant

asserts that the term “VOCAL BUS” is not merely descriptive of its software because it does not “immediately convey to the purchaser the nature of the goods, such as a vehicle *per se*, or more particularly a vehicle, such as a bus, that talks or sings.” Applicant insists, instead, that “[t]he effect of coupling verbal communications to inanimate objects is orchestrated by other equipment, such as audio equipment, and at most, the term VOCAL BUS for the underlying equipment that makes a vehicle appear to ‘communicate’ with passengers is suggestive of the underlying equipment,” including applicant's software.

*2 The Examining Attorney, on the other hand, maintains that applicant's software “is used to make ... [transit] vehicles into ‘talking buses’” in that “[t]he software is part of a system that uses a global positioning system to announce the location of the bus as it passes significant intervals such as the corner of 14th Street and Constitution Avenue.”³ According to the Examining Attorney, “[t]he immediate and direct impression of the mark ‘VOCAL BUS’ for software sold to bus manufacturers and transit authorities is that it makes a bus talk.”

As to applicant's argument that the word “voice” is not typically associated with sounds emanating from inanimate objects such as transit vehicles, the Examining Attorney, citing the definition which she made of record from The American Heritage Dictionary of the English Language (3rd ed. 1992), points out that “vocal” is defined as meaning, *inter alia*, “3. Having a voice; capable of emitting sound or speech.” In view thereof, the Examining Attorney contends that:

Applicant's identification of goods describes the software as “providing audio and/or visual output to a human in a selectable language and speech font.” This means that the software synthesizes location data and translates it into sounds that are recognized by the average person, including a bus manufacturer, as emitting speech. In other words it gives the bus a voice. It is not the literal meaning that controls, but rather the perception of the purchaser as to the mark in the context of the goods with which it is used. *In re Wink Corp.*, 218 U.S.P.Q. 739, 741 (TTAB 1983).

The applicant has described the average purchaser as a bus manufacturer or public transit authority. The purchaser is likely to believe that “VOCAL BUS” when used with software for providing audio output in a selectable language and speech font in vehicles describes software for use in giving buses a voice or causing them to emit a sound very much like speech. Thus the mark immediately identifies the function of the software and is merely descriptive in the context of the goods.

In addition, the Examining Attorney insists that the combination of the individually descriptive words “vocal” and “bus” into the term “VOCAL BUS” does not impart a bizarre or incongruous meaning, when used in connection with applicant's software, and that no imagination is required to understand the significance of such term in relation to such goods. The term “VOCAL BUS,” the Examining Attorney urges, therefore “remains merely descriptive” of the nature or function of applicant's goods. In this regard, the Examining Attorney insists that (footnote omitted):

It has been common place for many years for software to cause various inanimate objects to “talk.” Not that the objects have an independent thought process, but rather that they emit sounds very like human speech. The average purchaser of software for use in buses that is named VOCAL BUS is likely to understand that the software is used to make buses emit a sound like human speech. Thus the mark immediately names the purpose or function of the software and is not at all incongruous in relation to the goods.

*3 Applicant's mark can be distinguished from those that are considered incongruous, such as [applicant's citation to the mark] SNO-RAKE [in *In re Shutts*, 217 U.S.P.Q. 363 (TTAB 1983),] because while buses may not actually carry on conversation, software is commonly used to make vehicles, such as cars and buses, indeed many inanimate objects, emit sound or speech. Thus there is nothing incongruous about VOCAL BUS for software used for this purpose.

It is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys information concerning any significant ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *See, e.g., In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987) and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe

all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, whether a term is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. See *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Thus, “[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test.” *In re American Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

However, a mark is suggestive if, when the goods or services are encountered under the mark, a multistage reasoning process, or the utilization of imagination, thought or perception, is required in order to determine what attributes of the goods or services the mark indicates. See, e.g., *In re Abcor Development Corp.*, *supra* at 218, and *In re Mayer-Beaton Corp.*, 223 USPQ 1347, 1349 (TTAB 1984). As has often been stated, there is a thin line of demarcation between a suggestive mark and a merely descriptive one, with the determination of which category a mark falls into frequently being a difficult matter involving a good measure of subjective judgment. See, e.g., *In re Atavio*, 25 USPQ2d 1361 (TTAB 1992) and *In re TMS Corp. of the Americas*, 200 USPQ 57, 58 (TTAB 1978). The distinction, furthermore, is often made on an intuitive basis rather than as a result of precisely logical analysis susceptible of articulation. See *In re George Weston Ltd.*, 228 USPQ 57, 58 (TTAB 1985).

*4 Although perhaps a close question, in the present case we are constrained to agree with applicant that the term “VOCAL BUS” is suggestive rather than merely descriptive of its goods. While, in reaching this decision, we have taken judicial notice, in addition to the definitions previously mentioned, that *The Random House Dictionary of the English Language* (2d ed. 1987) at 2129 defines “vocal” as an adjective meaning, among other things, “1. of, pertaining to, or uttered with the voice: *the vocal mechanism; vocal criticism* 3. having a voice: *A dog is a vocal, but not a verbal being*. 4. giving forth sound with or as with a voice,”⁴ it appears that neither a transportation vehicle, such as a bus, nor the software utilized in connection with applicant’s automatic announcement and position locator system, is vocal. Instead, it is the automatic announcement and position locator system, of which applicant’s software is concededly an integral part, which determines and announces, by audio and/or visual means, the location of a bus based upon input from a global positioning system.

Thus, while applicant’s software and its associated automatic announcement and position locator system may be said to give a “voice” to a bus or other vehicle, the term “VOCAL BUS” does not immediately, and without conjecture or speculation, indicate the purpose or function of applicant’s software or forthwith convey, with the requisite particularity, a significant feature or other aspect of the goods. Rather, at least a modicum of imagination or reflection, if not a multi-stage reasoning process, is necessary in order for purchasers and prospective customers of applicant to comprehend that its “VOCAL BUS” software is a product which serves, in conjunction with an automatic announcement and position locator system, to vocalize the streets or neighborhoods through which a bus passes along its particular route or course of travel. Plainly, computer software, much less a transit vehicle such as a bus, is not typically considered or thought of as an item of vocal equipment, such as a microphone, amplifier or loudspeaker. The term “VOCAL BUS,” furthermore, contains an element of incongruity since, as applicant persuasively points out, an inanimate object like a bus is not usually regarded as being “vocal” in the sense of having a voice or being capable of emitting sound or speech.

The Examining Attorney, moreover, has not offered any evidence to show that the purchasing public for applicant’s software, even though knowledgeable and sophisticated as to ADA requirements for public transportation vehicles, would directly perceive or immediately understand the mark “VOCAL BUS” as describing software which, *inter alia*, accesses voice files in response to indicia from a global positioning system regarding the location of a bus and provides, in turn, audio output as to the location of the bus. To say that such mark “gives a bus a voice,” that is, a vocal sound, as the Examining Attorney maintains, does not immediately tell customers anything which is actually significant about applicant’s software; instead, what is meaningful is the location or position information which the software enables the automatic announcement and position locator system to provide to passengers.

*5 Accordingly, we find that the term “VOCAL BUS” is, at best, suggestive of the end result of the use of applicant's software rather than merely descriptive of its product. Cf. *In re Aid Laboratories, Inc.*, 221 USPQ 1215, 1216 (TTAB 1983) [term “PEST PRUF” for animal shampoo with insecticide and deodorizing properties held “merely suggestive of a possible end result of the use thereof”]; *In re Frank J. Curran Co.*, 189 USPQ 560 (TTAB 1975) [[designation “CLOTHES FRESH” for clothes and shoe spray deodorant is “suggestive of an expected end result of the use of ... product ... but is not, ... merely descriptive of the purpose or function of applicant's goods”]; and *In re C. J. Webb, Inc.*, 182 USPQ 63, 64 [term “BRAKLEEN” for a chemical composition for cleaning and degreasing automotive brake parts “is suggestive of a desired result of a brake cleaner”]. However, to the extent that there may be any doubt as to our conclusion, we resolve such doubt, in accordance with the Board's practice, in favor of the publication of applicant's mark for opposition. See, e.g., *In re Aid Laboratories, Incorporated*, *supra*; *In re Conductive Systems, Inc.*, 220 USPQ 84, 86 (TTAB 1983); *In re Morton-Norwich Products, Inc.*, 209 USPQ 791 (TTAB 1981); and *In re Gourmet Bakers, Inc.*, 173 USPQ 565 (TTAB 1972).

Decision: The refusal under Section 2(e)(1) is reversed.

- 1 Ser. No. 75/534,346, filed on August 11, 1998, which is based upon an allegation of a bona fide intention to use the mark in commerce.
- 2 Although, as the Examining Attorney points out in her brief, applicant has not previously made such definitions of record, the Examining Attorney has discussed them as if they were properly of record and it is settled that judicial notice may be taken of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). The definitions have accordingly been considered.
- 3 In her brief, the Examining Attorney again notes that she has dropped the contention in her initial refusal that the term “VOCAL BUS” merely describes goods which “are software that provides a pathway between computer files and audio or video output.” Such refusal was based on the definition of record from *The Computer Glossary* (8th ed. 1998) at 43, which defines “bus” as follows:
A common pathway, or channel, between multiple devices. A bus is always designed to connect multiple devices, whereas channels such as the serial and parallel ports are used to connect only one. Buses are generally hardware, although software can be designed and linked via a so called “software bus.”
The term was coined after a real bus since a bus stops at all bus stops en route. In an electronic bus, the signals go to all stations connected to it.
- 4 We also judicially notice that the same dictionary at 2129 defines “voice” in relevant part as a noun connoting “1. The sound or sounds uttered through the mouth of living creatures, esp. of human beings in speaking, shouting, singing, etc.”

DISSENTING OPINION

Bottorff
Administrative Trademark Judge

I disagree with the majority's holding that VOCAL BUS is not merely descriptive, but rather suggestive, of the applicant's goods. I find that the mark directly and immediately describes a significant purpose and function of applicant's software, i.e., that it enables a bus to provide information, in a vocal format, to its passengers. In short, the software enables the bus to vocalize.

The majority contends, *supra* at page 9, that [t]o say that such mark “gives a bus a voice,” that is, a vocal sound, as the Examining Attorney maintains, does not immediately tell customers anything which is actually significant about applicant's software; instead, what is meaningful is the location or position information which the software enables the automatic announcement and position locator system to provide to passengers.

I disagree. Clearly, a significant feature of applicant's software is the subject matter of the information it enables the bus to impart to its passengers, i.e., information as to the location of the bus. Equally significant, however, is the manner in which

applicant's software allows the bus to impart that information to passengers, i.e., vocally. VOCAL BUS immediately describes this significant feature of applicant's software, and it therefore is merely descriptive of the software. It is not necessary that the mark also describe all other significant features of the software. *In re Bright-Crest, Ltd., supra.*

Finally, I cannot agree with the majority's finding, *supra* at pages 8-9, that applicant's mark is not merely descriptive because "computer software, much less a transit vehicle such as a bus, is not typically considered or thought of as an item of vocal equipment, such as a microphone, amplifier or loudspeaker," or its related finding, *supra* at page 9, that the mark "contains an element of incongruity since ... an inanimate object like a bus is not usually regarded as being 'vocal' in the sense of having a voice or being capable of emitting sound or speech." What the majority perceives to be an incongruity in the mark is more likely the apparent novelty of the product itself and its underlying technology. The fact that buses have heretofore not been known to "talk" does not make VOCAL BUS incongruous as applied to a bus which, in fact, "talks," i.e., provides information in vocal form to its passengers.

For these reasons, I would affirm the Trademark Examining Attorney's mere descriptiveness refusal, and accordingly I dissent.

2001 WL 315034 (Trademark Tr. & App. Bd.)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPLE INC.'S TRIAL BRIEF was filed electronically on this 16th day of March, 2021, and a copy was electronically mailed to the following attorneys for Opposer Gang Cao:

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