

This Opinion is Not a
Precedent of the TTAB

Mailed: May 12, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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CC Serve Corporation

v.

Apex Bank
—————

Opposition No. 91254295
—————

Austin Padgett of Troutman Pepper Hamilton Sanders LLP,
for CC Serve Corporation.

L. Clint Crosby, Adam S. Baldridge, and Nicole Berkowitz Riccio of Baker Donelson
Bearman Caldwell & Berkowitz PC, for Apex Bank.

—————
Before Cataldo, Lykos, and English,
Administrative Trademark Judges.

Opinion by English, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the three marks below,
all for “banking and financing services” in International Class 36:



—————
¹ Application Serial No. 88573746, filed on August 9, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an allegation of a bona fide intent to use the



In its notice of opposition, Opposer alleges a claim of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on ownership of a Principal Register registration for the standard character mark ASPIRE for “credit card services,” in International Class 36,⁴ and prior common law use of the mark

mark in commerce. The word “bank” has been disclaimed. The application includes the following description of the mark: “The mark consists of the word ‘aspire’ positioned above the word ‘BANK’ in a stylized font with the outline of a mountain peak extending from behind the word ‘aspire’.” Color is not claimed as a feature of the mark.

² Application Serial No. 88573752, filed on August 9, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an allegation of a bona fide intent to use the mark in commerce. The word “bank” has been disclaimed. The application includes the following description of the mark: “The mark consists of the word ‘aspire’ positioned above the word ‘BANK’ in a stylized font with the orange outline of a mountain peak extending from behind the word ‘aspire’. The word ‘aspire’ is colored blue, and the word ‘BANK’ is colored orange.” The colors blue and orange are claimed as features of the mark.

³ Application Serial No. 88573758, filed on August 9, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an allegation of a bona fide intent to use the mark in commerce. The word “bank” has been disclaimed. The application includes the following description of the mark: “The mark consists of the word ‘aspire’ positioned above the word ‘BANK’ on a blue background in a stylized font with the orange outline of a mountain peak extending from behind the word ‘aspire’. The word ‘aspire’ is colored white, and the word ‘BANK’ is colored orange.” The colors white, blue, and orange are claimed as features of the mark.

⁴ Registration No. 2126948, registered on January 9, 1998, Section 8 accepted and Section 15 acknowledged; twice renewed.

ASPIRE for credit card services.⁵ Opposer attached to its notice of opposition printouts from the Office’s Trademark Electronic Search System (TESS) and assignment database showing that the pleaded registration is active and owned by Opposer.⁶ *See* Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1).

In its answer, Applicant denies the salient allegations in the notice of opposition and asserts certain “defenses.”⁷

The case is fully briefed. For the reasons discussed below, we sustain the opposition.

I. Evidentiary and Briefing Issues

A. Opposer’s Motion to Strike

We first address Opposer’s motion, filed July 6, 2022,⁸ “to strike the following evidence submitted by Applicant ... in its Notice of Reliance [Docket 42] and the corresponding testimony provided in Applicant’s Trial Testimony Declarations of Santiago Cuccarese [Docket 43] and Derek Brady [Docket 44]”:

In quoting portions of Opposer’s filings, we have omitted the “®” that Opposer displays after the mark.

⁵ Notice of Opposition, 1 TTABVUE.

⁶ *Id.* at 15-42 (Exhibit C).

⁷ As explained in the Board’s order of January 25, 2022: (1) we treat the “defenses” in paragraphs 22-27 of Applicant’s answer as amplifications of its denials; and (2) we give no consideration to Paragraphs 28 and 29 in the answer alleging nonuse, abandonment and “lack [of] continuous use” because such allegations must be raised by counterclaim and Applicant did not bring any counterclaims to cancel the pleaded registration. 34 TTABVUE 3 n.8 (citing Trademark Rule 2.114(b)(3)(ii), 37 C.F.R. § 2.114(b)(3)(ii)).

⁸ The Board issued an order on July 28, 2022 deferring consideration of Opposer’s motion to strike until final decision. 48 TTABVUE 2.

- Exhibits 4-6: Printouts from the Office’s TESS and TSDR databases showing Applicant’s ownership of Reg. Nos. 6002250, 6002252 and 6002253 for the following marks, respectively:⁹



- Exhibits 7-8 consisting of TESS and TSDR printouts and file histories for two third-party applications for ASPIRE-formative marks¹⁰ and Exhibits 30-34, 37-46, 48-63, 65-66, 70, 72, and 77-83 consisting of printouts from the Internet showing third-party use of ASPIRE and ASPIRE-formative marks;¹¹
- Exhibit 86 consisting of an academic article titled *Credit Growth and the Financial Crisis, A New Narrative*;¹² and
- Exhibits 87-91:¹³ Printouts from Westlaw for Virginia Code Section 6.2-939, Georgia Code Section 7-1-243, Utah Code 1953 Section 7-1-701, Washington State Code Section 30A.04.020, and Tennessee Code Section 45-2-1709.

Opposer contends that the evidence should be stricken because Applicant should have, but did not, produce these documents in response the following document requests:¹⁴

- Document Request No. 28: “All Documents Applicant intends to present in connection with this proceeding.”

⁹ Applicant’s Notice of Reliance, 42 TTABVUE 80-97. Applicant also introduced copies of the certificates of registration.

¹⁰ *Id.* at 98-172.

¹¹ *Id.* at 310-35; 348-87; 390-464; 471-78; 490-93; 499-506; 527-60.

¹² *Id.* at 569-638.

¹³ *Id.* at 640-55.

¹⁴ Opposer’s Motion to Strike, 46 TTABVUE 7-9, Declaration of Austin Padgett, ¶¶ 2-6.

- Document Request No. 32: “All Documents concerning Applicant’s Defenses set forth in Applicant’s Answer in this proceeding.”
- Document Request No. 34: “All Documents identifying the ‘over thirty (30) other federally registered ASPRIRE formative marks for banking and financing related goods and services in International Class 36,’ alleged in paragraph 27 of Applicant’s Answer in this proceeding.”
- Document Request No. 35: “All Documents evidencing the waiver of rights alleged in paragraph 27 of Applicant’s Answer in this proceeding.”
- Document Request No. 36: “All Documents evidencing the acquiescence alleged in paragraph 27 of Applicant’s Answer in this proceeding.”

As referenced in Document Request Nos. 34, 35, and 36, paragraph 27 in the Answer alleges:

Opposer waived its rights to the mark referenced in the Notice, and acquiesced to the registration of Applicant’s ASPRIRE BANK & Design Mark by allowing and failing to challenge over thirty (30) other federally registered ASPRIRE formative marks for banking and financing related goods and services and in International Class 36.¹⁵

As a general proposition, “a party has a duty to respond to interrogatories and to supplement incomplete answers and if a party fails to object to an interrogatory it waives its right to object thereto and must answer the question as put” but “application [of these principles] is dependent upon and presupposes that the matter in question comprises proper subject matter for ... inquiry.” *Charette Corp. v. Bowater Comm’n Papers Inc.*, 13 USPQ2d 2040, 2041 (TTAB 1989). Opposer’s Document Request No. 28 seeking “all documents” Applicant “intends to present” in this proceeding is not “proper subject matter” for discovery because a party need not identify the documentary evidence it intends to rely on in advance of trial. *Kate Spade*

¹⁵ 4 TTABVUE 7.

LLC v. Thatch, LLC, 126 USPQ2d 1098, 1103 (TTAB 2018) (party need not disclose each document or exhibit it plans to introduce at trial); *British Seagull Ltd. v. Brunswick Corp.*, 28 USPQ2d 1197, 1201 (TTAB 1993), *aff'd*, 35 F.3d 1527, 32 USPQ2d 1120 (Fed. Cir. 1994) (“A party is not required to disclose the entirety of its proposed [documentary] evidence in support of its case during discovery.”); *Charette v. Bowater*, 13 USPQ2d 2040, 2041 (TTAB 1989) (“The Board has held that a party need not specify the [documentary] evidence it intends to present in support of its case[.]”); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 414(7) (2022) (“A party is not required, in advance of trial, to disclose each document or other exhibit it plans to introduce.”).

Document Request No. 32, seeking “all documents” in support of Applicant’s “defenses” is similarly improper. The Board previously explained that Applicant’s “defenses,” as follows, merely amplify its denial that there is no likelihood of confusion because: (1) “of the dissimilarity and nature of the respective services, ... intended consumers and trade channels”; (2) “the marks have dissimilar and distinguishable connotations and commercial impressions”; (3) “the marks are dissimilar and distinguishable in overall appearance and pronunciation”; (4) during prosecution, the USPTO did not cite Opposer’s mark as a bar to registration of Applicant’s marks, despite the letters of protest Opposer filed; and (5) Opposer has “fail[ed] to challenge over thirty (30) other federally registered ASPIRE formative marks for banking and financing related goods and services in International Class 36.”¹⁶ As such, Document

¹⁶ Answer, 4 TTABVUE 5-7, ¶¶ 22-27.

Request No. 32 seeking “all documents” in support of Applicant’s “defenses” is akin to Document Request No. 28 requesting the production of the documents on which Applicant intends to rely and is improper. *See Time Warner Entm’t Co. v. Jones*, 65 USPQ2d 1650, 1657 (TTAB 2002) (interrogatory requesting that opposer “identify each and every fact, document ... in support of its pleaded allegations” was “equivalent to a request for identification of ... trial evidence prior to trial, and therefore improper”).

Because Applicant had no duty to identify its documentary evidence before trial, Opposer “cannot complain” that documents were not produced in response to Document Request Nos. 28 and 32. *Cf. Charette v. Bowater*, 13 USPQ2d at 2041 (denying motion to exclude witness testimony on ground witness was not identified in response to interrogatory because, at that time, the Trademark Rules did not require parties to identify witnesses in advance of trial). As for the 3 properly propounded document requests Opposer points to, they seek documents concerning a specific allegation in the Answer, namely, that Opposer “allow[ed] and fail[ed] to challenge over thirty (30) other **federally registered** ASPIRE formative marks for banking and financing related goods and services and in International Class 36.”¹⁷ None of the objected-to documents consist of “federally registered ASPIRE formative marks.”¹⁸

¹⁷ Opposer’s Motion to Strike, 46 TTABVUE 8-9, Declaration of Austin Padgett, ¶¶ 4-6.

¹⁸ Exhibits 7-8 are pending applications and the related file histories for two ASPIRE-formative marks.

Notwithstanding the foregoing, even if we were to treat the objected-to documents as responsive to properly pounded discovery requests, we would allow them for the reasons discussed below and not impose the estoppel sanction.¹⁹

Under Fed. R. Civ. P. 26(e)(1)(A), made applicable to this proceeding by Trademark Rule 2.116, 37 C.F.R. § 2.116, “a party ... who has responded to an interrogatory, request for production, or request for admission[,] must supplement or correct its ... response ... in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing[.]” Fed. R. Civ. P. 37(c)(1), in turn, provides in relevant part that “[i]f a party fails to provide information [in response to a properly propounded discovery request]... as required by Rule ... 26(e), the party is not allowed to use that information ... to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” In assessing whether the failure to produce discovery is substantially justified and harmless, the Board is guided by the following five-factor test:



- 1) the surprise to the party against whom the evidence would be offered;
- 2) the ability of that party to cure the surprise;
- 3) the extent to which allowing the testimony would disrupt the trial;

¹⁹ In opposition to the motion, Applicant attached to the Annex to its brief the declaration of its attorney L. Clint Crosby along with accompanying exhibits. The Crosby Declaration was not introduced as evidence at trial so we consider it only for purposes of deciding the motion to strike. We also do not consider the exhibits to the Crosby Declaration as evidence except to the extent they were properly introduced during trial.

- 4) importance of the evidence; and
- 5) the non-disclosing party's explanation for its failure to disclose the evidence.


Sheetz of Del., Inc. v. Doctor's Assoc. Inc., 108 USPQ2d 1341, 1348 (TTAB 2013) (setting forth the factors and overruling objection to evidence of third-party use in genericness case that was not produced during discovery).

1. Exhibits 4-6: Applicant's Registrations for the mark APEX BANK & Design

Applicant identified its APEX BANK & Design mark in response to Interrogatory No. 1²⁰ and Opposer was specifically aware of the application that matured into Reg. No. 6002253 for the mark  as Opposer asked Applicant about it during Applicant's Rule 30(b)(6) deposition.²¹ So there is no basis to exclude this registration from the record. We further find that there would be no harm to Opposer in allowing the introduction of the two other registrations because Applicant generally made Opposer aware of its APEX BANK & Design mark and because Reg. No. 6002252 is for the same mark in Registration No. 6002253 that Opposer was aware of, but without a claim of color () while Registration. No. 6002250 is for the nearly

²⁰ Applicant's Annex, 55 TTABVUE 56, 63-64, Crosby Declaration, ¶ 2 and Exhibit A (“[T]he Applicant Team designed its ASPIRE BANK & Design Mark, which is based on the design and color scheme of the APEX BANK Mark[.]”). In its notice of reliance, Applicant stated that it “submits these registrations to show the similar stylization between its APEX BANK (and Design) marks and its ASPIRE BANK (and Design) marks and Applicant's cohesive branding, which lessens the likelihood of confusion with Opposer's ASPIRE mark.” 42 TTABVUE 4.

²¹ Applicant's Annex, 55 TTABVUE 57, 71-72, 74-82, Crosby Declaration, ¶ 3 and Exhibit B.

identical mark with a slightly different color scheme () and both cover the same services as those in Registration No. 6002253.

2. Exhibits 7 and 8: TSDR/TESS Records and File Histories for Two Third-Party Applications²²

Third-party application Serial No. 90801344, subject to Exhibit 7, was filed on June 29, 2021, one day before the close of discovery on June 30, 2021. The file history did not exist during discovery because the application was not substantively examined until March 30, 2022 (after the close of Opposer's main trial period).²³ Third-party application Serial No. 90657005, subject to Exhibit 8, was filed approximately 6 weeks before the close of discovery but was not examined until February 7, 2022, which also was well after the close of discovery. Because the file histories did not exist until after discovery, Applicant could not have produced them.


As to the applications themselves, there is no indication that Applicant was aware of them during discovery. It seems particularly unlikely that Applicant was aware of application Serial No. 90801344 because it was filed only one day before the close of discovery. Opposer should not be surprised by Applicant's introduction of the

²² Notice of Reliance, 42 TTABVUE 98-125. Third-party applications are evidence only that they have been filed. *Made in Nature, LLC v. Pharmavite*, 2022 USPQ2d 557, at *26 (TTAB 2022). But Applicant attached to its brief copies of certificates of registration (55 TTABVUE 52-55) showing that these applications matured to registration on July 19, 2022 and June 28, 2022, respectively, which was after the close of Applicant's trial period on June 15, 2022 (35 and 36 TTABVUE). We construe this as a request that we take judicial notice of the resulting registrations, which we grant. *Cf. Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, n.19 (TTAB 2014) (taking judicial notice of changes in status and title of registrations properly introduced during trial).

²³ Applicant's Notice of Reliance, 42 TTABVUE 111-13; Board's January 25, 2022 Order, 34 TTABVUE 9.

applications as Applicant alleged in its answer an intent to rely on third-party registered ASPIRE-formative marks,²⁴ produced numerous documents during discovery regarding third-party marks,²⁵ and relied on such evidence in its summary judgment brief.²⁶ Opposer has cured any surprise by introducing rebuttal evidence in response to Exhibit 7 and arguing that Exhibit 8 has limited probative value.²⁷ There would be no disruption to trial if the evidence is allowed and generally third-party registrations are relevant to the conceptual strength of a mark.

3. Exhibits 31, 32, 44 and 72: Third-Party Use

Exhibits 31, 32, 44, and 72 to Applicant's notice of reliance consist of website printouts showing use of third-party marks subject to the following registrations that Applicant produced during discovery and relied on in its summary judgment brief: (1) Registration No. 5085019 for the mark ASPIRE UNIVERSAL; (2) Registration No. 6331340 for the mark ASPIRE CAPITAL ADVISORS; (3) Louisiana State Registration (no registration number) for the mark ASPIRE LENDING; and (4) Idaho State Reg. No. 27110 for the mark .²⁸ Based on the declaration of Applicant's attorney, it does not appear that Applicant was in possession of

²⁴ 4 TTABVUE 7, ¶ 27.

²⁵ Opposer did not object to Exhibits 9-29, 35-36, 47, 64, 67-69, 71, 73-76, and 84-58 to Applicant's Notice of Reliance so we infer that Applicant produced these documents during discovery.

²⁶ 28 TTABVUE 62-210 (Exhibits C-U).

²⁷ Stone Rebuttal Declaration, 51 TTABVUE 6, 81-94, ¶ 18 and Exhibit 15 thereto; Opposer's Rebuttal Brief, 57 TTABVUE 18.

²⁸ Applicant's Notice of Reliance, 42 TTABVUE 317-26, 378-81, 499-06; Applicant's Annex, 55 TTABVUE 57-59, Crosby Declaration, ¶¶ 6, 7, 9, 11 and Exhibits D, E, G, I; Applicant's Summary Judgment Brief, 28 TTABVUE 177, 183, 203, 210.

documents showing use of these marks (as opposed to registration) during discovery.²⁹ In any event, Opposer is hard-pressed to argue convincingly that it was surprised by Applicant's reliance on the use of such marks as Applicant produced the corresponding registrations and otherwise made clear in its summary judgment brief that it intended to rely on third-party uses in defending this opposition. There is no real surprise for Opposer to cure, but if there were, Opposer had an opportunity to offer rebuttal evidence and did so with the third-party mark introduced as Exhibit 72 to Applicant's notice of reliance.³⁰ *Sheetz*, 108 USPQ2d at 1348 (allowing evidence of third-party use in genericness case because, among other reasons, the non-proffering party had thirty days before the opening of its testimony period to "prepare any rebuttal evidence of third-party use"). There would be no disruption to trial if the evidence is allowed and evidence regarding third-party use is pertinent under the sixth *DuPont* factor.

4. Exhibits 37: Third-Party Use

Applicant produced during discovery and attached to its summary judgment brief Internet printouts showing use of the same third-party mark at a slightly different URL address (*aspirefcu.org v. aspirefcu.trucar.com*).³¹ Because Applicant produced

²⁹ Applicant's attorney avers that it during discovery it produced evidence of the registrations and that "except as otherwise stated ..., Applicant did not have the documents contained in [these Exhibits] in its possession, custody, or control during the discovery period." 55 TTABVUE 59.

³⁰ Opposer's Rebuttal Notice of Reliance, 49 TTABVUE 159-74 (Exhibits 25 and 26).

³¹ Annex to Applicant's Brief, 55 TTABVUE 58, 101-08, Crosby Declaration, ¶ 8 and Exhibit F; *see also* Applicant's Summary Judgment Brief, 28 TTABVUE 100-03.

documents showing use of this mark during discovery, we find no basis to exclude this exhibit.³²

5. Exhibit 70: Third-Party Use, Credit Card Disclosure Document

Applicant produced another version of this same credit card disclosure document during discovery so there is no basis to exclude this exhibit.³³

6. Exhibits 30, 33, 34, 38-43, 45-46, 48-63, 65-66, 77-78: Evidence of Third-Party Use; Exhibit 86: Academic Article

Applicant's attorney avers that "Applicant did not have the documents contained in [these Exhibits] in its possession, custody or control during the discovery period."³⁴

Contrary to Opposer's argument, it is well-settled that a party has no obligation to investigate third-party marks to respond to discovery requests.³⁵ *Kate Spade v. Thatch*, 126 USPQ2d at 1103 ("There is 'no duty to conduct an investigation of third party use during discovery,' and evidence of third party use may be 'obtained or created by applicant in anticipation of its testimony period.'") (quoting *Rocket Trademarks Pty. Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1071-72 (TTAB 2011); *Sports*

³² Opposer also introduced rebuttal evidence in response to this Exhibit. Stone Rebuttal Declaration, 51 TTABVUE 5-6, 66-70, ¶ 16 and Exhibits 11-12 thereto.

³³ Annex to Applicant's Brief, 55 TTABVUE 59, 113-14, Crosby Declaration, ¶ 10 and Exhibit H.

³⁴ Annex to Applicant's Brief, 55 TTABVUE 59, Crosby Declaration, ¶ 13.

³⁵ We find unpersuasive Opposer's argument that Applicant "took on its own duty by asserting an affirmative defense in this matter regarding third-party use" and that because Applicant produced some evidence of third-party use "Opposer was entitled to ... the understanding that it was working with a closed universe of documents that Applicant would assert at trial." Opposer's Reply in Support of Motion to Strike, 57 TTABVUE 29-30. Applicant pleaded an intent to rely on third-party **registrations**, not evidence of third-party use. Further, there is no rule precluding a party from searching for additional evidence after discovery to support its case at trial.

Auth. Michigan Inc. v. PC Auth. Inc., 63 USPQ2d 1782, 1788 (TTAB 2001) (no obligation to search for third-party uses); *Red Wing Co. v. J.M. Smucker Co.*, 59 USPQ2d 1861, 1864 (TTAB 2001) (investigation not necessary); *Johnston Pump/Gen. Valve Inc. v. Chromalloy Am. Corp.*, 10 USPQ2d 1671, 1675 (TTAB 1988) (need not investigate). Because “it is clear that the objected-to documents were obtained or created by [Applicant] in anticipation of its testimony period and were not responsive documents that were already in its possession or control when [Applicant] was responding to discovery requests,” there is no basis to exclude these exhibits.³⁶ *Sheetz*, 108 USPQ2d at 1348.

7. Exhibits 87-91: State Statutes

Applicant submitted the State statutes introduced as Exhibits 87-91 with its summary judgment brief so there should be no surprise to Opposer that Applicant introduced them at trial. Notably, at summary judgment, Opposer did not object on the ground that Applicant failed to produce these statutes.³⁷ In any event, even though Applicant introduced the statutes as “evidence,” they are laws and do not constitute factual evidence.³⁸

³⁶ We further note that all of the objected-to exhibits of third-party use consist of internet printouts equally accessible to Opposer. *Sheetz*, 108 USPQ2d at 1348.

³⁷ Annex to Applicant’s Brief, 55 TTABVUE 59, Crosby Declaration, ¶ 12; *see also* 28 TTABVUE 221-31.

³⁸ We hasten to add that the statutes are not outcome determinative.

8. Ruling on Opposer's Motion to Strike

For the reasons explained above, Opposer's objections to Applicant's Notice of Reliance Exhibits 4-8, 30-34, 37-46, 48-63, 65-66, 70, 72, 77-83, and 86-91 are overruled and its motion to strike is denied.

B. Duplicative Evidence

Both parties needlessly introduced multiple copies of the same evidence. By way of example only:

- Opposer introduced its pleaded registration four times: (1) with its notice of opposition under Trademark Rule 2.122(d)(1) (1 TTABVUE 15-42); (2) under notice of reliance (37 TTABVUE 4-40); and (3) attached twice as Exhibit 1 to the testimony declaration of Brian Stone, Chief Risk and Data Science Officer for Opposer's parent corporation Atlanticus Holdings Corporation ("Atlanticus") (39 TTABVUE 8-53).
- Opposer introduced duplicate excerpts from Applicant's Fed. R. Civ. P. 30(b)(6) deposition, in particular deposition p. 16, line 13 through p. 17, line 9, and p. 64 line 16 through p. 65, line 1.
- The exhibits to the testimony declaration of Opposer's witness Kristina Woodruff are the same documents attached as Exhibits 2-44 to Opposer's Notice of Reliance.
- Numerous exhibits to the Stone and Woodruff rebuttal declarations are duplicative.³⁹

³⁹ Compare generally 50 TTABVUE with 51 TTABVUE.

- The exhibits to the testimony declaration of Applicant's witness Derek Brady are identical to Exhibits 7-85, and 87-92 to Applicant's Notice of Reliance.

Suffice it to say, the probative value of evidence does not increase with repetition. Submitting duplicative evidence hinders the Board's review of the record and delays issuance of a decision. The parties and their counsel are advised to avoid filing duplicate submissions and wasting the Board's limited resources in future proceedings. *Made in Nature v. Pharmavite*, 2020 USPQ2d 557, at *12-13 (TTAB 2022) ("The parties also elected to file duplicative evidence by different methods of introduction; for example, once by Notice of Reliance and again by way of an exhibit to a testimony declaration or testimony deposition. The Board views the practice of introducing cumulative evidence at trial with disfavor.").

C. Citation Format

The parties did not follow Trademark Rule 2.142(b)(3) providing that "[c]itation to evidence in briefs should be to the documents in the electronic record for the subject application or registration by date, the name of the paper under which the evidence was submitted, and the page number in the electronic record." Trademark Rule 2.142(b)(3), 37 C.F.R. § 2.142(b)(3); TBMP § 801.03; *cf. In re Virtual Indep. Paralegals, LLC*, 2019 USPQ2d 111512, at *1 (TTAB 2019) (best way to cite evidence is "to refer to it by Office Action/Response date and TSDR page number"). The parties' failure to follow the Board's citation procedure "made it extremely cumbersome to provide evidentiary references for use in this [decision]; lengthening the time for review of the record, drafting of the decision and ultimately for issuance of ... [our]

opinion.” *Made in Nature v. Pharmavite*, 2022 USPQ2d 557, at *15. To avoid further delays in the determination of this proceeding, we decline to require the parties to submit revised briefs conforming with the Trademark Rules of Practice. The parties and their counsel are advised to use the Board’s evidence citation style in future submissions or risk additional delays and the potential requirement to submit revised briefs.

II. The Record

The record includes the pleadings, and by operation of law, the files of the involved applications.⁴⁰ Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b). In addition, the parties introduced the evidence listed below.

A. Opposer’s Evidence

- Notice of Reliance on:
 - Printouts from the USPTO’s Trademark Status and Document Retrieval (TSDR), Trademark Electronic Search System (TESS), and assignment databases demonstrating current status and Opposer’s ownership of the pleaded registration;⁴¹

⁴⁰ Accordingly, it was unnecessary for Applicant to introduce printouts from TESS and TSDR for the involved applications and the file histories for the same. Applicant’s Notice of Reliance, 42 TTABVUE 12-79.

⁴¹ 37 TTABVUE 4-40. As noted above, Opposer introduced this same evidence with its Notice of Opposition, 1 TTABVUE 15-42, and the Stone Declaration, 39 TTABVUE 8-53.

- Third-party use-based registrations and Internet screenshots showing use of third-party marks “to show the relationship between the parties’ respective goods and services”;⁴²
- Articles regarding Opposer and its ASPIRE credit card services;⁴³
- Excerpts from Applicant’s discovery deposition under Fed. R. Evid. 30(b)(6);⁴⁴
- Testimony Declaration of Brian Stone, Chief Risk and Data Science Officer for Atlanticus, Opposer’s parent corporation, and accompanying exhibits;⁴⁵
- Testimony Declaration of Kristina Woodruff, Trademark Paralegal for Opposer’s attorney, and accompanying exhibits;⁴⁶
- Rebuttal Notice of Reliance on:

⁴² 37 TTABVUE 41-377.

⁴³ 37 TTABVUE 378-98.

⁴⁴ 37 TTABVUE 399-411. Portions of this deposition were filed under seal at 38 TTABVUE. Notably, a number of redactions remain in the confidential version of the filing. It is unclear whether this was in error or whether Opposer redacted these portions of the deposition as irrelevant.

⁴⁵ 39 TTABVUE. The declaration appears to be missing pages 2 and 4.

Exhibits 12, 18 and 19 attached to the Stone Declaration are not referenced in the declaration (presumably because of the missing pages) so there is no testimony explaining the nature of this evidence. We have considered Exhibit 18, consisting of website screenshots bearing the URL and date the pages were printed, because this evidence is self-authenticating; however, we have not considered Exhibits 12 or 19 because they are not self-authenticating. *Missouri Silver Pages Directory Publ’g Corp. Inc. v. Sw. Bell Media, Inc.*, 6 USPQ2d 1028, 1030 n.9 (TTAB 1988) (documents not specifically identified in affidavit “cannot be considered as exhibits to the affidavit”).

⁴⁶ 40 TTABVUE.

- Additional excerpts from Applicant’s Fed. R. Evid. 30(b)(6), and exhibits thereto;⁴⁷
- Internet screenshots;⁴⁸
- Printouts from the USPTO’s databases related to Opposition No. 91156529 and Cancellation No. 92060990 and the application and registration involved in those proceedings;⁴⁹ and
- FDIC 2020 Community Banking Study – Chapter 2 and FDIC 2012 Community Banking Study – Chapter 1;
- Rebuttal Testimony Declaration of Brian Stone, and accompanying exhibits;⁵⁰ and
- Rebuttal Testimony Declaration of Kristina Woodruff, and accompanying exhibits.⁵¹

B. Applicant’s Evidence

- Notice of Reliance on:

⁴⁷ 49 TTABVUE 14-71 (public); 52 TTABVUE 4-62 (confidential).

⁴⁸ 49 TTABVUE 72-81, 87-332.

⁴⁹ 49 TTABVUE 82-86, 333-40.

⁵⁰ 51 TTABVUE (public); 52 TTABVUE (confidential (Exhibit 2)). The Stone Rebuttal Declaration includes testimony that Opposer should have introduced in its case-in-chief, but because Applicant has not objected to the rebuttal declarations on this basis and has treated it as part of the record, we have considered the declaration in its entirety. *Hunter Publ’g Co. v. Caulfield Publ’g Ltd.*, 1 USPQ2d 1996, 1997 n.2 (TTAB 1986) (improper rebuttal testimony considered where no objection raised); *Gen. Elec. Co. v. Graham Magnetics Inc.*, 197 USPQ 690, 692 n.5 (TTAB 1977) (case-in-chief evidence improperly submitted under notice of reliance during rebuttal period considered where applicant did not object); *cf. Automedx, Inc. v. Artivent Corp.*, 95 USPQ2d 1976, 1977 (TTAB 2010) (“Evidence which should constitute part of an opposer’s case in chief, but which is made of record during the rebuttal period, is not considered when the applicant objects.”).

⁵¹ 50 TTABVUE.

- Applicant’s registrations for the mark APEX BANK & Design;⁵²
 - TSDR and TESS records, file histories, certificates of registration, and Internet printouts for third-party ASPIRE-formative marks;⁵³
 - Article titled “Credit Growth and the Financial Crisis: A New Narrative”;⁵⁴
 - State Statutes;⁵⁵
 - Printout from the USPTO’s ID Manual;⁵⁶ and
 - Excerpts from Opposer’s Rule 30(b)(6) deposition, and exhibits thereto.⁵⁷
- Testimony Declaration of Santiago Cuccarese, Applicant’s Senior Vice President for Technology and Operations, and accompanying exhibits;⁵⁸ and
 - Testimony Declaration of Derek Brady, paralegal at Applicant’s attorney’s law firm, and accompanying exhibits.⁵⁹

III. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action must be established in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at *3 (Fed. Cir. 2020), *cert. denied*, 142 U.S. 82 (2021) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26, 109 USPQ2d 2061, 2067 n.4 (2014)). A party in the position of plaintiff may oppose

⁵² 42 TTABVUE 80-97.

⁵³ 42 TTABVUE 98-568.

⁵⁴ 42 TTABVUE 569-638.

⁵⁵ 42 TTABVUE 639-55.

⁵⁶ 42 TTABVUE 656-57.

⁵⁷ 42 TTABVUE 658-89.

⁵⁸ 43 TTABVUE.

⁵⁹ 44 TTABVUE.

registration of a mark when such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and the plaintiff has a reasonable belief in damage that is proximately caused by registration of the mark. *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 2022 USPQ2d 602, at *2 (Fed. Cir. 2022) (citing *Lexmark*, 572 U.S. at 129, 132); *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020).

Opposer introduced printouts from the Office's TSDR and TESS databases showing that the pleaded registration is active and owned by Opposer. Accordingly, Opposer has established its entitlement to a statutory cause of action. *Made in Nature v. Pharmavite*, 2022 USPQ2d 557, at *7 (pleaded registrations demonstrated entitlement to bring a statutory cause of action); *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1032 (TTAB 2016) (same).

IV. Priority and Likelihood of Confusion

To prevail on its Section 2(d) claim, Opposer must prove priority and likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Hydro-Dynamics Inc. v. George Putnam & Co.*, 811 F.2d 147, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987); *Made in Nature v. Pharmavite*, 2022 USPQ2d 557, at *9.

A. Priority

Because Opposer has made its pleaded registration of record and Applicant has not counterclaim to cancel it, priority is not an issue as to the registered standard-character mark ASPIRE for the registered services, namely, "credit card services."

King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

B. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc'ns., Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *see also In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29

(CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”). These factors, and others, are discussed below.

1. Similarity or Dissimilarity of the Services, Trade Channels and Classes of Consumers

We begin with the second and third DuPont factors, which “respectively consider ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,’ and ‘the similarity or dissimilarity of established, likely-to-continue trade channels.’” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *19 (TTAB 2021) (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567)). We must base our comparison of the services on the identifications in Applicant’s applications and Opposer’s registration. *Stone Lion Capital Partners, L.P. v. Lion Capital LLC*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

The services need not be identical for there to be a likelihood of confusion. The evidence need only establish that the services are related in some manner, or the conditions surrounding their marketing are such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the services come from a common source. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); *In re Rexel, Inc.*, 223 USPQ 830, 831

(TTAB 1984). It is sufficient for a finding of likelihood of confusion if relatedness is established for any service encompassed in the recitation of services in a particular class in an application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *6 (TTAB 2019); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015).

For ease of reference, Opposer's services are "credit card services" and all three of the involved applications cover "banking and financing services."

As an initial matter, we address Applicant's argument that "the entry for 'credit card services,'" identified in the pleaded registration "was deleted from the Trademark ID Manual as indefinite and overly broad because of the nature of the activity provided is unclear. As a result, it is not clear what is meant by 'credit card services' in the pleaded registration, nor has Opposer provided further clarity on what type of 'credit card service' it provides under its ASPIRE Registration."⁶⁰

The USPTO has explained that the identification "credit card services" is "indefinite and overly broad because the nature of activity is unclear."⁶¹ Where, as here, an identification of services is indefinite, it is appropriate to consider extrinsic evidence of use to determine the meaning of the identification of services. *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1354 (TTAB 2015) ("When identifications are technical or vague and require clarification, it is appropriate to consider extrinsic

⁶⁰ Applicant's Brief, 55 TTABVUE 37. Applicant did not file a counterclaim under Section 18 of the Trademark Act, 15 U.S.C. § 1068, to narrow the identification of services.

⁶¹ Applicant's Notice of Reliance, 44 TTABVUE 496-97 Brady Declaration, Exhibit 85.

evidence of use to determine the meaning of the identification of goods.”). Mr. Stone, the Chief Risk and Data Science Officer for Atlanticus, Opposer’s parent company, testified that “Atlanticus is authorized by Opposer to make use of the ASPIRE mark to partner with banking institutions to manage consumer credit card programs for the benefit of such institutions, and the ASPIRE mark is used by Atlanticus to offer and service those credit card user accounts, which are issued by the bank.”⁶² Opposer’s own use as well as third-party use-based registrations and Internet evidence of record further demonstrates that “credit card services” include issuing credit cards for use to finance purchases as well as counseling regarding credit card debt, processing credit card payments and transactions, credit card authorization, credit card monitoring and alerts, managing credit card accounts, and providing access to credit scores.⁶³ We thus consider the “credit card services” in Opposer’s registration to encompass all of the foregoing activities. *Tuxedo Monopoly*, 209 USPQ at 988 (“[T]he description of [goods or services] must be construed most favorably to the opposing prior user”); *C.H. Hanson*, 116 USPQ2d at 1355 (“Registrant’s identification is presumed to encompass all goods of the type described” *see also Sabhnani v. Mirage Brands*, 2021 USPQ2d 1241, at *20 (identifications “are construed to include all goods [or services] of the type identified”).

⁶² 51 TTABVUE 4, Stone Rebuttal Declaration, ¶ 10.

⁶³ Applicant’s Notice of Reliance, 42 TTABVUE 98-125, 336-43, 465-70, 479-82, 494-98, 507-13, 521-30, 548-53 (Exhibits 7, 35, 64, 67, 71, 73, 76, 77, and 82). 51 TTABVUE 28-48, Stone Rebuttal Declaration, Exhibit 3.

Turning to Applicant's identification of services, Applicant asserts that it is a "retail bank" and it:

plans to offer an internet bank, focused on high-income customers that are looking for FDIC insurance for their deposits, under ... the ASPIRE BANK (and Design) marks. Specifically, it plans to offer savings accounts, certificates of deposits, and money market accounts under the ASPIRE BANK (and Design) marks. There are no plans to offer loans or loan services, credit cards, or any other credit products or services under the ASPIRE BANK (and Design) marks. There are also no plans to offer financial counseling or credit reparation services under the ASPIRE BANK (and Design) marks.⁶⁴

...
[Applicant's] applied-for "banking and financing services," ... involve "raising deposits," and do not involve offering any credit card products.⁶⁵

As stated, in assessing the relatedness of the parties' services, we do not consider the services with which Applicant uses or intends to use its marks but the services for which Applicant seek registration, namely, "banking and financing services." *Tuxedo Monopoly*, 209 USPQ at 988 ("We conclude that use of the mark MONOPOLY on novelty T-shirts would be likely to cause confusion with appellee and that appellant's broad description of goods includes such items. Appellant's argument that it does not intend to make this type of use of the mark MONOPOLY is irrelevant. The question of the likelihood of confusion must be based upon a consideration of appellant's goods as described in the application."). Nor do we read any limitations

⁶⁴ Applicant's Brief, 55 TTABVUE 18 (internal citations omitted) (citing the Cuccarese Declaration, ¶¶ 10 and 14 at 43 TTABVUE 3-4).

⁶⁵ Applicant's Brief, 55 TTABVUE 37 (citing the Cuccarese Declaration, ¶¶ 14, 16, 21 at 43 TTABVUE 4, 6).

into Applicant’s broadly worded identification of “banking and financing services.”⁶⁶ *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069, 2073 (TTAB 1989); *see also In re Embiid*, 2021 USPQ2d 577, at *28 (TTAB 2021) (“[W]e may not import restrictions into the identification[s] based on alleged ‘real world conditions’ of the sort argued by Applicant, or consider extrinsic evidence regarding Applicant and Registrant themselves.”) (internal citation omitted).

We take judicial notice of the definitions for the words “banking,” “bank” and “finance”:⁶⁷

- “Banking” (noun): “the business of a bank or a banker”;⁶⁸
- “Bank” (noun): “an establishment for the custody, loan, exchange, or issue of money, for the extension of credit, and for facilitating the transmission of funds”;⁶⁹ and
- “Finance” (verb): “to sell something on credit”; “to raise or provide funds or capital for”; “to furnish with necessary funds.”⁷⁰

⁶⁶ To this end, Applicant argues that its “financing services” are distinguishable from Opposer’s credit card services because its “financing services” do not “involve[] a physical ‘credit card’.” We give this argument no consideration because the services as identified in Applicant’s applications do not exclude “financing services” provided via credit card.

⁶⁷ “The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format or have fixed regular editions.” *In re Nextgen Mgmt., LLC*, 2023 USPQ2d 14, at *9 n.5 (TTAB 2023); *see also Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁶⁸ Merriam-Webster Dictionary (<https://www.merriam-webster.com/dictionary/banking>) (last visited May 8, 2023). Mr. Cuccarese, Applicant’s Rule 30(b)(6) witness similarly testified that “[b]anking services are services performed by a bank.” Opposer’s Notice of Reliance, 37 TTABVUE 403, Applicant’s Rule 30(b)(6) Deposition, Exhibit 51.

⁶⁹ Merriam-Webster Dictionary (<https://www.merriam-webster.com/dictionary/bank>) (last visited May 8, 2023).

⁷⁰ Merriam-Webster Dictionary (<https://www.merriam-webster.com/dictionary/finance>) (last visited May 8, 2023).

Based on these definitions, Applicant’s “banking services” are broad enough to encompass the “extension of credit” through issuance of credit cards and its “financing services” are broad enough to include providing funds or extending credit through the issuance of credit cards. Accordingly, the parties’ services are legally identical, in part. *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *15-16 (TTAB 2023) (“If an application or registration describes goods or services broadly, and there is no limitation as to their nature, it is presumed that the ‘registration encompasses all goods or services of the type described.’”) (quoting *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013) (quoting Trademark Manual of Examining Procedure (TMEP) § 1207.01(a)(iii)). Indeed, Mr. Stone testified that it uses the ASPIRE mark to “offer and service ... credit card user accounts, which are issued by the bank.”⁷¹ This testimony is supported by a screenshot from Opposer’s website (aspire.com), which states “All Aspire Credit Cards are issued by The Bank of Missouri, St. Robert, MO.”⁷²

Opposer also introduced the following evidence of third-party registered marks, with accompanying evidence of use, and five additional unregistered marks in use for credit card and banking and financing services:⁷³



⁷¹ 51 TTABVUE 4, Stone Rebuttal Declaration, ¶ 10.


⁷² 51 TTABVUE 31, Stone Rebuttal Declaration, Exhibit 3.


⁷³ Opposer’s Notice of Reliance, 37 TTABVUE 41-377. Each third-party registration issued based on a claim of use under Trademark Act, 15 U.S.C. § 1051(a).

| Reg. No. | Mark | Pertinent Registered Services | Pertinent Internet Evidence of Use |
|----------|--|--|--|
| 5402125 | BALANCE ERASER (BALANCE disclaimed) | “Banking and financing services offered by invitation only through direct mail, namely, personal consolidation loans for refinancing credit card debt” | “Balance Eraser loan consolidates credit card balances into one convenient fixed-rate loan.” |
| 2069697 | CATHAY BANK (BANK disclaimed) | “consumer financing services, namely, ... credit cards” | Offering services including credit cards and digital banking |
| 4384328 | CITY NATIONAL CRYSTAL (NATIONAL disclaimed) | “Banking and financing services; credit card and debit card services” | Offering a CITY NATIONAL BANK CYRSTAL credit card |
| 3543112 | giant bank.com | “banking and financing services”; “credit card services” | Offering personal banking and credit card services |
| 4331532 | KEEP IT LOCAL! | “Banking; Banking and financing services”; “Financial services, namely, ... bank accounts and credit card accounts” | Offering personal and business banking |

| Reg. No. | Mark | Pertinent Registered Services | Pertinent Internet Evidence of Use |
|----------|-------------------------------|---|--|
| 5260376 | JONAH BANK (BANK disclaimed) | “Charge card and credit card payment processing services”; “Credit and cash card payment processing”; “Payment processing services, namely, credit card and debit card transaction processing services” | Offering personal loans including credit cards |
| 6065796 | PATH TO THE PACK | “banking services and financing services;” “credit card transaction processing services” | Offering banking services and debit cards |
| 5366347 | SAVOR | “banking and financing services, namely, issuance of credit cards” | Offering a credit card |
| 5776577 | UNITED BANK (BANK disclaimed) | “banking and financing services”; “financial services, namely, ... bank accounts and credit card accounts” | Offering banking and credit card services |

| Reg. No. | Mark | Pertinent Registered Services | Pertinent Internet Evidence of Use |
|------------------------------------|---|---|---|
| 4916562 | SIMMONS BANK (Section 2(f) in part; BANK disclaimed) | “Banking; Banking and financing services”; “Financial services, namely, ... bank accounts and credit card accounts”; “On-line banking services featuring electronic alerts that alert credit and debit card users when a single transaction exceeds a certain amount” | Offering personal and business banking and credit cards |
| 2434366 (Supplemental Register) |  | “Banking; financing services; and credit card services, namely, the business of issuing credit cards, providing financing on credit cards issued, servicing credit cards and providing financing” | Offering credit cards and banking services |
| 4916747 |  (Section 2(f) claim; BANK disclaimed) | “Banking services”; “credit card services” | Offering banking and credit card services |

| Reg. No. | Mark | Pertinent Registered Services | Pertinent Internet Evidence of Use |
|----------|---|---|---|
| 6023568 | CCBANK | “Banking services”; “Financial services, namely, ... bank accounts and credit card accounts” | Offering banking services |
| 6316855 | FOURTH CAPITAL (CAPITAL disclaimed) | “financial services, namely, banking services”; “credit card services and debit card services, namely, issuing credit cards, issuing debit cards, and credit card and debit card authorization services” | Offering banking and credit card services |
| 4789500 | <p>CAPITAL</p> <hr/> <p>BANK </p> <p>(CAPITAL BANK disclaimed)</p> | “Banking services; mobile banking; credit card and debit card services” | Offering banking and credit card services |
| 4994305 | MILLENNIUM BANK (BANK disclaimed) | “Banking services; credit card and debit card services” | Offering banking services |
| 4822030 | OAK BANK (BANK disclaimed) | “Banking; Banking services;” “Credit card and debit card services” | Offering banking and debit card services |

| Reg. No. | Mark | Pertinent Registered Services | Pertinent Internet Evidence of Use |
|----------|---|--|--|
| 4957077 | THE MURRAY BANK (BANK disclaimed) | “Banking services;” “financial services, namely, ... merchant credit card services” | Offering banking and debit card services |
| 4382300 |  | “Banking services;” “financial services, namely, ... merchant credit card and debit card transaction processing; credit card and debit card services” | Offering banking and credit card services |
| N/A | CENTENNIAL BANK | N/A | Offering banking and credit card services |
| N/A | FIFTH THIRD BANK | N/A | Offering credit cards and personal banking |
| N/A | BANK OF AMERICA | N/A | Offering credit cards |
| N/A | REGIONS | N/A | Offering banking and credit card services |
| N/A | CITI | N/A | Offering credit cards and banking services |

Third-party registrations that cover services from both Opposer’s registration and Applicant’s applications are relevant to show that the services are of a type that may

emanate from a single source under one mark. *In re Albert Trostel*, 29 USPQ2d at 1785-86; *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd* (unpublished), No. 88-1444, 864 F.2d 149 (Fed. Cir. Nov. 14, 1988). Third-party marks in use for both parties' services further demonstrates relatedness. *Embiid*, 2021 USPQ2d 577, at *22-23 (evidence of relatedness may include advertisements showing the relevant goods or services are advertised together or offered by the same entity and prior use-based registrations covering both parties' goods or services) (quoting *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *5 (TTAB 2020) (citing *In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014); *see also, e.g., Detroit Athletic*, 128 USPQ2d at 1050 (crediting relatedness evidence showing that third parties use the same mark for the goods and services); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (evidence that "a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis"); *Made in Nature v. Pharmavite*, 2022 USPQ2d 557, at *46 (third-party websites promoting sale of both parties' goods showed relatedness). The fact that Opposer "is not a bank authorized by the government to engage in banking business"⁷⁴ does not negate the identity, in part, and otherwise substantial similarities between the parties' services.⁷⁵

⁷⁴ Applicant's Brief, 55 TTABVUE 19.

⁷⁵ Applicant argues that "despite Opposer's contention that banking services and credit card services are related, Opposer has not presented any evidence of actual confusion between its ASPIRE Registration and the numerous third-party ASPIRE formative marks used in connection with checking and savings accounts identified by Applicant." 55 TTABVUE 37. But Applicant's "banking services" encompass all services of the type identified, which is

Turning to the third *DuPont* factor, Applicant argues that it “plans to use targeted advertising to reach high-income individuals and the minimum balance requirement is expected to be higher than that of other banks.”⁷⁶ Again, however, in assessing the trade channels and relevant consumers, we are bound by the recitation of services in Opposer’s registration and Applicant’s involved applications. *Sabhnani v. Mirage Brands*, 2021 USPQ2d 1241, at *20 (“[A]s with the relatedness of the goods, the similarity or dissimilarity of the channels of trade must be determine based on the identifications of goods [or services] in the parties’ registrations [or applications] rather than real-world conditions.”). Because there are no limitations in either Opposer’s registration or Applicant’s involved applications and the parties’ services are legally identical, we must presume that the trade channels and relevant purchasers overlap. *Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1661 (TTAB 2014); *Am. Lebanese Syrian Associated Charities, Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011); *see also In re Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1906 (Fed. Cir. 2012); *In re RiseSmart, Inc.*, 104 USPQ2d 1931, 1935 (TTAB 2012).

In sum, the second and third *DuPont* factors weigh heavily in favor of finding a likelihood of confusion.

much broader than checking and savings account services and includes credit card services. *Sabhnani v. Mirage Brands*, 2021 USPQ2d 1241, at *20.

⁷⁶ Applicant’s Brief, 55 TTABVUE 18 (citing the Cuccarese Declaration, ¶ 15 at 43 TTABVUE 4).

2. Strength of Opposer's Mark

Next, we assess the strength of Opposer's ASPIRE mark because it affects its scope of protection to which the mark is entitled. "In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition." *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017) (citing *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014)); see also *In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning.); *Made in Nature v. Pharmavite*, 2022 USPQ2d 557, at *21.

a. Commercial Strength

In the context of a likelihood of confusion analysis, the commercial strength of a mark is not a binary factor. Rather, it "varies along a spectrum from very strong to very weak." *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (quoting *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)). Opposer argues under the fifth *DuPont* factor that it "has strong rights" in the ASPIRE mark⁷⁷ while Applicant argues under the sixth *DuPont* factor that Opposer's mark is weak because "[n]umerous other businesses use the word

⁷⁷ Opposer's Brief, 53 TTABVUE 24.

ASPIRE in connection with credit cards and other credit offerings throughout the country.”⁷⁸

The fifth *DuPont* factor (fame) examines the extent to which the public perceives the mark as indicating a single source of origin, while the sixth factor (use by others) mitigates against a mark’s potential recognition by considering whether, because of widespread third-party use of similar marks in the marketplace, “customers have been educated to distinguish between different such marks on the bases of minute distinctions.” *Palm Bay Imps.*, 73 USPQ2d at 1694; *Made in Nature v. Pharmavite*, 2022 USPQ2d 557, at *20-21 (the fifth *DuPont* factor “enables Opposer to prove that its pleaded marks are entitled to an expanded scope of protection” while the sixth *DuPont* factor “allows Applicant to contract that scope of protection”).

Turning first to the fifth *DuPont* factor, commercial strength “may be measured indirectly by the volume of sales and advertising expenditures in connection with the goods [or services] sold under the mark, and other factors such as length of time of use of the mark; widespread critical assessments; notice by independent sources of the goods [or services] identified by the mark; and the general reputation of the goods.” *Made in Nature v. Pharmavite*, 2022 USPQ2d 557, at *31; *Weider Pubs., LLC v. D & D Beauty Care Co.*, 109 USPQ2d 1347, 1354 (TTAB 2014), *appeal dismissed per stipulation*, No. 2014-1461 (Fed. Cir. Oct. 10, 2014); *see also Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1308 (Fed. Cir. 2002).

⁷⁸ Applicant’s Brief, 55 TTABVUE 21-22.

In support of Opposer’s assertion that it has “strong rights in the ASPIRE mark for Opposer’s Services,”⁷⁹ Mr. Stone testified that: (1) Opposer and its predecessor-in-interest, have continuously used the ASPIRE mark for credit cards since 1997;⁸⁰ (2) the credit cards are “available throughout the United States, and Opposer maintains accounts for consumers residing in all of the fifty states”;⁸¹ (3) “[t]he ASPIRE mark has consistently appeared on the credit cards themselves, as well as on marketing materials for the products and services, user agreements, invoices, and communications with consumers in the rendering of services”;⁸² (4) “[t]hrough its decades of trademark ownership, Opposer’s services under the ASPIRE mark have been advertised through a variety of ways, including, without limitation, print advertisements, online advertisements, website advertising, email advertising, direct mail advertising, advertising by telephone, and social media advertising”;⁸³ and (5) “as a result of Opposer’s consistent marketing efforts, Opposer has enjoyed substantial revenues from its ASPIRE-branded credit card services.”⁸⁴

Attached to the Stone Declaration are copies of pages from Applicant’s aspire.com website, the Google Play App Store offering Opposer’s “ASPIRE ACCOUNT CENTER” mobile application for download, invitation mailers offering Opposer’s

⁷⁹ Opposer’s Brief, 53 TTABVUE 24.

⁸⁰ 39 TTABVUE 3, Stone Declaration, ¶ 13.

⁸¹ 39 TTABVUE 4, Stone Declaration, ¶ 26.

⁸² 39 TTABVUE 3, Stone Declaration, ¶ 15.

⁸³ 51 TTABVUE 4, Stone Rebuttal Declaration, ¶ 6; *see also* 39 TTABVUE 4, Stone Declaration, ¶¶ 27-29.

⁸⁴ 51 TTABVUE 4, Stone Rebuttal Declaration, ¶ 9.

ASPIRE credit card and customer invoices bearing the ASPIRE mark.⁸⁵ Opposer also introduced six articles identifying its ASPIRE credit card services. The articles were published in American Banker (USA) in 2002, SNL Financial Services Daily in 2018, Business Wire in 2006, Comtext News Network in 1999 (2 articles), and Market New Publishing USA in 2020.⁸⁶ Opposer also filed under seal an exhibit to the Stone Rebuttal Declaration identifying “true and correct confidential U.S. revenue records from 2001 to 2021 for services provided under the ASPIRE mark.”⁸⁷

While we recognize that Opposer’s ASPIRE mark has been in continuous use for credit card services for more than two decades, Opposer’s U.S. revenue for services provided under the ASPIRE mark has been, at best, inconsistent, particularly over the last several years,⁸⁸ and Opposer did not introduce any advertising expenditures. Six news articles issued over the course of two decades does not constitute “widespread critical assessments.” Nor is there sufficient evidence to establish the

⁸⁵ 39 TTABVUE 4, 66-89, 99-124, Stone Declaration, ¶¶ 30-33 and Exhibits 8-11, 13-17.

In its brief, Opposer asserts that “[t]he ASPIRE Mark-branded credit card services met with quick success with over one million cardholders just in the few years of offering it” citing to a November 4, 1999 article titled “CompuCredit Counts More than One Million Aspire Visa Credit Card Holders.” Opposer’s Brief, 53 TTABVUE 24; Opposer’s Notice of Reliance, 37 TTABVUE 396-98. The content of the article is hearsay so Opposer cannot rely on it to prove the matter asserted and there is no other evidence to support this assertion. “Attorney argument is no substitute for evidence.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

⁸⁶ Opposer’s Notice of Reliance, 37 TTABVUE 378-98 (Exhibits 45-50).

⁸⁷ 51 TTABVUE 4, Stone Declaration, ¶ 9; 52 TTABVUE 63-68 (confidential).

⁸⁸ Opposer filed its revenue under seal so we discuss it only generally.

general reputation of Opposer's services.⁸⁹ For these reasons, we find that Opposer has fallen short of establishing that its ASPIRE mark is commercially strong.

Turning to the sixth *DuPont* factor, evidence that the public is confronted with significant use by others of similar marks for similar services tends to indicate a lack of commercial strength. *DuPont*, 177 USPQ at 567. "The purpose of introducing evidence of third-party use is 'to show that customers have become so conditioned by a plethora of ... similar marks that customers have been educated to distinguish between different [such] marks on the bases of minute distinctions.'" *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693 (Fed. Cir. 2018) (quoting *Palm Bay Imps.*, 73 USPQ2d at 1694). Applicant introduced evidence of a number of third-party marks.

We give no consideration to the following exhibits to Applicant's Notice of Reliance:

- Exhibit 37: This exhibit is an Internet screenshot (aspirefcu.truecar.com) for a car buying service, "Powered by TrueCar" and offered by ASPIRE Federal Credit Union. "[I]n 2019, Opposer sent a letter to Aspire Federal Credit Union

⁸⁹ Opposer summarily asserts that "[t]housands of consumers have provided reviews and feedback on their experience with the credit card services provided under the ASPIRE Mark on [Opposer's] website." Opposer cites to screenshots from its website stating that the ASPIRE credit card had "3235 Reviews" on March 30, 2022 and "28907 Reviews" on July 30, 2022. 39 TTABVUE 126, Stone Declaration, Exhibit 18; 51 TTABVUE 14-19, Stone Rebuttal Declaration, Exhibit 1. As explain in n.85 supra, these statements are hearsay. We can consider the website screenshots only for what it is shown on their face, namely, eight reviews listed on each. An additional four reviews (3 out of 4 negative) are in the record at 39 TTABVUE 111-12, Stone Declaration, Exhibit 15. Twenty total reviews does not support Opposer's argument that its ASPIRE credit card has received "thousands" of consumer reviews.

to demand its cessation of the word ‘Aspire.’ ... Aspire Federal Credit Union notified Opposer, through its counsel, that it would cease use of the mark and that it was subject to an acquisition that would render the mark obsolete. Aspire Federal Credit Union no longer exists, and neither does the [aspirefcu.org] webpage.”⁹⁰ Accordingly, even though this particular screenshot still appears to be available, ASPIRE Federal Credit Union no longer operates under that name.⁹¹



- Exhibit 68: This exhibit shows Capital One Canada offering an ASPIRE TRAVEL credit card.⁹² There is no evidence that this credit card is offered to consumers in the United States.⁹³

⁹⁰ 51 TTABVUE 5, 66, Stone Rebuttal Declaration, ¶ 16, Exhibits 11 and 12; 50 TTABVUE 25-26, Woodruff Rebuttal Declaration, ¶ 2, Exhibit 6 (“aspirefcu.org (automatically redirects to <https://penfed.org/aspire/>)”). We recognize, however, that there is “no formal written agreement” between Opposer and Aspire Federal Credit Union. Applicant’s Notice of Reliance, 42 TTABVUE 670-71, Opposer’s Rule 30(b)(6) deposition.

⁹¹ In any event, use of ASPIRE FEDERAL CREDIT UNION for a car buying service is specifically different from providing credit card services.

⁹² Applicant’s Notice of Reliance, 42 TTABVUE 483-86 (Exhibit 68); 51 TTABVUE 9-10, Stone Rebuttal Declaration, ¶ 33 (“Capital One owns a trademark registration for ASPIRE in Canada but not in the United States.”); 51 TTABVUE 171-89, Exhibits 32-34.

⁹³ Attached as an exhibit to Opposer’s Rule 30(b)(6) deposition is an Internet screenshot for a CapitalOne ASPIRE CASH credit card. 42 TTABVUE 687. Although the record does not indicate whether this offering is from CapitalOne Canada, it seems likely as the screenshot has a link to “Français,” as does the CapitalOne Canada screenshot for the ASPIRE TRAVEL credit card, and we take judicial notice that French is an official language of Canada. Encyclopedia Britannica (<https://www.britannica.com/place/Canada>) (last visited May 11, 2023) (“Canada is officially bilingual in English and French.”); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1087 n.3 (TTAB 2016) (Board may take judicial notice of encyclopedias and other standard reference works.); *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.24 (TTAB 2013) (same). Because Applicant has not demonstrated that the ASPIRE CASH mark is in use on a credit card available to U.S. consumers, we also do not consider this reference.

- Exhibit 69: This exhibit shows use of ASPIRE for a credit card. Brian Stone, Chief Risk and Data Science Officer of Applicant’s parent Atlanticus testified on rebuttal that this “is an authorized ASPIRE-branded [credit] card made and licensed by Opposer and its predecessors in interest”⁹⁴ and, therefore, it is not a third-party mark.
- Exhibit 70:⁹⁵ This exhibit shows an ASPIRE Student VISA credit card offered by State Employees Credit Union of Maryland, Incorporated (SECU). Mr. Stone testified that “in 2020, Opposer entered into an agreement whereby [SECU], agreed to cease any use of the word ‘ASPIRE’ and acknowledged Opposer’s right, title, and interest in and to the ASPIRE mark. ... This company ceased use of the word ‘ASPIRE.’ ... The word ‘Aspire’ does not appear on the page or anywhere else on SECU’s website.”⁹⁶
- Exhibit 72: This exhibit shows an  VISA card offered by , a business that identifies itself as operating in Singapore, Indonesia, Vietnam

⁹⁴ 51 TTABVUE 5, Stone Rebuttal Declaration, ¶ 11.

⁹⁵ Applicant’s Notice of Reliance, 42 TTABVUE 490-93 (Exhibit 70).

⁹⁶ 51 TTABVUE 6, 171-80, 190-92, Stone Rebuttal Declaration, ¶ 17, Exhibits 13 (settlement agreement), 14 (pages from secumd.org/personal/credit-cards/visa-credit-cards/), and 35 (screenshot showing that a search for the word ASPIRE on SECU’s website (secumd.org) returned “Nothing Found”).

and India.⁹⁷ It is unclear, however, from the evidence of record whether these services are offered to U.S. consumers.⁹⁸

The following third-party marks are in use for credit card services:

- ASPIRE – a credit card offered by America’s Credit Union;⁹⁹ this entity also



owns Registration No. 6793418 for the mark

“issuing credit cards; providing personal loans and lines of credit”;¹⁰⁰

- ASPIRE – a secured credit card offered by Texell Credit Union;¹⁰¹
- ASPIRE – a partially secured credit card offered by Addition Financial;¹⁰²

⁹⁷ Applicant’s Notice of Reliance, 42 TTABVUE 499-506 (Exhibit 72); Opposer’s Rebuttal Notice of Reliance, 49 TTABVUE 159-74 (Exhibits 25 and 26) (promoting itself as “Reinventing business finance for Southeast Asia’s Internet Economy”).

⁹⁸ Applicant attached to its response to the motion to strike a printout showing that this mark is subject to an Idaho state registration. This printout is not evidence of record because it was not introduced during trial. *See* n.19. But even if it was, registration of the mark in Idaho does not establish that the mark is in use in the United States. *Cf. In re i.am.symbolic*, 123 USPQ2d at 1751 (federal registrations are not evidence of use of the marks in the marketplace); *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016).

⁹⁹ Applicant’s Notice of Reliance, 42 TTABVUE 306-09 (Exhibit 29). This entity also offers an ASPIRE home improvement loan and other ASPIRE and ASPIRE LIFESTYLE “lending options.” *Id.*

¹⁰⁰ Applicant’s Notice of Reliance, 42 TTABVUE 98-125 (Exhibit 7). As explained in n.22 above, we take judicial notice of this registration that issued after the close of trial.

On rebuttal, Opposer introduced evidence to show that it has petitioned to cancel the registration for this mark and the cancellation action is pending. 51 TTABVUE 6 and 81-94, Stone Rebuttal Declaration, ¶ 18 and Exhibit 15 thereto. But there is no indication that Opposer has objected to use of this mark or that the owner has ceased use.

¹⁰¹ Applicant’s Notice of Reliance, 42 TTABVUE 494-98 (Exhibit 71).

¹⁰² Applicant’s Notice of Reliance, 42 TTABVUE 507-13 (Exhibit 73). This entity also offers an ASPIRE checking account for college students.

- ASPIRE – a business checking account offered by B1Bank, that includes a “business rewards credit card”;¹⁰³
- ASPIRE – a checking account offered by Park Bank; “All of our accounts have unlimited access to” services including “credit card applications”;¹⁰⁴
- ASPIRE FINANCIAL COUNSELING – services to “gain control of your finances through budgeting and credit education, debt consolidation, loan modifications and more,” helping those who struggle with, inter alia “bad or no credit” offered by Kalsee Credit Union; the website includes information on how to “Make ... Loan or Credit Card Payment[s]”;¹⁰⁵
- ASPIRE CREDIT UNION – offering a feature to “Control Your Cards”: “Monitor your cards, turn them off or on, and approve charges with Card Valet”;¹⁰⁶
- HILTON HONORS AMERICAN EXPRESS ASPIRE and HILTON HONORS ASPIRE – a credit card offered by American Express;¹⁰⁷ and
- ASPIRATION ZERO – a credit card offered by Aspiration Card Services, LLC.¹⁰⁸

¹⁰³ Applicant’s Notice of Reliance 42 TTABVUE 527-30 (Exhibit 77).

¹⁰⁴ Applicant’s Notice of Reliance 42 TTABVUE 548-53 (Exhibit 82).

¹⁰⁵ Applicant’s Notice of Reliance 42 TTABVUE 465-70 (Exhibit 64).

¹⁰⁶ Applicant’s Notice of Reliance 42 TTABVUE 521-26 (Exhibit 76).

¹⁰⁷ Applicant’s Notice of Reliance, 42 TTABVUE 479-82 (Exhibit 67).

¹⁰⁸ Applicant’s Notice of Reliance 42 TTABVUE 336-43 (Exhibit 35). This same entity uses the mark ASPIRATION for a debit card (*id.* at 337) and a related company owns Reg. No. 4778449 for inter alia, financial services, including investment advice, management and consultation, debt investment, trading financial instruments, wealth management, money management services all for low-and mid-net worth clients. *Id.* at 206-13, 337 (Exhibit 14).

Applicant introduced additional evidence of use of third-party ASPIRE and ASPIRE-formative marks: ASPIRE BANK for online banking and banking “services/products”;¹⁰⁹ 6 marks for checking accounts (not the name of the bank), including 3 offering debit cards as part of the checking account services;¹¹⁰ 1 for a savings account;¹¹¹ 3 for mortgage loan services;¹¹² 1 for student loan services;¹¹³ 21 marks for financial planning, investing and wealth management;¹¹⁴ 5 for insurance and annuity underwriting services;¹¹⁵ and a number of marks for services further afield from “credit card services,” e.g. IT solutions, technology and

¹⁰⁹ Applicant’s Notice of Reliance, 42 TTABVUE 688, Exhibit 19 to discovery deposition of Opposer under Fed. R. Civ. P. 30(b)(6). Although “banking services” generally are broad enough to encompass credit card services, there is no evidence that this particular bank offers credit card services so we do not include this reference among the list of ASPIRE formative marks for “credit card services.”

¹¹⁰ Applicant’s Notice of Reliance 42 TTABVUE 531-40, 543-47 (Exhibit 78, 79, 81); TTABVUE 514-20, 541-42, 561-63 (Exhibits 74, 75, 80, 84 (the latter two exhibits show use by a single entity) (ASPIRE checking account from Fairfield County Bank, offering a Fairfield County Bank Visa Debit Card; Greater Nevada Credit Union offering an ASPIRE checking account with a free Visa Debit Card and free “debit card manager app to receive activity alerts, block certain types of purchases, turn your card on/off, travel notices and more”; and Guardians Credit Union offering an ASPIRE checking account with a “Mastercard debit card”).

¹¹¹ Applicant’s Notice of Reliance 42 TTABVUE 554-60 (Exhibit 83).

¹¹² Applicant’s Notice of Reliance 42 TTABVUE 378-87 (Exhibits 44, 45 and 46).

¹¹³ Applicant’s Notice of Reliance 42 TTABVUE 327-31, 382-83 (Exhibits 33 and 45). Applicant also introduced a corresponding registrations. Applicant’s Notice of Reliance, 42 TTABVUE 186-98 (Exhibits 11-12).

¹¹⁴ Applicant’s Notice of Reliance, 42 TTABVUE 267-74, 310-16, 325-26, 344-47, 351-55, 356-60, 361-64, 365-77, 390-99, 410-25, 435-50, 457-59, 475-78 (Exhibits 23, 30, 32, 36, 38, 39, 40, 41, 42, 43, 48, 49, 52, 53, 54, 55, 58, 59, 62, 66). In addition, Exhibits 8 and 10 to Applicant’s Notice of Reliance are registrations for the marks shown to be in use at Exhibits 30 and 32. 42 TTABVUE 126-72, 173-85, 310-16, 325-26. The record also includes an additional registration (without corresponding evidence of use) for the mark ASPIRE TO MONEY for financial information. 42 TTABVUE 247-52 (Exhibit 20).

¹¹⁵ Applicant’s Notice of Reliance, 42 TTABVUE 228-32, 240-46, 260-66, 281-99 (Exhibit 17, 19, 22, 25, 26 and 27)

“smart-lending operations” for banks and finance companies, grants, scholarship programs and capital campaigns for schools and universities, social networking events, accounting and tax services, and venture capital and healthcare startup services.¹¹⁶

Applicant argues that “[i]n light of the substantial third-party use of the word ASPIRE in connection with credit card-related services, as well as in the financial services industry more broadly, consumers are used to distinguishing between various uses of ASPIRE in connection with financial services.”¹¹⁷ The Federal Circuit, however, has cautioned against taking “an overbroad view of what qualifies as a ‘similar good [or service]’” under the Sixth DuPont factor. *Omaha Steaks*, 128 USPQ2d at 1694.

[T]he “real world segment of the public is limited to the market or universe necessary to circumscribe purchasers or users of products or services like those being offered by the parties” under a common mark. Only if the other offerings under the ‘common’ mark are also directed to that relevant public is it reasonable to infer that they may have become conditioned to draw fine lines between sources of ‘related’ goods or services. ... To take an extreme example, ACE for canned, large peas could not escape likelihood of confusion with a prior use of ACE for canned, small peas because ACE is concurrently used by unrelated

¹¹⁶ 42 TTABVUE 173-78, 199-05, 214-21, 222-27, 235-39, 253-59, 275-80, 300-05, 317-24, 332-35, 400-11, 426-28, 429-34, 451-55, 460-64, 471-74, 564-68 (Exhibits 9, 13, 15, 16, 18, 21, 24, 28, 31, 34, 50, 51, 52, 56, 57, 60, 61, 63, 65, 72, 85). Exhibit 52 to Applicant’s Notice of Reliance (42 TTABVUE 410-11) does not identify the services offered by third-party ASPIRE CAPITAL but Opposer introduced evidence that this entity “is a private, long-only investment fund focused on making investments in US publicly traded biotechnology companies through the open market as well as direct investments including private placements, PIPEs, registered directs, and public offerings.” 50 TTABVUE 128-30, Woodruff Rebuttal Declaration, ¶ 30.

The third-party mark at Exhibit 34 (42 TTABVUE 332-35) no longer appears to be in use. 50 TTABVUE 4, 132-27 Woodruff Rebuttal Declaration, ¶ 2 (Exhibits 31).


¹¹⁷ Applicant’s Brief, 55 TTABVUE 30.

third parties on aircraft, clothing, computer services, hardware or even bread, bananas, milk and canned carrots. Properly defined, the relevant public in the example need be defined no broader than purchasers of canned peas, and the third party ACE marks outside the segment become essentially irrelevant. While ACE for peas is “weak” in that a right to prevent use of ACE on “related” products in the food industry is highly doubtful due to its “commonness”, such rights are not so limited as to be nonexistent except for an identical use.

Nat’l Cable Television Ass’n v. Am. Cinema Editors, Inc., 937 F.2d 1572, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991).

As discussed in Section IV.B. 1 above, the parties’ services are legally identical to the extent Applicant’s “banking and financing services” encompass Opposer’s “credit card services.” Accordingly, for purposes of the sixth *DuPont* factor, the properly defined relevant public is consumers of “credit card services.” In assessing the strength of Opposer’s mark, we therefore focus solely on those marks for credit card services identified above. The third-party ASPIRE-formative marks for services other than credit card services are “essentially irrelevant.” *Id.*

We find that nine third-party uses does not rise to the level of the “ubiquitous” or “considerable” use that the Federal Circuit has found to demonstrate weakness.¹¹⁸ *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 and n.2 (Fed. Cir. 2015) (discussing “voluminous evidence” of registration and use of paw print design elements; highlighting fourteen “notable examples of third-party registration and use”); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671,

¹¹⁸ We would arrive at the same conclusion even if we were to consider the ASPIRE credit cards of CapitalOne Canada and the  VISA card.

1674, n.1 (Fed. Cir. 2015) (referring to 26 third-party marks as “a considerable number”). And the record does not reflect the extent of use of the third-party marks such that we can conclude that the third-party uses, although smaller in number and therefore not powerful on their face, have affected the commercial strength of Opposer’s mark. *Juice Generation*, 115 USPQ2d at 1675 (widespread third-party use and registration is “powerful on its face”); *Palm Bay Imps.*, 73 USPQ2d at 1693 (recognizing that “[t]he probative value of third-party trademarks depends entirely upon their usage. ... [W]here [as here] the ‘record includes no evidence about the extent of [third-party] uses ... [t]he probative value of this evidence is ... minimal.”).

Further, Opposer has successfully enforced its rights against some third-parties. *Burns Philp Food Inc. v. Modern Prods. Inc.*, 24 USPQ2d 1157, 1158 n.2 (TTAB 1992) (policing efforts go to the strength of the mark); 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11.91 (5th ed. March 2023 update) (“It has been observed that an active program of prosecution of infringers, resulting in elimination of others’ uses of similar marks, enhances the distinctiveness and strength of a mark: ‘since no one else uses a similar sounding name, plaintiff’s name looks and sounds all the more unique.’”) (quoting *Dictaphone Corp. v. Dictamatic Corp.*, 199 USPQ 437 (D. Or. 1978)). As discussed above, Aspire Federal Credit Union and SECU ceased use of the ASPIRE mark after objection from Opposer. Mr. Stone further testified that:

- “[I]n 2003, Opposer’s predecessor in interest opposed a third-party application [for the mark ASPIRE529 PLAN,] which was abandoned with prejudice.”¹¹⁹
- “[I]n 2014, Opposer’s counsel contacted counsel for Umpqua Bank and requested that it withdraw its application for ASPIRE CHECKING and cease use of the mark. The bank agreed and withdrew its application ... and the withdrawn mark does not appear on [Umpqua Bank’s] [web]site.”¹²⁰
- “[I]n 2015, Opposer cancelled a third-party registration” for the mark ASPYRE SETTLEMENT FUNDING.¹²¹

In addition, “[i]n weighing its trademark enforcement efforts, Opposer considers the relevant size and scope of the institution and also accounts for the trend” in the “number of [banks, particularly community banks, and] credit unions declining on a consistent basis each year” due to consolidation and closure.¹²² “[M]any banks and credit unions cease to do business in relatively short periods of time”; “credit unions are generally much smaller institutions than bank[s]”; and “credit unions are limited to a field of membership based on occupation, association or community.”¹²³ To illustrate Opposer’s point, Mr. Stone testified that a few third-party uses of ASPIRE that Applicant produced during discovery are no longer in use.¹²⁴ We recognize that

¹¹⁹ 51 TTABVUE 5, 52-55, Stone Rebuttal Declaration, ¶ 13, Exhibits 5 and 6.

¹²⁰ 51 TTABVUE 5, 56-60, Stone Rebuttal Declaration, ¶ 14, Exhibits 7 and 8.

¹²¹ 51 TTABVUE 5, 61-65, Stone Rebuttal Declaration, ¶ 15, Exhibits 9 and 10.

¹²² 51 TTABVUE 6-8, Stone Rebuttal Declaration, ¶¶ 19-23, 26.

¹²³ 51 TTABVUE 8, Stone Rebuttal Declaration, ¶¶ 24, 26.

¹²⁴ 51 TTABVUE, Stone Rebuttal Declaration, ¶¶ 28, 29, and 31, and Exhibits 24-27, 29 (ASPIRE BANK (aspireonline.site/#), ASPIRE BANK (aspirecrestbank.com), and ASPIRE PAYMENTS (aspirepayments.co)).

a trademark owner need not police inconsequential or transient uses of its mark. *Cf. McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1899-1900 (TTAB 1998) (McDonald's failure to object to some other "MC" formative marks did not weaken its mark.).

b. Conceptual Strength


In determining the conceptual strength of Opposer's mark, "we evaluate its intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary (or fanciful) continuum of words." *In re Davia*, 110 USPQ2d at 1815. "Marks that are descriptive or highly suggestive are entitled to a narrower scope of protection, *i.e.*, are less likely to generate confusion over source identification, than their more fanciful counterparts." *Juice Generation*, 115 USPQ2d at 1675.

Because Opposer's mark is registered on the Principal Register without a claim of acquired distinctiveness, we must presume that it is inherently distinctive, *i.e.* that it is at least as distinctive as a suggestive term for Opposer's services. Trademark Act Section 7(b), 15 U.S.C. § 1057(b). Indeed, we find that Opposer's mark suggests that users of Opposer's credit card services will ascend, soar or accomplish particular goals.¹²⁵

Applicant argues that the number of third-party registrations of record demonstrates that the mark ASPIRE "has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that

¹²⁵ We take judicial notice that the word "aspire" means "to seek or attain or accomplish a particular goal"; "ascend, soar" Merriam-Webster Dictionary (<https://www.merriam-webster.com/dictionary/aspire>) (last visited May 8, 2023).

segment is relatively weak.”¹²⁶ For the reasons explained above, however, the only third-party marks relevant to the conceptual strength of Opposer’s mark are those used and/or registered for credit card services. There is one third-party mark registered for credit card services, Registration No.


6793418 (for “issuing credit cards; providing personal loans and lines of credit”), and Opposer has brought a petition to cancel this registration that is currently pending before the Board.¹²⁷ This sole third-party registration and the third-party marks in use for credit card services identified above reinforce our conclusion that Opposer’s ASPIRE mark is suggestive of its “credit card services” but we find the number of third-party marks insufficient to demonstrate that Opposer’s mark is conceptually weak.

c. Summary Regarding Strength of Opposer’s Mark

Weighing all the pertinent evidence, we find that Opposer has not shown that its mark has any particular commercial strength, but Applicant has not shown that Opposer’s mark is commercially or conceptually weak such that it is entitled to a narrow scope of protection. Accordingly, we find that Opposer’s ASPIRE mark is entitled to a normal scope of protection accorded inherently distinctive marks.

¹²⁶ Applicant’s Brief, 55 TTABVUE 31 (quoting *Juice Generation*, 115 USPQ2d at 1675) (internal quotation marks omitted).


¹²⁷ Applicant’s Notice of Reliance, 42 TTABVUE 98-125 (Exhibit 7). On rebuttal, Opposer introduced evidence to show that it has petitioned to cancel the registration for this mark and the cancellation action is pending. 51 TTABVUE 6 and 81-94, Stone Rebuttal Declaration, ¶ 18 and Exhibit 15 thereto.

3. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we consider the “similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *DuPont*, 177 USPQ at 567; *see also Stone Lion*, 110 USPQ2d at 1160. The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs.*, 101 USPQ2d at 1721. The focus is on the recollection of the average purchaser of credit card services, who normally retains a general rather than specific impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

We do not predicate our analysis on a dissection of the involved marks; we consider the marks in their entirety. *Stone Lion*, 110 USPQ2d at 1160; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, “there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

For a number of reasons, we find that the word ASPIRE is the dominant feature

of Applicant's marks . It is the first word in the marks “most likely to be impressed upon the mind of a purchaser and remembered.” *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988); *see also Palm Bay Imps.*, 73 USPQ2d at 1692. The term BANK also is generic for Applicant's “banking services” and has been disclaimed. It is well-settled that disclaimed generic or descriptive matter may have less significance in likelihood of confusion determinations because consumers tend to focus on more distinctive portions of marks. *Detroit Athletic*, 128 USPQ2d at 1050 (citing *In re Dixie Rests.*, 41 USPQ2d at 1533-34); *Palm Bay Imps.*, 73 USPQ2d at 1692 (“That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark”); *Cunningham v. Laser Golf*, 55 USPQ2d at 1846 (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2011) (disclaimed matter is often “less significant in creating the mark's commercial impression”). ASPIRE is the only inherently distinctive wording in Applicant's marks and it is displayed in a font size twice as large as the word BANK.

In addition, “in a mark ‘consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon

purchasers, to be remembered by them, and to be used by them to request the goods.” *Sabhnani v. Mirage Brands*, 2021 USPQ2d at *32 (quoting *Aquitaine Wine USA*, 126 USPQ2d at 1184). “The verbal portion of a word and design mark ‘likely will appear alone when used in text and will be spoken when requested by consumers.’” *Aquitaine Wine*, 126 USPQ2d at 1184 (quoting *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012); see also *Jack Wolfskin*, 116 USPQ2d at 1134 (“We have also explained that when a mark consists of both words and a design, ‘the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.’”) (citation omitted); *Orange Bang, Inc. v. Olé Mexican Foods, Inc.*, 116 USPQ2d 1102, 1116 (TTAB 2015) (finding bull design and geometric background design “not sufficient to distinguish” Applicant’s mark from Opposer’s mark “because [the design elements] would not be articulated by consumers in referring to the goods”).

We find that to be the case here as the triangular design element in Applicant’s marks is a common geometric shape unlikely to have much source-identifying significance. *Cf. In re Ocean Tech., Inc.*, 2019 USPQ2d 450686, at *5 (TTAB 2019) (circular design around wording in proposed mark found to be “a common geometric shape that consumers likely would perceive as a background design or carrier to the enclosed wording, rather than as a separable design element with trademark significance.”). Even if consumers were to perceive the design as a “mountain peak,” as intended by Applicant, this would reinforce the commercial impression of the word ASPIRE, which means to ascend or soar.

Notwithstanding that the dominant portion of Applicant's marks is the whole of Opposer's mark, Applicant argues that the marks are distinguishable in appearance, sound, connotation and commercial impression. With respect to appearance, Applicant argues that the parties' marks are "not alike" because "ASPIRE BANK consists of two words, rather than one" and "the particular stylized design ... includes a mountain feature in the background."¹²⁸ For the reasons discussed, we find that consumers encountering Applicant's marks are likely to focus and rely on the ASPIRE portion of the marks for source identification. *Detroit Athletic*, 128 USPQ2d at 1050 (citing *In re Dixie Rests.*, 41 USPQ2d at 1533-34).

Indeed, likelihood of confusion is often found where, as here, the entirety of one mark is incorporated as the dominant element in another mark. *See, e.g. In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) ("the presence of an additional term in the mark does not necessarily eliminate the likelihood of confusion if some terms are identical,"); *In re U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (CAREER IMAGE for women's clothing stores and women's clothing likely to cause confusion with CREST CAREER IMAGES for uniforms including items of women's clothing); *In re South Bend Toy Mfg. Co.*, 218 USPQ 479, 480 (TTAB 1983) (LIL' LADY BUGGY for toy doll carriages and LITTLE LADY for doll clothing); *Johnson Publ'g Co. v. Int'l Dev. Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner); *In re Strathmore Prods., Inc.*,

¹²⁸ Applicant's Brief, 55 TTABVUE 34.

136 USPQ 81, 82 (TTAB 1962) (GLISTEN and GLISS'N phonetic equivalents with the same meaning since GLISS'N is a contraction of GLISTEN).

We further find unpersuasive Applicant's argument that "the stylization of [the] ASPIRE BANK [Marks] is consistent with the stylization in Applicant's APEX BANK trade house mark, which further prevents consumer confusion."¹²⁹ Applicant's applied-for marks do not include the APEX BANK house mark. We are limited to comparing the parties' marks as depicted in the drawing pages. Trademark Rule 2.52, 37 C.F.R. § 2.52 ("A drawing depicts the mark sought to be registered."). *See, e.g., Denney v. Elizabeth Arden Sales Corp.*, 263 F.2d 347, 120 USPQ 480, 481 (CCPA 1959) (court refused to consider "house mark" used in conjunction with the mark at issue, where the house mark was not part of the mark in the application); *Blue Cross and Blue Shield Assoc. v. Harvard Cmty. Health Plan Inc.*, 17 USPQ2d 1075, 1077 (TTAB 1990) ("It need hardly be said that in determining the applicant's right to registration, only the mark as set forth in the application may be considered; whether or not the mark is used with an associated house mark is not controlling.") (internal quotation marks omitted); *Wisconsin Historical Society v. Ringling Bros.-Barnum & Bailey*, 190 USPQ 25, 29 n.3 (TTAB 1976) (opposer's trade name or mark CIRCUS WORLD MUSEUM and applicant's applied for mark CIRCUS WORLD held confusingly similar despite the fact that applicant's actual use of CIRCUS WORLD was in conjunction with its house mark "Ringling Bros.-Barnum & Bailey"). Further, because Opposer's mark is in standard characters, "we must consider that it may be

¹²⁹ Applicant's Brief, 55 TTABVUE 7.

presented in any font style, size or color, including the same font, size and color as the literal portions of Applicant’s mark” heightening the visual similarities between the parties’ marks. *Aquitaine Wine*, 126 USPQ2d at 1186.

Turning to sound, Applicant argues that “ASPIRE BANK and ASPIRE do not sound alike” because the marks have a different number of syllables and “the addition of ‘bank’ at the end of ASPIRE BANK brings an entirely new sound to ASPIRE BANK that is unlike that of ASPIRE alone.”¹³⁰ It is foreseeable, however, that consumers, having a penchant to shorten marks, may drop the word “bank” when pronouncing Applicant’s marks given that the word is generic for Applicant’s services. *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016) (consumers may drop the highly descriptive term ‘Blonde’ when calling for TIME TRAVELER BLONDE beer) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring) (“[T]he users of language have a universal habit of shortening full names—from haste or laziness or just economy of words[.]”)); *see also* *Aquitaine Wine*, 126 USPQ2d at 1188 (“[C]onsumers often have a propensity to shorten marks” when verbally asking for them); *Spoons Rests. v. Morrison*, 23 USPQ2d at 1740-41 (recognizing consumers’ “propensity for shortening names with which they have become familiar”); *Big M. Inc. v. U.S. Shoe Corp.*, 228 USPQ 614, 616 (TTAB 1985) (“[W]e cannot ignore the propensity of consumers to often shorten trademarks[.]”). Even if, however, consumers were to articulate the generic word “bank” when referring to Applicant’s marks, that additional word “does not affect the identical

¹³⁰ Applicant’s Brief, 55 TTABVUE 33.

pronunciation of the source-identifying portion of [Applicant's] marks and the entirety of [Opposer's] mark." *Orange Bang. v. Olé Mexican Foods*, 116 USPQ2d at 1116.

As to connotation, Applicant argues:

The word "bank" at the end of the ASPIRE BANK mark[s] clearly establishes that Applicant is a bank. ... Indeed, virtually all states in the United States prohibit the use of terms indicating that a business is a bank unless the business is legally authorized to engage in banking. The obvious reason for these regulations is that consumers attribute significant meaning to the word "bank." Thus, the use of the word "bank" in the ASPIRE BANK Applications has a very specific connotation and indicates to consumers that the services are being provided by a business authorized by law to engage in banking activities. On the other hand, Opposer is not a bank.¹³¹

As explained, the word ASPIRE is the dominant portion of Applicant's mark and creates the same commercial impression as Opposer's ASPIRE mark. The addition of the word BANK does not meaningfully change this connotation or commercial impression because, even though Opposer is not a bank, "credit card services" are encompassed within banking services (as discussed in Section IV.B.1 above). As such, consumers are likely to perceive (i) Applicant's Marks as a variant of Opposer's mark, identifying an extension of Opposer's services to encompass a broader range of banking services, or (ii) Opposer's mark as a shortened version of Applicant's marks identifying a subset of Applicant's services.

Next, Applicant argues that "the examining attorney approved Applicant's ASPIRE BANK Applications over a letter of protest by Opposer without so much as

¹³¹ Applicant's Brief, 55 TTABVUE 35-36.

an office action. In other words, the examining attorney considered Opposer's ASPIRE Registration and did not believe that there was any risk of confusion among consumers that would warrant further inquiry."¹³² "[I]n an inter partes proceeding such as this, where we have before us more evidence on the issue under Section 2(d) than the Examiner could possibly have had ... we necessarily have the authority to reach whatever decision is supported by this record." *McDonald's Corp. v. McClain*, 37 USPQ2d 1274, 1277 (TTAB 1995); *Hilson Research Inc. v. Society for Human Res. Mgmt.*, 27 USPQ2d 1423, 1439 (TTAB 1993) ("The Board is not bound by the actions of the Trademark Examining Attorney who, of course, did not have the benefit of the evidence which has been introduced in these [consolidated opposition and cancellation] proceedings."). The examining attorney's approval of Applicant's marks for registration is not dispositive nor relevant to this inter partes proceeding. *Miss Universe L.P. LLP v. Cmty. Mktg. Inc.*, 82 USPQ2d 1562, 1571 (TTAB 2007) ("[I]t is not dispositive or even relevant that applicant was able to convince the Trademark Examining Attorney during ex parte examination to pass applicant's mark to publication.").


Finally, Applicant argues that "the banking industry has a recognized history of similar marks, so consumers are more likely to notice what, in other contexts, may be relatively minor differences in marks."¹³³ As Applicant has pointed out numerous times, Opposer is not a bank. In any event, even if consumers were able to distinguish


¹³² Applicant's Brief, 55 TTABVUE 17.

¹³³ Applicant's Brief, 55 TTABVUE 8.

between some similar marks in the banking field it does not ipso facto mean that consumers would be able to distinguish the parties' marks in this case. Each case must be decided on its own merits. *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (“[E]ach application must be considered on its own merits.”); *In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (same).

In sum, where, as here, the parties' marks are used in connection with in-part legally identical services, the degree of similarity between the marks necessary to support likely confusion declines. *Century 21 Real Estate v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992); *see also Cai v. Diamond Hong*, 127 USPQ2d at 1801. When we compare the parties' marks in their entireties, the addition of the word BANK and the triangle design in Applicant's marks is

insufficient to preclude confusion. Applicant's marks ,

and , in their entireties, are highly similar to Opposer's registered standard-character mark ASPIRE in overall appearance, sound, connotation and commercial impression. In reaching this determination, we are mindful that “marks must be considered in light of the fallibility of memory and not on the basis of side-by-side comparison.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014).

4. Sophistication of the Purchasers

Under the forth *DuPont* factor we consider “the conditions under which and buyers to whom sales are made, i.e. ‘impulse’ v. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. A heightened degree of care when making a purchasing decision may tend to minimize likelihood of confusion. *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 224 USPQ 969, 971 (Fed. Cir. 1985) (because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED). Conversely, impulse purchases of inexpensive services may tend to have the opposite effect. *Palm Bay Imps.*, 73 USPQ2d at 1695.

Applicant argues that “consumers of banking and financing services are sophisticated purchasers that are accustomed to distinguishing between similar marks. These services are not typically subject to impulse buying.”¹³⁴ Applicant points to decisions from the Eighth Circuit and the United States District Court for the Western District of Michigan for the propositions that “consumers tend[] to exercise a relatively high degree of care in selecting a bank” and “the services provided by banks are not services that are normally subject to impulse buying.”¹³⁵ We are not bound by the decisions of these courts and must consider the record before

¹³⁴ Applicant’s Brief, 55 TTABVUE 8.

¹³⁵ Applicant’s Brief, 55 TTABVUE 41 (citing *First Nat’l Bank in Sioux Falls v. First Nat’l Bank S.D.*, 153 F.3d 885, 889 (8th Cir. 1998) and *Empire Nat’l Bank of Traverse City v. Empire of Am. FSA*, 559 F. Supp. 650, 656 (W.D. Mich. 1983)).

us.

Neither Applicant's involved application nor Opposer's registration restrict the services to a specific type of purchaser.¹³⁶ The banking, financing and credit card services at issue here are general consumer services offered to the public at large. While many consumers of these services may be savvy and likely to exercise care in selecting providers, many other consumers are not sophisticated in financial matters and would not be likely to exercise any particular degree of care in choosing the services. For example, the record shows that banking and credit card services are marketed to consumers such as students who are new to banking and credit services and may not be likely to exercise any particular degree of care in selecting a provider.¹³⁷ Because the standard of care for the likelihood of confusion analysis is that of the least sophisticated consumer and the record is devoid of evidence that such consumers would exercise more than ordinary care, *Stone Lion*, 110 USPQ2d at 1163, the fourth *DuPont* factor is neutral.

5. Balancing the *DuPont* Factors

The parties' services are legally identical, in part, and the channels of trade and relevant consumers overlap and are otherwise closely related. The marks are highly similar in appearance, sound, connotation and commercial impression. The sophistication of the relevant purchasers is neutral. Because the first, second, and

¹³⁶ Accordingly, we give no consideration to Applicant's argument regarding the different income levels of the parties' consumers, filed under seal at 56 TTABVUE 19, 40.

¹³⁷ Applicant's Notice of Reliance, 42 TTABVUE 490-93, 507-16 (Exhibits 70, 73, 74).

third *DuPont* factors weigh in favor of Opposer and no factors weigh in favor of Applicant, we find that consumer confusion is likely.¹³⁸

Decision: The opposition is sustained under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).

¹³⁸ It bears pointing out that many of Applicant's "real world" arguments would be appropriate in a trademark infringement case in court where "the district court considers the full range of a mark's usages, not just those in the application." *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049, 2054-55 (2015). Such arguments, however, are not persuasive here as we are bound to consider only the marks and services identified in Applicant's applications and Opposer's registration.