

This Opinion is Not a
Precedent of the TTAB

Mailed: January 29, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
—

eBay Inc.

v.

Afrebay, Inc.
—

Opposition No. 91266958
—

Amy J. Tindell and Hope Hamilton of Holland & Hart LLP for eBay Inc.

Rexford Brabson, Alexandra Berkowitz, and Jorge Franco of T-Rex Law, P.C. for
Afrebay, Inc.

—
Before Larkin, Johnson, and Cohen,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Afrebay, Inc. (“Applicant”) seeks registration on the Principal Register of the mark
shown below



for the following services:

Advertising and marketing services, namely, promoting the goods and services of others; Advertising, marketing and promotion services; On-line retail store services featuring a wide variety of consumer goods of others; General business networking referral services, namely, promoting the goods and services of others by passing business leads and referrals among group members; Providing business information regarding charitable or humanitarian organizations; Providing an on-line searchable database featuring business information and business contacts, in International Class 35, and

Credit card payment processing services; Debit card transaction processing services; Payment processing services, namely, credit card and debit card transaction processing services; Processing of credit card payments; Processing of debit card payments, in International Class 36.¹

eBay Inc. (“Opposer” or “eBay”) opposes registration of Applicant’s mark on two grounds: (1) under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the mark EBAY, registered and used by Opposer for a variety of goods and services, as to be likely, when used in connection with the services identified in the application, to cause confusion, to cause mistake, or to deceive; and (2) under Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c), on the ground that the EBAY mark became famous prior to the filing date of the

¹ Application Serial No. 90076450 was filed on July 27, 2020 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce. Applicant describes its mark as follows: “The mark consists of a filled outline of the continent of Africa in orange and the wording ‘AFREBAY’ on the top right next to the filled outline of Africa. The letters ‘AFRE’ are orange and the letters ‘BAY’ are black. Under ‘AFREBAY’ are thirteen orange rhombuses. The rhombuses are an orange gradient from light to dark orange. Under the orange rhombuses is the wording ‘REACH THE SOURCE’ in black.” The colors black and orange are claimed as a feature of the mark. Applicant has disclaimed the exclusive right to use the outline of the continent of Africa.

opposed application, and Applicant's use of the applied-for mark is likely to dilute the distinctiveness of Opposer's mark by blurring.

The case is fully briefed.² We sustain the opposition based on Opposer's Section 2(d) claim and do not reach its dilution claim.

I. Record and Evidentiary Matters

The record consists of the pleadings,³ the file history of the opposed application, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), and the following materials submitted by the parties:

Opposer

- Declaration of Valente Tolero, Opposer's Paralegal for Global Intellectual Property, and Exhibits 1-85 thereto, 34 TTABVUE 1-623;⁴
- Rebuttal Declaration of Valente Tolero and Exhibits 86-89 thereto, 42 TTABVUE 1-132;

² Citations in this opinion to the briefs and other materials in the case docket refer to TTABVUE, the Board's online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. The numbers following TTABVUE usually do not correspond to the numbered pages of documents, particularly briefs. Opposer's main brief appears at 47 TTABVUE and its reply brief appears at 50 TTABVUE. Applicant's brief appears twice at 48 and 49 TTABVUE. We will cite the brief filed at 48 TTABVUE.

³ The operative pleadings are Opposer's Notice of Opposition, 1 TTABVUE 1-54, and Applicant's Answer, 5 TTABVUE 1-14. Applicant denied the salient allegations of the Notice of Opposition and originally interposed nine self-styled affirmative defenses, but subsequently withdrew all but two of them. 8 TTABVUE 2-4. The remaining "affirmative defenses" are merely amplifications of Applicant's denials of likelihood of confusion and likelihood of dilution "and will be treated as such." *JNF LLC v. Harwood Int'l Inc.*, 2022 USPQ2d 862, at *3 n.8 (TTAB 2022).

⁴ The body of the Tolero Declaration, 34 TTABVUE 599-615, follows 85 exhibits consisting of many hundreds of pages. The better practice is to file a declaration followed by the exhibits referenced in the declaration.

- Declaration of Hope Hamilton, one of Opposer's attorneys, and Exhibits A-F thereto, 31 TTABVUE 1-23;
- Rebuttal Declaration of Hope Hamilton and Exhibits G-J thereto, 43 TTABVUE 1-30;
- Notice of Reliance and Exhibits A-S thereto, 32 TTABVUE 1-168; 33 TTABVUE 1-5; and
- Rebuttal Notice of Reliance and Exhibits T-U thereto, 41 TTABVUE 1-78.

Applicant

- Declaration of Lekan Salaam, Applicant's founder, 38 TTABVUE 1-35; and
- Notice of Reliance and Exhibits A-I thereto, 37 TTABVUE 1-835; 39 TTABVUE 1-47.

Evidentiary Matters

During trial, Opposer moved to strike Exhibits A-I to Applicant's Notice of Reliance. 40 TTABVUE 1-8. Applicant filed an opposition to the motion, 44 TTABVUE 1-11, and Opposer filed a reply brief. 45 TTABVUE 1-8. The Board deferred determination of the motion until final decision. 46 TTABVUE 1.

In an appendix to its main trial brief, Opposer renewed its objections to the exhibits to Applicant's Notice of Reliance, and asserted other substantive objections to the exhibits and to portions of the Salaam Declaration. 47 TTABVUE 52-55. Applicant responded to Opposer's evidentiary objections in an appendix to its trial brief, and asserted its own evidentiary objections. 48 TTABVUE 53-57. Opposer addressed Applicant's objections and arguments in an appendix to Opposer's reply brief. 50 TTABVUE 26-31.

Motion to Strike

Timeliness

We turn first to Opposer's motion to strike. Applicant filed its evidence, including its Notice of Reliance, on Monday, February 27, 2023, the last day on which it could timely submit evidence after the close of its trial period on Saturday, February 25, 2023, as last reset by Opposer's consented motion to extend. 30 TTABVUE 1; 29 TTABVUE 1. *See Icon Health & Fitness, Inc. v. Eifit LLC*, 2022 USPQ2d 315, at *2 n.6 (TTAB 2022) (citing Trademark Rule 2.196, 37 C.F.R. § 2.196). Opposer moved to strike Applicant's Notice of Reliance on April 4, 2023, more than a month later and after Opposer's rebuttal period had begun. 40 TTABVUE. Opposer moved "to strike Applicant's Notice of Reliance and referenced evidence in part on grounds that it does not conform to the procedural and substantive requirements of the Trademark Trial and Appeal Board." *Id.* at 2. Opposer noted in its motion that it "will assert additional substantive objections to this evidence during briefing." *Id.* at 3-7.

Applicant argues in its brief on the motion to strike that the motion "should be given no consideration for the simple fact that it was not timely filed," 44 TTABVUE 3, claiming that "the time period for filing a motion is twenty (20) days," *id.* (citing Trademark Rule 2.127(a) and Trademark Trial and Appeal Board Manual of Procedure ("TBMP") Section 502.02(b)),⁵ and that Opposer did not file its motion to

⁵ Both parties frequently cite the TBMP as the source of governing law and rules. The TBMP "does not modify, amend, or serve as a substitute for any statutes, rules or decisional law and is not binding upon the Board," TBMP (Introduction), and it does not have the force of law. *See Rosenruist-Gestao E Servicios LDA v. Virgin Enters. Ltd.*, 511 F.3d 437, 85 USPQ2d 1385, 1393 (4th Cir. 2007). The Federal Circuit has stated, however, that "the TBMP is accorded a degree of deference to the extent that it has the 'power to persuade,'" *Cai v. Diamond Hong*,

strike “until April 4, 2023, a total of thirty-six (36) days later.” *Id.*⁶ Opposer responds in its reply brief on the motion that “[t]he only requirement is that such objections be made ‘promptly, preferably by motion to strike if the defect is one that can be cured,’” 45 TTABVUE 2 (quoting TBMP § 707.02(b)),⁷ and that Opposer’s motion “easily meets this standard because [it] was filed before the end of the Testimony Period and with more than sufficient time – over two months – for Applicant to cure any deficiencies as allowed by the Board prior to the commencement of briefing.” *Id.*

As Opposer acknowledges, procedural objections to testimony and evidence must be raised promptly to allow the adverse party an opportunity to cure any procedural defects. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 2022 USPQ2d 1242, at *8 n.21 (TTAB 2022); TBMP § 707.02(b) and cases cited therein. Procedural objections to evidence submitted under notice of reliance ordinarily should be asserted “before the opening of the next testimony period following that in which the material was offered into the record.” *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031, 1040 (TTAB 2010); *cf. FUJIFILM SonoSite, Inc. v. Sonoscape Co.*, 111 USPQ2d 1234, 1235 (TTAB 2014) (considering the applicant’s motion, filed the day prior to the opening of its testimony period, to strike portions of the opposer’s notice of reliance

Inc., 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000)), and the court has noted that it “has affirmed the TTAB’s determinations, specifically with regard to evidence admission, when they are clearly in line with the language of the TBMP.” *Id.* (citations omitted).

⁶ Applicant renews its untimeliness objection and repeats its supporting arguments in an appendix to its trial brief. 48 TTABVUE 54-55.

⁷ Opposer repeats its arguments against untimeliness in an appendix to its reply brief. 50 TTABVUE 28-29.

filed on the last day of the opposer's testimony period). Opposer filed its motion to strike during its rebuttal period, and 36 days after the filing of Applicant's Notice of Reliance. We conclude, under these circumstances, that Opposer did not "promptly" move to strike Applicant's Notice of Reliance, and thus forfeited all procedural objections asserted in the motion to strike.

We turn next to a determination of which of Opposer's objections were procedural rather than substantive in nature because substantive objections to a notice of reliance may be asserted for the first time in the objecting party's brief. *See, e.g.*, TBMP § 707.02(c) and cases cited therein.

Opposer's Various Objections

Opposer originally objected to Exhibit A, consisting of third-party registration certificates, on the ground that "[w]ith the exception of the 13 registrations referenced in Applicant's Answer (5 TTABVUE 6-11), Applicant did not produce these documents during the discovery period even though they were requested by Opposer, in violation of Federal Rules of Civil Procedure 26 and 37." 40 TTABVUE 3. Opposer objected to Exhibit B, consisting of third-party applications and notices of allowance, on the same ground. *Id.* Opposer reiterated these objections in the appendix to its main brief. 47 TTABVUE 52-53.

Applicant argued in its opposition to Opposer's motion to strike that the objected-to documents were all public records and that Applicant was not obligated to produce the documents in discovery because a party need not investigate third-party use to respond to discovery requests. 44 TTABVUE 5-6. In its reply brief on the motion to

strike, Opposer responded that “it strains credulity that Applicant’s allegedly diligent and reasonable searches during the Discovery Period did not identify these responsive documents.” 45 TTABVUE 6.

Opposer objected to Exhibits C-E, consisting of Opposer’s responses to Applicant’s discovery requests, on the grounds that Applicant did not cite a rule for the admission of the responses under notice of reliance, specify the responses on which it relies, or associate the responses with particular issues. *Id.* at 4-5.⁸ Applicant responded in its opposition to the motion to strike that such citations are unnecessary, but that if they were, this was a procedural defect that was curable. 44 TTABVUE 8. In its reply brief on the motion to strike, Opposer responded that the TBMP provides for objection to a notice of reliance where it does not comply with the procedural requirements of the particular rule under which it was submitted, 45 TTABVUE 5, and that Applicant’s did not cite a “particular rule” with respect to these exhibits. With respect to Opposer’s objections regarding Applicant’s submission of the entirety of Opposer’s discovery responses, Opposer noted that Applicant’s counsel was previously admonished in another case for the same practice in a decision in which the Board stated that a similar notice of reliance did “not comply with Trademark Rule 2.122(g).” *Id.* at 4 (quoting *iFit Inc. v. Eifit LLC*, Opposition No. 91264393 (TTAB Nov. 30, 2022) (38 TTABVUE 11)).

⁸ Opposer also objected to Applicant’s alleged reliance on Opposer’s denials of Applicant’s requests for admission. 40 TTABVUE 4.

Opposer objected to Exhibits F-I to Applicant's Notice of Reliance, consisting of documents produced by Opposer in discovery (Exhibit F), Internet webpages showing third-party use of "BAY-" formative marks (Exhibit G), a dictionary definition of the word "bay" (Exhibit H), and online articles regarding the African slave trade (Exhibit I), on the grounds that they are inadmissible under notice of reliance under Trademark Rule 2.122 and, with respect to Exhibits G and I, that they were not produced during discovery. 40 TTABVUE 6-7.

In its main trial brief, Opposer amplifies certain objections made in its motion to strike, 47 TTABVUE 52-55, arguing in each instance that the Board should either not consider the evidence or give it little weight. Opposer also asserts a hearsay objection to Exhibit I to the extent that the referenced articles were offered for the truth of their contents. *Id.* at 53.

Opposer's objections to Exhibits A, B, G, and I on the ground that they were not produced by Applicant in discovery are substantive in nature, and thus could have been raised for the first time in Opposer's brief, because the alleged defects regarding these exhibits could not have been cured even if Opposer had moved promptly to strike them. We **overrule** these objections, however, because Applicant was under no obligation to investigate third-party uses to respond to Opposer's discovery requests, *see, e.g., Sheetz of Del., Inc. v. Doctor's Assocs. Inc.*, 108 USPQ2d 1341, 1348 (TTAB 2013), and Opposer has not shown that these documents were in Applicant's

possession, custody, or control when Applicant responded to Opposer's discovery requests.⁹

Opposer's objections to Applicant's submission of Opposer's discovery responses in Exhibits C-E to Applicant's Notice of Reliance on the grounds that Applicant did not cite a rule for the admission of the responses under notice of reliance, specify the responses on which it relies,¹⁰ or associate the responses with particular issues, are procedural in nature and are thus forfeited because the alleged defects could have been cured if Opposer had moved to strike promptly. *Flame & Wax, Inc. v. Laguna Candles, LLC*, 2022 USPQ2d 714, at *12-13 (TTAB 2022).

Opposer's objections to Exhibits F-I on the ground that Applicant cited no particular rule for their admissibility under notice of reliance are procedural in nature and are thus forfeited because this alleged defect could have been cured if Opposer had moved to strike promptly. *Id.* Opposer's hearsay objection to Exhibit I is substantive, not procedural, and is thus not forfeited and could appropriately be raised for the first time in Opposer's brief, but it is moot because the Board considers Internet evidence submitted under notice of reliance only for what is shown on its face, and not for the truth of assertions within it, "whether there is an objection or

⁹ Opposer does not refute Applicant's claim in its brief that the referenced documents "were not in the possession, custody, or control of Applicant during the discovery period" and that "Opposer received them only days after Applicant found them." 48 TTABVUE 57.

¹⁰ In the *iFit* case cited by Opposer, the Board found that the applicant's failure to identify the specific discovery responses on which it relied justified striking the exhibits, but allowed the applicant an opportunity to cure this defect. 38 TTABVUE 11. We find here that Opposer forfeited its right to object on this and other procedural grounds by not promptly moving to strike Applicant's Notice of Reliance.

not.” *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1040 n.18 (TTAB 2018).

We have considered all of the exhibits to Applicant’s Notice of Reliance for whatever probative value they may have.

Opposer’s Objections to the Salaam Declaration

In the appendix to its main brief, Opposer objects to various paragraphs in and exhibits to the Salaam Declaration. Opposer first objects to paragraphs 5-8 to the Salaam Declaration, which purport to describe various third-party marks, registrations, and applications, Salaam Decl. ¶¶ 5-8 (38 TTABVUE 3-33),¹¹ on the ground that the documents referred to in Mr. Salaam’s testimony were not produced in discovery. 47 TTABVUE 52-53. As discussed above in connection with Opposer’s motion to strike these exhibits as attachments to Applicant’s Notice of Reliance, Opposer has not shown that these documents were in Applicant’s possession, custody, or control when Applicant responded to Opposer’s discovery requests. We **overrule** Opposer’s objections to Mr. Salaam’s testimony about these third-party marks.

Opposer objects to paragraphs 8 and 14 of the Salaam Declaration, in which he testified that “[b]ecause of the third party registrants and applicants noted above, Opposer’s right to exclude other users from using the word ‘bay’ is minimal, if any. Indeed, consumers are used to being exposed to use of the word ‘bay’ or a close variation thereof in association with retail, trade, shopping and other commerce

¹¹ The referenced exhibits are attached to Applicant’s Notice of Reliance as Exhibits A-B and G, 37 TTABVUE 7-352, 582-818, rather than to the Salaam Declaration per se.

services,” Salaam Decl. ¶ 8 (38 TTABVUE 32-33), and that “Applicant first used its mark in a manner analogous to trademark use in 2013.” Salaam Decl. ¶ 14 (38 TTABVUE 34). Opposer first objects pursuant to Rule 701 of the Federal Rules of Evidence on the grounds that Mr. Salaam “lacks expertise in trademark law necessary to assert conclusions regarding what use may be ‘analogous to trademark use,’ which is a technical area of trademark law,” and that he “lacks expertise in trademark law necessary to assert conclusions regarding the scope of Opposer’s rights in the context of alleged third-party use and registration, which is a legal issue.” 47 TTABVUE 53-54. Opposer also objects to this testimony “on the basis of hearsay given Applicant provides no evidence to support the incorrect statements that Applicant currently uses and has used Applicant’s Mark since 2013,” and because “[t]his testimony is inconsistent with Applicant’s own discovery responses that confirm Applicant does not use and has never used Applicant’s Mark, and with Opposer’s evidence confirming that Applicant’s website is non-functional and Applicant’s social media remains dormant.” *Id.* at 54.

Mr. Salaam did not establish expertise in trademark law, so we **sustain** Opposer’s objection to his testimony regarding the legal effect of the referenced third-party uses on the protectability of Opposer’s mark and regarding whether Applicant first used its mark in a manner “analogous to trademark use,” and we have given it no consideration in our decision. *See Plyboo Am. Inc. v. Smith & Fong Co.*, 51 USPQ2d 1633, 1641 (TTAB 1999) (witness did not establish expertise in trademark law and was not competent to opine regarding descriptiveness of mark). The remainder of

Opposer's objections go to the weight to be given the rest of the referenced testimony, not its admissibility, and we have considered that testimony for whatever probative value it may have, "taking into account the imperfections surrounding the admissibility of such testimony and evidence." *Adamson Sys. Eng'g, Inc. v. Peavey Elecs. Corp.*, 2023 USPQ2d 1293, at *5 (TTAB 2023) (quoting *Peterson v. Awshucks SC, LLC*, 2020 USPQ2d 11526, at *3-4 (TTAB 2020)).

Applicant's Objections to the Tolero and Hamilton Declarations

Tolero Declaration

Applicant objects to Mr. Tolero's testimony that Opposer's mark "was chosen by the founder of eBay, Inc., Mr. Pierre Morad Omidyar, without it having any intended meaning," Tolero Decl. ¶ 24 (34 TTABVUE 604), on the ground that he "cannot have firsthand knowledge of the meaning associated with the name EBAY as chosen by Opposer's founder Pierre Omidyar, since by his own testimony Tolero was not employed by Omidyar at the time the mark was chosen." 48 TTABVUE 54. Applicant's reference to "firsthand knowledge" appears to invoke Rule 602 of the Federal Rules of Evidence, which provides that a "witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602.¹²

¹² Applicant makes this argument in a portion of its Evidentiary Objections captioned "Objections based on Hearsay," 48 TTABVUE 54, but there is no hearsay involved in the cited testimony because Mr. Tolero does not state that his testimony is based on what he was told by someone else, or what someone else said. See Fed. R. Evid. 801(c) (defining "hearsay" as "a statement that (1) the declarant does not make while testifying at the current trial or hearing, and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."). There is no hearsay "declarant," i.e., a person making a statement outside of the current trial, referenced in the cited testimony.

Rule 602 requires “personal knowledge” rather than what Applicant describes as “firsthand knowledge,” 48 TTABVUE 54, by which Applicant appears to mean knowledge derived from personal observation of facts or events occurring prior to Mr. Tolero’s employment with Opposer. “Personal knowledge” can be acquired by a review of files and records in the course of a witness’s employment and the discharge of the witness’s job duties. *See, e.g., City Nat’l Bank v. OPGI Mgmt. GP Inc.*, 106 USPQ2d 1668, 1673 (TTAB 2013) (“there may be some difficulty for a company involved in a trademark dispute to produce witnesses with personal knowledge of the company’s use of its trademarks, especially if such use dates back many years. In certain cases, testimony by a person that his job responsibilities require him to be familiar with the activities of the company that occurred prior to his employment may be sufficient to lay a foundation for his subsequent testimony.”). Rule 602 provides that “[e]vidence sufficient to prove personal knowledge may consist of the witness’s own testimony.” Fed. R. Evid. 602. Mr. Tolero testified variously that in his capacity as Paralegal for Global Intellectual Property for Opposer, he is “familiar with eBay’s policies and procedures regarding its business and its domestic and international trademark portfolio,” and that the “facts set forth below are known to me personally or based upon my review of records kept by eBay in the ordinary course of business.” Tolero Decl. ¶ 1 (34 TTABVUE 599). It is not clear, however, that Mr. Tolero has personal knowledge regarding Mr. Omidyar’s intent in selecting the EBAY mark, so we

sustain Applicant's objection regarding that specific portion of the cited testimony and have given it no consideration in our decision.¹³

Applicant also requests that we take judicial notice of what Applicant describes as "the connection between EBAY and Echo Bay," which Applicant characterizes as "a well-documented fact." 48 TTABVUE 54. Citing a United States Supreme Court decision from 1875, Applicant requests that the "Board judicially notice this fact, based not only on the article submitted into evidence by Opposer, but on the numerous news reports evidencing the same which can be found easily using Google or another search engine." *Id.* Opposer objects to this request in its reply brief. 50 TTABVUE 27.

"The Board may take judicial notice of facts that are either 'generally known' or 'accurately and readily [discernable] from sources whose accuracy cannot reasonably be questioned.'" *McGowen Precision Barrels, LLC v. Proof Rsrch., Inc.*, 2021 USPQ2d 559, at *23 n.88 (TTAB 2021) (quoting Fed. R. Evid. 201(b)). We find that the claimed "connection between EBAY and Echo Bay" is not subject to judicial notice under the standard set forth in Rule 201, and **deny** Applicant's request. *See In re Medline Indus., Inc.*, 2020 USPQ2d 10237, at *2-3 (TTAB 2020) (declining the applicant's request that the Board take judicial notice of "the various shades of green").

¹³ As evidence of "the history of eBay," Mr. Tolero attached pages captioned "Our History" from Opposer's website as Exhibit 86 to his Rebuttal Declaration. Tolero Rebuttal Decl. ¶ 4; Ex. 86 (42 TTABVUE 2-3, 10-41). Statements on the website regarding the founding of Opposer as "AuctionWeb" that are not supported by corroborating testimony from Mr. Tolero, or another witness with sufficient personal knowledge, are hearsay when offered by Opposer for their truth, and we have given them no consideration in our decision.

Finally, Applicant “objects to the remainder of the Tolero Declaration as suspect and asks that the Board treat it with little to no consideration.” 48 TTABVUE 54. We **overrule** this omnibus objection, which has no basis beyond Applicant’s unspecified suspicion regarding Mr. Tolero’s testimony.

Hamilton Declaration

In a portion of its Evidentiary Objections, Applicant “objects to the Hamilton Declaration on the grounds that, as stated in its Brief, Ms. Hamilton’s statement is prejudicially incomplete.” *Id.* In the body of its brief, Applicant refers to Ms. Hamilton’s testimony regarding the pronunciation of Applicant’s mark in a voice mail message. *Id.* at 26. Ms. Hamilton testified that in April 2022, she received a voice mail message from Dante Fiorini of Xentina Creative Group. Hamilton Decl. ¶ 2; Exs. A-C (31 TTABVUE 2, 5-10). Applicant argues that what Ms. Hamilton “fails to mention is that Mr. Fiorino [sic], the speaker in the voicemail at issue, is Argentinian and a native Spanish speaker, and speaks English with a Spanish accent” and that “his natural propensity would be to pronounce the word ‘Africa’ with a long ‘e’ sound.” 48 TTABVUE 26.

According to Applicant, “the Hamilton Declaration is highly prejudicial,” “the pronunciation of a mark by a single person is of little relevance,” and “the minimal probative value of this testimony is far outweighed by its incredibly prejudicial effect.” *Id.* Applicant “asks that the Board give this testimony no consideration, or in the alternative treat it with little weight.” *Id.*

In its reply brief, Opposer argues that

[a]s to Applicant's objection that the sound recording is "highly prejudicial" insofar as it is "a single person" with an "accent," this objection is also unfounded. Applicant cites no basis in law for this objection. The recording is complete and speaks for itself; it is probative because Mr. Fiorini was the person who designed Applicant's Mark. *See* FRE 1002. Moreover, nothing precluded Applicant from presenting the Board with evidence of alternative pronunciations.

50 TTABVUE 28.

Applicant essentially admits that Mr. Fiorini pronounced words in Applicant's mark in the manner argued by Opposer, but argues that the Board should discount his pronunciation because he is a native speaker of Spanish and because his pronunciation does not establish how the words in Applicant's mark would be pronounced by consumers generally. We **overrule** Applicant's objections and have considered the voice mail for whatever probative value it may have.

II. The Parties and Their Marks

Opposer provides a worldwide online marketplace featuring millions of goods and services on its website at ebay.com. Tolero Decl. ¶ 2 (34 TTABVUE 599). Opposer was launched in 1995 and has used the mark EBAY continuously in the United States since then. Tolero Decl. ¶ 4 (34 TTABVUE 600). Opposer owns numerous registrations of the EBAY mark for a variety of goods and services. 1 TTABVUE 10-11, 21-54 (Not. of Opp. ¶¶ 3-4; Ex. A); Tolero Decl. ¶ 26-27; Ex. 79 (34 TTABVUE 478-508, 605).

Applicant filed the opposed application on July 27, 2020. Salaam Decl. ¶ 2 (38 TTABVUE 3). Mr. Salaam describes Applicant's business as offering "a safe, secure

and proprietary trading platform of the buying and selling of commodities, finished products, and manufacturing equipment.” Salaam Decl. ¶ 3 (28 TTABVUE 3).

III. Opposer’s Entitlement to a Statutory Cause of Action

“Entitlement to a statutory cause of action is a requirement in every inter partes case.” *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *11 (TTAB 2023), *civ. action filed*, No. 5:23-cv-00549-GW-PVC (C.D. Cal. Mar. 28, 2023), (citing *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2066 (2014))). “A party in the position of plaintiff may oppose registration of a mark when doing so is within the zone of interests protected by the statute and it has a reasonable belief in damage that would be proximately caused by registration of the mark.” *Id.* (citing *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020)). Opposer must prove its entitlement to oppose by a preponderance of the evidence. *Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, at *4 (TTAB 2022).

Opposer properly submitted electronic records from the databases of the United States Patent and Trademark Office (“USPTO”) regarding “its pleaded registrations showing their active status and Opposer’s ownership.” *Monster Energy*, 2023 USPQ2d 87, at *11. “The pleaded registrations establish Opposer’s direct commercial interest in the proceeding that entitles it to bring a statutory cause of action, namely, to oppose registration of Applicant’s mark on the ground of priority and likelihood of confusion.” *Id.* (citation omitted). Having established its entitlement to oppose based

on that claim, Opposer can assert any other grounds for opposition. *DC Comics v. Cellular Nerd LLC*, 2022 USPQ2d 1249, at *20 (TTAB 2022).

IV. Opposer's Section 2(d) Claim

Section 2(d) of the Trademark Act prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d). “To prevail on its Section 2(d) claim, Opposer must prove, by a preponderance of the evidence, that it has priority in the use of its pleaded marks and that use of Applicant’s mark is likely to cause confusion, mistake, or deception as to the source or sponsorship of [Applicant’s] . . . services” *DC Comics*, 2022 USPQ2d 1249, at *20-21 (citations omitted).

A. Priority

As discussed above, Opposer’s pleaded registrations of its EBAY marks are of record and Applicant did not counterclaim to cancel them. “The pleaded registrations that establish Opposer’s entitlement to maintain this opposition also establish that priority is not an issue as to the marks and the goods and services covered by the registrations.” *Id.*, at *21.

B. Likelihood of Confusion

Our determination of the likelihood of confusion under Section 2(d) of the Trademark Act is based on an analysis of all probative facts in the record that are

relevant to the likelihood of confusion factors set forth in *E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is argument and evidence. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).¹⁴

“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services.” *Monster Energy*, 2023 USPQ2d 87, at *14 (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA (1973))). Opposer argues that

a finding of a likelihood of confusion is inescapable under the relevant *Du Pont* factors, which include: (1) the strength of the prior mark; (2) the similarity of the goods or services; (3) the similarity of the trade channels; (4) the similarity of the purchasers; (5) the similarity of the marks; and (6) the lack of coexistence of the marks such that there has been no opportunity for actual confusion.

47 TTABVUE 29.¹⁵

Applicant devotes most of its argument to the key first two *DuPont* factors, 48 TTABVUE 13-35, 41, arguing that the first factor is dispositive of the issue of likelihood of confusion. *Id.* at 30-31.

¹⁴ “Because each class in Applicant’s multi-class application is, in effect, a separate application, we consider each class separately, and determine whether Opposer has shown a likelihood of confusion with respect to each.” *N. Face Apparel Corp. v. Sanyang Indus. Co.*, 116 USPQ2d 1217, 1228 (TTAB 2015).

¹⁵ In its reply brief, Opposer invokes the thirteenth *DuPont* factor, “[a]ny other established fact probative of the effect of use,” *DuPont*, 177 USPQ at 567, in arguing that Applicant intended to create an association with Opposer when it created and adopted Applicant’s mark. 50 TTABVUE 22-23. The purpose of a plaintiff’s reply brief is to respond to arguments made in the defendant’s brief, not to raise new arguments or theories to which the defendant has no opportunity to respond. We have given Opposer’s arguments under the thirteenth *DuPont* factor no consideration in our decision.

We will focus our *DuPont* analysis on Opposer’s lowercase word mark (the “EBAY Lowercase Word Mark”) shown in Registration No. 4408423 (the “423 Registration”) and reproduced below:



1 TTABVUE 47-48, and Opposer’s standard-character EBAY word mark (the “EBAY Standard-Character Word Mark”) shown in Registration No. 6687204 (the “204 Registration”). Tolero Decl. ¶ 26; Ex. 79 (34 TTABVUE 491-99, 605).¹⁶

1. Similarity or Dissimilarity of the Services and Channels of Trade

The second and third *DuPont* factors 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 *15 (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)).¹⁷ As noted above, because

¹⁶ In its Notice of Opposition, Opposer pleaded ownership of the application that matured into the ’204 Registration during the pendency of this proceeding. 1 TTABVUE 11, 53-54. This was sufficient to put Applicant on notice of Opposer’s intention to rely on any resulting registration. *United Glob. Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1040 n.3 (TTAB 2014) (“When an opposer pleads ownership of the underlying applications in the notice of opposition, the opposer may make the registrations which issue during the opposition of record without having to amend the notice of opposition to assert reliance on the registrations.”).

¹⁷ Applicant cites the Ninth Circuit’s decision in *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 204 USPQ 808 (9th Cir. 1979), in its discussion of the relatedness of the services. 48

Applicant's two-class application is, in effect, two separate applications, we must consider the evidence of relatedness of the services and channels of trade separately in each class. *Cf. In re OSF Healthcare Sys.*, 2023 USPQ2d 1089, at *3 (TTAB 2023). At the same time, "[t]here is no need to establish a likelihood of confusion as to each distinct service; likely confusion as to even one service recited in [each class in] the application is sufficient for the purposes of establishing a likelihood of confusion" as to the entire class. *Monster Energy*, 2023 USPQ2d 87, at *16 n.36 (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)). Opposer thus needs to show only that one of the services in Class 35 in the application and one of the services in Class 36 in the application are related to one of the services identified in the '423 and '204 Registrations.

Our determination of relatedness "must be based on the recitations of services in the pleaded registration[s] and subject application because they define the scope of the benefit of registration." *Id.*, at *14 (citing *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014)). "The application and registration[s] themselves may provide evidence of the relationship between the services." *Id.* (citations omitted).

a. Class 35

The Class 35 services identified in the application are:

Advertising and marketing services, namely, promoting the goods and services of others; Advertising, marketing

TTABVUE 31-33, 35. We must, of course, apply the *DuPont* likelihood of confusion factors that govern registrability determinations, not analogous likelihood of confusion factors applied by regional circuit courts in infringement cases, so we have given no consideration to any of Applicant's arguments under the *Sleekcraft* factors. *See generally* TBMP § 101.03.

and promotion services; On-line retail store services featuring a wide variety of consumer goods of others; General business networking referral services, namely, promoting the goods and services of others by passing business leads and referrals among group members; Providing business information regarding charitable or humanitarian organizations; Providing an on-line searchable database featuring business information and business contacts.¹⁸

In the '423 Registration, Opposer has registered its EBAY Lowercase Word Mark for “advertising and advertisement services” and many other services.

Applicant argues that “Opposer’s advertising services are limited to ‘advertising and advertisement services,’” while “Applicant’s description includes ‘advertising and marketing services, namely, promoting the goods and services of others; advertising, marketing and promotion services.’” 48 TTABVUE 32. According to Applicant, “[t]his distinction highlights Applicant’s intent to assist its sellers by not merely providing a platform for listing advertisements, as Opposer does, but actively promot[ing] their wares and businesses as partners.” *Id.*

There is no such “distinction” or expression of “Applicant’s intent” on the face of Applicant’s Class 35 identification, and “[i]f an application or registration describes goods or services broadly, and there is no limitation as to their nature, it is presumed that the [identification] ‘encompasses all goods or services of the type described.’” *Monster Energy*, 2023 USPQ2d 87, at *15-16 (quoting *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir.

¹⁸ Distinct goods or services in an identification are separated by semicolons. *Monster Energy*, 2023 USPQ2d 87, at *15 n.35. There are six distinct services in Applicant’s Class 35 identification.

2013)). Accordingly, we must presume that the unrestricted “advertising and advertisement services” identified in the ’423 Registration encompass all services of the type described, including Applicant’s “advertising and marketing services, namely, promoting the goods and services of others” and “advertising, marketing and promotion services.” Opposer’s “advertising and advertisement services” are thus legally identical to the “advertising and marketing services, namely, promoting the goods and services of others” and the “advertising, marketing and promotion services” identified in the application. *Id.* The second *DuPont* factor supports a conclusion that confusion is likely with respect to Class 35 in its entirety.

“Because the services described in the application and the pleaded registration are legally identical in part, we must presume that the channels of trade and classes of purchasers are the same as to those legally identical services.” *Monster Energy*, 2023 USPQ2d 87, at *17 (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)). The third *DuPont* factor also supports a conclusion that confusion is likely with respect to Class 35 in its entirety.

b. Class 36

The Class 36 services identified in the application are:

Credit card payment processing services; Debit card transaction processing services; Payment processing services, namely, credit card and debit card transaction processing services; Processing of credit card payments; Processing of debit card payments.

In the ’204 Registration, Opposer has registered its EBAY Standard-Character Word Mark for “credit card and debit card transaction processing services.” These services

are identical on their face to the “payment processing services, namely, credit card and debit card transaction processing services” identified in the application.

Applicant acknowledges that “both Applicant and Opposer offer payment processing services,” but argues that the services differ because Opposer operates “these services under its subsidiary PayPal and the PAYPAL Mark rather than its EBAY Mark,” 48 TTABVUE 33, making those services qualitatively different from Applicant’s services because its “financial services are not intended as a payment option and Applicant does not act as a financier.” *Id.* at 34. These arguments are unavailing because we must focus on the involved unrestricted identifications, not any extrinsic evidence of actual use. *In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018) (citing *Stone Lion*, 110 USPQ2d at 1162).¹⁹ The “credit card and debit card transaction processing services” identified in both the application and the ’204 Registration are identical, so for the reasons discussed above, the second and third *DuPont* factors support a conclusion that confusion is likely with respect to Class 36 in its entirety.

2. The Strength or Weakness of Opposer’s EBAY Word Mark

Before we evaluate the similarity or dissimilarity of the parties’ marks, we first consider the strength or weakness of Opposer’s EBAY word mark under the fifth and sixth *DuPont* factors. We consider them in tandem because the “fifth *DuPont* factor

¹⁹ The fact that the parties’ services as identified in the application and registrations are literally or legally identical renders irrelevant all of Applicant’s arguments based on extrinsic evidence regarding the actual nature of, and channels of trade and classes of consumers for, Opposer’s and Applicant’s services. 48 TTABVUE 31-34, 37-39. *See, e.g., Stone Lion*, 110 USPQ2d at 1162.

enables Opposer to prove that its pleaded marks are entitled to an expanded scope of protection by adducing evidence of ‘[t]he fame of the prior mark (sales, advertising, length of use),’ while the “sixth *DuPont* factor allows Applicant to contract that scope of protection by adducing evidence of ‘[t]he number and nature of similar marks in use on similar goods [or services].” *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *20-21 (TTAB 2022) (quoting *DuPont*, 177 USPQ at 567).

a. The Strength of Opposer’s EBAY Word Mark²⁰

“The strength of Opposer’s mark[] affects the scope of protection to which [it is] entitled. Thus, we consider Opposer’s mark[s] conceptual strength, based on the nature of the mark[] [itself], and [its] commercial strength, based on marketplace recognition of the mark[].” *Id.*, at *21 (citing *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010)).

i. Conceptual Strength

The conceptual strength of Opposer’s EBAY word mark is a function of the nature of the mark itself. *Id.* All of Opposer’s pleaded registrations, including the ’423 and

²⁰ As the Board noted recently in *Monster Energy*, “[w]hile *DuPont* factor five specifies the ‘fame’ of the mark, the Court of Appeals for the Federal Circuit also considers the ‘strength’ of the mark under that factor.” *Monster Energy*, 2023 USPQ2d 87, at *19 n.39 (citing *Stone Lion*, 110 USPQ2d at 1160, and *Kenner Parker Toys Art Indus. v. Rose Art Indus., Inc.*, 963 F.2d 22 USPQ2d 1453, 1458 (Fed. Cir. 1992)). Opposer asserts a dilution claim, and “[w]hile dilution fame is an either/or proposition—fame either does or does not exist—likelihood of confusion fame ‘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)). Accordingly, we will generally use the word “strength” in connection with Opposer’s Section 2(d) claim. Because we do not reach Opposer’s dilution claim, we express no opinion on whether the EBAY mark is “famous” for purposes of that claim.

'204 Registrations, issued “on the Principal Register without a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f),” and the EBAY word mark is thus “presumed to be inherently distinctive for the goods and services recited in those registrations.” *Id.* (citing *New Era*, 2020 USPQ2d 10596, at *10). The EBAY word mark is thus presumptively entitled, at a minimum, to “the normal scope of protection to which inherently distinctive marks are entitled.” *Sabhnani*, 2021 USPQ2d 1241, at *26 (quoting *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1347 (TTAB 2017)).

ii. Commercial Strength

“We now turn to Opposer’s arguments and evidence that its [EBAY word mark has] acquired commercial strength and [is] famous through use and recognition in the marketplace.” *Made in Nature*, 2022 USPQ2d 557, at *30. As noted above, “[l]ikelihood of confusion fame varies along a spectrum from very strong marks to very weak marks.” *Id.* (citing *Joseph Phelps Vineyards*, 122 USPQ2d at 1734). “Because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it.” *Id.*, at *31 (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012) (internal citation omitted)).

Commercial strength may be measured indirectly by the volume of sales and advertising expenditures in connection with the goods sold under the marks, for example, and other factors such as length of time of use of the mark; widespread critical assessments; notice by independent

sources of the products identified by the marks; and the general reputation of the products and services.

Monster Energy, 2023 USPQ2d 87, at *22.

Opposer argues that the EBAY word mark is “commercially strong, as underscored by eBay’s extensive and almost 30-year-long use in connection with its highly successful business.” 47 TTABVUE 30. Opposer points to its advertising and promotion in the print and electronic media and online, billions of dollars in sales from its online marketplace, its robust social media presence, third-party recognition of Opposer as a top-ranked ecommerce company, third-party awards, unsolicited media coverage, rankings in various brand surveys, and Opposer’s enforcement efforts. *Id.* at 30-33. Opposer also notes that more than 15 years before trial began in this case, the Ninth Circuit held in *PerfumeBay.com Inc. v. eBay Inc.*, 506 F.3d 1164, 84 USPQ2d 1865, 1877 (9th Cir. 2007), that Opposer “possesse[d] a famous and widely known mark, and has expended considerable resources in attaining this status.”²¹

Applicant’s position on the commercial strength of Opposer’s EBAY word mark is schizophrenic. Applicant first states boldly that it “will argue that the Opposer’s EBAY mark is both conceptually and commercially weak, and thus entitled to a narrow scope of protection.” 48 TTABVUE 14.²² Later in its brief, however, Applicant

²¹ The Ninth Circuit addressed the fame of Opposer’s mark in the context of reversing the district court’s dismissal of Opposer’s claim under California’s anti-dilution statute, *PerfumeBay.com*, 84 USPQ2d at 1876-77, which the Ninth Circuit noted was “substantially similar” in nature to its federal counterpart. *Id.* at 1876.

²² Applicant includes this statement and arguments based on it in a section of its brief that discusses the first *DuPont* factor. 48 TTABVUE 13-21. The conceptual and commercial weakness of a mark should be discussed under the sixth factor. *Spireon, Inc. v. Flex Ltd.*, 71

“does not dispute Opposer’s claim that its EBAY Marks are commercially famous for purposes of likelihood of confusion,” and expressly states that “[i]ndeed, Opposer has submitted significant evidence that its Marks are globally recognized in connection with the services for which they have been registered.” *Id.* at 41.²³ Applicant’s concession that the “EBAY Marks are commercially famous for purposes of likelihood of confusion,” *id.*, is fully supported by the record, which shows extensive sales of services under the EBAY word mark, extensive advertising and promotion of services under the mark, and widespread consumer and public recognition of the mark in the United States. Tolero Decl. ¶¶ 3-9, 11-14, Exs. 1-67 (34 TTABVUE 2-353, 599-602); Tolero Rebuttal Dec. ¶ 11; Ex. 89 (42 TTABVUE 8, 112-32).

Based on Applicant’s concession of the commercial strength of the EBAY word mark for Section 2(d) purposes, and the record evidence of commercial strength, we

F.4th 1355, 2023 USPQ2d 737, at *4 (Fed. Cir. 2023). We address Applicant’s argument that the EBAY word mark is conceptually weak in our discussion below of that factor.

²³ Applicant’s turnabout is based on its argument that “it is in fact this recognition that serves to further distinguish Applicant from Opposer.” 48 TTABVUE 41. Applicant argues that “[t]he fame of a mark cuts both ways with respect to likelihood of confusion” because “[t]he better known it is, the more readily the public becomes aware of even a small difference.” *Id.* (quoting *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 6 USPQ2d 1719, 1721 (Fed. Cir. 1988)). *B.V.D.* does not support Applicant’s argument because its holding has been limited by the Federal Circuit “to the facts of that case” to the “extent that it treats fame as a liability.” *Kenner Parker Toys*, 22 USPQ2d at 1457. As the Federal Circuit explained in *Kenner Parker Toys*, “[b]oth before and after *B.V.D.*, this court has consistently afforded strong marks a wider latitude of protection than weak marks.” *Id.* (citations omitted). *See also DC Comics*, 2022 USPQ2d 1249, at *55 (“a potential consumer who is aware of Opposer’s famous ‘S’ shield design marks is more likely to be attuned to its similarity to Applicant’s mark upon encountering the latter. In this regard, ‘a purchaser is less likely to **perceive** differences from a famous mark.”) (quoting *B.V.D.*, 6 USPQ2d at 1722 (Nies, J., dissenting) (quoted with approval in *Kenner Parker Toys*, 22 USPQ2d at 1465 and *Nike Inc. v. Maher*, 100 USPQ2d 1018, 1022 (TTAB 2011)). (Except where otherwise indicated, all emphasis in bold in this opinion appeared in italics or underscoring in any original quoted text.)

find that the EBAY word mark is extremely strong for “the services for which [it has] been registered.” 48 TTABVUE 41. *See Monster Energy*, 2023 USPQ2d 87, at *24-25 (citing *Swatch AG v. M.Z. Berger & Co.*, 108 USPQ2d 1463, 1469 (TTAB 2013) (“Nor does applicant dispute the extensive evidence of fame of the SWATCH mark introduced by opposer, which we find to be sufficient to prove that the mark is famous for purposes of the likelihood of confusion analysis.”)). There is no doubt that for the various services identified in its pleaded registrations, Opposer’s EBAY word mark “falls on the much higher end of the commercial strength spectrum ‘from very strong to very weak. . . .’” *New Era*, 2020 USPQ2d 10596, at *12 (quoting *Joseph Phelps Vineyards*, 122 USPQ2d at 1734). The commercial strength of Opposer’s EBAY word mark presumptively entitles it to “an expanded scope of protection” *Made in Nature*, 2022 USPQ2d 557, at *20.

c. Applicant’s Arguments That the EBAY Word Mark is Conceptually Weak and Exists in a Crowded Field

We turn now to Applicant’s claims that Opposer’s EBAY word mark is not entitled to a broad scope of protection because it is conceptually weak, 48 TTABVUE 14-17, and exists in a crowded market. *Id.* at 17-21. Applicant bases these arguments on the meaning of the prefix “e-” and the meaning of the word “bay,” *id.* at 15, as well as numerous third-party registrations and applications involving marks “containing the term ‘bay’ for retail store services in Classes” 35 and 42. *Id.* at 18.

Applicant first argues that

by combining “e” and bay”, Opposer’s Mark EBAY immediately conveys the notion of an online or electronic “bay” in which goods are traded or exchanged. This combination does not imbue the mark with inherent

distinctiveness but rather describes a **fundamental** characteristic of the services offered under the Mark. As integral parts of Opposer's services, the "e" and "bay" components, both separately and together, convey information about a **significant** quality, characteristic or feature of Opposer's goods and services, thus meeting the definition of merely descriptive.

Id. at 16. As discussed above, however, Opposer's registrations of its EBAY word mark all issued without a requirement of a showing of acquired distinctiveness, indicating that the USPTO did not consider the marks to be "merely descriptive" but instead inherently distinctive, and Applicant did not counterclaim to cancel any of Opposer's registrations that are vulnerable to cancellation on the ground that the registered mark is merely descriptive.

Applicant next attacks Opposer's claim that EBAY is a coined mark and what Applicant calls previous "determinations by the Board regarding the strength of its EBAY marks," arguing that "this is an improper use of collateral estoppel" because a mark may be subject to "genericide" and "even a fanciful mark may lose its trademark function." *Id.* These arguments are all meritless because the EBAY word mark remains registered and is thus considered to be inherently distinctive whether or not it was "coined," and because Applicant did not counterclaim to cancel any of Opposer's registrations on the ground that the EBAY mark has fallen victim to "genericide."

Applicant's final challenge to the conceptual strength of the EBAY word mark focuses on "the prevalence of the term 'bay' in the online retail industry," which Applicant claims "further limits the protections afforded to Opposer." *Id.* at 17. Applicant relies on 66 registrations and two applications "containing the term 'bay'

for retail store services in Classes 035 and 042” *Id.* at 18.²⁴ As discussed above, we have overruled Opposer’s objections to this evidence and will consider it for whatever probative value it may have.

“Where marks share a common segment, [t]hird-party registrations are relevant to prove that [the shared] segment of the composite . . . has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Spireon*, 2023 USPQ2d 737, at *5 (quoting 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:43 (5th ed. 2023)). As discussed below in our analysis of the first *DuPont* factor, the “common” or “shared” segment of the marks here is not simply “BAY,” but rather “E-B-A-Y.” *See Spireon*, 2023 USPQ2d 737, at *5 (“flex” found to be the common segment of the applicant’s mark FL FLEX and the opposer’s marks FLEX, FLEX (stylized), and FLEX PULSE). As discussed below, Applicant presents dozens of third-party registrations and uses of marks containing the word “bay,” but no third-party registrations or uses of marks containing the word “ebay.” There is simply no third-party mark evidence that “ebay” has “a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak,” *id.* (quotation and quotations marks omitted), or that the conceded

²⁴ Applicant actually made of record three third-party applications. 37 TTABVUE 338-42, 343-47, 348-52. We have given them no weight because they “are evidence only of the fact that they have been filed . . . and have no other probative value.” *Made in Nature*, 2022 USPQ2d 557, at *26 (citations omitted).

commercial strength of the EBAY word mark has been diminished by third-party use of the same mark.

Moreover, when considering the probative value of third-party registrations or uses under the sixth *DuPont* factor, we must take into account the goods or services for which the involved and third-party marks are registered and used, and the nature of the marks themselves. *See Made in Nature*, 2022 USPQ2d 557, at *24-30. We have found above in our discussion of the second *DuPont* factor that the Class 35 “advertising and advertisement services” identified in the ’423 Registration of the EBAY Lowercase Word Mark are legally identical to the “advertising and marketing services, namely, promoting the goods and services of others,” and that the “advertising, marketing and promotion services” identified in the application, and that the Class 36 services identified in the ’204 Registration of the EBAY Standard-Character Word Mark as “credit card and debit card transaction processing services” are literally identical to the “payment processing services, namely, credit card and debit card transaction processing services” identified in the application. The identity of those services reduces the universe of relevant third-party uses to those involving “advertising and advertisement services” in Class 35 and “credit card and debit card transaction processing services” in Class 36. *Made in Nature*, 2022 USPQ2d 557, at *24 (where “Opposer’s MADE IN NATURE marks are registered for fresh fruit, dried fruits and vegetables, and chocolate covered fruit,” evidence of “third-party registrations of NATURE or MADE marks that Applicant submitted for products other than Opposer’s identified goods have little or no probative value in showing the

conceptual weakness of the terms NATURE or MADE in Opposer's marks.") (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017)); see also *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1694-95 (Fed. Cir. 2018) (where involved goods were legally identical meat products, third-party uses of OMAHA-formative marks on other goods, such as popcorn, wine, oriental foods and alcoholic beverages, were improperly considered by the Board because "these goods bear no relationship to meat or meat-based products" and had "no real probative value for the analysis at hand," where "the evidentiary universe is much smaller"). Under this controlling principle of Federal Circuit law, there is far less to Applicant's evidence of third-party registration and use of BAY-formative marks than first meets the eye.

Because the involved "advertising and advertisement services" in Class 35 and the involved "credit card and debit card transaction processing services" in Class 36 are literally or legally identical, the universe of relevant third-party uses of BAY-formative marks here is very small. It consists of:

- Registration No. 2877201 of the mark GBF Golden Bay Foods and design for, among other things, "providing cooperative advertising and marketing services" and "advertising matter dissemination services" in Class 35, 37 TTABVUE 89-93;
- Registration No. 2817337 of the mark GOLDEN BAY FOODS for "providing cooperative advertising and marketing services" and "advertising matter dissemination services" in Class 35, *id.* at 93-96;
- Registration No. 4545826 of the mark EXIMBAY (stylized) for, among other things, "credit and cash card services," *id.* at 119-25;
- Registration No. 6010288 of the mark GREENBAY for, among other things, "Financial payment services, namely, providing secure commercial transactions and payment options," *id.* at 132-36; and

- Registration No. 5949606 of the mark BAYPAY for, among other things, “financial transaction services, namely, providing secure commercial transactions and payment option.” *Id.* at 276-79.

The vast majority of the other registrations of various BAY-formative marks cover wholesale and retail store services, and electronic retailing services, featuring a host of disparate goods listed in a table in Appendix B to Applicant’s brief, 48 TTABVUE 58-66, and reflected in third-party uses of some of the registered marks authenticated by Mr. Salaam. Salaam Decl. ¶ 7; Ex. G (38 TTABVUE 22-32; 37 TTABVUE 582-818).²⁵ The remaining registrations cover shopping center and supermarket services;²⁶ various banking, financial, and business management and consultation services;²⁷ connecting buyers and sellers of financial assets;²⁸ operating an online

²⁵ 37 TTABVUE 13-17 (CHESAPEAKE BAY OUTFITTERS); 18-21 (BAY 101 and design); 22-31 (ARCADIA BAY); 32-36 (MANGO BAY); 37-43 (BACK BAY); 44-47 (CHESAPEAKE BAY LTD.); 48-51 (BAYSIDE BRUSH CO.); 52-62 (CASTAWAY BAY); 68-71 (YARD SALE BAY); 72-75 (HUNTER BAY); 85-88 (MUD BAY); 96-102 (EASTBAY.COM); 106-09 (BAYBASICS.COM); 110-13 (MAHOGANY BAY); 114-18 (FLASHBAY); 137-42 (DOCK & BAY); 148-51 (COCO • BAY); 152-56 (CHARLES BAY); 162-66 (SKUNA BAY); 167-75 (BAY CLUB); 177-81 (BLUE CHAIR BAY); 182-86 (NORTH BAY MADE and design); 187-91 (ENTERBAY); 192-97 (MUDDY BAY); 203-06 (TILES BAY); 207-11 (BAY DIAMOND IMPORTERS); 212-16 (BAYOMA); 217-20 (VIRIDIAN BAY); 221-25 and 226-31 (BISHOPS BAY and BISHOPS BAY and design); 232-37 (PADDLE BAY OUTFITTERS); 238-41 (BAYFRONT BOUTIQUE); 242-45 (THE BAY NIGHT MARKET and design); 246-49 (KAHUNA BAY); 250-53 (BAYWELL); 254-58 (BAY HILL JEWELERS); 264-67 (VANILLA BAY); 268-71 (YUKON BAYS); 272-75 (BANYAN BAY TRADING); 280-84 (EAST BAY PROVISIONS); 285-88 (LIVBAY); 289-92 (DAPPLEBAY); 293-97 (NINTH BAY and design); 298-303 (VITABAY); 304-08 (BAYWAY and design); 319-22 (BAYDREAM); 323-27 (PINEAPPLE BAY); 328-32 (BAYSIDE SOAPWORKS); 333-36 (SOUTH BAY INTERNATIONAL). The registrations were also referenced in Mr. Salaam’s Declaration. Salaam Decl. ¶ 5 (38 TTABVUE 3-21).

²⁶ *Id.* at 63-67 (MONARCH BAY PLAZA and design); 198-202 (CEASAR’S BAY)

²⁷ *Id.* at 76-79 (PAINTER BAY); 157-61 (BAYCOAST BANK); 309-13 (BAYPINE); 314-18 (TOKEN BAY).

²⁸ *Id.* at 81-84 (BAYMARKETS (stylized)).

marketplace;²⁹ order fulfillment services;³⁰ “providing retail outlet services for independent merchants to set up discount booths;”³¹ and the “bringing together, for the benefit of others, of a variety of goods,” including HVAC and electricity-related goods, “enabling customers to conveniently view and purchase those goods, such services may be provided by retail stores, wholesales outlets, by means of electronic media or through mail order catalogues.”³²

Mr. Salaam testified that as of February 17, 2023, shortly before the execution of his Declaration, “[n]ot only do the [registrants] exist, but the majority of them currently and actively use the bay-formative marks in commerce.” Salaam Decl. ¶ 7 (38 TTABVUE 22). He authenticated webpages reflecting the use of four of the five registered marks discussed above for the services identified in the application and the ’423 and ’204 Registrations. Salaam Decl. Ex. G (37 TTABVUE 637-41 (BAYPAY), 718-720 (EXIMBAY),³³ and 728-29 (GOLDEN BAY and GB GOLDEN BAY)).³⁴

Five relevant third-party registrations, and four relevant third-party uses of BAY-formative (not EBAY-formative) marks, have negligible, if any, probative value on either the conceptual or commercial strength of the EBAY word mark. “This is a far cry from the large quantum of evidence of third-party used and third-party

²⁹ *Id.* at 103-05 (MERCHANTS BAY).

³⁰ *Id.* at 143-47 (BAY CITIES); 259-63 (ROYAL BAY).

³¹ *Id.* at 8-12 (CEASAR’S BAY BAZAAR).

³² *Id.* at 128-31 (BAYMAK and design).

³³ This business is located in Korea and identifies itself on its website as a business catering to “Korean businesses to reach the global market including USA, Europe, China, Japan, and Southeast Asia.”

³⁴ This business identifies itself on its website as one of “The Companies of Federated Group.”

registrations that was held to be significant in both” of the Federal Circuit’s seminal third-party mark cases. *Sabhnani*, 2021 USPQ2d 1241, at *25-26 (quoting *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1745 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019) and citing *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129 (Fed. Cir. 2015) and *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671 (Fed. Cir. 2015)). The conceptual and significant commercial strength of the EBAY word mark emerges unscathed from Applicant’s scattershot challenge. We find that the fifth *DuPont* factor strongly supports a conclusion of a likelihood of confusion and that the sixth *DuPont* factor is neutral in our analysis of that issue.

3. Similarity or Dissimilarity of the Marks

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *Sabhnani*, 2021 USPQ2d 1241, at *26 (quoting *Palm Bay Imps.*, 73 USPQ2d at 1691). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *Inn at St. John’s, LLC*, 126 USPQ2d at 1746 (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

“The proper test regarding similarity ‘is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.’” *Id.* (quoting *Cai*, 127 USPQ2d at 1801 (quoting *Coach Servs.*, 101 USPQ2d at 1721)).

“The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific impression of marks.” *Id.* (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)). The average consumers of Applicant’s services identified as “advertising and marketing services, namely, promoting the goods and services of others,” “advertising, marketing and promotion services” and “payment processing services, namely, credit card and debit card transaction processing services,” include both businesses and ordinary members of the general public.

The similarity or dissimilarity of marks “is not a binary factor but is a matter of degree.” *Monster Energy*, 2023 USPQ2d 87, at *31 (quoting *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (internal quotation omitted)). “Because the involved . . . services are legally identical, ‘the degree of similarity between the marks necessary to support a determination that confusion is likely declines.’” *Id.* (quoting *i.am.symbolic*, 127 USPQ2d at 1630 (internal citation omitted)). The significant commercial strength of Opposer’s EBAY word mark similarly reduces the degree of similarity between the marks required to show that confusion is likely because “the Lanham Act’s tolerance for similarity between competing marks varies inversely with the fame of the prior mark.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992) (quoting *Kenner Parker Toys*, 22 USPQ2d at 1456).

As discussed above, we focus our analysis on the EBAY Lowercase Word Mark shown in four colors in the ’423 Registration and the EBAY Standard-Character Word

Mark shown in the '204 Registration. Applicant's mark is shown again below for ease of reference in following our discussion:



Opposer begins by arguing that the word AFREBAY is the dominant portion of Applicant's mark. Opposer argues that "[c]onsumers are likely to perceive the literal term AFREBAY as the dominant, source-identifying element of Applicant's Mark because it is displayed in the top center of the mark in large, all-capital print" and that "AFREBAY is therefore most likely to be remembered by consumers and used when referencing the Applicant's services." 47 TTABVUE 40 (citations omitted). Opposer further argues that "the name 'AFREBAY' comprises Applicant's business name and appears alone in standard characters throughout Applicant's website and social media to identify the source of Applicant's intended services." *Id.* According to Opposer, "the disclaimed design of the continent of Africa and the tagline 'REACH THE SOURCE' do not distinguish Applicant's Mark from the EBAY Marks" because "[g]iven their placement off to the side of and in smaller text below the large, dominant, source-indicating element AFREBAY, consumers are likely to perceive these elements as secondary." *Id.* at 44.

Opposer then argues that "[t]he dominant element AFREBAY creates a likelihood of confusion because it wholly incorporates EBAY, thus creating confusing similarities in appearance, sound, connotation, and commercial impression." *Id.* at 41

(all emphasis in original). Opposer notes materials in the record in which the word AFREBAY appeared as “AfreBay,” and argues that the “BAY element also remains a visual emphasis in Applicant’s mark today, with the BAY suffix set apart in black print from the orange color scheme of the remainder of the mark.” *Id.* Opposer also argues that “consumers perceiving the readily familiar EBAY Marks as part of Applicant’s Mark are also likely to pronounce it as they are accustomed, with a long E sound.” *Id.*

Opposer next argues that the prefix AFR in the word AFREBAY is “a common abbreviation for Africa,” *id.* at 42, and that “based on Applicant’s description of its intended services, AFR is descriptive of the commerce between the United States and Africa that Applicant intends to offer.” *Id.* According to Opposer, “[i]f anything, the addition of AFR increases the likelihood of confusion because consumers may incorrectly assume Applicant’s Mark and/or the Applied-For-Services are associated with a branch or line of eBay’s online marketplace or trading goods or services focused on Africa.” *Id.* Opposer concludes that “these secondary elements in Applicant’s Mark create a connotation and commercial impression that could and does apply to both parties, given Applicant’s Marks and the EBAY Marks are both used or intended to be used in connection with trading or selling goods or services from or with Africa.” *Id.* at 43.

Applicant responds that “[t]he mere fact that two trademarks contain a common element does not in itself create a likelihood of confusion” and that “[t]his is true even if the trademarks at issue are used in relation to identical goods and services.” 48

TTABVUE 21. Applicant argues that “Opposer improperly dissects Applicant’s AFREBAY REACH THE SOURCE (+design) mark” and that Opposer incorrectly “focus[es] upon the ‘prominent’ feature of a mark and not upon the mark in its totality,” *id.*, but that “Applicant’s Mark, if dissected, should not be viewed as a portmanteau of AFR and EBAY, as Opposer would suggest, but of AFRE and BAY, as indicated by Applicant’s design scheme and other evidence on record.” *Id.* at 23.

In its brief, Applicant presents a side-by-side comparison of Applicant’s mark and Opposer’s EBAY Lowercase Word Mark. *Id.* Applicant argues that “[r]egarding the word marks themselves, Applicant’s AFREBAY REACH THE SOURCE and Opposer’s EBAY, the former is four words comprised of twenty-four (24) characters, spaces included, while the latter is a single word comprised of four (4) characters” and that “even without consideration of the design elements, the marks are drastically different from one another.” *Id.*

Applicant concedes that its mark “contains elements of Opposer’s Mark,” *id.*, but argues that it “has added distinguishing matter to the beginning of the mark; the distinguishing characteristic of Applicant’s Mark is its prefix” and that “[c]onsumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark.” *Id.* at 23-24. According to Applicant, “[t]he differing fonts, colors, stylizations, and placements used by each party in this case, combined with Opposer’s numerous registrations for its design mark and historical record of use of the same evidence a substantial difference in branding, further enabling consumers to distinguish between the marks.” *Id.* at 24.

With respect to Opposer's EBAY Lowercase Word Mark specifically, Applicant argues that

Opposer's Mark consists of the term "EBAY" in lowercase stylized text, with the letters appearing in different colors in the following order: red, blue, yellow, and green. The colors are bold, primary shades. In contrast, Applicant's Mark consists of a filled outline of the continent of Africa in an orange gradient, from dark at the top to light at the bottom, and the wording "AFREBAY" on the top right next to the filled outline of Africa. The letters "AFRE" are orange and the letters "BAY" are black. Under "AFREBAY" are thirteen orange rhombuses. The rhombuses are an orange gradient from light to dark orange. Under the orange rhombuses is the wording "REACH THE SOURCE" in black. All text in Applicant's Mark is capitalized. Applicant's narrow color scheme is vastly different and visually distinct from the vibrant, bold, multicolored look chosen by Opposer. Applicant's mark also employs [sic] non-text elements such as the shape of the African continent and the line of rhombuses to distinguish itself. Clearly, upon an initial inspection or quick scan of the marks in either isolation or a side-by-side manner, an average consumer would have no difficulty recognizing these differences in color scheme and font and understanding that the two are unrelated.

Id. at 24-25.

Applicant next argues that the marks differ in sound because "EBAY is a single word of two syllables, while AFREBAY REACH THE SOURCE (+design) is four words comprised of six syllables." *Id.* at 25. Applicant further argues that "the addition of the prefix AFRE adds a new aural component, which changes both the sound and cadence of the phrases," because "Opposer's Mark is commonly pronounced as 'ee-bay' with a long 'e' sound, to signify the electronic and Internet nature of the service, as it is heavily apparent that the letter 'e' is a modifier for 'bay'," *id.*, and "Applicant's Mark is commonly pronounced as 'a-frih-bay' as consumers of Applicant's

services would recognize that AFREBAY REACH THE SOURCE (+design) signifies an African connotation and ‘Africa’ is pronounced as ‘a-frih-ka.’” *Id.* at 25-26. According to Applicant, “a single letter of ‘e’ following the letters ‘fr’ is commonly pronounced as a ‘freh’ sound as seen in words ‘fret’, ‘frenulum’, or ‘fresh,’”³⁵ and “[n]either the use of a short ‘I’ nor a short ‘e’ in the pronunciation of Applicant’s AFREBAY REACH THE SOURCE (+design) would be aurally similar to the common pronunciation of Opposer’s EBAY.” *Id.* at 26.

As discussed above in our rulings on Applicant’s evidentiary objections, Applicant effectively concedes “that one of Applicant’s business contacts pronounced Applicant’s Mark with a long ‘e’ and emphasized the ‘bay’ portion of the mark.” *Id.* Applicant acknowledges that “this Board has long recognized that ‘there is no correct pronunciation of a trademark,’” *id.* (quotation omitted), and argues that “[t]he inquiry is not what the correct pronunciation is, but what the usual pronunciation by the ordinary consumer is.” *Id.* (quotation omitted). According to Applicant,

the tendency of native English speakers would be to pronounce Applicant’s Mark with a short “e,” and testimony that a single, non-native speaker pronounced the mark in a different manner consistent with his primary language is hardly a conclusive finding of how all consumers might pronounce the Mark or that native English speakers would choose a pronunciation at odds with English linguistic and phonetic patterns.

Id. at 26-27.

³⁵ Applicant states in a footnote that the “Board may take judicial notice of dictionary definitions and encyclopedias, which include proper phonetic pronunciations,” 48 TTABVue 26 n.2 (citations omitted), but does not attach or refer to any dictionaries reflecting what Applicant claims to be the “proper phonetic pronunciation” of the letter “e” in this context.

With respect to meaning, Applicant argues that “Opposer’s mark references the primary definition of the term ‘BAY’; it is indicative of the fact that its business model is that of electronic or Internet natured ‘bay,’ and in particular, references Echo Bay,” *id.* at 27, while “Applicant’s Mark AFREBAY REACH THE SOURCE (+design) indicates to consumers that . . . the goods and services encountered are sourced directly from Africa and contains several distinctive elements which help to create this impression,” *id.*, including “the prefix AFRE, which immediately connotes Applicant’s connection with Africa,” *id.*, and “an image of the African continent, which visually cements the connection between Applicant’s Mark and the transfer of goods and services from Africa.” *Id.* Applicant claims that it “uses the term ‘bay’ for the same geographical meaning used by Opposer,” *id.* at 28, and argues that “Applicant’s inclusion of this term is significant” because

bays were historically centers of trade and commerce due to unique geography; the surrounding land provided protection during the loading and unloading of cargo from both foul weather and enemy forces. More specifically, bays were essential to slavery in America as the historical point of departure and arrival for ships carrying slaves from Africa to the Americas. . . . Rivers and bays were essential to the African slave trade and many slaves and African goods flowed through these channels in regions such as Galveston Bay, Chesapeake Bay, and the Narragansett Bay. . . . Applicant’s Mark AFREBAY REACH THE SOURCE (+design) seeks to specifically connote such African trade as Applicant’s service predominantly involves the trade of African goods to and from Africa. Applicant’s Mark would seek to erase the negative connotations of the term and reclaim it for a better and higher purpose.

Id. (record citations omitted).

Applicant also argues that its “tagline ‘REACH THE SOURCE’ further reinforces the idea that consumers of Applicant’s business would be purchasing goods and services directly from African businesses” and that the tagline “is itself a double entendre, as not only will consumers be purchasing goods and services directly from their producers, but from producers in the resource-rich ‘source’ continent of Africa.”

Id.

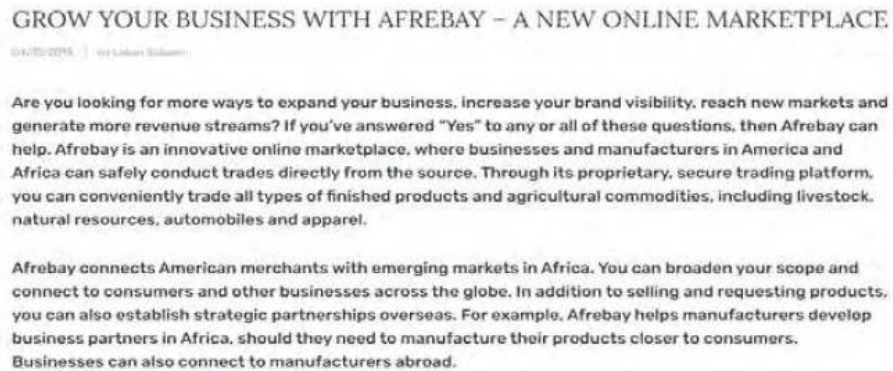
Applicant again accuses Opposer of dissecting its mark “to reach the conclusion that the marks are connotatively similar” by focusing “on the comparison between the literal elements EBAY and AFREBAY.” *Id.* at 29. According to Applicant, “Opposer cannot disregard the meaning the additional elements imbue upon Applicant’s mark.” *Id.* Applicant rejects Opposer’s claim that Applicant’s mark might suggest that Applicant is an Africa-oriented affiliate of Opposer because, according to Applicant, its mark “visually separates the terms as AFRE and BAY rather than AFR and EBAY and incorporates a color scheme and font that are both wholly distinct from Opposer’s.” *Id.*

In analyzing the similarity or dissimilarity of the involved marks, “[w]hile the marks must be considered in their entirety, ‘in articulating reasons for reaching a conclusion on the issue of confusion, 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.’” *Sabhnani*, 2021 USPQ2d 1241, at *30 (quoting *Detroit Athletic Co.*, 128 USPQ2d at 1050 (internal quotation and quotation marks omitted)). As discussed

above, Opposer argues that the word AFREBAY is the dominant portion of Applicant's composite word-and-design mark. 47 TTABVUE 41. In its brief, Applicant does not directly address that issue, instead arguing that its mark must be considered in its entirety, but Applicant acknowledges that "there is some merit" to Opposer's alleged reference "to Applicant's Mark as simply AFREBAY in an attempt to make the marks appear more similar," 48 TTABVUE 23, because "consumers may refer to marks in their shortened version" *Id.* For the reasons discussed below, we agree with Opposer that the word AFREBAY is the dominant portion of Applicant's mark.

"In marks '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*, 2021 USPQ2d 1241, at *31 (quoting *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *Viterra*, 101 USPQ2d at 1908; *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)). That general principle applies here, where the word AFREBAY in two-toned large capital letters is centrally located within the mark and comprises its most prominent verbal element, the disclaimed outline of the continent of Africa to the immediate left of the letters AFRE in AFREBAY associates AFREBAY with Africa, what Applicant describes in its application as "thirteen orange rhombuses" with "an orange gradient from light to dark orange" are non-descript, and the tagline "REACH THE SOURCE" appears in very small lettering at the bottom of the mark.

As noted above, the dominant portion of a composite mark is the portion that is most likely to be used by consumers to identify and refer to the mark owner and to order the subject goods and services. Applicant's original website at afrebay.com and its social media pages repeatedly used "AFREBAY" or "Afrebay" to identify Applicant in a manner that would condition consumers to use AFREBAY alone for these purposes. 32 TTABVUE 57-119.³⁶ We reproduce below portions of representative pages from Applicant's website and social media pages:³⁷



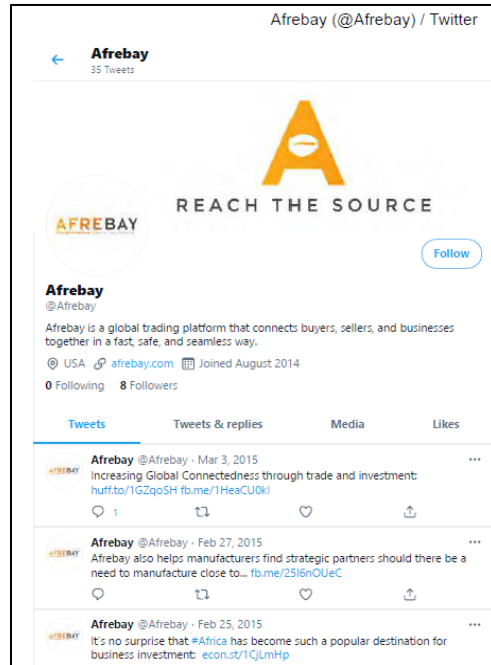
Id. at 62.



³⁶ A portion of Applicant's website captioned "FAQs: Afrebay Sellers" used "Afrebay" to identify Applicant in the listed questions. 32 TTABVUE 80-81.

³⁷ Applicant's website and social media pages appear to have been inactive as of the time of trial. Hamilton Rebuttal Decl. ¶¶ 4-12; Exs. G-J (45 TTABVUE 4-5, 7-30);

Id. at 82.



Id. at 94 (twitter.com, now X).



Id. at 119 (pinterest.com).

Applicant's own textual uses of "AFREBAY" or "Afrebay" confirm that AFREBAY is the dominant portion of Applicant's composite mark because it is most "likely to make a greater impression upon purchasers, to be remembered by them, and to be

used by them to request the [services].” *Sabhnani*, 2021 USPQ2d 1241, at *31. We turn now to the required comparisons of Applicant’s mark, in its entirety, to the EBAY Lowercase Word Mark and the EBAY Standard-Character Word Mark, in their entireties, giving greater weight in those comparisons to the word AFREBAY in Applicant’s mark than to other elements of the mark.

With respect to appearance, as discussed above, Applicant displays its mark next to the EBAY Lowercase Word Mark in its brief, 48 TTABVUE 23, and appears to rely on the visual differences between the marks that are discernable when the marks are considered together. *Id.* at 23-25. But the marks must be considered “in light of the fallibility of human memory’ and ‘not on the basis of side-by-side comparison.” *St. Helena Hosp.*, 113 USPQ2d at 1085 (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977)). We must assess the visual similarity or dissimilarity of the marks from the perspective of a consumer with a general rather than specific impression of the EBAY Standard-Character Word Mark, or the EBAY Lowercase Word Mark, who separately sees Applicant’s mark used in connection with services that are identical to those for which Opposer’s marks are registered.

Opposer’s rights in the EBAY Standard-Character Word Mark shown in the ’204 Registration “reside in the wording per se and not in any particular font style, size, or color.” *Aquitaine Wine USA*, 126 USPQ2d at 1186 (citing *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011)). The EBAY Standard-Character Word Mark thus “may be presented in any font style, size

or color, including the same font, size and color as the literal portions of Applicant's mark," *id.*, and in "the same stylization actually used or intended to be used by the other party, or one that minimizes the differences or emphasizes the similarities between the marks." *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1823 (TTAB 2015) (citing *Citigroup*, 98 USPQ2d at 1258-59). Accordingly, we must assume that the letters in the word EBAY in the EBAY Standard-Character Word Mark could be presented by Opposer in the same font style and colors in which those four letters appear in Applicant's mark.³⁸

A consumer with a general recollection of the EBAY Standard-Character Word Mark in this envisioned display who separately encounters Applicant's composite mark used in connection with the identical Class 36 "credit card and debit card transaction processing services" identified in the '204 Registration could readily view Applicant's mark as a variant of Opposer's mark pertaining to credit card and debit card transactions involving buyers or sellers in Africa. We find that the marks are more similar than dissimilar in appearance with respect to Class 36 in the application.

With respect to Class 35, we must compare the appearance of the EBAY Lowercase Word Mark with Applicant's composite mark. A consumer with a general

³⁸ Applicant argues that "[w]hile a standard character mark covers 'all reasonable manners' of display, where it would be unreasonable to assume that the word mark owner would adopt the same design as the cited mark, the marks are not improperly similar." 48 TTABVUE 24 (citing *In re White Rock Distilleries, Inc.*, 92 USPQ2d 1282, 1284 (TTAB 2009)). The Federal Circuit has "rejected the 'reasonable manners' test as 'unduly narrow' and [has] endorsed a standard 'that allows a broader range of marks to be considered in the *DuPont* analysis when a standard character mark is at issue.'" *Aquitaine Wine USA*, 126 USPQ2d at 1186 (quoting *Viterra*, 101 USPQ2d at 1910).

recollection of that mark will unquestionably recall the word EBAY and will likely recall that it is displayed in lowercase letters in multiple colors, but it is less likely that such a consumer will recall that the letters E-B-A-Y appear “in the following order: red, blue, yellow, and green,” 48 TTABVUE 24, as Applicant suggests. Such a consumer who separately views Applicant’s mark, which is dominated by the word AFREBAY in black and orange, with “E” in orange and “BAY” in black, is unlikely to view AFREBAY, or the letter string E-B-A-Y in AFREBAY, as the EBAY Lowercase Word Mark. The question is whether the dominant word AFREBAY in Applicant’s mark is likely to be viewed as a variant of that mark.

Applicant’s argument that its mark “visually separates the terms as AFRE and BAY rather than AFR and EBAY,” 48 TTABVUE 29, is true to the extent that the letters AFRE appear in orange while the letters BAY appear in black, but the record shows that “AFR,” the first three letters in the words “Africa” and “African,” is a recognized abbreviation of both words, but “AFRE” is not. 32 TTABVUE 10 (Allacronyms), 14 (MERRIAM-WEBSTER DICTIONARY), 18 (yourdictionary.com). Applicant stated in discovery that in selecting its mark it also considered “Afribay,” which contains the letter string “A-F-R-I” that appears in “Africa” and “African,” 32 TTABVUE 133 (Resp. to Int. No. 1d) (emphasis added), but it ultimately selected “Afrebay,” in which the letter string “A-F-R-E” does not correspond to a letter string in the words “Africa” or “African” (emphasis added). It is unlikely that “AFRE” would invariably be viewed as a shorthand for either “Africa” or “African” even if the letters “A-F-R-E” appear together in the same colors in the word AFREBAY, and it is possible

that some consumers would view the letter string A-F-R as that shorthand, with the letters E-B-A-Y that follow A-F-R being Opposer's mark. We find, however, that Applicant's mark is slightly more dissimilar than similar in appearance to the EBAY Lowercase Word Mark.

Turning next to the similarity or dissimilarity of the marks in sound, the parties agree that Opposer's word mark will be pronounced with a long "e" sound (i.e., "ee-bay"), and they focus primarily on how consumers will pronounce the word AFREBAY in Applicant's mark.³⁹ Applicant properly notes that there is no "correct" way to pronounce a mark that is not a recognized English word. 48 TTABVUE 26. *See, e.g., StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651 (Fed. Cir. 2014). Applicant claims, however, that this rule "may be tempered by linguistic possibilities," 48 TTABVUE 26, and that the proper inquiry is "what the usual pronunciation by the ordinary consumer is." *Id.* (quoting *Lebow Bros. v. Lebole Euroconf S.p.A.*, 503 F. Supp. 209, 212 USPQ 693, 695 (E.D. Pa. 1980)). *Lebow Bros.* does not bind us and to the extent that it holds that the factfinder must determine

³⁹ As discussed above, Applicant makes a threshold argument that "EBAY is a single word of two syllables, while AFREBAY REACH THE SOURCE (+design) is four words comprised of six syllables," 48 TTABVUE 25, and that "the addition of the prefix AFRE adds a new aural component, which changes both the sound and cadence of the phrases." *Id.* Applicant acknowledges, however, that "consumers may refer to marks in their shortened version," *id.* at 23, and the Board has noted the "penchant of consumers to shorten marks," *Sabhnani*, 2021 USPQ2d 1241, at *36 (quoting *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring: "the users of language have a universal habit of shortening full names – from haste or laziness or just economy of words.")). Given Applicant's own use of AFREBAY alone to identify itself and its services, and the length, relatively small size, and subordinate positioning of the tagline "Reach the Source" in Applicant's mark, it is far more likely that consumers will verbalize Applicant's mark simply as "AFREBAY" than as the "four words comprised of six syllables" that form the phrase "AFREBAY REACH THE SOURCE."

the “usual” or “likely” pronunciation of a mark, *Lebow Bros.*, 212 USPQ at 695, we must reject its analysis because it conflicts with the applicable principle that we must consider “all the reasonable possibilities” for the pronunciation of AFREBAY, not merely its “usual” or “likely” pronunciation. *Inter IKEA Sys., B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 n.19 (TTAB 2014).

Applicant argues that its “Mark is commonly pronounced as ‘a-frih-bay’ as consumers of Applicant’s services would recognize that AFREBAY REACH THE SOURCE (+design) signifies an African connotation and ‘Africa’ is pronounced as ‘a-frih-ka.’” 48 TTABVUE 25-26. As discussed above, Applicant does not dispute that its logo designer, Dante Fiorini of Xentina Creative Group, pronounced “AFREBAY” with a long “e” sound in a voice mail message to Opposer’s counsel, but attributes this to the fact that Mr. Fiorini “is Argentinian and a native Spanish speaker, and speaks English with a Spanish accent” and that “his natural propensity would be to pronounce the word ‘Africa’ with a long ‘e’ sound.” *Id.* at 26. Under Applicant’s view of the natural propensity of Spanish speakers, there are millions of people in the United States who, like Mr. Fiorini, would pronounce “AFREBAY” with a long “e” sound. The United States is a polyglot nation, and the Board has “consistently found that Spanish is a ‘common language’ in the United States,” *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, at *7 (TTAB 2019), and has taken judicial notice that “after English, Spanish is the most common spoken language in the United States and that over 12% of the United States population speaks Spanish.” *Id.*

The pronunciation of “AFREBAY” with a long “e” sound may not be the most common pronunciation of the word by United States consumers, but it is at least a reasonable possibility and not “inherently implausible.” *Id.*, at *6 (finding that it would be inherently implausible “for RICARDO to pronounced similarly to RICHARD.”). We find that Applicant’s mark is likely to be verbalized simply as “AFREBAY” and that a consumer familiar with the sound of the EBAY word mark could hear “AFREBAY” spoken with a long “e” sound as “Afreebay” as being more similar than dissimilar in sound to EBAY.

Finally, with respect to meaning, there is no doubt that Applicant’s composite mark in its entirety connotes Africa given the presence in the mark of an outline of the African continent, but there is nothing on the face of the mark or otherwise in the record supporting either Applicant’s argument that the word BAY in the word AFREBAY connotes the historical African slave trade or Applicant’s claim that its mark “would seek to erase the negative connotations of the term and reclaim it for a better and higher purpose.” 48 TTABVUE 28. There is no mention on Applicant’s website and social media pages of what one of Applicant’s discovery response called “the historical slave trade bay across West Africa with the Americas.” 32 TTABVUE 133 (Resp. to Int. No. 1b). Applicant’s webpages discussed more mundane matters such as mitigating “the risk of conducting business with African companies,” *id.* at 58, achieving financial freedom by becoming an “Afreebay Ambassador,” *id.* at 59, “revolutioni[zing] the way the world did business with Africa and beyond,” *id.* at 60, showing that there are export resources beyond coffee, gold, and diamonds,” including

traditional African clothing, livestock, rare earth minerals, chemicals, and energy, *id.* at 62, and growing one's business with the new Afrebay online marketplace. *Id.* Applicant's Twitter and Facebook pages described "Afrebay" as "a global trading platform that connects buyers, sellers, and businesses together in a fast, safe, and seamless way," *id.* at 94, 103, while Applicant's Pinterest page stated that "Afrebay offers a safe, secure and proprietary trading platform for the buying and selling of products and commodities across Africa." *Id.* at 119. Indeed, there is no discussion of the meaning of the word "bay" in Applicant's mark in Applicant's public-facing materials, which simply discussed the business of its trading platform focusing on Africa.

As shown and discussed above, in the word AFREBAY in Applicant's mark, the letters AFRE appear in orange while the letters BAY appear in black, but the record shows that "AFRE" is not an understood or commonly used abbreviation of the words "Africa" or "African," and there is no evidence that "AFRE" (as opposed to "AFR") would be understood to be a shorthand for either "Africa" or "African" even if the letters "AFRE" appear together in the same colors. We find that a consumer with a general recollection of either Opposer's EBAY Standard-Character Word Mark or EBAY Lowercase Word Mark who separately encounters Applicant's mark for identical services could reasonably understand Applicant's mark, dominated by the word AFREBAY, as a variant of Opposer's EBAY mark referring to an Africa-centric

trading platform.⁴⁰ Applicant's mark is more similar than dissimilar in meaning to Opposer's EBAY Standard-Character Word Mark and EBAY Lowercase Word Mark.

As discussed above, similarity between marks is a matter of degree, not a binary choice. There are differences between Applicant's mark and both the EBAY Standard-Character Word Mark and EBAY Lowercase Word Mark, particularly in appearance, but Applicant's mark is more similar than dissimilar in appearance, sound, and meaning to Opposer's EBAY Standard-Character Word Mark shown in the '204 Registration, and more similar than dissimilar in sound and meaning to Opposer's EBAY Lowercase Word Mark shown in the '423 Registration. The first *DuPont* factor supports a conclusion of a likelihood of confusion in both Class 35 and Class 36.

4. Consumer Sophistication and Purchaser Care

“Under the fourth *DuPont* factor, we consider ‘[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *Made in Nature*, 2022 USPQ2d 557, at *49 (quoting *DuPont*, 177 USPQ at 567). We must assess this factor from the standpoint of the purchasers of the “advertising and marketing services, namely, promoting the goods and services of others” and “advertising, marketing and promotion services” broadly identified in Class 35 in the application, and the “credit card and debit card transaction processing services” broadly identified in Class 36 in the application.

⁴⁰ Applicant rejects this possibility because, in addition to the differences in appearance discussed above, Opposer's SEC filing lists international subsidiaries with “eBay” before geographic references. 48 TTABVUE 30. There is no evidence that the average United States consumer of Opposer's services is familiar with these names.

Applicant argues that its business model

is restricted to sellers from Africa, offering newly manufactured goods and/or services for international export. . . . As these sellers are businesses, rather than a combination of businesses and individuals, they are likely to be more knowledgeable about sales techniques and selling than the assorted masses gathered on EBAY. Moreover, as sellers of original products with more closely related points of origin, prices are less likely to vary significantly for similar goods. Purchasers, meanwhile, are typically also businesses, endeavoring to create lasting trade relationships with these African manufacturers. . . . As such, they have a vested interest in the quality and authenticity of the goods purchased. . . . Where the relevant buyer class is composed solely of professional, or commercial, purchasers, it is reasonable to set a higher standard of care than exists for consumers.

48 TTABVUE 40 (record citations omitted).

Applicant's arguments based on its intended actual use of its mark are unavailing because neither of the involved identifications in the application contains any "class-of-consumer restrictions" to businesses. *Made in Nature*, 2022 USPQ2d 557, at *49.⁴¹ In the absence of such restrictions, we must deem Applicant's Class 35 "advertising and marketing services, namely, promoting the goods and services of others" and "advertising, marketing and promotion services," and Applicant's Class 36 "credit card and debit card transaction processing services," to be rendered to all ordinary consumers of such services, which could include individuals who own credit and debit cards (likely a large majority of adults in the general public in the United States) and who run sole proprietorships that require advertising services. The record is devoid

⁴¹ Applicant concedes that only the "majority of Applicant's customers, both its sellers and buyers," are retailers. 48 TTABVUE 41.

of evidence that such consumers would exercise anything more than ordinary care in purchasing the identified services, and the fourth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

5. Coexistence of the Parties' Marks

The “eighth *DuPont* factor considers the ‘length of time during and conditions under which there has been concurrent use without evidence of actual confusion.’” *Made in Nature*, 2022 USPQ2d 557, at *56 (quoting *DuPont*, 177 USPQ at 567). Opposer raises this factor preemptively in its main brief, arguing that Applicant has never actually used its mark and that “it is not surprising that neither party has submitted evidence of actual confusion.” 47 TTABVUE 44. Applicant does not address the eighth factor in its brief, although it claims that “Opposer’s statements regarding Applicant’s lack of use in the marketplace are both meaningless and deceptive” because Applicant “has not yet filed an allegation to allege use.” 48 TTABVUE 11. Although Applicant suggests obliquely that it has made sufficient use to file an amendment to allege use, but has simply elected not to do so, *id.*, Applicant admitted in discovery that as of July 6, 2022, it had made no use of its mark and had not offered any of the identified services. 32 TTABVUE 134-35 (Resps. to Int. Nos. 2 and 3(b)). There is also no evidence that Applicant began use of its mark thereafter.

“The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by applicant of its mark for a significant period of time in the same markets as those served by opposer under its marks.” *Made in Nature*, 2022 USPQ2d 557, at *56 (quoting *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff’d*, 637 F.3d 1344, 98

USPQ2d 1253 (Fed. Cir. 2011)). On this record, there has been no meaningful opportunity for actual confusion to arise, and the eighth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

6. The Extent of Potential Confusion

“The twelfth *DuPont* factor discusses “[t]he extent of potential confusion, i.e., whether de minimis or substantial.” *Id.*, at *62 (quoting *DuPont*, 177 USPQ at 567). Applicant argues that “[m]ere speculation cannot provide the basis for a finding of confusion; the standard must be greater than a scintilla of a possibility,” 48 TTABVUE 42, that “[f]or this factor to favor the Opposer, a **probability** of confusion, not a mere possibility, must exist,” *id.*, that “[a] probability of confusion may be found when a large number of purchasers likely will be confused as to the source of the goods in question,” *id.*, and that “no actual confusion is known or has been shown.” *Id.* Applicant concludes that “any potential confusion is unlikely given the differences in the marks and the goods. Nothing on the record indicates any potential confusion that would cause harm to the Opposer. As such, this factor must either favor Applicant, or be found neutral.” *Id.*

These arguments are similar in nature to those made by the applicant in *Made in Nature*, who argued that given the claimed differences in the marks and trade channels and the weakness of the opposer’s mark, “the potential for confusion is, at most, de minimis, and does not rise to the **likelihood** of confusion standard in any case.” *Made in Nature*, 2022 USPQ2d 557, at *62 (emphasis in bold in the original). As in *Made in Nature*, however, our disposition of the underlying *DuPont* factors

against Applicant dooms its argument under the twelfth factor, *see id.*, which we find to be neutral in our analysis of the likelihood of confusion.

7. Summary of the *DuPont* Factors

The only relevant *DuPont* factor that does not strongly support a conclusion that confusion is likely is the first factor.⁴² The second, third, and fifth *DuPont* factors strongly support such a conclusion because the involved services, channels of trade, and classes of consumers are literally or legally identical, and Opposer's EBAY word mark is extremely strong. The strength of the EBAY word mark admitted by Applicant, 48 TTABVUE 41, and supported by the record, "plays a dominant role in [our] likelihood of confusion analysis, because famous marks enjoy a broad scope of protection or exclusivity of use." *Monster Energy*, 2023 USPQ2d 87, at *22 (citing *Bose Corp. v. OSC Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002)).

With respect to the first *DuPont* factor, there are some differences between the marks, particularly with respect to appearance, but Applicant's mark, and the EBAY word mark shown in the '204 and '423 Registrations, are sufficiently similar in overall commercial impression when considered in their entireties for confusion to be likely given the strength of Opposer's mark and the use of the involved marks in connection with identical services, and the longstanding principle that "[a]ny doubts about likelihood of confusion . . . under § 2(d) must be resolved against [A]pplicant as the newcomer." *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025, 1026

⁴² As discussed above, the fourth, sixth, eighth, and twelfth *DuPont* factors are neutral.

(Fed Cir. 1988)). We conclude, based on the record as a whole, that consumers familiar with Opposer's well-known EBAY word mark who encounter Applicant's mark for identical services are likely to believe that the services have a common source or that Applicant is an affiliate of Opposer.

Opposer proved, by a preponderance of the evidence, that it is entitled to oppose registration of Applicant's mark, that it has priority of use of its EBAY word mark, and that there is a likelihood of confusion arising from Applicant's use of its mark in connection with at least one service identified in each class in Applicant's two-class application. Because Opposer has proven its Section 2(d) claim as to both classes in the application, it is unnecessary for us to reach Opposer's Section 43(c) likelihood of dilution claim. *See, e.g., Andrusiek v. Cosmic Crusaders LLC*, 2024 USPQ2d 21, at *11 n.14 (TTAB 2022).

Decision: The opposition is sustained.