

This Opinion is Not a  
Precedent of the TTAB

Mailed: December 26, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*My Own Meals, Inc.*

*v.*

*Purfoods, LLC*  
—

Opposition No. 91254642  
Opposition No. 91277104  
Cancellation No. 92073705  
Cancellation No. 92078906  
(Consolidated)  
—

Michele S. Katz of Advitam IP, LLC for My Own Meals Inc.

Wendy K. Marsh, Jeffrey D. Harty, and Allison E. Kerndt of Nyemaster Goode, P.C.  
for Purfoods, LLC.  
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Before Shaw, Deputy Chief Administrative Trademark Judge, and Larkin and  
Thurmon, Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

These four consolidated cases involve a messy food fight between two companies  
who each claim the right to be recognized as “Mom” in connection with prepared meal-  
related goods and services.

One of the would-be “Moms,” Purfoods, LLC, the defendant in each proceeding (“Respondent”),<sup>1</sup> owns the following registrations of, and applications to register, various MOM’S MEALS-formative marks:

### **Registrations**

- Registration No. 2430824 (the “824 Registration”) of the standard-character mark MOM’S MEALS for “food preparation, namely preparation of home cooked meals” and “restaurant services featuring home delivery” in International Class 42;<sup>2</sup>
- Registration No. 4316266 (the “266 Registration”) of the composite word-and-design mark shown below for “food preparation, namely, preparation of home cooked meals and preparation of frozen or shelf-stable meals” and “restaurant services featuring home delivery” in International Class 42.<sup>3</sup>



- Registration No. 4638408 (the “408 Registration”) of the standard-character mark MOM’S MEALS NOURISHCARE for “Prepared, packaged meals consisting primarily of meat, fish, poultry or vegetables” in International Class 29.<sup>4</sup>

### **Applications**

- Application Serial No. 88611072 (the “072 Application”) to register the composite word-and-design mark shown below for “food preparation,

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<sup>1</sup> In Board inter partes proceedings, the party in the position of plaintiff is called the petitioner in cancellations and the opposer in oppositions, and the party in the position of defendant is called the respondent in cancellations and the applicant in oppositions. Nevertheless, the parties have both referred to themselves in their filings primarily as the “Petitioner” and the “Respondent,” and for the sake of consistency, we will use the same defined terms in this opinion.

<sup>2</sup> The ’824 Registration issued on February 27, 2001 and has been renewed.

<sup>3</sup> The ’266 Registration issued on April 9, 2013 and has been renewed.

<sup>4</sup> The ’408 Registration issued on November 11, 2014 and has been renewed.

namely, preparation of home cooked meals and preparation of frozen or shelf-stable meals” in International Class 43:<sup>5</sup>



- Application Serial No. 90888215 (the “215 Application”) to register the composite word-and-design mark shown below for “food preparation, namely, preparation of home cooked meals and preparation of frozen or shelf-stable meals” in International Class 43:<sup>6</sup>



The other would-be “Mom,” My Own Meals, Inc., the plaintiff in each proceeding (“Petitioner”), claims that “[i]n blatant disregard for Petitioner’s prior trademark rights and reputation in the market, Respondent applied to register confusingly similar marks and improperly maintains registrations obtained through deception.”

71 TTABVUE 9.<sup>7</sup> Petitioner has filed the following four proceedings against

Respondent:

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<sup>5</sup> The '072 Application was filed on September 10, 2019 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Respondent’s claim of first use of the mark anywhere and first use of the mark in commerce at least as early as July 2019.

<sup>6</sup> The '215 Application was filed on August 17, 2021 under Section 1(a) of the Trademark Act, based on Respondent’s claim of first use of the mark anywhere and first use of the mark in commerce at least as early as November 2019.

<sup>7</sup> As discussed below, the Board consolidated all four proceedings and designated Opposition No. 91254642 as the “parent” case in which all post-consolidation filings were to be made.

- Opposition No. 91254642 against the '072 Application, filed on March 12, 2020, seeking to prevent registration of Respondent's mark on the ground of priority and likelihood of confusion;
- Cancellation No. 92073705, filed on March 18, 2020, seeking to cancel the '266 Registration on the grounds of fraud and abandonment, and the '824 Registration on the ground of fraud;
- Cancellation No. 92078906, filed on January 26, 2022, seeking to cancel the '408 Registration on the grounds of fraud and abandonment; and
- Opposition No. 91277104 against the '215 Application, filed on July 1, 2022, seeking to prevent registration of Respondent's mark on the ground of priority and likelihood of confusion.

Petitioner has asserted the following four registrations and one pending application in these proceedings:<sup>8</sup>

### **Registrations**

- Registration No. 1470809 (the "809 Registration") of the standard-character mark MY OWN MEAL for "prepackaged prepared meals namely, meat and vegetable entrees" in International Class 29;<sup>9</sup>
- Registration No. 1548528 (the "528 Registration") of the standard-character mark MY OWN MEAL for "prepacked, prepared pasta dinners" in International Class 30;<sup>10</sup>

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Citations in this opinion to the briefs and other materials in the case file in the parent case refer to TTABVUE, the Board's online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, Opp. No. 91216455, 2020 WL 2853282, at \*1 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. Unless otherwise indicated, all TTABVUE citations in this opinion are to the parent case file. Petitioner's main brief appears at 71 TTABVUE and its reply brief appears at 73 TTABVUE. Respondent's brief appears at 72 TTABVUE.

<sup>8</sup> Petitioner pleaded additional registrations, but in its main brief it included only the ones discussed below in a chart of "relevant trademarks." 71 TTABVUE 13.

<sup>9</sup> The '809 Registration issued on December 29, 1987 and has been renewed.

<sup>10</sup> The '528 Registration issued on July 18, 1989 and has been renewed.

- Registration No. 3964874 (the “874 Registration”) of the composite word-and-design mark shown below for “packaged meals consisting primarily of meat, fish, poultry or vegetables” in International Class 29;<sup>11</sup>



- Registration No. 5631463 (the “463 Registration”) of the composite word-and-design mark shown below for “prepackaged prepared meals, namely, meat and vegetable entrees” in International Class 29;<sup>12</sup>



- Registration No. 6067075 (the “075 Registration”) of MY OWN MEALS in standard characters for “food preparation services.”<sup>13</sup>

### **Application**

- Application Serial No. 88509153 (the “153 Application”) to register the standard character mark M.O.M. for “Prepackaged, prepared meals consisting principally of meat or vegetables; prepackaged, prepared meals consisting suspended principally of meat or vegetables and also including potatoes; prepackaged prepared meals, namely, meat and vegetable entrees” in International Class 29; “Prepackaged, prepared pasta dinners; prepackaged, prepared pasta meals consisting primarily of pasta featuring tomato, cheese, or vegetable sauces; prepackaged entrees consisting primarily of pasta or rice; prepackaged meals consisting primarily of pasta or rice” in International Class 30; “Wholesale food distributorship services”

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<sup>11</sup> The ’874 Registration issued on May 24, 2011 and has been renewed.

<sup>12</sup> The ’463 Registration issued on December 18, 2018 and has been maintained.

<sup>13</sup> The ’075 Registration issued on June 2, 2020.

in International Class 35; “Food delivery services” in International Class 39; and “Food preparation services” in International Class 43.<sup>14</sup>

### **Consolidation of the Proceedings**

The Board ultimately consolidated all four proceedings. 41 TTABVUE 2.<sup>15</sup> Although they have been consolidated, “each proceeding retains its separate character and requires entry of a separate judgment.” *Mountain Gateway Order, Inc. v. Va. Cmty. Coll. Sys.*, Opp. Nos. 91283412 and 91283416, 2024 WL 2863444, at \*1 (TTAB 2024).<sup>16</sup> The “decision on the consolidated cases will take into account any differences in the issues raised by the respective pleadings” and “a copy of the decision will be placed in each proceeding file.” *Id.* (citation omitted).

Because the parties submitted a single set of briefs, made a single record, and asserted a single set of evidentiary objections in the four consolidated cases, we have elected to decide all four cases in this single (albeit lengthy) opinion rather than in two or more separate opinions that would require repetitive discussion of matters or cross-referencing.

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<sup>14</sup> The ’153 Application was filed on July 11, 2019 under Section 1(a) of the Trademark Act based on Petitioner’s claimed first use and first use in commerce in 1987 in Classes 29, 30, 35, and 39, and in 1991 in Class 43.

<sup>15</sup> A chronological history of the consolidation of the four proceedings appears in the Board’s final order setting the four consolidated cases for trial. 53 TTABVUE 1-2.

<sup>16</sup> The citation form in this opinion is in a form provided in Section 101.03(a) of the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion cites the Westlaw legal database (“WL”) and, in the initial full citation of a case, also identifies the number of the Board proceeding where it is available. The Board’s decisions that have issued since 2008 are available in TTABVUE and many precedential Board decisions that issued from 1996 to 2008 are available online from the TTAB Reading Room by entering the same information. Practitioners should also adhere to the practice set forth in TBMP § 101.03(a).

In Section I below, we discuss the record and resolve numerous procedural and evidentiary matters. In Section II below, we discuss Petitioner's entitlement to assert the statutory causes of action that it has asserted in each of the four proceedings. In Section III below, we decide Petitioner's priority and likelihood of confusion claims in Opposition Nos. 91254642 and 91277104. In Section IV below, we decide Petitioner's fraud claims in Cancellation Nos. 92073705 and 92078906. In Section V below, we decide Petitioner's abandonment claims in Cancellation Nos. 92073705 and 92078906. For the reasons discussed in Sections III-V below, we dismiss both oppositions and deny both cancellation petitions.

#### **I. The Record and Preliminary Matters**

The record in these four consolidated proceedings includes the pleadings in each case, which we discuss immediately below, the file histories of the two opposed applications and the three challenged registrations, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), and various materials submitted by the parties, many of which are subject to evidentiary objections that we discuss and decide below.

#### **Operative Pleadings**

In Opposition No. 91254642, the parent case, the operative pleadings are Petitioner's Amended Notice of Opposition, 31 TTABVUE 1-7, and Respondent's Answer thereto. 34 TTABVUE 1-6. Respondent's Answer admitted that the words MOM, M.O.M., MOM'S, and MOM MEALS are confusingly similar to Respondent's mark MOM'S MEALS and design for similar services, *id.* at 4 (Answ. ¶¶ 12, 15), but denied the other salient allegations in Petitioner's Amended Notice of Opposition.

In Opposition No. 91277104, the operative pleadings are Petitioner's Notice of Opposition, 1 TTABVUE 1-11 (Opp. No. 91277104), and Respondent's Answer thereto. 5 TTABVUE 1-6 (Opp. No. 91277104). Respondent's Answer denied the salient substantive allegations in Petitioner's Notice of Opposition.

In Cancellation No. 92073705, the operative pleadings are Petitioner's Second Amended Petition for Cancellation, 32 TTABVUE 1-106,<sup>17</sup> and Respondent's Answer thereto. 35 TTABVUE 1-11. Respondent's Answer denied the salient substantive allegations in Petitioner's Second Amended Petition for Cancellation.

In Cancellation No. 92078906, the operative pleadings are Petitioner's Petition for Cancellation, 1 TTABVUE 1-106 (Canc. No. 92078906),<sup>18</sup> and Respondent's Answer thereto. *Id.* at 1-10 (Canc. No. 92078906). Respondent's Answer denied the salient substantive allegations in Petitioner's Petition for Cancellation and asserted the purported affirmative defenses of laches and the insufficiency of Petitioner's pleading of fraud.<sup>19</sup>

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<sup>17</sup> Petitioner attached seven exhibits to its Second Amended Petition for Cancellation, including a declaration and portions of the transcript of a discovery deposition in Cancellation No. 92073705 and Opposition No. 91254642. 1 TTABVUE 15-106. With certain exceptions that are inapplicable here, "exhibits to pleadings are not evidence and will not be considered unless they are properly introduced in evidence." *Flame & Wax, Inc. v. Laguna Candles, LLC*, Canc. No. 92072343, 2022 WL 3083070, at \*1 n.3 (TTAB 2022) (citing Trademark Rule 2.122(c), 37 C.F.R. § 2.122(c)).

<sup>18</sup> Petitioner attached the same seven exhibits to its Petition for Cancellation. 1 TTABVUE 15-106 (Canc. No. 92078906).

<sup>19</sup> A laches defense is unavailable against claims of fraud and abandonment, *Mountain Gateway Order*, 2024 WL 2863444, at \*6, and Respondent did not pursue that defense at trial.



## Materials Submitted by the Parties

### Petitioner

- Petitioner’s July 19, 2022 Notice of Reliance on “plain” copies of the certificates of registration of its pleaded ’809, ’528, ’874, ’463, and ’075 Registrations and a portion of the file history of its ’153 Application, and United States Patent and Trademark Office (“USPTO”) electronic records regarding, and portions of the file histories of, the challenged registrations and opposed applications (Exhibits 1-10); Respondent’s responses to Petitioner’s discovery requests (Exhibit 11); excerpts from the discovery depositions of Respondent’s witnesses (Exhibits 12-14); various printed publications (Exhibit 15); Internet materials from Petitioner’s website at myownmeals.com (Exhibits 16-18) and from Respondent’s website at momsmeals.com (Exhibits 19); and 17 declarations executed between December 17, 2019 and March 10, 2020, including the March 10, 2020 declaration of Mary Anne Jackson, Petitioner’s founder and President (the “First Jackson Declaration”) (Exhibit 20); 39 TTABVUE 1-628;<sup>20</sup>
- Petitioner’s Amended Notice of Reliance on Internet materials, including pages from Respondent’s website (Exhibits 21, 24) printed publications (Exhibit 22), and various materials produced by Respondent in discovery (Exhibits 23, 25), 48 TTABVUE 1-160;<sup>21</sup> and

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<sup>20</sup> Petitioner’s July 19, 2022 Notice of Reliance was filed prior to the scheduled opening of Petitioner’s trial period in the three cases that were then consolidated when the Notice of Reliance was filed. 53 TTABVUE 2. The fourth case was subsequently consolidated with the other three and a new trial schedule was issued. 41 TTABVUE 3.

<sup>21</sup> In its September 7, 2023 Amended Notice of Reliance, Petitioner referred to Exhibits 1-20 in its July 19, 2022 Notice of Reliance, 48 TTABVUE 2-7, but attached only new Exhibits 21-25. *Id.* at 9-160. Respondent moved to strike the referenced Exhibits 1-20 in their entirety on the ground of untimeliness and the declarations in Exhibit 20 on the additional ground that they had all been executed prior to Petitioner’s original trial period. The Board denied the motion as to the untimely filing of Exhibits 1-20 because Respondent had waived any such objection by failing to challenge the Notice of Reliance when it was filed prematurely. 53 TTABVUE 4. The Board granted Respondent’s motion to strike Exhibit 20, however, because the 17 declarations in Exhibit 20 were “executed over three years prior to [Petitioner’s] [2023] testimony period and there [was] no stipulation or Board order” permitting their use as trial testimony, *id.* at 5, and because the declarations were originally used in 2019 and 2020 in support of Petitioner’s prosecution of its ’153 Application. *Id.* at 6-7. Accordingly, Exhibits 1-19 and 21-25 are in the record subject to Respondent’s specific evidentiary objections to certain of those exhibits, 72 TTABVUE 15-18, which we address below.

- Petitioner’s Second Notice of Reliance on two videos (Exhibits 26-27),<sup>22</sup> Internet materials (Exhibits 28-30) and another declaration of Ms. Jackson executed on April 9, 2024 (Exhibit 31) (the “Second Jackson Declaration”), 63 TTABVUE 1-25, submitted during Petitioner’s rebuttal period.<sup>23</sup>

## Respondent

- Testimony Declarations of Rickey Lee (“Rick”) Anderson, Respondent’s co-founder, Michael Anderson, Rick Anderson’s son and a member of Respondent’s board, and Brian Hoey, Respondent’s Risk Officer, 56 TTABVUE 1-11;<sup>24</sup> and
- Respondent’s Notice of Reliance on portions of the discovery deposition transcript of Rick Anderson (Exhibit 1); Respondent’s answers in the four consolidated proceedings (Exhibits 2-5);<sup>25</sup> the same declarations of Rick Anderson, Michael Anderson, and Brian Hoey (Exhibits 6-8); and exhibits to the discovery deposition of Ms. Jackson, and excerpts from the transcript of the deposition (Exhibits 9-17).<sup>26</sup> 57 TTABVUE 1-79; 59 TTABVUE 1-36.

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<sup>22</sup> Petitioner did not submit the two videos, but instead relies on Exhibits 26 and 27, which are screenshots from youtube.com together with comments of various viewers. 63 TTABVUE 6-9. Petitioner also provides what appear to be hyperlinks to the pages in the body of its Second Notice of Reliance. *Id.* at 3. The Board has “made clear that providing hyperlinks to internet materials is insufficient to make such materials of record.” *In re Weiss*, Ser. No. 88621608, 2024 WL 3617597, at \*2 (TTAB 2024) (citations omitted).

<sup>23</sup> Respondent moved to strike Petitioner’s Second Notice of Reliance on the grounds that the Second Jackson Declaration is improper rebuttal testimony and should have been submitted as part of Petitioner’s case-in-chief, and that it contains impermissible hearsay. 64 TTABVUE 5-7. The Board deferred consideration of that motion until final decision, 65 TTABVUE, and we decide it below.

<sup>24</sup> Petitioner moved to strike portions of the three declarations on the ground that they are “sham declarations” that “blatantly contradict prior sworn testimony.” 60 TTABVUE 2. The Board deferred consideration of that motion until final decision, 61 TTABVUE 1, and we decide it below.

<sup>25</sup> The operative pleadings in a Board proceeding “are automatically of record,” *Monster Energy Co. v. Lo*, Opp. No. 91225050, 2023 WL 417620, at \*2 (TTAB 2023), and it was unnecessary for Respondent to separately submit its answers.

<sup>26</sup> The excerpts from Ms. Jackson’s deposition were designated as confidential under the Board’s Standard Protective Order, and were filed in redacted form at 57 TTABVUE and under seal at 58 TTABVUE. The Board is not “bound by the parties’ [confidentiality] designations, and will treat as confidential only testimony and evidence that is truly confidential, so that it can discuss the pertinent evidence of record.” *Major League Baseball Players Ass’n v. Chisena*, Opp. Nos. 91240180, 91242556, and 91243244, 2023 WL 2986321,

## Preliminary Matters

Before we discuss the merits of the four consolidated cases, we must address (1) Petitioner’s motion to strike portions of the declarations of Respondent’s witnesses; (2) Respondent’s motion to strike Petitioner’s Second Notice of Reliance; (3) Respondent’s motion to strike Petitioner’s reply brief and two attachments, 74 TTABVUE;<sup>27</sup> (4) specific evidentiary objections made in Respondent’s brief, 72 TTABVUE 15-18; and, if Petitioner’s reply brief is considered, (5) evidentiary objections made in that brief. 73 TTABVUE 26-27.

### **Petitioner’s Motion to Strike Portions of the Declarations of Respondent’s Witnesses Rick Anderson, Michael Anderson, and Brian Hoey**

Petitioner moves to strike portions of the testimony declarations of Respondent’s witnesses on the ground that those portions are a “sham” because they “blatantly contradict prior sworn testimony.” 60 TTABVUE 2. Petitioner argues that

[t]he testimonial declarations of Michael Anderson, Ricky Lee Anderson, and Brian Hoey appear to be specifically intended to **contradict their previous deposition testimony** in an attempt to create a question of fact with respect to the use of the marks at issue. To retroactively attempt to create a disputed issue of fact through a declaration that blatantly contradicts the deponent’s own prior sworn testimony, without providing any plausible explanation for the discrepancy, is precisely the type of “sham affidavit” that courts have made clear should be disregarded.

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at \*2 n.8 (TTAB 2023) (citations omitted), *appeal docketed*, No. 23-2073 (Fed. Cir. June 26, 2023). We discuss below certain portions of Ms. Jackson’s deposition testimony that we find not to be properly designated as confidential.

<sup>27</sup> Following the filing of Respondent’s motion to strike Petitioner’s reply brief, the Board issued an order deferring consideration of it until final decision. 75 TTABVUE 1.

*Id.* at 3 (emphasis in bold here in italics in Petitioner’s motion). According to Petitioner, “when a deposition and an affidavit are in conflict, the affidavit is to be disregarded unless it is demonstrable that the statement in the deposition was mistaken, perhaps because the question was phrased in a confusing manner or because there is a plausible explanation for a lapse of memory.” *Id.*

Petitioner discusses the claimed discrepancies between the witnesses’ deposition testimony and their trial testimony, *id.* at 4-7,<sup>28</sup> and concludes that the Board should strike the cited portions of the witnesses’ trial testimony. *Id.* at 7.

Respondent responds that the “sham affidavit” doctrine applies only in the context of summary judgment motions, and that Respondent “cannot find a single instance where the TTAB has adopted and/or followed this doctrine.” 62 TTABVUE 4 & n.1. Respondent also argues that if the doctrine applies in Board proceedings, “there is nothing inconsistent with the statements made by the declarants in their declarations and earlier depositions,” *id.* at 5, and proceeds to discuss the discrepancies claimed by Petitioner. *Id.* at 5-7.

In its reply brief, Petitioner notes that the Board considered the “sham affidavit” doctrine in the context of a summary judgment motion in *Hollywood Casino LLC v. Chateau Celeste, Inc.*, Opp. No. 91203686, 2015 WL 9699248, at \*9-11 (TTAB 2015), after the Federal Circuit did so in *Del. Valley Floral Grp., Inc. v. Shaw Rose Nets, LLC*, 597 F.3d 1374, 1381 (Fed. Cir. 2010) (applying Eleventh Circuit procedural law).

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<sup>28</sup> The claimed discrepancies are relevant to Petitioner’s fraud and abandonment claims in the cancellation proceedings.

66 TTABVUE 3. Petitioner argues that the doctrine is applicable before the Board in the context of trial and that a “motion to strike is an appropriate vehicle to evaluate the reliability of evidence and should not be denied solely due to the procedural stage.” *Id.*

We agree with Petitioner that the “sham affidavit” doctrine applies in Board proceedings at the summary judgment stage, where it prevents a non-movant from creating a genuine dispute of material fact simply by having a witness contradict earlier deposition testimony without an adequate explanation for the discrepancy, but Petitioner has not cited, and we have not located, any precedential decision in which the Board has applied the doctrine on a motion to strike trial evidence. We **deny** Petitioner’s motion to strike the referenced testimony, but will take into account the claimed discrepancies between the witnesses’ deposition and trial testimony in evaluating the credibility of their trial testimony.

**Respondent’s Motion to Strike Plaintiff’s Second Notice of Reliance**<sup>29</sup>

Respondent argues that the Second Jackson Declaration “simply reiterates several of [Plaintiff’s] prior arguments and **again** argues that the testimony of Respondent’s declarants is inconsistent with their prior deposition testimony.” 64 TTABVUE 3 (emphasis in bold here in underscoring in Respondent’s motion). Respondent further argues that “[d]uring a plaintiff’s rebuttal testimony period, the plaintiff may introduce evidence and testimony to deny, explain, or discredit facts

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<sup>29</sup> The title of this motion is a misnomer because Respondent does not seek to strike all of Petitioner’s Second Notice of Reliance, but only Exhibit 31, the Second Jackson Declaration.

and witnesses adduced by the defendant,” *id.* at 4, but that “the Board considers evidence to be improper rebuttal where it does not serve to do the above, but rather where it relates to witness testimony and factual materials that more appropriately should have been introduced during the plaintiff’s case-in-chief.” *Id.*

Respondent summarizes its argument as follows:

While Petitioner alleges that the second Declaration of Mary Anne Jackson rebuts evidence submitted in Respondent’s Notice of Reliance, it is clear that the declaration should have presented with Petitioner’s case in chief. In fact, as already noted, Petitioner attempted to present much of the content of Ms. Jackson’s second declaration in her first declaration that the Board already struck from the record. Petitioner now mischaracterizes the declaration previously stricken as “rebuttal evidence” in order to remedy the deficiencies of Petitioner’s case in chief. The Board should grant the present motion and reject Petitioner’s attempt to rely on inadmissible evidence.

*Id.* at 5.

Specifically, Respondent argues that the Second Jackson Declaration

seeks to introduce inadmissible hearsay statements in order to allege that Respondent adopted its “MOM’S MEALS” mark with prior knowledge of Petitioner’s “MY OWN MEALS” mark, and further, makes unfounded allegations that Respondent intended to confuse the public. . . . Paragraphs 9-10 of Ms. Jackson’s Declaration discuss hearsay statements by third parties allegedly overheard by Ms. Jackson. . . . The statements in Exhibit 31 are self-serving and unreliable. What’s more, Exhibit 31 does not rebut or relate to the evidence presented in Respondent’s Notice of Reliance, which focused primarily on demonstrating use of the “MOM’S MEALS” marks with the goods of Respondent’s trademark registrations and applications in response to Petitioner’s allegations of abandonment. Because Exhibit 31 does not respond to or rebut anything raised in Respondent’s testimony and evidence, it is clearly improper as rebuttal evidence and

should have been presented in Petitioner's case-in-chief regarding the elements of likelihood of confusion.

*Id.* (record citations omitted). Respondent's hearsay objections are directed specifically to paragraphs 9 and 10. *Id.*

Petitioner responds that the Second Jackson Declaration is

proper rebuttal testimony because is not a mere repetition of prior arguments. Instead, it directly addresses the inconsistent statements provided in the declarations introduced by Respondent. Mary Anne Jackson's declaration serves to establish her identity and role within My Own Meals and her history with PurFoods, prior to the initiation of any legal action and countering any assertions of inconsistency in the testimony of Respondent's declarants. Therefore, it is a strategic response aimed at rectifying oversights in Respondent's filings rather than a redundant restatement of previous argument.

68 TTABVUE 2-3.

Petitioner further argues that the Second Jackson Declaration "directly den[ies] and discredit[s] the assertions of Rickey Anderson and Brian Hoey, regarding the supposed lack of confusion between . . . use of 'MOM'S MEALS' and . . . 'MY OWN MEALS'" by "identifying instances of confusion which directly contradict those assertions, and is thus proper rebuttal evidence," *id.* at 4, and by contradicting Respondent's witnesses' testimony that Respondent's meals are shelf-stable. *Id.* at 5.

"It is axiomatic that rebuttal testimony may be used only to rebut evidence offered by the defendant." *Andrusiek v. Cosmic Crusaders LLC*, Canc. No. 92064830, 2022 WL 4103636, at \*2 (TTAB 2022) (redesignated as precedent Jan. 3, 2024) (citing *Life Zone Inc. v. Middleman Grp. Inc.*, Opp. No. 91160999, 2008 WL 2781162, at \*5 (TTAB 2008) (internal citation omitted)), *aff'd mem.* No. 2023-1150 (Fed. Cir. Oct. 19, 2023).

“Rebuttal evidence is ‘submitted for the proper purpose of denying, explaining or discrediting [Defendant’s] case.’” *Philanthropist.com, Inc. v. Genl. Conf. Corp. of Seventh-Day Adventists*, Canc. Nos. 92065178 and 92065255, 2021 WL 247776, at \*13 (TTAB 2021) (quoting *Wet Seal, Inc. v. FD Mgmt., Inc.*, Opp. No. 91157022, 2007 WL 458529, at \*2 (TTAB 2007)), *aff’d mem.* No. 2023-1150 (Fed. Cir. 2023). “The function of rebuttal evidence is to explain, repel, counteract, or disprove the evidence of the adverse party.” *Id.* (quoting *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, Opp. No. 91219435, 2017 WL 3600737, at \*3 (TTAB 2017) (citing *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1082 (Fed. Cir. 2015)), *rev’d on other grounds by stipulation pursuant to settlement agreement*, No. 3:17-cv-02150-AJB-MSB (S.D. Cal. Apr. 13, 2021). “Evidence is improper rebuttal, however, where it does not serve to do the above, but rather where it relates to a witness and facts that might appropriately have been introduced during the plaintiff’s case-in-chief.” *Illyrian Imps., Inc. v. Adol SH.P.K.*, Opp. Nos. 91234244 and 91234345, 2022 WL 970321, at \*5 (TTAB 2022) (citations omitted). Here, “[t]he only proper rebuttal evidence consists of averments in [the Second Jackson Declaration] that directly rebut certain statements made” by Respondent’s witnesses in their trial testimony. *Andrusiek*, 2022 WL 4103636, at \*2.



In the following paragraphs in the Second Jackson Declaration, Ms. Jackson discusses and responds to specific statements made in the declarations of Respondent's witnesses Rick Anderson, Michael Anderson, and Brian Hoey:<sup>30</sup>

- ¶ 6 (63 TTABVUE 22): “Contrary to Michael Anderson’s Declaration that seeks to change and reverse his September 16, 2020 testimony where he stated that US Serial No. 88/611,072 replaces all prior logos, including ‘Mom’s Meals Nourishcare,’ this company-wide brand (mark) replacement was actually announced by PurFoods through a February 17, 2020 newsletter on its website which remains on its site today, stating ‘Mom’s Meals . . . announced today the launch of its new corporate brand identity, featuring a redesigned logo, new website, updated packaging, and other key marketing materials . . . The result is an impactful brand that most-effectively resonates with Moms Meals stakeholders, and works seamlessly across the company’s online and physical marketing assets . . .’”;
- ¶ 7 (63 TTABVUE 22): “Likewise, contrary to Michael Anderson’s and Rickey Anderson’s Declarations, they state, ‘PurFoods began using the trademark ‘MOM’S MEALS’ in interstate commerce through its predecessor company Mom’s Meals, Ltd. at least as early as September of 1999 for, a) food preparation, namely preparation of home cooked meals; b) restaurant services; c) restaurant services featuring home delivery; and d) catering.’ This is not possible since the USDA, by statute, is responsible for ensuring that only labels that are permitted/approved by the USDA may appear on products or brochures accompanying meat products destined for interstate commerce. According to public records, Mom’s Meals did not obtain a USDA Establish [sic] Number until March 22, 2000.”;
- ¶ 8 (63 TTABVUE 22-23): “Despite Michael Anderson’s, Rickey Anderson’s, and Brian Hoey’s [sic] Declarations, we have not seen any record or production of evidence of its frozen or shelf-stable meals. PurFoods has failed to address the fact that the shipping boxes state ‘Perishable. Refrigerate Upon Arrival’, and are thus are not shelf-stable. References to ‘frozen’ meals or handling appear on one of its websites as recently as today stating, ‘ . . . And, since meals are refrigerated and not frozen, they deliver a better quality and taste - more like homemade.’ Similar references appear on its other sites. PurFoods has promoted and defined itself to be known as a ‘fresh’ meals-product company, not a shelf stable or frozen meals-product

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<sup>30</sup> Some of Ms. Jackson’s testimony in the excerpted paragraphs refers to other evidence in the record, or contains legal argument or her personal opinions.

company. From how it presents itself, PurFoods uses its marks only on ‘fresh’ meals, in conflict with these claims.”;

- ¶ 9 (63 TTABVUE 23): “Rickey Anderson’s Declaration #15 and Brian Hoey’s #8 each introduced the subject of no known confusion between Purfoods’ use of ‘Mom’s Meals’ and ‘My Own Meals’. This fails to account for the concerns voiced by PurFoods employees, Chef Jon Benedict and Tammy Harrington, a PurFoods Strategic Sourcing Manager. Both individuals acknowledged concerns of confusion in 2019 and were exploring options to mitigate the potential confusion issues.”;
- ¶ 10 (63 TTABVUE 23): “Additionally on December 21, 2023, I spoke with Donna Rounsavell, HR Manager for Baxter’s North America at a party with production workers in Oregon. During our conversation, she mistakenly recounted meeting a gentleman she assumed worked for MOM, but later realized she had confused our company with PurFoods/Mom’s Meals. Specifically, Ms. Rounsavell asked if I knew a gentleman from ‘My Own Meals’ whose name she provided. When I said I did not recognize that individual, she replied that he worked for what she thought was our company for many years. I asked if by chance she meant ‘Mom’s Meals,’ to which she confirmed yes, mistakenly believing the MOM products we were co-producing at that factory in Oregon were affiliated with Mom’s Meals. This instance of actual confusion further illustrates the likelihood of consumers and customers mixing up our highly similar company and brand names.”; and
- ¶ 11 (63 TTABVUE 24): “Both Rickey Anderson and Michael Anderson stated in their declarations that they had never heard of My Own Meals. However, this claim strains credibility given the extensive publicity MOM received nationally and locally beginning in 1987. During the height of our success and innovation in the prepared meal delivery market, MOM had been prominently featured in numerous publications and media outlets, including: national, regional and local news; university case studies; books; trade and business journals, including cover story features; consumer and lifestyle magazines, also including cover story features. I have been the keynote speaker and speaker at universities, entrepreneur events, business leaders’ forums, women’s leadership conferences, and healthy dietary roundtables. At one point, promoters connected us to innovations portrayed in the movie ‘Baby Boom’ because we started the business about the same time as that movie. It is simply not believable to me that Michael and Rickey Anderson would not have heard of MOM. The volume of attention our company has received makes their professed lack of awareness of My Own Meals very difficult to accept.”

The rest of Ms. Jackson's testimony involves her personal background and involvement with Petitioner, Second Jackson Decl. ¶¶ 1-2 (63 TTABVUE 20-21), Petitioner's alleged prior dealings with Respondent in 2019, including the parties' alleged execution of a "Mutual Confidentiality and Non-Disclosure Agreement," and the parties' alleged decision not to work together "due to the potential for confusion," Second Jackson Decl. ¶¶ 3-5 (63 TTABVUE 21), and Ms. Jackson's speculation regarding Respondent's conduct and intent following the alleged 2019 dealings with Petitioner. Second Jackson Decl. ¶ 12 (63 TTABVUE 24).

The only reference to the alleged 2019 dealings between the parties in Respondent's witnesses' testimony is in the declaration of Michael Anderson, who testified that "I was not aware of the company My Own Meals nor of any of its products or names used in or with its business until around 2019 when PurFoods was looking for a vendor to provide kosher meals." M. Anderson Decl. ¶ 14 (56 TTABVUE 8). Ms. Jackson does not try to rebut his claimed ignorance of Petitioner based on the 2019 dealings, but rather based on Petitioner's alleged activities and use of the claimed MOM mark long prior to 2019. Second Jackson Decl. ¶ 11 (63 TTABVUE 24).

Ms. Jackson's testimony regarding the alleged 2019 dealings, Second Jackson Decl. ¶¶ 3-5 (63 TTABVUE 21), Petitioner's alleged extensive activities and use of the claimed MOM mark prior to 2019, Second Jackson Decl. ¶ 11 (63 TTABVUE 24), and Respondent's motives and intent, Second Jackson Decl. ¶ 12 (63 TTABVUE 24), are "facts that might appropriately have been introduced during [Petitioner's] case-in-chief," *Illyrian Imps.*, 2022 WL 970321, at \*5, on Petitioner's likelihood of confusion

claims, particularly on the threshold element of priority of use of the claimed MOM mark, as well as on the strength of the claimed mark, the similarity between the marks, and Respondent's intent. "[I]t is reasonable to impose upon Petitioner a duty to present whatever evidence [it] had demonstrating [its] use prior to any use by [Respondent] as part of [its] main trial testimony." *Andrusiek*, 2022 WL 4103636, at \*2. Indeed, as discussed below, the Second Jackson Declaration is cited by Petitioner as key evidence in support of its claimed priority by virtue of use of its claimed marks in a manner analogous to trademark use, 71 TTABVUE 12, and paragraph 11 is the portion of the Second Jackson Declaration that addresses those matters. We **grant** Respondent's motion to strike paragraphs 3-5 and 11-12 in the Second Jackson Declaration as improper rebuttal testimony, and will not consider them in our decisions.

Although paragraphs 9 and 10 in the Second Jackson Declaration respond to statements made in Respondent's witnesses' declarations, they are the subject of an additional objection by Respondent that

[t]he statements in these paragraphs clearly constitute inadmissible hearsay. Regarding paragraph 9, Ms. Jackson discusses alleged out of court statements made by Chef Jon Benedict and Tammy Harrington while, in paragraph 10, Ms. Jackson discusses alleged out of court statements made by Donna Rounsavell of Baxter's North America. The alleged statements are all being offered to prove the truth of the matter asserted by Petitioner, namely, that there is a likelihood of confusion between Petitioner's and Respondent's trademarks.

64 TTABVUE 6-7. Respondent further argues that Petitioner "clearly could have taken the depositions of the alleged witnesses or had them sign declarations, but

chose not to and is instead trying to improperly ‘back door’ the self-serving statements into the record through Ms. Jackson’s declaration. The self-serving statements are inherently unreliable and text book examples of hearsay.” *Id.* at 7.

Petitioner does not dispute that paragraphs 9 and 10 contain inadmissible hearsay, 68 TTABVUE 5, arguing only that “[e]ven excluding the potentially objectionable paragraphs, the balance of Exhibit 31 retains significant probative value as rebuttal.” *Id.*

Paragraph 9 relates the alleged statements of two of Respondent’s employees to Ms. Jackson. Rule 801 of the Federal Rules of Evidence, which defines “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,” Fed. R. Evid. 801(c)(1)-(2), provides that an out-of-court statement offered for the truth of the matter asserted in the statement is not “hearsay” if “[t]he statement is offered against an opposing party” and it “was made by the party’s agent or employee on a matter within the scope of that relationship while it existed.” Fed. R. Evid. 801(d)(2)(D). *See McGowen Precision Barrels, LLC v. Proof Rsch., Inc.*, Canc. No. 92067618, 2021 WL 2138663, at \*14 n.120 (TTAB 2021). The referenced “concerns voiced by PurFoods employees” in 2019 regarding confusion, Second Jackson Decl. ¶ 9 (63 TTABVUE 23), are thus not hearsay and Ms. Jackson’s related testimony is not inadmissible on that basis, but her testimony once again involves “facts that might appropriately have been introduced during [Petitioner’s] case-in-chief,” *Illyrian Imps.*, 2022 WL 970321, at \*5, to show Respondent’s intent for purposes of

Petitioner's likelihood of confusion claim. We **grant** Respondent's motion to strike paragraph 9 as improper rebuttal testimony, and will not consider it in our decisions.

In paragraph 10, Ms. Jackson relates out-of-court statements of an employee of a third party allegedly made to her in December 2023, after the close of Petitioner's trial period, which Petitioner offers to show that the employee "mistakenly believ[ed] the MOM products we were co-producing at that factory in Oregon were affiliated with Mom's Meals." Second Jackson Declaration ¶ 10 (63 TTABVUE 23). These statements are hearsay when offered for that purpose. Although they could not have been presented in Petitioner's case-in-chief due to their timing, the Trademark Rules permit a party to move to re-open a testimony period to submit newly-discovered evidence based on a showing of excusable neglect, *see* TBMP § 509.01(b)(2) and cases cited therein, but Petitioner did not file such a motion. We **grant** Respondent's motion to strike paragraph 10, and will not consider it in our decisions.

For the reasons discussed above, we have stricken paragraphs 3-5 and 9-12 of the Second Jackson Declaration and will not consider them, but we will consider paragraphs 1-2 and 6-8 for whatever probative value they may have on Petitioner's claims. *Andrusiek*, 2022 WL 4103636, at \*2.

### **Respondent's Motion to Strike Petitioner's Reply Brief and Attachments**

Respondent moves to strike Petitioner's reply brief on two grounds. First, Respondent argues that "a party's reply brief, 'shall not exceed twenty-five pages in its entirety', 'including the table of contents, index of cases, description of the record, statement of the issues, recitation of the facts, argument, and summary,'" 74

TTABVUE 3 (quoting TBMP § 801.03),<sup>31</sup> and that Petitioner’s reply brief “has 36 pages (29 pages without exhibits), including the table of contents, index of cases, and argument.” *Id.*

Second, Respondent argues that Petitioner improperly attached to its reply brief a third declaration of Ms. Jackson (the “Third Jackson Declaration”), 73 TTABVUE 31-33, and a declaration of Joseph D’Onofrio, Petitioner’s Chief Financial Officer (the “D’Onofrio Declaration”). *Id.* at 35-36. Respondent argues that the Third Jackson Declaration “should have been presented during Petitioner’s testimony period, and not for the first time with its brief in reply to Respondent’s trial brief,” 74 TTABVUE 3, and that the D’Onofrio Declaration is “a means of backdooring in brand new alleged evidence of actual confusion” that “is improper and contrary to TTAB rules.” *Id.* at 4.

Petitioner’s opposition to the motion to strike does not dispute that its reply brief exceeds 25 pages in its entirety, but argues that “the cited rule specifically governs the length of the main brief submitted by a party, and the limitations imposed are meant to prevent unnecessarily long initial filings that could burden the opposing party and the Board,” 76 TTABVUE 2 (citation omitted), that “[t]he information

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<sup>31</sup> Both parties cite the TBMP as the source of the applicable page limitation, 74 TTABVUE 2-3; 76 TTABVUE 2; 77 TTABVUE 2, but the TBMP “does not modify, amend, or serve as a substitute for any existing statutes, rules, or decisional law and is not binding upon the Board, its reviewing tribunals, the Director, or the USPTO.” TBMP Introduction (June 2024). The applicable page limit is set by Rule 2.128(b) of the Trademark Rules of Practice, 37 C.F.R. § 2.128(b), which states that a reply brief may not exceed 25 pages “in its entirety” without enumerating what is included in the page count. The portion of TBMP Section 801.03 that enumerates what is included in a page count pertains to a party’s main brief, not a reply brief. Rule 2.128(b) (“a main brief on the case shall not exceed fifty-five pages in length in its entirety, including the table of contents, index of cases, description of the record, statement of the issues, recitation of the facts, argument, and summary.”).

provided in the reply brief was essential to address the arguments raised by Respondent, which necessitated a thorough response,” *id.*, and that Respondent “ignores that its own brief exceeded the 25-page limit by 18 pages,” which requires that “any decision regarding page limits . . . be applied uniformly to both parties.” *Id.* at 3.

With respect to the two declarations, Petitioner acknowledges that “[e]vidence may not be submitted with a brief, with the exception of a proper request for judicial notice,” and that “[e]videntiary material attached to a brief on the case can be given no consideration unless it was properly made of record during the testimony period of the offering party.” *Id.* (quoting TBMP § 539). Petitioner nevertheless argues that “[t]his rule must be interpreted in conjunction with the principle that rebuttal evidence is permissible in rebuttal briefs when it directly responds to arguments or evidence introduced by the opposing party.” *Id.* Petitioner claims that the two declarations “were introduced to rebut the arguments and evidence presented by Respondent in its Trial Brief,” *id.*, which Petitioner claims is “a standard and accepted practice . . . .” *Id.*

Petitioner further argues that the “declarations are not new evidence in the sense prohibited by TBMP §539; rather, they serve as specific rebuttals to points made by Respondent, making them both proper and permissible,” *id.* at 4, and that with respect to the D’Onofrio Declaration regarding alleged actual confusion, “the events in the declaration occurred after the Petitioner submitted its brief.” *Id.*



In its reply brief on the motion, Respondent argues that “Section 801.03 of the TBMP requires that Petitioner’s reply brief be given no consideration” because Petitioner did not seek prior leave from the Board to file an overlong reply brief. 77 TTABVUE 3.<sup>32</sup> Respondent argues alternatively that if the Board considers Petitioner’s reply brief, “the evidence introduced by Petitioner with its reply brief for the first time in the case should be stricken from the record.” *Id.* at 4.

Petitioner’s opposition to the motion to strike suggests ignorance of the applicable rules or a cavalier attitude toward compliance with them (or both). With respect to the page-limit issue, under Trademark Rule 2.128(b), Petitioner was required to obtain prior leave from the Board before filing a reply brief that exceeded 25 pages in its entirety, but instead simply filed its admittedly overlong reply brief and argued after the fact that doing so was justified because “[t]he information provided in the reply brief was essential to address the arguments raised by Respondent, which necessitated a thorough response.” 76 TTABVUE 2.

At the same time, Respondent misreads the language in Trademark Rule 2.128(b) that Petitioner’s overlong brief “**may not** be considered by the Board,” 37 C.F.R. § 2.128(b) (emphasis added), to mean that the Board **cannot** consider Petitioner’s brief. 77 TTABVUE 3. Rule 2.128(b) gives the Board discretion to decide whether to consider an overlong brief, and allows the Board, in the exercise of that discretion, to strike a brief in its entirety, consider a brief in its entirety, or consider a brief but

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<sup>32</sup> Respondent also notes that Petitioner’s argument that Respondent also filed an overlong brief is incorrectly based on the portion of TBMP § 801.03(b) pertaining to the 55-page limit on a party’s main brief. 77 TTABVUE 3 n.1. Respondent’s brief was within that page limit.

strike any attachments. *See Hole in 1 Drinks, Inc. v. Lajtay*, Canc. No. 92065860, 2020 WL 859853, at \*3 (TTAB 2020) (Board struck materials attached to an improperly-formatted brief, but considered the brief itself).

As discussed above, Petitioner’s reply brief exceeds 25 pages in its entirety, but three of those pages are the ESTTA cover sheet, 73 TTABVUE 1, the signature page, *id.* at 28, and the certificate of service. *Id.* at 29. The body of Petitioner’s reply brief consists of 26 pages, *id.* at 2-27, one of which contains a single listing at the end of Petitioner’s Table of Authorities. *Id.* at 6. Given the nature of these four consolidated proceedings, the relatively minor violation of Rule 2.128(b), and the fact that a reply brief may assist the Board in its decision making, we **deny** Respondent’s motion to strike Petitioner’s reply brief and will exercise our discretion to consider it.

The declarations attached to Petitioner’s reply brief are another matter. As noted above, Petitioner acknowledges its violation of the rules through the submission of the declarations with its reply brief, but again asks the Board to excuse its non-compliance after the fact by applying what Petitioner calls the “principle that rebuttal evidence is permissible in rebuttal briefs when it directly responds to arguments or evidence introduced by the opposing party.” 76 TTABVUE 3. There is no such “principle” in the rules or the case law.<sup>33</sup> To the contrary, as Petitioner acknowledges, the law is clear that “[a] brief may not be used as a vehicle for the introduction of evidence,” *Hole in 1 Drinks*, 2020 WL 859853, at \*2 (quoting TBMP § 801.01), and

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<sup>33</sup> Plaintiff cites *Hilson Rsch. Inc. v. Soc’y for Hum. Res. Mgmt.*, Canc. No. 19007, 1993 WL 290669 (TTAB 1993), as support for this “principle,” 76 TTABVUE 3, but in that case the allowed rebuttal evidence was not submitted with the offering party’s reply brief.

that “[t]he Board will not consider evidence and other evidentiary materials attached to the briefs unless they were properly made of record during the time assigned for taking testimony.” *Id.* (citations omitted). Because Petitioner did not properly make the Third Jackson Declaration of record,<sup>34</sup> we **grant** Respondent’s motion to strike it and will give it no consideration in our decisions.

The July 26, 2024 D’Onofrio Declaration involves a separate issue because it purports to recount an alleged instance of actual confusion that Mr. D’Onofrio claims happened on July 12, 2024, D’Onofrio Decl. ¶ 2 (73 TTABVUE 35), after the close of Petitioner’s rebuttal period on April 16, 2024. 53 TTABVUE 7. As noted above, the Trademark Rules permit a party to move to re-open a testimony period to submit newly-discovered evidence based on a showing of excusable neglect, but Petitioner once again did not make the required motion, and simply submitted the July 26, 2024 D’Onofrio Declaration in a manner that precluded Respondent from considering exercising its right to cross-examine Mr. D’Onofrio. Because Petitioner did not move to re-open its rebuttal period to properly make the D’Onofrio Declaration of record, we **grant** Respondent’s motion to strike the D’Onofrio Declaration and will give it no consideration in our decisions.

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<sup>34</sup> It is doubtful that the Third Jackson Declaration is proper rebuttal evidence because Petitioner’s reply brief characterizes it as “further evidence” of Petitioner’s priority, 73 TTABVUE 11, indicating that it “might appropriately have been introduced during [Plaintiff’s] case-in-chief.” *Illyrian Imps.*, 2022 WL 970321, at \*5. We need not decide that issue, however, because if the Third Jackson Declaration is proper rebuttal evidence, it should have been submitted during Petitioner’s rebuttal period, not as an attachment to Petitioner’s reply brief.

## **The Parties' Other Evidentiary Objections**

### **Respondent's Objections**

In its brief, Respondent asserts multiple particularized objections to Petitioner's evidence. 72 TTABVUE 15-18.

Respondent first objects to Petitioner's "Exhibit 12a," which is attached to Petitioner's main brief, 71 TTABVUE 41-42, and consists of four pages from the transcript of the discovery deposition of Michael Anderson. Respondent argues that attachment of the pages to Petitioner's brief is improper because "[w]hile Petitioner could have introduced the entire deposition of Mr. Anderson into the record in its Notices of Reliance, it chose not to, instead opting only to include certain portions of Mr. Anderson's deposition," and "Petitioner cannot now bring in additional pages from Mr. Anderson's deposition for the first time in its trial brief as Respondent has not received proper notification that Petitioner intended to rely upon these pages in support of its case." *Id.* at 15.

Petitioner's main brief characterizes Exhibit 12a as a "missing page" from Petitioner's July 19, 2022 Notice of Reliance, *id.* at 11, with no explanation or elaboration. Petitioner offers Exhibit 12a to show that Respondent made false representations to the USPTO. *Id.* at 23. Petitioner's reply brief is silent about Respondent's objection.

As Petitioner acknowledged in its opposition to Respondent's motion to strike Petitioner's reply brief, evidence attached to a brief cannot be considered unless it was properly made of record. Petitioner could have made the "missing page" of record

during its rebuttal period if the testimony rebutted testimony offered by Respondent, but it cannot submit the testimony with its brief. We **sustain** Respondent's objection to "Exhibit 12a" and will give it no consideration in our decisions.

Respondent next argues that "Exhibits 15-19, 21-22, 24, and 26-27 [to Petitioner's Notices of Reliance] consist of Petitioner's and Respondent's magazine articles, Internet printouts and/or screenshots which Petitioner attempts to use to demonstrate the truth of various matters asserted in these proceedings," and that the "probative value of these printouts is highly limited." 72 TTABVUE 16.<sup>35</sup> Respondent further argues that "because there is no testimony from one or more witnesses based on personal knowledge linking these Internet printout websites to any of the parties or explaining the information found therein, these Internet printouts cannot be used to demonstrate the truth of the matter asserted because they constitute hearsay." *Id.* at 17.

Petitioner does not address the hearsay objection in its reply brief, arguing only that its "Notices of Reliance formally introduce evidentiary materials into the record, making them available for consideration by the TTAB," 73 TTABVUE 24, and that "these exhibits consist of actual newspaper and magazine articles, investigated and reported by independent reporters, internet printouts from Respondent's own website, and other documentary evidence that Petitioner uses to establish various claims like fraud and likelihood of confusion." *Id.* at 24-25. We suspect that

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<sup>35</sup> Respondent also objects to Exhibits 28-30 in Petitioner's Second Notice of Reliance on hearsay grounds. 72 TTABVUE 16-17.

Petitioner's silence with respect to Respondent's hearsay objections is rooted in Petitioner's argument in its reply brief against Respondent's own use of these exhibits:

Printouts and internet materials used by Respondent to demonstrate truth are considered hearsay unless supported by testimony or other evidence, making them inadmissible. [Respondent's] submissions [sic], such as Exhibits 15-22, 24, 26-27, and 28-31, contain magazine articles, Internet printouts, and screenshots intended to establish various assertions made in the proceedings. **These are considered hearsay unless accompanied by testimony or other evidence that validates the truth of the content presented within these documents.**

73 TTABVUE 26 (emphasis added).

#### **Printed Publications (Exhibits 15 and 22)**

According to Petitioner, Exhibit 15 contains "Printed Publications," specifically "[a] collection of publicly available works for My Own Meals a/k/a 'MOM.'" 39 TTABVUE 5. Exhibit 15 contains copies of a September 1988 article from *Inc.* magazine, *id.* at 457-64;<sup>36</sup> a November 1988 article in the KPMG Peat Marwick Alumni Newsletter, *id.* at 467-68; an October 1988 article from the Food section of *The Advocate* (Stamford, Connecticut), *id.* at 469-70; a February 1989 article from

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<sup>36</sup> The *Inc.* article is followed in Exhibit 15 by identical color and black-and-white photographs that do not appear to be part of the article. 39 TTABVUE 465-66. The color photograph is accompanied by the typewritten statement "1988 Store Level Use of MOM and M.O.M. for My Own Meal Brand. April 1988," *id.* at 465, while the black-and-white photograph is accompanied by the typewritten statement "1988 Point of Sale Materials for MOM – In store photo." *Id.* at 466. The black-and-white photograph also contains handwritten circles and arrows. These photographs reappear in Petitioner's September 7, 2023 Amended Notice of Reliance. 48 TTABVUE 22-23 (Exhibit 22). In the absence of proof of a connection to the *Inc.* article or another article in Exhibit 15, the photographs do not qualify as part of any "printed publications" and we will give them no consideration in our decisions.

*The Capital Times* (Madison, Wisconsin), *id.* at 471; an article in the August 7, 1989 edition of *Business Week*, *id.* at 472-74; an October 1989 article in *The Star*, *id.* at 475; a November 1990 article in *Food and Beverage Marketing*, *id.* at 476; an article in the Spring 1990 edition of the *Leukemia Society News* (Illinois Chapter), *id.* at 477, 479;<sup>37</sup> an article in the August/September 1989 edition of *Poultry Processing*, *id.* at 480-82; a January 1989 article in the *Chicago Sun-Times*, *id.* at 483-84; an article in the November 1989 edition of *Family Circle*, *id.* at 485-89; articles in the January 1989 and May 1989 editions of *Food & Beverage Marketing*, *id.* at 490-94; a February 1989 article in *News/Voice*, *id.* at 495; an article in the November 1989 edition of *Wealth*, *id.* at 496-98; a November 1990 article in *Adweek*, *id.* at 499; an article in the March 1990 edition of *Convenience Store Decisions*, *id.* at 501; an article in the November 1990 edition of *Food & Beverage Marketing*, *id.* at 502; an article in the November 1990 edition of *North Shore*, *id.* at 503; an article in the March 30-April 1, 1990 edition of *The Detroit News and Free Press*, *id.* at 504-05; a January 1991 article in the *Chicago Tribune*, *id.* at 506-07; an article in the May 1991 edition of *Entrepreneurial Women*, *id.* at 508-12; a February 1991 article in *Talking to the Boss*, *id.* at 513; a May 1992 article in *The Plain Dealer* (Cleveland, Ohio), *id.* at 514-15; a March 1995 article in the *Herald-Tribune* (Sarasota, Florida), *id.* at 516; an article in the June 1996 edition of *Feingold News*, *id.* at 517; and a July 2007 article in the

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<sup>37</sup> It appears that the two parts of this article are separated by Petitioner's "Exhibit 15 Part 2" page.

*Jewish Review. Id.* at 518-19.<sup>38</sup> Petitioner claims that they are relevant on the issues of “Fraud in the procurement and maintenance of U.S. Registration Nos. 2,430,824 and 4,316,266; Priority.” *Id.* at 5.

Exhibit 22 to Petitioner’s September 7, 2023 Amended Notice of Reliance is also listed under the category “Printed Publications” and is described by Petitioner as a “collection of publicly available works referencing My Own Meals as ‘MOM.’” 48 TTABVUE 5. Exhibit 22 contains Petitioner’s promotional materials, including “The ‘My Own Gifts’ Merchandise Menu,” *id.* at 19, and what appear to be package inserts and coupons. *Id.* at 21, 24-29. Petitioner claims that Exhibit 22 is relevant on the issues of “Priority; Likelihood of Confusion.” *Id.*

Petitioner’s promotional materials are not “printed publications” within the meaning of Trademark Rule 2.122(e)(1). *See Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, Opp. No. 91197659, 2013 WL 5407313, at \*3 (TTAB 2013) (“Promotional material generated by [a party], labels, or hang tags applied to the goods, or similar advertising materials do not qualify as” printed publications). But Respondent did not object to these materials on the ground that they are not admissible under a notice

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<sup>38</sup> Exhibit 15 also contains some handwritten and typed letters, and an email, addressed to Ms. Jackson. 39 TTABVUE 520-24. “Letters and emails are generally not proper subject matter for introduction by notice of reliance because they do not constitute printed publications under Trademark Rule 2.122(e).” *L.C. Licensing, Inc. v. Berman*, Opp. No. 91162330, 2008 WL 835278, at \*1 n.6 (TTAB 2008). But “[a]s a general rule, [procedural] objections [to a notice of reliance] that are curable must be seasonably raised, or they will be deemed waived.” *Flame & Wax*, 2022 WL 3083070, at \*5 (quotation and quotation marks omitted). Respondent did not object to these materials on the ground that they are not admissible under a notice of reliance and treated them as if they were of record, so we have considered them to be part of the record subject to Respondent’s hearsay objection.



of reliance and treated them as if they were of record, so we have considered them to be part of the record subject to Respondent's hearsay objection.

Although we find that Exhibits 15 and 22 are of record, we nevertheless **sustain** Respondent's hearsay objection to the extent that the Exhibits "may not be considered for the truth of the matters asserted therein" and are only "admissible for what they show on their face." *Ricardo Media, Inc. v. Inventive Software, LLC*, Opp. No. 91235063, 2019 WL 3956987, at \*2 (TTAB 2019) (citing *Safer Inc. v. OMS Inv. Inc.*, Opp. No. 91176445, 2010 WL 985355, at \*8 (TTAB 2010)).

**Internet Materials (Exhibits 16-18, 19, 24, 26-27, and 28-30)**

Exhibits 16-18 are pages from Petitioner's website at myownmeals.com. 39 TTABVUE 525-85. They purport to list, by date, subject, and the media or venue in which they appeared or occurred: (1) print, radio, and television articles, interviews, and reports about Respondent, *id.* at 525-71 (Exhibit 16), (2) books and textbooks mentioning Respondent, *id.* at 572-75 (Exhibit 17), and (3) speeches by Ms. Jackson. *Id.* at 576-85 (Exhibit 18). Petitioner claims that they are relevant on the issues of "Fraud in the procurement and maintenance of U.S. Registration Nos. 2,430,824 and 4,316,266; Priority." *Id.* at 5.

Petitioner's own "webpages are admissible for what they show on their face [but] Petitioner may not rely on them for the truth of any matter asserted, unless supported by testimony or other evidence." *Flame & Wax*, 2022 WL 3083070, at \*3 n.10 (citing Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2); Fed. R. Evid. 801(c)); *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, Opp. No. 91221553,

2018 WL 1326374, at \*4 (TTAB 2018); *Safer*, 2010 WL 985355, at \*8). The pages from Petitioner’s website are not supported by “testimony or other evidence,” and we **sustain** Respondent’s objection to Exhibits 16-18 to the extent that they may not be considered for the truth of the matters asserted therein, including the dates on which the listed materials were allegedly exposed publicly in third-party publications and media, *Spiritline Cruises LLC v. Tour Mgmt. Servs., Inc.*, Opp. No. 91224000, 2020 WL 636467, at \*4 (TTAB 2020), and are only admissible for what they show on their face.<sup>39</sup>

Exhibits 19, 24, and 28-30 contain pages from Respondent’s website at momsmeals.com. 39 TTABVUE 586-90; 48 TTABVUE 53-160. Exhibit 19 includes a page dated February 17, 2020 and captioned “Mom’s Meals Unveils new brand identity.” 39 TTABVUE 587. Exhibit 24 contains what Petitioner describes as Respondent’s “website screenshots identifying menu options, preparation information, and frozen delivery requirements.” 48 TTABVUE 6. Petitioner claims that Exhibit 19 is relevant on the issue of “Abandonment of U.S. Registration Nos. 4,316,266 and 4,638,408,” 39 TTABVUE 5, while Exhibit 24 is relevant on the issue of “Fraud in the procurement and maintenance of U.S. Registration No. 4,316,266.” 48 TTABVUE 6.

Exhibits 28-30 are screenshots from Respondent’s website. 63 TTABVUE 8-18. Petitioner offers these pages “to show [evidence] contrary to the testimony submitted

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<sup>39</sup> As the Board explained in *WeaponX*, this principle “is in fact merely a recitation of the holding in *Safer*, which we apply whether there is an objection or not.” *WeaponX*, 2018 WL 1326374, at \*6 n.18.

in Registrant's Trial Testimony Declarations of Michael Anderson, Rickey Anderson, and Brian Hoey stating that Registrant produces shelf-stable and frozen meals. *Id.* at 2. Petitioner quotes specific statements from each page. *Id.* at 3-4.

Exhibits 26 and 27 to Petitioner's Second Notice of Reliance are each one-page screenshots from videos allegedly posted by Respondent on YouTube in late November and early December 2023. 63 TTABVUE 3. Petitioner describes them as videos "available to the public and recorded by [Petitioner] on March 29, 2024, at the various URLs identified in each document." *Id.* at 2. Petitioner did not submit the videos to the Board, but instead provided in its Second Notice of Reliance what appear to be links to youtube.com. *Id.* at 3. While parties can submit screenshots and printouts from the Internet, providing a link to a YouTube video is insufficient to make that video of record. *See Chutter, Inc. v. Great Mgmt. Group, LLC*, Opp. No. 91223018, 2021 WL 4494251, at \*16 n.67 (TTAB 2021) (article and accompanying video referenced by hyperlink inadmissible); *rev'd on other grounds*, 84 F.4th 1014 (Fed. Cir. 2023), *modified and superseded*, 90 F.4th 1333 (Fed. Cir. 2024); *In re Powermat, Inc.*, Ser. Nos. 77715011 and 77715052, 2013 WL 326571, at \*2 (TTAB 2013).

We **overrule** Respondent's hearsay objections to Exhibits 19, 24, and 28-30 because, as explained above, the contents of Respondent's own webpages are not hearsay under Rule 801(c) of the Federal Rules of Evidence when offered against Respondent. We will consider the contents of Exhibits 19, 24, and 28-30 for whatever probative value they may have.

We also **overrule** Respondent's hearsay objection to the contents of Exhibits 26 and 27 with respect to any statements attributable to Respondent on the screenshots, but we will give no consideration to any third-party comments regarding the videos, which are hearsay, or to Petitioner's description of the contents of the videos. 63 TTABVUE 3.

### **Official Records**

Respondent objects to Exhibit 21 to Petitioner's Notice of Reliance on hearsay grounds. 72 TTABVUE 16. Petitioner describes Exhibit 21 as "[o]nline registries listing Respondent's business information and type of business presented to the public," 48 TTABVUE 6, and lists the material in Exhibit 21 under "Internet Materials." *Id.* Exhibit 21 consists of pages downloaded from the websites of the Secretaries of State of Arizona and Connecticut, and from the website at ehawaii.gov. *Id.* at 9-17. Petitioner states that they are relevant to "Fraud in the procurement and maintenance of U.S. Registration No. 2,430,824 and 4,316, 266." *Id.* at 6. Petitioner does not address Respondent's objections to Exhibit 21 per se, but as noted above, Petitioner acknowledges that Internet printouts and screenshots "intended to establish various assertions made in the proceedings . . . are considered hearsay unless accompanied by testimony or other evidence that validates the truth of the content presented within these documents." 73 TTABVUE 26. We **sustain** Respondent's hearsay objection to the official records in Exhibit 21 because they are admissible as official records, "but only for what they shown on their face." *Standard*

*Knitting, Ltd. v. Toyota Jidosha K.K.*, Opp. No. 9116242, 2006 WL 173463, at \*16 n.25 (TTAB 2006).

### **Petitioner's Objections**

Petitioner raised no evidentiary objections in its main brief, but in Section VIII of its reply brief, captioned “Respondent’s Exhibits Should Not Be Allowed,” 73 TTABVUE 26, Petitioner argues that “[p]rintouts and internet materials used by Respondent to demonstrate truth are considered hearsay unless supported by testimony or other evidence, making them inadmissible,” *id.*; that “Respondent has failed to establish a proper foundation for the admission of certain evidence,” *id.*; that “[c]ertain pieces of evidence presented by the Respondent are irrelevant to the issues at hand and should therefore be excluded,” *id.* at 27; and that “Respondent’s evidence includes speculative assertions that lack proper factual support and should not be admitted . . . .” *Id.* Petitioner concludes that “[t]hese reasons reflect procedural and substantive issues with the evidence submitted by Respondent, which could lead to their evidence being excluded from consideration in the ongoing trademark dispute.” *Id.*

“[O]bjections raised for the first time in a reply brief are untimely because they effectively foreclose the adverse party from responding to the objections.” *JNF LLC v. Harwood Int’l Inc.*, Canc. No. 92070634, 2022 WL 4379238, at \*12 n.59 (TTAB 2022) (quoting *Grote Indus., Inc. v. Truck-Lite Co.*, Opp. No. 91196923 and Canc. No. 92053498, 2018 WL 1557301, at \*2 (TTAB 2018), *judgment rev’d and vacated by consent decree*, No. 1:18-cv-00599 (W.D.N.Y. June 8, 2022)). Accordingly, we will give

no further consideration to Petitioner's purported objections to Respondent's Exhibits.<sup>40</sup>

### **Summary of Evidentiary Rulings**

We summarize below the evidence that we have excluded in our rulings above, or that we will consider only for limited purposes.

We have stricken paragraphs 3-5 and 9-12 of the Second Jackson Declaration.

We have stricken the Third Jackson Declaration and the D'Onofrio Declaration attached to Petitioner's reply brief.

We have stricken "Exhibit 12a" attached to Petitioner's main brief.

We will consider Exhibits 15, 16, 17, 18, 21, and 22 to Petitioner's Notices of Reliance only for they show on their face.

We will give no consideration to any third-party comments regarding the videos referenced in Exhibits 26 and 27 to Petitioner's Notice of Reliance or to Petitioner's description of the contents of the videos.

## **II. Petitioner's Entitlement to a Statutory Cause of Action to Oppose and to Petition to Cancel**

Petitioner has brought four proceedings challenging Respondent's right to register, or maintain existing registrations of, five marks. "Entitlement to a statutory cause of action must be established in every inter partes case." *Sage Therapeutics, Inc. v. Sageforth Psych. Servs., LLC*, Opp. No. 91270181, 2024 WL 1638376, at \*3

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<sup>40</sup> We are compelled to note, however, that other than mentioning Petitioner's own Exhibits 15-22, 24, 26-27, and 28-31, which Petitioner misdescribes as "Purfoods' submissions," 73 TTABVUE 26, Petitioner does not object to **any** specific evidence. To put it charitably, this is unhelpful advocacy.

(TTAB 2024) (citing *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303-04 (Fed. Cir. 2020)).<sup>41</sup> “A party in the position of plaintiff may seek to oppose an application where such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and the opposer must have a reasonable belief in damage that is proximately cause by registration of the mark.” *Id.* (citations omitted). “A party in the position of plaintiff may seek to cancel a registration of a mark when doing so is within the zone of interests protected by the statute[, 15 U.S.C. § 1064,] and it has a reasonable belief in damage that would be proximately caused by continued registration of the mark.” *State Permits, Inc. v. Fieldvine, Inc.*, Canc. No. 92075095, 2024 WL 3825297, at \*8 (TTAB 2024) (citing *Corcamore*, 978 F.3d at 1303-04).

“Proof of [entitlement to a statutory cause of action] in a Board [inter partes proceeding] is a low threshold, intended only to ensure that the plaintiff has a real interest in [the] matter, and is not a mere intermeddler.” *Pepsico, Inc. v. Arriera Foods LLC*, Opp. No. 91269057, 2022 WL 15328405, at \*5 (TTAB 2022) (quoting *Sygenta Crop Prot., Inc. v. Bio-Chek, LLC*, Opp. No. 91175091, 2009 WL 691309, at \*5 n.8 (TTAB 2009) (citing *Ritchie v. Simpson*, 170 F.3d 1092, 1095 (Fed. Cir. 1999)).

Petitioner bears the burden of proving its entitlement to a statutory cause of action

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<sup>41</sup> This threshold element was previously called “standing,” and it is referred to as such in the parties’ briefs. 71 TTABVUE 20, 34; 72 TTABVUE 22-23; 73 TTABVUE 8-9. “We now refer to what previously had been called ‘standing’ as entitlement to a statutory cause of action. But our prior decisions and those of the Federal Circuit interpreting ‘standing’ under §§ 13 and 14 [of the Trademark Act] remain applicable.” *Sabhnani v. Mirage Brands, LLC*, Canc. No. 92068086, 2021 WL 6072822, at \*6 n.14 (TTAB 2021) (quotation and quotation marks omitted). Proof of “[a] plaintiff’s entitlement to invoke a statutory cause of action for opposition or cancellation is a necessary element in every inter partes case even if . . . the defendant does not contest the plaintiff’s entitlement.” *Id.*

in each proceeding by a preponderance of the evidence. *DowntownDC Bus. Improvement Dist. v. Clarke*, Opp. No. 91275100, 2024 WL 4449409, at \*1 (TTAB 2024).

**A. Opposition Nos. 91254642 and 91277104**

Petitioner argues that it has “standing to oppose [Respondent’s] attempts to register the MOM’S MEALS and MOM’S MEALS A PURFOODS COMPANY marks by virtue of its ownership of the valid and existing registrations,” 71 TTABVUE 33, apparently a reference to Petitioner’s ’809, ’528, ’874, ’463, and ’075 Registrations.<sup>42</sup>

Respondent argues that “Petitioner has merely presented allegations of standing with no direct evidence of or corroborating witness testimony regarding any alleged damage resulting from Petitioner’s . . . pending MOM’s MEALS trademark applications.” 72 TTABVUE 23.

In its reply brief, Petitioner argues that it “has established standing through its continuous use of the MY OWN MEAL Marks and related family of marks, which predate Respondent’s usage.” 73 TTABVUE 9.

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<sup>42</sup> As noted above, Petitioner made of record “plain” copies of the certificates of registration of these marks as Exhibits 1-5 to its July 19, 2022 Notice of Reliance. 39 TTABVUE 9-18. Although Petitioner stated that their relevance is “Status & Title,” *id.* at 2-3, the submission of plain copies of registration certificates unaccompanied by electronic records from the USPTO’s Trademark Search & Document Retrieval (“TSDR”) database do not make a party’s pleaded registrations of record because plain copies generally do not show the “current” status and title of the registrations. *See generally Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, Opp. No. 91263919, 2022 WL 16646840, at \*3-5 (TTAB 2022). But Respondent did not object to Petitioner’s submission of plain copies, and treated them as if they were properly of record, 72 TTABVUE 9-10, 24-25, 29, so we will consider Petitioner’s pleaded registrations to be of record. *Shenzhen IVPS*, 2022 WL 16646840, at \*5 (evidence may be considered to be of record when “a party does not object to the submission of evidence and/or argues the evidence in its brief on the case.”).



As noted above, proof of entitlement “is a low threshold, intended only to ensure that the plaintiff has a real interest in this matter, and is not a mere intermeddler.” *Pepsico*, 2022 WL 15328405, at \*5 (quotation omitted). For purposes of showing entitlement, a “reasonable belief in damage may be established by ‘assert[ing] a likelihood of confusion [claim] which is not wholly without merit . . . .’” *Major League Baseball Players Ass’n*, 2023 WL 2986321, at \*7 (quoting *Lipton Indus. Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1029 (CCPA 1982)). We find that Petitioner’s claim of a likelihood of confusion based on its registered marks is sufficient to show its entitlement to bring both oppositions.

**B. Cancellation Nos. 92073705 and 92078906**

Petitioner’s entire argument in its main brief for “standing” in the cancellation proceedings is in the portion devoted to its fraud claims:<sup>43</sup>

To establish its standing, the petitioner/opposer in a Board *inter partes* proceeding must prove that it is not a mere intermeddler, *i.e.*, that it has a real interest in the outcome of the proceeding and a reasonable basis for its belief that it would be damaged by issuance or maintenance of the defendant's registration. . . . Respondent does not appear to challenge [Petitioner’s] standing in this cancellation/opposition proceeding. Nonetheless, [Petitioner] has adequately and amply alleged that it will suffer damage to its reputation as the creator and distributor of the MOM Meals so as to entitle it to standing in this proceeding.

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<sup>43</sup> Petitioner does not separately argue that it is entitled to assert its abandonment claims, but such a showing is unnecessary if Petitioner proves its entitlement to bring its fraud claims. “Once a plaintiff has shown entitlement on one ground, it has the right to assert any other relevant ground” in an inter partes proceeding. *Look Cycle Int’l v. Kunshan Qiyue Outdoor Sports Goods Co.*, Canc. No. 92079409, 2024 WL 3739358, at \*3 (TTAB 2024).

*Id.* at 20 (citation omitted).

Respondent argues that “Petitioner has failed to prove standing in this cancellation/opposition proceeding,” 72 TTABVUE 22, because “[a]lthough allegations in support of standing may be sufficient for pleading purposes, those allegations must be affirmatively **proved** by the plaintiff at trial.” *Id.* (emphasis in bold here in italics in Respondent’s brief). According to Respondent, “Petitioner has merely presented allegations of standing with no direct evidence of or corroborating witness testimony regarding any alleged damage resulting from Petitioner’s MOM’S MEALS incontestable registrations, nor its pending MOM’s MEALS trademark applications.” *Id.* at 23.

In its reply brief, Petitioner offers as one basis for its entitlement to petition to cancel that its “pending trademark application has been refused due to a likelihood of confusion with Respondent’s MOM’S MEALS registration.” 73 TTABVUE 8. Refusal of a pending application based on a cited registration entitles the applicant to seek cancellation of the cited registration. *See, e.g., Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 1274 (Fed. Cir. 2014); *ShutEmDown Sports, Inc. v. Lacy*, Canc. No. 92049692, 2012 WL 684464, at \*6 (TTAB 2012). In support of this claim, Petitioner’s reply brief cites numbered page 3 of its main brief, 71 TTABVUE 11, which describes the record, including the ’153 Application. The portion of the file history of the ’153 Application in the record as Exhibit 6 to Petitioner’s July 19, 2022 Notice of Reliance consists only of the application itself, and does not contain any prosecution history showing that the application has been refused based on any of

Respondent's registrations. 39 TTABVUE 19-27. The portions of the record cited by Petitioner thus do not support its argument regarding refusal of its '153 Application.

As discussed above, however, the operative pleadings in the two cancellation proceedings are also part of the record, and Respondent admitted in its answers that its three registrations have been cited against Petitioner's application to register the mark shown in the '153 Application. In its Answer to the Second Amended Petition for Cancellation in Cancellation No. 92073705, Respondent "[a]dmitted that the Examining Attorney of U.S. Serial No. 88/509,153 refused registration of the application under Section 2(d) likelihood of confusion, in part, due to the prior existing registrations of Mom's Meals Word Mark and Mom's Meals Design Mark." 35 TTABVUE 4-5 (Answ. to Second Amended Pet. for Canc. ¶ 26).

In Cancellation No. 92078906, Petitioner alleged in its Petition for Cancellation that "[i]n an office action dated April 29, 2020 . . . the Examiner of the M.O.M. App. has cited the NOURISHCARE Mark against the application, thereby interfering with Petitioner's Application and causing harm to Petitioner" and that "[b]ecause this harm to Petitioner is within the zone of interests protected by the Lanham Act and is proximately caused by the Registration, Petitioner is entitled to bring this action." 1 TTABVUE 6 (Cancellation No. 92078906) (Pet. for Cancellation ¶ 20). In its Answer, Respondent "[a]dmitted that USPTO issued an Office Action in U.S. Serial No. 88/509,153 and submits that the document speaks for itself." 5 TTABVUE 4 (Cancellation No. 92078906) (Answ. to Pet. for Cancellation ¶ 20). Given Respondent's failure to deny any portion of the pertinent allegation, we deem

Respondent's response to be an admission of Petitioner's allegation that the Office Action refused registration based on the '408 Registration.

Respondent's admissions that the mark shown in Petitioner's '153 Application has been refused registration based on a likelihood of confusion with the marks shown in Respondent's '266, '408, and '824 Registrations establish Petitioner's entitlement to seek cancellation of the cited registrations in both cancellation proceedings and on both of Petitioner's claims for relief. *Empresa Cubana Del Tabaco*, 753 F.3d at 1274; *ShutEmDown Sports*, 2012 WL 684464, at \*6.

### **III. Petitioner's Likelihood of Confusion Claims (Opposition Nos. 91254642 and 91277104)<sup>44</sup>**

We will first decide the two oppositions filed by Petitioner because they both involve a single ground for opposition and because some of our findings in the oppositions bear on the fraud claims in the two cancellation proceedings.

In Opposition No. 91254642, Petitioner opposes registration of the composite mark shown in the '072 Application and reproduced again below

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<sup>44</sup> The portion of Petitioner's main brief devoted to the two oppositions is quite short. 71 TTABVUE 33-37. Petitioner first discusses its "standing" in both oppositions, *id.* at 33-34, and then discusses likelihood of confusion generally. *Id.* at 34-35. The portion of Petitioner's main brief devoted specifically to arguments regarding the '072 Application is about three pages, *id.* at 35-37, and the portion devoted specifically to arguments regarding the '215 Application is the following sentence: "Incorporating the arguments above, see *infra* [sic], Respondent again incorporates an all-caps MOM logo creating a likelihood of confusion between its mark and that of Petitioners [sic]." *Id.* at 37. Respondent also discusses the two oppositions together in its brief. 72 TTABVUE 28-32. We will follow the parties' lead and discuss Petitioner's priority and the likelihood of confusion in each case together.



for “food preparation, namely, preparation of home cooked meals and preparation of frozen or shelf-stable meals” based on a likelihood of confusion with what Petitioner defines as the “MOM Marks,” 71 TTABVUE 37, namely, MOM, M.O.M., MOM’S, MOM MEALS, MY OWN MEALS, and MY OWN MEAL. *Id.*

In Opposition No. 91277104, Petitioner opposes registration of the composite mark shown in the ’215 Application and reproduced again below



for “food preparation, namely, preparation of home cooked meals and preparation of frozen or shelf-stable meals,” again based on a likelihood of confusion with the self-styled “MOM Marks.” *Id.*

#### **A. Applicable Law on Petitioner’s Section 2(d) Claims**

Section 2(d) of the Trademark Act “provides that a mark may be refused registration if it [c]onsists or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark 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 . . . .”

*Major League Baseball Players Ass'n*, 2023 WL 2896321, at \*7 (quoting 15 U.S.C. § 1052(d)). “In order to prevail on [its] claims under Section 2(d), [Petitioner] must prove both priority of use of [its] pleaded marks and a likelihood of confusion between those marks and those [Respondent] has applied to register.” *Id.* (citation omitted).

### 1. Priority

“For purposes of priority, ‘proprietary rights may arise from a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights.’” *Id.* at \*8 (citing *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1162 (Fed. Cir. 2002)).

Petitioner does not address the issue of priority in the portion of its main brief devoted to the oppositions. 71 TTABVUE 33-37. The portion of Petitioner’s brief captioned “Priority” appears in Petitioner’s arguments regarding the cancellation proceedings,<sup>45</sup> where priority is irrelevant because Petitioner seeks cancellation only on the grounds of fraud and abandonment.<sup>46</sup> In the portion of its main brief captioned “Priority,” Petitioner argues that “the evidence is legion that [Petitioner] has been using the MOM-formative mark for years prior to Respondent’s filing of its applications” because “[e]very meal package sold by [Petitioner] since its first

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<sup>45</sup> In its reply brief, Petitioner repeats its misguided discussion of priority with respect to the cancellation proceedings. 73 TTABVUE 9-11.

<sup>46</sup> Section 2(d) claims against Respondent’s three registrations are time-barred under Section 14 of the Trademark Act, 15 U.S.C. § 1064(3), because the registrations were all more than five years old when the cancellation proceedings were commenced, and likelihood of confusion is not an enumerated available ground for cancellation of such a registration.

interstate commerce sales in 1987 clearly displays ‘MOM’ stacked vertically as part of the spelling out of its My Own Meal mark. (Petitioner’s NOR Exs. 3-4, Ex. 15 at 10, 21, Ex. 17 at 3).” 71 TTABVUE 20-21.

This argument indicates that Petitioner relies for priority on the claimed prior use of the composite marks shown in its ’874 and ’463 Registrations, which we reproduce again below:



Because those registrations are deemed to be of record and Respondent did not counterclaim to cancel any of them, “priority is not at issue with respect to the registered marks and the goods and services identified in the registrations . . . .” *Sage Therapeutics*, 2024 WL 1638376, at \*4 (citing *Nkanginieme v. Appleton*, Opp. No. 91256464, 2023 WL 2424119, at \*4 (TTAB 2023)).

Petitioner also includes within the defined term “MOM Marks” the claimed marks MOM, M.O.M, MOM’S, and MOM MEALS, for which it does not own registrations. 71 TTABVUE 37. Petitioner must prove its priority of use with respect to these

claimed unregistered marks by a preponderance of the evidence either through prior technical trademark use or analogous use. *Andrusiek*, 2022 WL 4103636, at \*5.

In the “Recitation of the Facts” portion of its main brief, Petitioner claims that

Mary Anne Jackson, Founder and President of My Own Meals, Inc., put the **MOM** in **My Own Meals**. As early as 1986, Petitioner started using the mark MOM and M.O.M., always in all capital letters, an acronym for My Own Meal and My Own Meals (hereinafter references to “MOM” include “M.O.M.”). (Petitioner’s Second Notice of Reliance Ex. 31 (hereinafter “Petitioner’s Second NOR”). In 1987, Petitioner introduced a line of all-natural, no MSG, no preservatives shelf stable meals developed for the taste and nutritional needs of children ages 2-10. (Petitioner’s Notice of Reliance Exs. 15-18 (hereinafter “Petitioner’s NOR”). As early as 1988, Petitioner’s PR campaigns used MOM in its press releases. *Id* at Exs. 15-16. Furthermore, as early as 1988, publications, television, radio, and public speaking events referred to Petitioner and its products as MOM. *Id* at Exs. 16 and 18. Petitioner has consistently and substantially exclusively been referred to as “MOM” in the food industry for over three and a half (3.5) decades. *Id* at Exs. 15-18. My Own Meals’ earliest recorded recognition as MOM was in 1988 across a variety of mediums, including store fronts, magazines, journals, television articles, interviews, radio talk shows, and more. (Petitioner’s NOR Ex. 15, Part 1, at 2, 9, 12, 15, 20). MOM Meals’ fame and brand recognition only grew as the product line became a household staple in everyday American homes as well as the Department of Defense, Department of Justice, Retail, Direct Mail, schools, universities, institutions, nursing homes, hospitals, NASA, FEMA, and international militaries all adopted MOM Meals as the only delicious, affordable, and shelf stable special diet food option on the market. (Petitioner’s NOR, Ex. 15, Part 3, at 6, 7, 15).

71 TTABVUE 12-13 (emphasis supplied by Petitioner).

Elsewhere in its main brief, Petitioner argues that the

record is replete with evidence of sales of MOM meals and the nationwide recognition of Mary Anne Jackson as MOM. The evidence illustrating MOM Meals’ nationwide



influence spans a timeline of thirty-five (35) years, underscoring the solidification of My Own Meals' product identity as MOM Meals. . . Accordingly, My Own Meals has demonstrated priority in its use of the MOM-formative mark over the constructive use date of Respondent.

*Id.* at 19 (citing Exhibits 1-2 to Petitioner's July 19, 2022 Notice of Reliance).

We interpret these arguments to claim prior use of the unregistered self-styled "MOM Marks" based on use analogous to trademark use rather than technical trademark use on products.<sup>47</sup>

The Board has "long held that reliance on priority through analogous use must be pleaded." *Andrusiek*, 2022 WL 4103636, at \*6. Respondent argues that "[i]n the event Petitioner is somehow attempting to claim analogous use of 'MOM' as a basis for priority, such a claim is not allowed" because Petitioner "does not allege in the Notices of Opposition nor elsewhere that the alleged advertising should be considered 'analogous use' as a trademark." 72 TTABVUE 26 (citing 24 TTABVUE 13). Respondent further argues that "[t]he Board gave Petitioner the opportunity to file an amended notice of opposition to expressly plead an intent to rely on use analogous to trademark use in support of its likelihood of confusion claim, *id.* at 26-27, but "as the Board notes, Petitioner did not do so." *Id.* at 27 (citing 29 TTABVUE 1, n.1). Respondent concludes that Petitioner "should therefore be precluded from relying on

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<sup>47</sup> As discussed above, Petitioner incorrectly argues that it must show prior use before the constructive use filing dates of the applications that matured into the '824, '266, and '408 Registrations. In the opposition to the '072 Application, Petitioner must show analogous use of its claimed marks prior to July 2019, the first use date of Respondent's mark to which Rick Andersen testified, without contradiction, R. Anderson Decl. ¶ 10 (56 TTABVUE 4), and in the opposition to the '215 Application, Petitioner must show analogous use prior to November 2019, the first use date of Respondent's mark to which Rick Andersen testified, without contradiction. R. Anderson Decl. ¶ 11 (56 TTABVUE 4).

analogous use, rather than its alleged common law trademark rights in view of its failure to plead analogous use in its Notices of Opposition.” *Id.*

This argument is based on the Board’s August 4, 2021 order denying Respondent’s motion for summary judgment based on its claimed priority on Petitioner’s Section 2(d) claim in Opposition No. 91254642. 24 TTABVUE.<sup>48</sup> In evaluating Petitioner’s evidence in opposition to that motion, the Board explained that “[w]here a party has not made technical trademark use of a term, it may establish protectable prior rights in that term through use analogous to trademark use,” *id.* at 9 (citation omitted), but “an intent to rely on analogous use must be pleaded” and Petitioner “does not expressly allege prior analogous use of those marks in the notice of opposition.” *Id.*<sup>49</sup> The Board considered analogous use for purposes of the summary judgment motion, but stated that “[t]o rely on analogous use to establish priority at trial, Plaintiff must replead its Section 2(d) claim to expressly rely upon analogous use.” *Id.* at 10 n.16. The Board gave Petitioner 30 days from the date of the order “to file an amended notice of opposition in which it expressly pleads an intent to rely upon use analogous to trademark use in support of its Section 2(d) claim.” *Id.* at 13.

It is true, as Respondent argues, that Petitioner did not file an amended notice of opposition in Opposition No. 91254642 by the deadline, and that the Board noted the

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<sup>48</sup> In that order, the Board also advised the parties that “[e]vidence submitted in connection with the motion for summary judgment is of record only for purposes of that motion, unless the parties stipulate otherwise. To be considered at final hearing, the summary judgment evidence must be properly introduced in evidence during the appropriate testimony period.” 24 TTABVUE 12 n.19.

<sup>49</sup> Petitioner’s original Notice of Opposition in Opposition No. 91254642 did not mention analogous use. 1 TTABVUE 7-11.

lack of such a filing in a December 18, 2021 order on Respondent's motion to dismiss Petitioner's amended petition for cancellation in Cancellation No. 92073705. 29 TTABVUE 1 n.1. But Respondent paints a misleading picture of what actually happened.

Petitioner **did** timely file an amended notice of opposition in Opposition No. 91254642, but it did so in the TTABVUE docket in Cancellation 92073705, the "child" case in the two cases that were consolidated at that time, rather than in the TTABVUE docket in the "parent" case. 17 TTABVUE (Cancellation No. 92073705). The Board addressed that misfiling in a December 23, 2021 order discussing the need for the parties to file all submissions in consolidated cases in the designated "parent" case. 30 TTABVUE. The Board noted that Petitioner "filed its amended notice of opposition in the child case," *id.* at 2, stating that it was "unclear why [Petitioner] filed its amended notice of **opposition** in the **cancellation** proceeding rather than the **opposition** proceeding." *Id.* at 2 n.2 (emphasis in bold here in italics in the Board's order). The Board granted Petitioner until January 20, 2022 "to refile its amended notice of opposition previously filed in the cancellation and child case." *Id.* Petitioner refiled its amended notice of opposition in the parent case by the new deadline. 31 TTABVUE. Accordingly, we reject Respondent's argument that Petitioner should be "precluded from relying on analogous use, rather than its alleged common law trademark rights in view of its failure to plead analogous use in its Notices of Opposition" in Opposition No. 91254642, 72 TTABVUE 27, and we will consider Petitioner's claim of priority based on analogous use in that case. We will

also consider Petitioner's claim of priority based on analogous use in Opposition No. 91277104 because Petitioner alleged in its July 1, 2022 Notice of Opposition in that case that

Opposer has made continuous use of the marks MOM, M.O.M., MOM'S, MOM MEALS, MY OWN MEALS, and MY OWN MEAL for Opposer's goods and services with both analogous use starting April, 1987 and actual use starting afterwards, with the period of analogous use tacked onto the date of actual use. Opposer's activity prior to Applicant's constructive use date was sufficiently public to identify or distinguish the goods of Opposer in an appropriate segment of the public mind as those of Opposer.

1 TTABVUE 8 (Opp. No. 91277104 (Not. of Opp. ¶ 6)).

Before turning to the merits of Petitioner's analogous use claim, we note its unusual nature. In the analogous use cases discussed below, the plaintiff sought to prove the existence of prior proprietary rights with respect to goods or services that were not yet in the marketplace and on which the plaintiff had not yet made technical trademark use of the putative mark. Here, however, Petitioner claims proprietary rights in its putative "MOM Marks" with respect to goods that were **already** in the marketplace during the relevant period and that **already** bore Petitioner's composite My Own Meal trademarks. In essence, Petitioner claims that the goods were associated with Petitioner by the My Own Meal trademarks that actually appeared on them **and** by the putative "MOM Marks" that did not. Petitioner cites no case that has found analogous use under these circumstances.

Turning to the merits, an analogous claim can succeed "only where the analogous use is of such a nature and extent as to create public identification of the target term

with the [plaintiff's] product or service.” *Andrusiek*, 2022 WL 4103636, at \*8 (citing *T.A.B. Sys. v. PacTel Teletrac*, 77 F.3d 1372, 1375 (Fed. Cir. 1996)). This places a significant burden on the analogous use claimant. “As the Federal Circuit has made clear . . . [b]efore a prior use becomes an analogous use sufficient to create proprietary rights, the petitioner must show prior use sufficient to create an association in the minds of the purchasing public between the mark and the petitioner’s goods.” *JNF*, 2022 WL 4379238, at \*16 (internal quotation and quotation marks omitted). Petitioner must prove prior analogous use by a preponderance of the evidence. *Id.* at \*18.

Direct evidence, such as a survey, of the consuming public’s identification of the MOM Marks with Petitioner as the source of its prepared meals for children is not required. The “fact finder may infer the fact of identification on the basis of indirect evidence regarding [Petitioner’s] use of the word or phrase in advertising brochures, catalogs, newspaper ads, and articles in newspapers and trade publications.” *Andrusiek*, 2022 WL 4103636, at \*8. Petitioner thus “may establish [its] priority [here] by showing that [it] has used the [MOM Marks] in the United States in a manner analogous to trademark use sufficient to create an association in the mind of the relevant consumers between the mark[s] and the goods, followed by actual trademark use of the mark within a ‘commercially reasonable time.’” *Id.* at \*9 (quoting *Dyneer Corp. v. Automotive Prods., PLC*, Opp. No. 89148, 1995 WL 785742, at \*5 (TTAB 1995)).

Petitioner's main brief cites Exhibits 15-18 to its July 19, 2022 Notice of Reliance and Exhibit 31 to its April 10, 2024 Second Notice of Reliance, the Second Jackson Declaration, as Petitioner's evidence of prior analogous use. 71 TTABVUE 12-13. In our evidentiary rulings above, we have excluded Ms. Jackson's purported rebuttal testimony in paragraph 11 in the Second Jackson Declaration, which is the portion of Exhibit 31 that addresses Petitioner's claimed analogous use, and will not consider it in our analysis of Petitioner's analogous use claim. We have also sustained Respondent's hearsay objections to Exhibits 15-18 and will consider those materials only for what they show on their faces, not for the truth of their contents.

As discussed above in our evidentiary rulings, Exhibit 15 consists almost entirely of print articles from various publications between 1988 and 1996, with one outlier from 2007, which contain the words MOM or M.O.M. in headlines, text, or both.<sup>50</sup> The articles focus largely on Ms. Jackson, a working mother and former big-company executive turned entrepreneur. Most of the articles include her photograph and discuss her career, with many going into detail about starting her own company. An example is a cover story about Ms. Jackson in the *Inc.* magazine edition shown below:

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<sup>50</sup> As noted above, Exhibit 15 contains several photographs that are not connected to any of the articles and we will give them no consideration in our decisions. Exhibit 15 also contains some typed and handwritten letters and an email, which we will consider for what they show on their faces. We have listed the particulars of the articles, including record citations, in our evidentiary rulings above, and we will refer to the articles in this portion of our opinion primarily by the names of the publications in which they appeared.



Newspaper and magazine articles have been viewed skeptically by the Federal Circuit, its predecessor court, and the Board as evidence of the creation of trademark rights via analogous use. In *T.A.B. Sys.*, the record showed that “11 articles appeared in various publications in September and October 1989, but those were not advertisements per se but news articles.” *T.A.B. Sys.*, 77 F.3d at 1377. The Federal Circuit noted that in *Old Swiss House, Inc. v. Anheuser-Busch, Inc.*, 569 F.2d 1130 (CCPA 1978), the Court of Customs and Patent Appeals had found that 12 articles appearing in various publications over a three-month period were insufficient to establish prior analogous use. *T.A.B. Sys.*, 77 F.3d at 1377. The Federal Circuit explained that the *Old Swiss House* court had “rejected the contention that the

articles constituted analogous use sufficient to demonstrate prior proprietary rights in the target phrase,” *id.* at 1375, because

[t]he articles . . . were, in effect, press releases; in all but one, the mark, The Old Swiss House, was buried in the body of the articles. This, in our view, is not the type of public exposure of a mark that would be expected to have any significant impact on the purchasing public

*Id.* (quoting *Old Swiss House*, 569 F.2d at 1133). The Federal Circuit held that the 11 articles in the record in *T.A.B. Sys.* were also insufficient as proof of analogous use. *Id.* at 1377. In *JNF*, the Board applied this analysis in holding that articles appearing in *The New York Times* and on Grubstreet.com containing the putative mark did not prove priority via analogous use. *JNF*, 2022 WL 4379238, at \*17-18.

The articles in the record here are greater in quantity than those in the records in *T.A.B. Sys.*, *Old Swiss House*, and *JNF*, but not materially better in quality. There are 27 articles in Exhibit 15 and the word MOM or M.O.M. appears in some manner in the headlines of only 15 of them, the articles in the *KPMG Peat Marwick Alumni Newsletter*; *The Advocate*; *The Capital Times*; *The Star*; *Food and Beverage Marketing* (three articles); *Poultry Processing*; the *Chicago Sun-Times*; the *News/Voice*; *North Shore*; the *Chicago Tribune*; *Entrepreneurial Woman*; *Talking to the Boss*; and *The Plain Dealer*. Almost half of these articles use “MOM” in a headline that evokes a familiar phrase, including a phrase about mothers. These are the articles in the *KPMG Peat Marwick Alumni Newsletter* (“Just Like MOM Would Make”); *The Advocate* (“What’s for dinner Mom?”); *Food and Beverage Marketing* (“Look M.O.M.! No Nothing!”) (two articles) and “A M.O.M FOR ALL SEASONS”); *Entrepreneurial Woman* (“MOM KNOWS BEST”); and *Talking to the Boss* (“M.O.M.’s the word”). A



reader is required to delve into the “buried mentions” of MOM in the text of these articles to associate the MOM in the headline with Ms. Jackson, Petitioner, or Petitioner’s products.

In the other 12 articles in Exhibit 15, the *Inc.* cover story and the articles in *Business Week*, *Leukemia Society News*, *Family Circle* magazine, *Food & Beverage Marketing*, *Wealth Secrets*, *Adweek*, *Convenience Store Decisions*, *The Detroit News and Free Press*, *Sarasota Herald-Tribune*, *Finegold News*, and *Jewish Review*, the putative MOM marks are “buried in the body of the articles.” *T.A.B. Sys.*, 77 F.3d at 1375 (quoting *Old Swiss House*, 569 F.2d at 1133). As in *Old Swiss House*, *T.A.B. Sys.*, and *JNF*, we find that these “buried” mentions are “not the type of public exposure of a mark that would be expected to have any significant impact on the purchasing public.” *JNF*, 2022 WL 4379238, at \*18 (quoting *Old Swiss House*, 569 F.2d at 1133). These 12 articles are not probative evidence of analogous use of the “MOM Marks” by Petitioner.

Almost all of the 15 articles in which “MOM” appears in the headline use “MOM” or “M.O.M.” at least once as an internal shorthand for Petitioner’s trade name “My Own Meals Inc.,” or its house mark MY OWN MEAL, or as a double entendre referring to Ms. Jackson, a working mother, as well as her company.<sup>51</sup> Examples include the articles in the *KPMG Peat Marwick Alumni Newsletter* (under headline reading “Just Like MOM Would Make It” and next to a photograph of the *Inc.* cover,

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<sup>51</sup> The letters and email in Exhibit 15 also use “MOM” as an internal shorthand to refer to Ms. Jackson’s company “My Own Meals, Inc.” 39 TTABVUE 520-24.

stating that “Thus began My Own Meals Inc. (MOM)” and “MOM has been great for working mom Jackson”); *The Capital Times* (in article headlined “MOM offers fast, easy, nutritious meals for kids,” stating that “Jackson’s company, My Own Meals Inc. (MOM, for short) offers five main-dish meal varieties . . . .”); *Poultry Processing* (in article headlined “MOM, INCORPORATED,” discussing Ms. Jackson’s company, and stating that she “founded My Own Meals (MOM) Inc.”); *Chicago Sun-Times* (in article displaying the headline “She sells MOM’s home cooking” next to a photograph of Ms. Jackson, referring to “Jackson’s My Own Meals (the acronym is MOM)” and stating that “the rest of MOM consists of Beth Martin, who was also canned from Beatrice and Marian Flynn, who left Frito-Lay”); *Food & Beverage Marketing* (in article captioned “Marketer of the Month” and headlined “A M.O.M. FOR ALL SEASONS” above depictions of Petitioner’s composite mark and a photograph of Ms. Jackson, stating that “Mary Anne Jackson is the founder and president of My Own Meals (“M.O.M., for short) . . . .”); *North Shore* (stating that “Mary Anne Jackson is founder and president of Deerfield-based My Own Meals (MOM)”); *Entrepreneurial Woman* (in cover story featuring Ms. Jackson and under the headline “MOM KNOWS BEST” and pictures of packages bearing Petitioner’s composite mark, stating that “If you didn’t know Mary Anne Jackson was mortal like everyone else, you’d think she was bionic. The 37-year-old creator of My Own Meals (MOM), the innovative Deerfield, Illinois, company that manufactures prepared meals for children, is like a wind-up toy gone berserk”).

Only a few of the 15 articles that use MOM in their headlines also more directly associate the words MOM or M.O.M. with Petitioner's My Own Meal products. These include articles in *The Capital Times* (showing a package bearing one of Petitioner's composite marks under the headline "MOM offers fast, easy, nutritious meals for kinds"); *The Star* (under the headline "Mom gives birth to My Own Meals," stating that "Today, MOM stands for a lot of things" including "a new concept in packaged meals for children. It stands for My Own Meals."); *Chicago Tribune* (stating that "the initials of her product weren't chosen by accident" and that Ms. Jackson "already has marketed MOM to the government for military commissaries"); *Entrepreneurial Woman* (stating that "By the beginning of 1991, MOM was in supermarkets in Northern California, New York, New Hampshire, Connecticut, Virginia, Kentucky and Minnesota"); *Talking to the Boss* (under the headline "M.O.M.'s the word," discussing Ms. Jackson's selection of her new company's name and stating that "My Own Meals, MOM for short, suited Jackson because she wanted her product to appeal to parents as well as kids"); and *The Plain Dealer* (under the headline "MOM's cooking finds a spot in kitchens, grocery shelves," stating that Ms. Jackson "created My Own Meals Inc. (MOM) in 1986").

The potential market in the United States for Petitioner's prepared meals for children was and is very large, as there were and are many millions of children in the United States and many millions of parents who, like Ms. Jackson herself, want to provide their children with nutritious and convenient meals. Petitioner must "prove that the 'necessary association' [with its prepared meals] was created among more

than an insubstantial number of potential customers. Otherwise, [it] cannot show ‘significant impact on the purchasing public.’” *T.A.B. Sys.*, 77 F.3d at 1377. The record is devoid of evidence of the extent to which any of the articles in Exhibit 15 were exposed to these relevant purchasers.

About half of the 27 total articles appeared in what Petitioner describes as “business journals, women’s business journals, trade journals, food service journals, [and] distribution journals . . .” 71 TTABVUE 23.<sup>52</sup> These include the *Inc.* cover story, and the articles in the *KPMG Peat Marwick Alumni Newsletter*; *Business Week*; *Food and Beverage Marketing* (three articles); *Poultry Processing*; *Wealth Secrets*; *Adweek*; *Convenience Store Decisions*; *Food & Beverage Marketing*; *Entrepreneurial Women*; and *Talking to the Boss*. There is no evidence regarding the extent of the circulation of these publications when the articles appeared in them, and Petitioner acknowledges that they are directed to business readers and to companies in the food and retailing industries, not the general public.<sup>53</sup> There is no evidence that any of these articles were ever read by members of the relevant purchasing public for Petitioner’s prepared meals for children, much less that they had a “significant impact” on those consumers’ perception of Petitioner’s claimed “MOM Marks.” *T.A.B. Sys.*, 77 F.3d at 1377. *Cf. Andrusiek*, 2022 WL 4103636, at \*11 (noting that the parties

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<sup>52</sup> For example, *Inc.* magazine is subtitled “The Magazine for Growing Companies.”

<sup>53</sup> With the exception of the 2007 article, all of the articles in Exhibit 15 circulated before the Internet became a part of everyday life. To find and read them at that time required more effort than the click of a mouse, as members of the relevant purchasing public would have needed to obtain physical copies of the publications in which the articles appeared either through subscriptions or purchases at brick-and-mortar world stores.

were directing their respective marks to niche communities of comic book readers and consumers of marijuana, and finding that the petitioner’s CAPTAIN CANNABIS mark was “reasonably well-known within these communities, even if the numbers are not large in absolute terms, and was reasonably well-known prior to Respondent’s priority date” based on exposure in niche publications and media and promotion of its mark “through trade shows, social media, and the Internet.”).

The other articles in Exhibit 15 appeared in 10 newspapers, one magazine, and what appear to be newsletters of three organizations. The newspaper articles include articles in *The Advocate*; *The Capital Times*; *The Star*;<sup>54</sup> the *Chicago Sun-Times*; *News/Voice*; *North Shore*; *The Detroit News and Free Press*; the *Chicago Tribune*; *The Plain Dealer*; and the *Herald-Tribune*. The magazine article appeared in one edition of *Family Circle*, and the three other articles appeared in editions of the *Leukemia Society News*; *Feingold News*; and the *Jewish Review*.

Petitioner argues that its putative MOM Marks were discussed in “newspapers throughout the country [and] women’s and household magazines,” 71 TTABVUE 23, but Exhibit 15 does not support this sweeping claim.<sup>55</sup> Exhibit 15 shows that only a total of 10 articles about Ms. Jackson and her company My Own Meals Inc. appeared

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<sup>54</sup> It is not clear where *The Star*, *News/Voice*, and *North Shore* newspapers were published and distributed when the cited articles appeared in them, but what is shown on the face of the articles suggests that they were circulated in the Chicago, Illinois area. Petitioner is located in Deerfield, Illinois. The Board may take judicial notice of geographic locations, *In re Morinaga Nyugyo K.K.*, Ser. No. 86338392, 2016 WL 5219811, at \*6 n.4 (TTAB 2016), and we take judicial notice that Deerfield is a suburb of Chicago.

<sup>55</sup> This argument appears to be based in part on information on Petitioner’s website, which we discuss below in connection with Exhibits 16-18.

between 1988 and 1995 in five general circulation newspapers published in the Chicago area, and in general circulation newspapers published in Stamford, Connecticut; Madison, Wisconsin; Detroit, Michigan; Cleveland, Ohio; and Sarasota, Florida; and that an article about Ms. Jackson and her company appeared in *Family Circle* magazine. We do not know the geographic extent and size of the circulation of the newspapers or of *Family Circle* magazine during the relevant period, and we can safely assume that the *Leukemia Society News*, the *Feingold News*, and the *Jewish Review* had limited distribution to members or friends of the organizations in particular areas. There is again no evidence regarding the extent, if any, to which these articles in local newspapers, one national magazine, and three organization newsletters were read by members of the relevant purchasing public for Petitioner's prepared meals for children.<sup>56</sup>

In summary, the record is devoid of evidence that the 15 articles that used MOM in some manner in their headlines "reached a substantial portion of the public that might be expected to purchase the [goods]." *T.A.B. Sys.*, 77 F.3d at 1377.

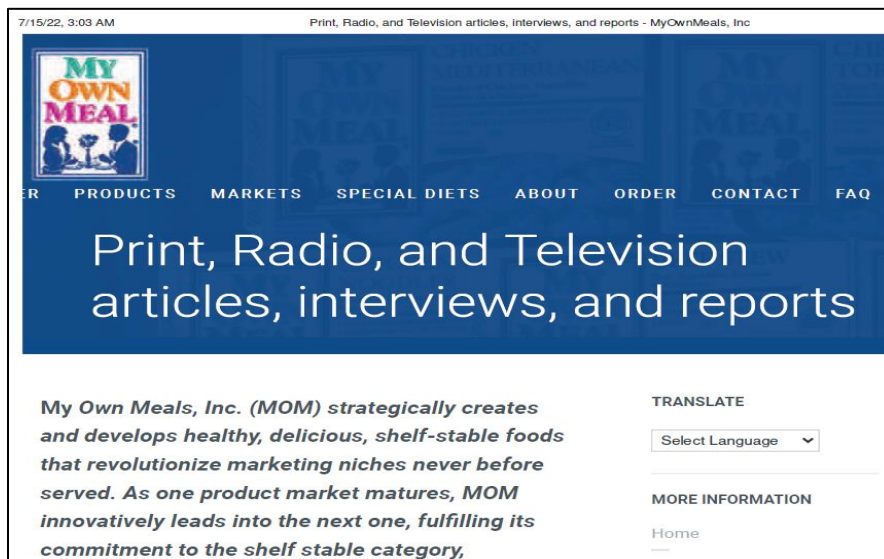
We turn now to Exhibits 16-18, which are pages from Petitioner's website at myownmeals.com.<sup>57</sup> Exhibit 16 is captioned "Print, Radio, and Television articles,

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<sup>56</sup> The letters and email in Exhibit 15 are private correspondence between the authors and Ms. Jackson and My Own Meals Inc., and, as such, were not exposed to the relevant purchasing public. 39 TTABVUE 520-24.

<sup>57</sup> Unlike the plaintiff in *Andrusiek*, who registered a domain name corresponding to his putative mark CAPTAIN CANNABIS and operated a website at captaincannabis.com promoting and selling CAPTAIN CANNABIS products, *Andrusiek*, 2022 WL 4103636, at \*9, there is no evidence in the record that Petitioner ever registered and used any domain name other than myownmeals.com, which corresponds to Petitioner's trade name and house mark.

interviews, and reports.” 39 TTABVUE 526. Like many of the third-party articles discussed above, the first page of Exhibit 16 uses MOM as an internal shorthand for Petitioner’s trade name “My Own Meals, Inc.”:



*Id.* These webpages list “MOM™” and M.O.M.™ as one of Petitioner’s brands in several places, including in the entry set forth below:

Brands	My Own Meal®, MOM™, My Kind of Chicken®, My Favorite Pasta®, My Meatballs & Shells®, My Turkey Meatballs®, Chicken Please®, My Own Meals™
Jingle	<i>Serve the ones you love, My Own Meals®</i>

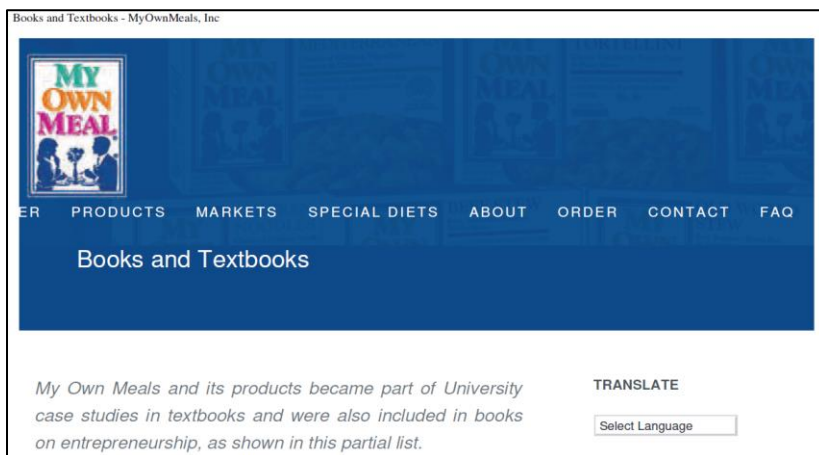
*Id.* at 527. The primary purpose of Exhibit 16, however, is to list articles and electronic media mentions for the period between 1988 and 2020. *Id.* at 529-71. We display a portion of one such page below:

1988	Advertising Age / November 7	<a href="#">Food Makers Jump on Microwave Kids Meals</a>
1988	Adweek's Marketing Week	<a href="#">Ex Beatrice Exec Entrepreneur develops shelf stable meals for children</a>
1988	Chicago Daily Herald / August 11	<a href="#">Nutritious meal in pouch assures busy moms that kids eat right</a>
1988	Chicago Parent / April	<a href="#">My Own Meals for mother's guilt</a>

https://www.myownmeals.com/marketing-publicity-history/print-radio-and-television-articles-interviews-and-reports/

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Exhibit 17 contains pages from Petitioner's website captioned "Books and Textbooks":



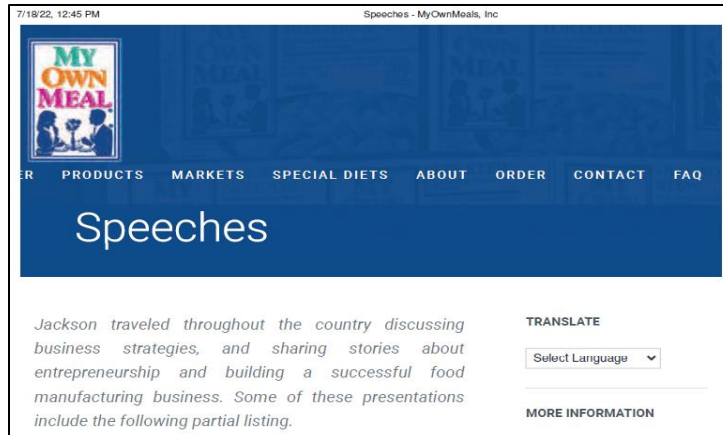
*Id.* at 573.

Exhibit 18 contains pages from Petitioner's website captioned "Speeches":

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<sup>58</sup> It is not clear whether the language in what appear to be links to third-party websites is Petitioner's or that of third parties.





*Id.* at 577. The pages have entries between 1988 and 2019. *Id.* at 577-85.

Petitioner’s own “webpages are admissible for what they show on their face [but] Petitioner may not rely on them for the truth of any matter asserted [because they are not] supported by testimony or other evidence.” *Flame & Wax*, 2022 WL 3083070, at \*3 n.10 (citing Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2); Fed. R. Evid. 801(c)); *see also Spiritline Cruises*, 2020 WL 636467, at \*4. As explained in our evidentiary rulings above, because there is no testimony accompanying these listings on Petitioner’s website of articles, electronic media mentions, books and textbooks, and speeches, the listings do not prove that the referenced materials actually appeared in the referenced publications, media, books, and textbooks on the referenced dates, or that Ms. Jackson gave the referenced speeches on the referenced dates.

Moreover, we again have no information regarding the number of visitors to Petitioner’s website in general, or to the pages in Exhibits 16-18 in particular, during the period in which Petitioner claims that the articles in Exhibit 15 appeared and its claimed “MOM Marks” marks were used in the other identified materials in a manner

analogous to trademark use prior to 2019. As a result, we do not know the extent, if any, to which the relevant purchasing public was ever exposed through Petitioner's website to the use of "MOM" or "M.O.M." in the titles or bodies of the materials in Exhibits 16-18.

As discussed above, Petitioner may establish analogous use priority through "use in advertising brochures, trade publications, catalogues, newspaper advertisements and Internet websites that created a public awareness of the designation as a trademark identifying Petitioner as the source of the relevant goods." *Andrusiek*, 2022 WL 4103636, at \*6. But the record is devoid of admissible evidence of any use of MOM or M.O.M. by Petitioner during the relevant period in materials such as advertising brochures, any trade publications in which Petitioner itself promoted its products under the putative marks MOM and M.O.M., any newspaper or other advertisements in which Petitioner itself promoted its products under the putative "MOM Marks," or on its own website. There is also no factual support based on admissible evidence for Petitioner's claims that its putative "MOM Marks" were also exposed to consumers during the relevant period through "TV and radio segments," "family event promotions," and "couponing." 71 TTABVUE 23.<sup>59</sup>

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<sup>59</sup> Ms. Jackson testified in her discovery deposition that M.O.M. or MOM did not appear on product packaging between 1988 and 2019, but that it appeared in Petitioner's brochures, "PR," press releases, and "marketing," and that "[w]e have copies of many of those." Jackson Tr. 47:17-24 (58 TTABVUE 6). In our evidentiary rulings above, we ruled that we will consider Exhibit 22 to Petitioner's September 7, 2023 Amended Notice of Reliance, which contains what appear to be various promotional materials and coupons showing the word MOM or M.O.M., only for what those materials show on their faces, but there is no admissible accompanying testimony from Ms. Jackson regarding when, how, and to what extent these materials were exposed to the relevant purchasing public.

As the party claiming use analogous to trademark use, Petitioner must “prove that the ‘necessary association’ was created among more than an insubstantial number of potential customers” to show “significant impact on the purchasing public.” *T.A.B. Sys.*, 77 F.3d at 1377. We “must take the record as [Petitioner] made it,” *id.* at 1378, and we find that the articles and Internet materials in Exhibits 15-18 do not show that Petitioner’s claimed analogous use of MOM or M.O.M. “create[d] public identification of the target term with the [Petitioner’s] product or service.” *Andrusiek*, 2022 WL 4103636, at \*8. Petitioner thus did not show, by a preponderance of the evidence, use of its putative “MOM Marks” in a manner analogous to trademark use prior to the first use dates of the marks shown in the opposed applications, and Petitioner thus must rely solely on its pleaded registrations for purposes of priority on its Section 2(d) claims in the oppositions.

## **2. Likelihood of Confusion**

“Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits 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.’” *Sage Therapeutics*, 2024 WL 1638376, at \*4 (quoting 15 U.S.C. § 1052(d)). To prevail on its Section 2(d) claims in the two oppositions, Petitioner must show, by a preponderance of the evidence, that Respondent’s “use of its mark is likely to cause confusion, mistake, or deception regarding the source of the services identified in its Application.” *Id.* (citation omitted).

“Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion.” *Id.* (citing *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”). “We must consider each *DuPont* factor for which there is evidence and argument.” *Id.* (citing *In re Guild Mortg.*, 912 F.3d 1376, 1380 (Fed. Cir. 2019)). “Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because the fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *DC Comics v. Cellular Nerd LLC*, Opp. No. 91246950, 2022 WL 17832492, at \*10 (TTAB 2022) (internal quotations and quotation marks omitted).

“Not all of the *DuPont* factors are necessarily ‘relevant or of equal weight in a given case, and any one of the factors may control a particular case.’” *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1362 (Fed. Cir. 2022) (quoting *Citigroup Inc. v. Cap. City Bank Grp.*, 637 F.3d 1344, 1355 (Fed. Cir. 2011) (internal quotation omitted)). “Only the *DuPont* factors ‘of significance to the particular mark need be considered’ in the likelihood of confusion analysis.” *Id.* (quoting *In re Mighty Leaf Tea*, 601 F.3d 1324, 1346 (Fed. Cir. 2010)).

Petitioner’s arguments in its main brief on its Section 2(d) claims in the two oppositions discuss or allude to the key first and second *DuPont* factors. 71 TTABVUE 34-37. Petitioner’s reply brief also discusses those factors, 73 TTABVUE 11-13, as well as the seventh *DuPont* factor, the “nature and extent of any actual confusion,

*DuPont*, 476 F.2d at 1361, 73 TTABVUE 13-14,<sup>60</sup> and the eighth *DuPont* factor, the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion,” *DuPont*, 476 F.2d at 1361, 73 TTABVUE 13.

Respondent argues that the most relevant factors are “the differences in the marks, the weakness of the alleged MOM-formative Marks, and the absence of any actual confusion despite the alleged contemporaneous use of Petitioner’s alleged MOM-formative Marks and Respondent’s MOM’S MEALS marks in the marketplace for a time period of more than 25 years.” 72 TTABVUE 29. This argument implicates the first *DuPont* factor, 72 TTABVUE 29-30, the sixth *DuPont* factor, the “number and nature of similar marks in use on similar goods,” *DuPont*, 476 F.2d at 1361, 72 TTABVUE 30-32,<sup>61</sup> and the eighth *DuPont* factor. *Id.* at 32.

We begin with the key first *DuPont* factor, under which “we consider ‘[t]he similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.’” *Iron Balls Int’l Ltd. v. Bull Creek Brewing, LLC*, Canc. No. 92079099, 2024 WL 2844425, at \*11 (TTAB 2024) (quoting *DuPont*, 476 F.2d at

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<sup>60</sup> In our evidentiary rulings above, we have excluded the D’Onofrio Declaration, filed with Petitioner’s reply brief, on which Petitioner’s argument under the seventh *DuPont* factor is based. 73 TTABVUE 13-14. We have also excluded the portions of the Second Jackson Declaration that purport to recount other instances of actual confusion. In the absence of any admissible evidence regarding the seventh factor, we need not consider it in our decisions. *See, e.g., Heil Co. v. Tripleye GmbH*, Opp. No. 91277359, 2024 WL 4925901, at \*37 (TTAB 2024) (declining to consider four *DuPont* factors mentioned by the parties in their briefs because the parties did not present any supporting evidence).

<sup>61</sup> Respondent’s arguments under the sixth factor are based entirely on what Respondent describes as “MOM-Formative Marks.” 72 TTABVUE 21-22. We have found above that Petitioner did not prove analogous use priority with respect to its claimed “MOM-Formative Marks” and its Section 2(d) claims are thus based solely on the marks shown in its pleaded registrations, which do not contain the word MOM. Accordingly, the sixth *DuPont* factor is inapplicable in our analysis of the likelihood of confusion in both oppositions.

1361). “[T]he similarity or dissimilarity of the marks in their entireties is a predominant inquiry.” *Heil Co.*, 2024 WL 4925901, at \*29 (quoting *Herbko Int’l*, 308 F.3d at 1165).

“The proper test 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.” *Sage Therapeutics*, 2024 WL 1638376, at \*5 (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012)). “The focus is on the recollection of the average purchaser, who normally ‘retains a general rather than a specific impression of marks.’” *Id.* (quoting *In re i.am.symbolic, llc*, Ser. No. 85916778, 2018 WL 3993582, at \*4 (TTAB 2018)). The average purchasers here are buyers of prepared meals.

On its Section 2(d) claims, Petitioner appears to rely on the ’874 Registration of the composite word-and-design mark shown again below



(MEAL disclaimed) for “packaged meals consisting primarily of meat, fish, poultry or vegetables,” and the ’463 Registration of the composite word-and-design mark shown again below



(MEAL disclaimed) for “prepackaged prepared meals, namely, meat and vegetable entrees.”

Petitioner described the mark shown in the ’874 Registration as follows:

The mark consists of the stylized wording “MY OWN MEAL” and stylized design of a boy and a girl eating. The word “MY” is cyan. The word “OWN” is orange. The word “MEAL” is magenta. Beneath the wording appears the design of a young boy with blue head, hair and arm, dressed in a blue and white striped shirt holding a blue utensil to his mouth, and the design of a young girl with blue head, hair and arm, dressed in a blue dress with white blouse, holding a blue rimmed glass containing a white liquid up to her mouth. The boy and girl are sitting opposite each other at a stylized table with a blue and white checkered tablecloth. The background is white and the border consists of blue and white lines of varying width.

Petitioner described the mark shown in the ’463 Registration as follows: “The mark consists of a silhouette of a male and female child eating under the stylized words ‘MY OWN MEAL’.”

Citing plain copies of its ’874 and ’463 Registrations, the photographs in Exhibit 15 that we excluded in our evidentiary rulings above, and a page from its website displaying the mark shown in the ’874 Registration, Petitioner first argues, with respect to both of its registered marks, that “[e]very meal package sold by My Own Meals since its first interstate commerce sales in 1987 clearly displays ‘MOM’ stacked vertically as part of the spelling out of its My Own Meal mark.” 71 TTABVUE 20-21.

Petitioner next argues with respect to the mark shown in the '072 Application and reproduced again below



for “food preparation, namely, preparation of home cooked meals and preparation of frozen or shelf-stable meals” that “Respondent, after 20+ years in business using either initial cap or all small lettering, creates a new mark using MOM’S MEALS in all capital letters for the first time drawing its mark and My Own Meals’ marks even closer than they already were prior.” *Id.* at 35. Petitioner further argues that “even if consumers recognize some differences between the marks, the overall commercial impression of the marks could easily cause consumers to mistakenly believe that there is an association between the brands – wrongly assuming, for example, that the MY OWN MEAL (MOM) brand had expanded to launch a new MOM’S MEALS brand,” *id.*, and that the “suspiciously close similarity between the parties’ respective services, namely prepackaged meals properties, contributes to the likelihood that consumers would believe the similarly named MOM’S MEALS is a new line of products coming from Petitioner’s MY OWN MEALS.” *Id.* at 36.

Petitioner concludes its argument in its main brief regarding the mark shown in the '072 Application with a classic example of circular reasoning, claiming that



“Respondent’s mark is confusingly similar to Petitioner’s marks . . . MY OWN MEALS, and MY OWN MEAL . . . because Respondent’s usage of MOM and MEALS force the consuming public to mistakenly confuse MOM’S MEALS with Petitioner’s marks.” *Id.* at 37.

With respect to the mark shown in the ’215 Application and reproduced again below



for “food preparation, namely, preparation of home cooked meals and preparation of frozen or shelf-stable meals,” Petitioner purports to incorporate by reference its arguments discussed above, adding that “Respondent again incorporates an all-caps MOM logo creating a likelihood of confusion between its mark and that of Petitioners [sic].” *Id.*

In its reply brief, Petitioner argues that “both marks prominently feature the word MOM or MEALS in conjunction with food-related product, creating a similar overall impression that can easily confuse consumers” and that Respondent’s “recent use of MOM’S MEALS in all capital letters further exacerbates this confusion. The shift to all caps is a marked change from their previous branding and brings their mark even closer in appearance to Petitioner’s marks.” 73 TTABVUE 11-12.

Respondent argues that “[i]f Petitioner is claiming a likelihood of confusion between its ‘MY OWN MEALS’ trademark and Respondent’s “MOM’S MEALS” marks, these marks differ substantially in terms of sound, sight, and meaning” and

that the “only similarity between the marks is ‘MEALS’, whereby Petitioner’s mark is preceded with “MY OWN” and Respondent’s mark is preceded with “MOM’S”. As such, this factor favors Respondent.” 72 TTABVUE 30.

At the outset of our analysis, we reject Petitioner’s argument that the marks shown in its ’874 and ’463 Registrations “clearly display[ ] ‘MOM’ stacked vertically as part of the spelling out of its My Own Meal mark.” 71 TTABVUE 20.<sup>62</sup> It is true that the first letters of each word in Petitioner’s marks combine to form the word “MOM,” but the words in the marks are not stacked to vertically align the first letters M, O, and M. The record does not show that the artificial word “MOM,” and not the actual words “MY OWN MEAL,” would be what is in the mind’s eye of a consumer with a general rather than specific recollection of Petitioner’s My Own Meal marks. Ms. Jackson is quoted in an article discussed above that “[t]he name ‘My Own Meals’ has a lot of impact; the kids know it’s only for them,” 39 TTABVUE 482 (*Poultry Processing* (August/September 1989)), and she testified that Petitioner waited until 2019 to apply to register M.O.M., the putative mark that Petitioner claims has always appeared on its packaging, more than 30 years after the claimed first use of the mark and about nine years after learning of Respondent and its MOM’S MEALS marks. Jackson Tr. 201:2-7 (58 TTABVUE 34).<sup>63</sup>

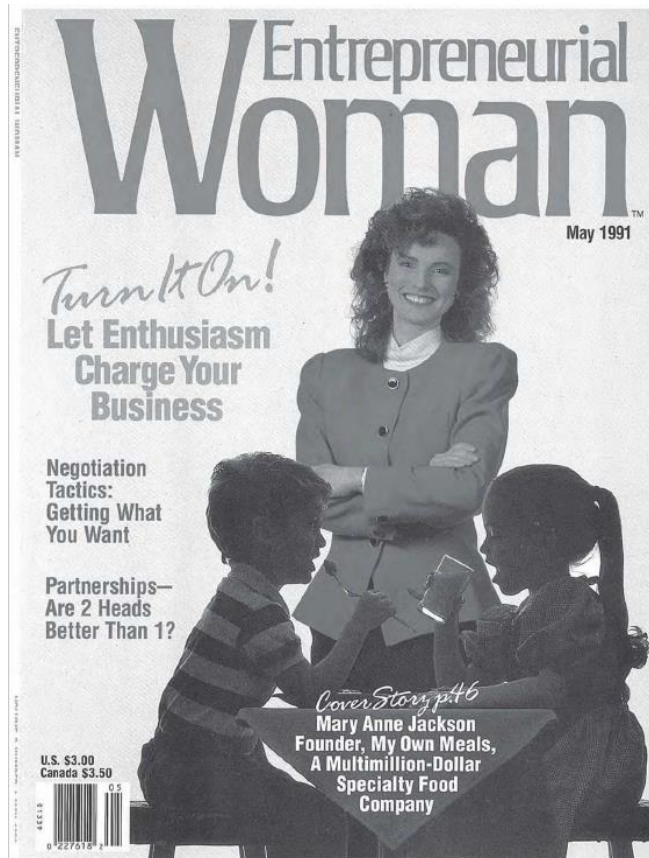
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<sup>62</sup> As noted above, Petitioner’s descriptions of the two composite marks made no reference to the marks’ containing or forming the word “MOM.”

<sup>63</sup> By contrast, Petitioner promptly registered the MY OWN MEAL word mark that appears on its packaging in 1987 and 1989. 39 TTABVUE 9-12.

Turning to a comparison of the actual marks, the only element in common among Petitioner's and Respondent's respective composite marks is the word "MEAL" in the singular or plural. That common element has no source-identifying capacity with respect to the parties' respective meal-related goods and services, and has been disclaimed in both of Petitioner's registrations and in both of Respondent's applications. "While we must consider the marks in their entirety, it is entirely appropriate to accord greater importance to the more distinctive elements in the marks than to the less distinctive elements in determining whether the marks are dissimilar." *Iron Balls*, 2024 WL 2844425, at \*12 (citing *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985)). In comparing the marks in their entirety, we will give the unprotectable common MEAL(S) element less weight than the other elements.

Petitioner's marks differ from both of Respondent's marks in appearance, as Petitioner's marks display the words MY OWN MEAL in what appears to be a child's handwriting above a depiction of young children eating at a table. The table scene in Petitioner's composite marks is reproduced "live," with what appear to be Ms. Jackson's children sitting in, on the cover of the May 1991 edition of *Entrepreneurial Woman* containing a cover story about Ms. Jackson:



39 TTABVUE 508.

Respondent's marks display the words MOM'S MEALS in plain block lettering above a horizontal depiction of a spoon and, in one mark, the phrase "A PURFOODS COMPANY." The facts that both parties' marks display their verbal and design elements in a "stacked" vertical presentation and their verbal elements in squiggly or block capital letters is insufficient to make them similar in appearance when the verbal and design elements themselves are as dissimilar as they are here.

Petitioner's marks also differ from both of Respondent's marks in sound. The words MEAL and MEALS sound the same when the parties' marks are verbalized, but the marks as a whole sound different because Petitioner's marks begin with "MY

OWN” and Respondent’s marks begin with “MOM’S,” and those lead words are entirely distinct aurally.

Finally, Petitioner’s marks differ from Respondent’s marks in connotation and commercial impression. Against the backdrop of the depiction of young children eating, the words MY OWN MEAL in Petitioner’s marks, which appear to be in a child’s handwriting, emphasize the personalized nature of the goods for their young consumers; as Ms. Jackson put it, “the kids know it’s only for them.” 39 TTABVue 482. The packaging for Petitioner’s products has reinforced the personalized nature of the goods by accompanying Petitioner’s My Own Meal composite mark with phrases such as “My Turkey Meatballs,” “My Favorite Pasta,” and “My Kind of Chicken”:



*Id.* at 510.<sup>64</sup>

By contrast, Respondent’s MOM’S MEALS composite marks use the word “MOM” in the possessive case above what appears to be a serving spoon, and thus focus not on the young consumers of the meals that Respondent prepares, but rather on the figurative (and perhaps literal) maternal provider of the meals.

“Similarity is not a binary factor but is a matter of degree.” *Heil Co.*, 2024 WL 4925901, at \*29 (quoting *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 1985) (internal citation omitted)). Because the parties’ marks are much more dissimilar than similar in all means of comparison, the first *DuPont* factor strongly supports a conclusion that confusion is unlikely in both oppositions. *Cf. Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 1119 (Fed. Cir. 2024) (holding that where the Board found the involved marks to be more similar than dissimilar, the Board erred in not weighing the first *DuPont* factor heavily in favor of a finding of likelihood of confusion).

We turn next to the second *DuPont* factor, which “considers the similarity or dissimilarity and nature of the goods [and services] as described in the involved application[s] and . . . registration[s],” *In re Samsung Display Co.*, Ser. No. 90502617, 2024 WL 3451873, at \*3 (TTAB 2024) (citing *DuPont*, 476 F.2d at 1361), and “contemplates whether the consuming public may perceive the respective goods [and services] as related enough to cause confusion about their source or origin.” *Id.* (citing

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<sup>64</sup> Some of these phrases were listed in Exhibit 16 to Petitioner’s July 19, 2022 Notice of Reliance as Petitioner’s registered trademarks. 39 TTABVUE 527.

*Naterra*, 92 F.4th at 1117). Petitioner’s registrations cover goods (packaged and prepared meals), while Respondent’s applications cover services (the preparation of such meals), and Petitioner is thus required to prove the relatedness of the identified goods to the identified services. *See generally In re Country Oven, Inc.*, Ser. No. 87354443, 2019 WL 6170483, at \*2-8 (TTAB 2019) (discussing proof of relatedness of goods to services).

Petitioner makes no serious effort to show relatedness. Petitioner addresses the second *DuPont* factor in the portion of its main brief devoted to its Section 2(d) claims only to the extent of claiming that there is a “suspiciously close similarity between the parties’ respective services,” 71 TTABVUE 36, and in its reply brief, Petitioner simply argues that “[b]oth parties offer similar services, primarily focusing on prepackaged meals.” 73 TTABVUE 12.<sup>65</sup> But Respondent not address the second *DuPont* factor in its brief at all, and we find, based on the involved identifications, that the prepared meal goods identified in Petitioner’s registrations are intrinsically related to the meal preparation services identified in Respondent’s applications. The second *DuPont* factor thus supports a conclusion that confusion is likely in both oppositions.

The last remaining relevant *DuPont* factor is the eighth factor, which is “[t]he length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *KME Ger. GmbH v. Zhejiang Hailiang Co.*,

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<sup>65</sup> Petitioner refers in both places to its “services” even though its ’874 and ’463 Registrations only cover goods. Only Petitioner’s ’075 Registration covers services, 39 TTABVUE 18, and Petitioner does not rely on it.

Opp. No. 91267675, 2023 WL 6366806, at \*21 (TTAB 2023) (quoting *DuPont*, 476 F.2d at 1361). As discussed above, we have excluded Petitioner’s claimed evidence of actual confusion and there is thus no record evidence that actual confusion has occurred during the period of the parties’ concurrent use of the marks shown in Petitioner’s ’874 and ’463 Registrations and in Respondent’s applications. That does not end our analysis, however, because “an absence of evidence of actual confusion is meaningful only if the record indicates appreciable and continuous use by [Respondent] of its mark[s] for a significant period of time in the same markets as those served by [Petitioner] under its mark[s].” *Id.* (citations omitted). “In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred.” *Id.* (citations omitted).

Respondent simply argues that it “has been using its MOM’S MEALS mark since at least as early as 1999, [and] the absence of any instance of actual confusion weighs substantially against a likelihood of confusion.” 72 TTABVUE 32.<sup>66</sup> Respondent points to no record evidence that it has rendered its services “in the same markets as those served by [Petitioner] under its mark[s].” *KME*, 2023 WL 6366806, at \*21. *See In re Guild Mortg. Co.*, Ser. No. 86709944, 2020 WL 1639916, at \*8 (TTAB 2020) (holding that in applying the eighth factor, the Board must look at “**actual market conditions**, to the extent that there is evidence of such conditions of record.”)

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<sup>66</sup> Respondent actually claims a much shorter period of use of the marks shown in the ’072 and ’215 Applications at issue in the oppositions. In the ’072 Application, Respondent claims first use of its mark in July 2019, and in the ’215 Application, Respondent claims first use of its mark in November 2019. As noted above, Rick Anderson testified without challenge regarding these claimed dates of first use. By Respondent’s own admissions, the period of co-existence of the marks in the opposition is actually only a few years.



(emphasis in original). In the absence of such evidence, the eighth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

“The final step in analyzing likelihood of confusion is to weigh the *DuPont* factors for which there has been evidence and argument; ‘explain the results of that weighing;’ and [explain] ‘the weight [we] assigned to the relevant factors.’” *Heil Co.*, 2024 WL 4925901, at \*37 (quoting *In re Charger Ventures LLC*, 65 F.4th 1375, 1384 (Fed. Cir. 2023)). We have found above that the “critical first *DuPont* factor (difference in sound, appearance, connotation, and commercial impression of the marks) weighs [strongly] against a likelihood of confusion,” *id.* at \*38, while the second *DuPont* factor supports a conclusion that confusion is likely, and the eighth *DuPont* factor is neutral.

Petitioner’s MY OWN MEAL-based composite marks are far more dissimilar than similar to Respondent’s MOM’S MEALS-based composite marks in all means of comparison. As the Federal Circuit has explained, “any one of the [*DuPont*] factors may control a particular case,” *Tiger Lily Ventures*, 35 F.4th at 1362, and “[w]e find that the dissimilarity of the marks in sound, appearance, connotation, and commercial impression to be pivotal here, insofar as it, in conjunction with the conceptual weakness of the only shared element of the parties’ marks (i.e., [MEAL(S)]), outweighs the other [relevant] *DuPont* factor[ ].” *Heil Co.*, 2024 WL 4925901, at \*38 (dismissing opposition by owner of 3RD EYE mark to registration of TRIPLEYE mark for goods that were identical in part). The goods identified in Petitioner’s ’874 and ’463 Registrations and the services identified in Respondent’s

'072 and '215 Applications are, by definition, not identical, and the parties' respective marks are sufficiently dissimilar to make confusion unlikely even though the involved goods and services are intrinsically related.

Because Petitioner did not prove a likelihood of confusion in either opposition, each opposition is dismissed.

#### **IV. Petitioner's Fraud Claims in Cancellation Nos. 92073705 and 92078906<sup>67</sup>**

Petitioner asserts fraud claims in both cancellations against all three of Respondent's registrations. 71 TTABVUE 19-28.

##### **A. Applicable Law on Petitioner's Fraud Claims**

"Fraud in procuring or maintaining a trademark registration occurs when an applicant for registration or a registrant in a declaration of use or a renewal application knowingly makes specific false, material representations of fact with the intent of obtaining or maintaining a registration to which it is otherwise not entitled."

*Illyrian Imps.*, 2022 WL 970321, at \*19 (citing *In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009); *Torres v. Cantine Torresella, S.r.l.*, 808 F.2d 46, 48 (Fed. Cir. 1986)).

"A party seeking cancellation of a trademark registration for fraudulent procurement bears a heavy burden of proof." *Bose*, 580 F.3d at 1243. "Indeed, 'the very nature of the charge of fraud requires that it be proven 'to the hilt' with clear and convincing

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<sup>67</sup> Petitioner's briefs discuss its fraud and abandonment claims separately rather than discussing each cancellation separately. 71 TTABVUE 19-28 (fraud claims), 28-33 (abandonment claims); 73 TTABVUE 14-19 (fraud claims), 20-23 (abandonment claims). Respondent's brief follows suit. 72 TTABVUE 32-39 (fraud claims), 39-42 (abandonment claims). We will also discuss the fraud and abandonment claims separately.

evidence. There is no room for speculation, inference or surmise, and, obviously, any doubt must be resolved against the charging party.” *Id.* (quoting *Smith Int’l, Inc. v. Olin Corp.*, Opp. No. 91059261, 1981 WL 48127, at \*7 (TTAB 1981)).<sup>68</sup>

“[A] trademark is obtained fraudulently under the Lanham Act only if the applicant or registrant knowingly makes a false, material representation with the intent to deceive the PTO. Subjective intent to deceive, however difficult it may be to prove, is an indispensable element in the analysis.” *Bose*, 580 F.3d at 1245. “Of course, because direct evidence of deceptive intent is rarely available, such intent can be inferred from indirect and circumstantial evidence. But such evidence must still be clear and convincing, and inferences drawn from lesser evidence cannot satisfy the deceptive intent requirement.” *Id.* (quoting *Star Sci., Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357, 1366 (Fed. Cir. 2008)). “When drawing an inference of intent, ‘the involved conduct, viewed in light of all the evidence . . . must indicate sufficient culpability to require a finding of intent to deceive.’” *Id.* (quoting *Kingsdown Med. Consultants, Ltd. v. Hollister, Inc.*, 863 F.2d 867, 876 (Fed. Cir. 1988 (en banc))).

Petitioner asserts different theories of fraud. One theory is that Respondent “signed declarations that stated not only that [Respondent] was the owner of the MOM’S MEALS mark but also that ‘no other person, firm, corporation or association

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<sup>68</sup> At the outset of the discussion of its fraud claims, Petitioner states that Respondent’s registrations enjoy a presumption of validity that Petitioner must overcome “by a preponderance of the evidence.” 71 TTABVUE 19 (citing *Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 1356 (Fed. Cir. 2009)). As discussed below, that is true with respect to Petitioner’s abandonment claims, but not with respect to its fraud claims. Petitioner later acknowledges that it bears a heavy burden of proof on its fraud claims and that it must prove fraud to the hilt by clear and convincing evidence. *Id.* at 21 (citations omitted).

. . . has the right to use’ the applied for marks” when Respondent “knew these statements to be false at the time the applications were filed.” 71 TTABVUE 23.

To prevail on this claim, Petitioner must prove that: (1) Petitioner was the user of the same or a confusingly similar mark at the time the oath was signed; (2) Petitioner had legal rights superior to Respondent’s rights at the time Respondent signed the applications for registration; (3) Respondent knew that Petitioner’s rights in the mark were superior to Respondent’s and either believed that a likelihood of confusion would result from Respondent’s use of its mark or had no basis for believing otherwise; and that (4) Respondent, in failing to disclose these facts to the USPTO, intended to procure a registration to which it was not entitled.

*Daniel J. Quirk, Inc. v. Vill. Car Co.*, Canc. No. 92057667, 2016 WL 6136609, at \*3 (TTAB 2016) (citing *Qualcomm Inc. v. FLO Corp.*, Opp. No. 91182244, 2010 WL 985358, at \*2 (TTAB 2010); *Intellimedia Sports Inc. v. Intellimedia Corp.*, Canc. No. 24801, 1997 WL 398344, at \*2 (TTAB 1997)).

## **B. Petitioner’s Fraud Claims Against the ’824 and ’266 Registrations in Cancellation No. 92073705<sup>69</sup>**

### **1. The ’824 Registration**

On May 12, 1999, Respondent’s predecessor-in-interest, Mom’s Meals, Ltd.,<sup>70</sup> filed the intent-to-use application that matured into the ’824 Registration. 39 TTABVUE

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<sup>69</sup> Petitioner discusses “Priority” as an element of its fraud claims. 71 TTABVUE 20-21. As discussed above, priority is not an element of a fraud claim. Perhaps Petitioner included a discussion of priority in this section of its main brief because as discussed above, one of its fraud theories requires proof that “Petitioner had legal rights superior to Respondent’s rights at the time Respondent signed the applications for registration . . . .” *Daniel J. Quirk, Inc.*, 2016 WL 6136609, at \*3.

<sup>70</sup> Mom’s Meal Ltd. assigned the ’824 Registration to Respondent on July 21, 2006 through an assignment recorded in the USPTO on July 28, 2006 under Reel/Frame 3356/0942.

340-42.<sup>71</sup> The application was executed by Rick Anderson. *Id.* at 342. It stated in part that “Applicant has a bona fide intention to use the mark in commerce in connection with the above identified services . . . .,” *id.* at 340, and that Mr. Anderson

believe[d] the applicant to be the owner of the trademark sought to be registered; that applicant is entitled to use such mark in commerce; to the best of my knowledge and belief no other person, firm, corporation, or association has the right to use the above - identified mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on the goods or in connection with the goods or services of such other person, to cause confusion, or to cause mistake, or to deceive . . . .

*Id.* at 341.<sup>72</sup>

Petitioner claims that “Respondent committed fraud in the procurement of [the ’824 Registration], its first mark, continued its fraud through prosecution of that application, and thereafter with maintenance filings and subsequent trademark filings (see *infra*).” 71 TTABVUE 21. In reality, Petitioner does not argue that what it calls “maintenance filings and subsequent trademark filings” regarding the ’824

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<sup>71</sup> Portions of the file history of the ’824 Registration were made of record by Petitioner under its July 19, 2022 Notice of Reliance even though the entire file history is automatically of record.

<sup>72</sup> It appears that in 1999, the application oath on an intent-to-use application was different from the one that is used today. On a current intent-to-use application, “[t]here is no statutory requirement that the filer of an intent-to-use application be the owner of the mark at the time it files an intent-to-use application; rather, the filer avers that: “The signatory believes that the applicant is entitled to use the mark in commerce” and that the “applicant has a bona fide intention to use the mark in commerce on or in connection with the goods/services in the application.” *Hole in 1 Drinks*, 2020 WL 859853, at \*7 (holding that there is no cognizable claim in an inter partes proceeding that an applicant did not own a mark that is the subject of an intent-to-use application).

Registration were infected by fraud and focuses solely on the filing and prosecution of the application that matured into the '824 Registration.

Petitioner argues that “[a]ffirming that no other person, firm, or corporation has the right to use the applied-for mark in a declaration when you have information to the contrary has been held sufficient to amount to fraud and to result in cancellation of the trademark registration.” 71 TTABVUE 22. According to Petitioner, Respondent

made a false, material statement in connection with the MOM’S MEALS Mark trademark application. [Respondent] signed declarations that stated not only that [Respondent] was the owner of the MOM’S MEALS mark but also that “no other person, firm, corporation or association . . . has the right to use” the applied for marks. [Respondent] knew these statements to be false at the time the applications were filed. Petitioner focused company dollars on publicists and marketing efforts to become widely known in the food industry and with the consuming public[.] This massive marketing effort included garnering media attention in business journals, women’s business journals, trade journals, food service journals, distribution journals, and speaking engagements at industry, business, dietician and nutritional conferences, as well as at military conferences, universities, including key note speaking engagements, speaking at government forums on children’s nutrition and related topics. Then for consumers, additional efforts included articles in newspapers throughout the country, women’s and household magazines, TV and radio segments, speaking at women’s and mother’s events, family event promotions, advertising, couponing, and so on. The Petitioner and its products were published and studied at universities as case studies. . . . This investment in time and money to such an effort was critical because shelf stable meals were new and required explanation to the consuming public about its safety and benefits. Similarly, Respondent falsely claimed use of [sic] catering and restaurant services. . . .

*Id.* at 23 (citing Exhibits 15-18 to Petitioner’s July 19, 2022 Notice of Reliance and Exhibit 31 to Petitioner’s September 7, 2023 Amended Notice of Reliance).

Petitioner also argues that “[a]n applicant is also required to declare that all the information contained in every trademark filing before the USPTO is accurate,” *id.*, and that Respondent committed fraud because Michael Anderson testified that “this mark was not used in ‘Restaurant Services’ at the time of the mark’s date of first use.” *Id.* at 24.<sup>73</sup>

In its reply brief, Petitioner argues that “[i]t is a well-established principle that a basic level of due diligence, including running a search for potential conflicting marks, is essential before filing a trademark application.” 73 TTABVUE 15. Petitioner claims that in *Intellimedia Sports*, the Board “held that ‘the duty to make a reasonable inquiry is an ongoing one, and that an applicant’s failure to do so may result in cancellation of its mark,’” 73 TTABVUE 15 (quoting *Intellimedia Sports*, 43 USPQ2d 1203, 1208 (TTAB 1997)), and that “[t]he court emphasized that applicants must conduct a thorough search to ensure that no existing marks would be infringed by their use.” *Id.* The Board is not a court, so it is perhaps understandable (though no less troubling) that the *Intellimedia Sports* decision does not contain the language that Petitioner purports to quote from it. Contrary to Petitioner’s claim, “[a] trademark applicant has no duty to investigate third-party uses.” *Milwaukee Elec. Tool Corp. v. Freud Am., Inc.*, Canc. Nos. 92059634 and 92059637, 2019 WL 6522400, at \*31 (TTAB 2019) (citing *Maid to Order of Ohio, Inc. v. Maid-to-Order, Inc.*, Canc. No. 92040571, 2006 WL 936993, at \*11 (TTAB 2006)).

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<sup>73</sup> We will give no consideration to Petitioner’s argument that “Respondent falsely claimed use of [sic] catering and restaurant services,” 71 TTABVUE 23, because it is based solely on “Exhibit 12a,” *id.*, which we have excluded in our evidentiary rulings above.

With respect to Petitioner's *Intellimedia Sports* theory of fraud, Rick Anderson, the signatory on the application that matured into the '824 Registration, testified at trial that he "had literally never heard of the company My Own Meals, Inc. . . . until My Own Meals filed these opposition/cancellation proceedings against [Respondent]." R. Anderson Decl. ¶ 14 (56 TTABVue 4). At his September 18, 2020 discovery deposition, Mr. Anderson testified on the subject of his knowledge of Petitioner and its marks as follows:

Q When did you first hear of My Own Meals mark?

A Literally My Own Meals what?

Q Mark, trademark? My client?

A Right now. Literally right now. Seriously I have never heard of the company. I have never ran across it in web searches over all my years that I've -- because I would have know [sic], it would have been concerning. So, yeah, and I haven't been involved at all with the day-to-day stuff. So, no, I'm not aware of it. I don't even know what it looks like, frankly. My Own Meals, huh? That's what this is about. Interesting.

Q When was the first time you heard of the company My Own Meals, not the brand, the actual company?

A Yeah, Mike mentioned it to me like I said in the last, what did I tell you when I became aware of it, in the last three to five weeks, something like that.

. . .

Q Rick, do you know when My Own Meals first started using the MOM mark which is the acronym for My Own Meals?

A I'm not aware of it at all period. I am not aware of it at all. I never heard of the company up until this whole thing unfolded.



Q So from that testimony I gather you would also not know when My Own Meals first started using the MOM mark in its PR campaign or publications, speaking engagements and so on; is that correct?

A I'm not aware of it; but if you want to provide the documentation, I would be glad to look at it. If you have documented evidence that it has been used in public.

...

Q You have never seen a My Own Meals product; is that correct?

A I never have.

R. Anderson Tr. 114:17-115:14; 123:2-16; 126:22-24 (39 TTABVUE 435-37, 440).

In the face of Mr. Anderson's denial of knowledge of Petitioner or its marks when he signed the May 12, 1999 application that matured into the '824 Registration, Petitioner asks us to infer that Mr. Anderson had such knowledge based on the media coverage and other evidence that Petitioner offers in support of its analogous use claim. As discussed above, we may draw inferences of deceptive intent from "indirect and circumstantial evidence. But such evidence must still be clear and convincing, and inferences drawn from lesser evidence cannot satisfy the deceptive intent requirement." *Bose*, 580 F.3d at 1245. It is true that the articles in Exhibit 15 to Petitioner's July 19, 2022 Notice of Reliance, and the pages from Petitioner's website in Exhibits 16-18, refer on their faces to Petitioner and its My Own Meal marks, but there is no evidence from which we can infer that Mr. Anderson ever saw them. There is also no evidence that Mr. Anderson was otherwise exposed to Petitioner or its

marks through any of the other unproven means by which Petitioner claims it exposed its My Own Meals marks prior to 1999.<sup>74</sup>

Petitioner deposed Mr. Anderson at some length and attached a number of pages from his deposition transcript as Exhibit 13 to Petitioner's July 19, 2022 Notice of Reliance. Petitioner could have examined Mr. Anderson about whether he ever read any of the articles in Exhibit 15 to Petitioner's July 19, 2022 Notice of Reliance, was familiar with any of the publications in which they appeared, ever visited Petitioner's website, or was ever otherwise aware of the activities by which Petitioner claims to have "become widely known in the food industry and with the consuming public," 71 TTABVue 23, but there is no such dialogue in the record. This suggests either that such questions were not asked of Mr. Anderson, or that if they were asked, Petitioner did not like the answers. In any event, Petitioner did not show that Mr. Anderson knew that "Petitioner had legal rights superior to Respondent's rights at the time [he] signed the application[ ] for registration" in 1999, and that he "either believed that a likelihood of confusion would result from Respondent's use of its mark or had no basis for believing otherwise . . . ." *Daniel J. Quirk, Inc.*, 2016 WL 6136609, at \*3.

Petitioner did not prove that Respondent committed fraud in the procurement of the '824 Registration, and that claim in Petitioner's Second Amended Petition for Cancellation in Cancellation No. 92073705 is denied.

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<sup>74</sup> We found above that Petitioner did not prove analogous use of its putative MOM marks.

## 2. The '266 Registration

On July 19, 2012, Respondent filed the use-based application that matured into the '266 Registration. 39 TTABVUE 188. The application was executed by Respondent's CFO Brian Hoey, who signed a declaration oath that included the following statements:

he believes the applicant to be the owner of the trademark/service mark sought to be registered [and] that to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive . . . .

*Id.* at 263.

Petitioner argues that the Board "should cancel [the '266 Registration] because Respondent obtained the Registration through fraud." 71 TTABVUE 25. Petitioner advances two theories of fraud against the '266 Registration:

The evidence clearly shows that Respondent, in order to improperly obtain the Registration, knowingly and falsely stated that (1) no other party had the right to use the MOM'S MEALS mark in connection with pre-packaged foods, despite Respondent's knowledge of Petitioner's prior use and rights, and (2) that Respondent had used the MOMS MEALS trademark in the preparation of shelf-stable or frozen foods.

*Id.*<sup>75</sup> Petitioner's arguments in its briefs in support of these theories of fraud merely repeat ad nauseum its prior discussion of the law of fraud. There is no discussion of

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<sup>75</sup> Petitioner also argues that "Respondent committed fraud on the USPTO in signing and submitting to the USPTO a sworn declaration that it had 'a bona fide intention to use' the

the “evidence” that Petitioner claims “clearly shows” that Respondent committed either type of fraud.

Mr. Hoey testified at trial that he “first became aware of My Own Meals, Inc. (‘My Own Meals’) around April of 2019 when My Own Meals began objecting to PurFoods’ trademarks,” Hoey Decl. ¶ 8 (56 TTABVUE 11), and that “[a]t least as early as June 16, 2010, PurFoods began using the ‘MOM’S MEALS’ and spoon logo (‘the spoon logo’) for all of the goods/services of U.S. Registration No. 4,316,266, namely, 1) food preparation, namely preparation of home cooked meals; and 2) preparation of frozen or shelf-stable meals; restaurant services featuring home delivery.” Hoey Decl. ¶ 4 (56 TTABVUE 10-11). Mr. Hoey apparently was not deposed, or cross-examined at trial, and his testimony on these matters stands unrebutted.

There is no evidence from which we can properly infer that Mr. Hoey read any of the articles in Exhibit 15 to Petitioner’s July 19, 2022 Notice of Reliance, visited Petitioner’s website, or was otherwise exposed to Petitioner or its marks through any of the other unproven means by which Petitioner claims it exposed its marks prior to 2012. Petitioner also points to no evidence that contradicts Mr. Hoey’s testimony that Respondent was using the mark shown in the ’266 Registration in connection with the preparation of frozen or shelf-stable meals when he signed the application that matured into the ’266 Registration. 71 TTABVUE 24-27.

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MOM’S MEALS Ladle mark in commerce on or in connection with ‘preparation of home cooked meals and preparation of frozen or shelf-stable meals.’” 71 TTABVUE 26. Petitioner repeated this argument in its reply brief. 73 TTABVUE 19. This argument is meritless because Respondent filed a use-based application, not an intent-to-use application.

Petitioner did not prove that Respondent committed fraud in the procurement of the '266 Registration, and that claim in its Second Amended Petition for Cancellation in Cancellation No. 92073705 is denied.

**C. Petitioner's Fraud Claim Against the '408 Registration in Cancellation No. 92078906**

On November 25, 2013, Applicant filed the intent-to-use application to register the MOM'S MEALS NOURISHCARE standard-character mark that matured into the '408 Registration. 39 TTABVUE 69. The '408 Registration issued on November 11, 2014 for "prepared, packaged means consisting primarily of meat, fish, poultry or vegetables" in Class 29. *Id.* at 89. As discussed below in connection with Petitioner's abandonment claims, the '408 Registration was renewed in 2024 based on a Section 8 and 9 renewal application filed on January 24, 2024 and signed by Matthew Koopman, Respondent's CEO.

Petitioner's argument in its main brief in support of its fraud claim against the '408 Registration is only two paragraphs long, 71 TTABVUE 27-28,<sup>76</sup> but at least it focuses on the facts that Petitioner claims support its claim of fraudulent maintenance of the '408 Registration.<sup>77</sup> Petitioner argues that Respondent "continued to file maintenance requirements when it had, in fact, stopped using the mark," and that "Respondent committed fraud on the USPTO in signing and submitting to the

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<sup>76</sup> Petitioner does not address its fraud claim against the '408 Registration in its reply brief.

<sup>77</sup> The argument heading regarding Petitioner's fraud claim against the '408 Registration states that "Purfoods' MOM'S MEALS NOURISHCARE '408 Reg. Should Be Cancelled for Fraud on the USPTO based on Non-use + Prior User (Cancellation No, 92078906," 71 TTABVUE 27, but there is no argument regarding the alleged "Prior User."

USPTO a sworn declaration that it had continuous use of the '408 Reg in commerce on or in connection with any of the items claimed in the registration.” *Id.* at 27. According to Petitioner, “[o]n September 10, 2019, Michael Anderson testified that the pending application, Serial # 88611072 replaced all prior logos, including the Nourishcare mark '408. (Petitioner’s NOR Ex. 12 at 10-16),” *id.* at 26,<sup>78</sup> but that “on January 24, 2024, Respondent filed for Sections 8 and 9 using a delivery truck to show continued use, even though management had no intention to continue using the mark on products as evidenced by submitting a truck instead of a product as a specimen.” *Id.* at 26-27.

Respondent argues that Petitioner’s position

appears to be that Respondent’s filing of a renewal application for the '408 mark was fraudulent solely based upon the statement by Michael Anderson that the logo of Serial No. 88/611,702 was intended to replace the other company logos. This argument is ludicrous. First, Mr. Anderson is a layperson, not a trademark lawyer, and is not qualified to testify as to whether a trademark is “in use” in accordance with trademark laws. Mr. Anderson noted in his testimonial declaration that while he said during the deposition that the mark of the '408 registration was no longer in use, he confirmed that the mark is still in use on delivery trucks which provide the goods/services of the '408 registration which, in fact, **does** demonstrate use of the mark on and/or with the goods/services of the '408 registration, as confirmed by the USPTO. . . . Co-founder/CEO of Respondent, Rickey Lee Anderson, further confirmed during his deposition that while various logos will ultimately be retired, he knew they were still being used on Respondent’s trucks. . . . In fact the specimen of use for the application resulting in the '408 registration

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<sup>78</sup> Michael Anderson testified at his discovery deposition on September 16, 2020, 39 TTABVUE 404-05, not on September 10, 2019, as Petitioner claims. 71 TTABVUE 26.

was a photo of a truck, which was accepted by the USPTO as sufficient evidence of use of the registered mark.

72 TTABVUE 37-38 (emphasis in bold here in italics in Respondent's brief). Respondent also argues that its three trial witnesses all testified that the mark shown in the '408 Registration has been used continuously since at least 2014 in connection with all of the services identified in the registration. *Id.* at 38.

At his September 16, 2020 discovery deposition, Mr. Anderson testified that the mark shown below was no longer in use:



The colloquy bearing on his testimony includes the following:

Q So the one right above it, Mom's Meals NourishCare, it says, "Revised Mom's Meals logo 2013, NourishCare added". Is that logo in use?

MS. KERNDT: I just want to caution the witness to not reach any legal conclusions. So to the extent that your question asks for a legal conclusion, the witness is not a lawyer and he can testify to the best of his knowledge.

THE WITNESS: I'm thinking about getting into trademark law.

MS. KATZ: It's a great field. Ask your attorneys.<sup>79</sup>

THE WITNESS: They're great. They're fun. That mark is not in use anymore.

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<sup>79</sup> The parties agree on very little in these cases, but we are heartened that they at least agree that trademark law is a great field.

Q It's not on your packaging for example, correct?

A It is not.

Q Okay. It's not in your advertisements? It's not being used anymore, correct?

A It's all the square green logo.

...

Q Okay. What about NourishCare? I believe I have seen a trademark that's Mom's Meals Nourishcare?

A Yes. Nourishcare is no longer in use.

M. Anderson Tr. 70:11-24; 71:108; 73:15-18 (39 TTABVUE 416-17, 419).

Mr. Anderson testified at trial, however, that “[i]n my September 16, 2020 deposition, I also stated that the ‘MOM’S MEALS NOURISHCARE’ trademark was no longer in use. However, in actuality, this mark is also being used on delivery trucks which provide the goods and services of U.S. Registration No. 4,638,408, namely prepared, packaged meals consisting primarily of meat, fish, poultry or vegetables.”

M. Anderson Decl. ¶ 13 (56 TTABVUE 8). He further testified this use was “shown in the specimen of use submitted with the Section 8 and 15 renewal application [sic] for U.S. Reg. No. 4,638,408 dated October 21, 2020 and which was approved by the USPTO on February 9, 2021.” Anderson Decl. ¶ 13 (56 TTABVUE 8).<sup>80</sup> We reproduce below the specimen of use to which Mr. Anderson referred in his trial testimony:

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<sup>80</sup> Matthew Koopman signed the combined Section 8 and 15 Declaration and Respondent's subsequent renewal application on Respondent's behalf. He was apparently not deposed.





39 TTABVUE 80.

Contrary to Petitioner’s argument in its motion to strike portions of Respondent’s witnesses’ trial testimony, we do not view Mr. Anderson’s trial testimony as “blatantly contradicting [his] prior sworn [deposition] testimony.” 60 TTABVUE 2. The record as a whole shows that the deposition testimony of would-be trademark lawyer Mr. Anderson regarding Respondent’s cessation of use of the “Nourishcare” mark was simply in error or limited to Respondent’s packaging or advertising.<sup>81</sup>

As Mr. Anderson testified at trial, the USPTO accepted and acknowledged the combined Section 8 and 15 Declaration based on this specimen on February 9, 2021. *Id.* at 74. The MOM’S MEALS NOURISHCARE mark was in use when Respondent

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<sup>81</sup> Elsewhere in its main brief, Petitioner argues that “[o]n February 17, 2020, Respondent announced publicly that it was replacing all its marks with the First-Time-All-Caps-Mark.” 71 TTABVUE 18 (citing Exhibit 19 to Petitioner’s July 19, 2022 Notice of Reliance). Exhibit 19 is an announcement on Respondent’s website headlined “Mom’s Meals Unveils new brand identity.” 39 TTABVUE 587. The announcement touted Respondent’s “launch of its new corporate brand identity, featuring a redesigned logo, new website, updated packaging, and other key marketing materials. *Id.* This announcement does not support Petitioner’s grandiose claims that Respondent’s marks became abandoned and that Respondent’s representations to the USPTO were both false and fraudulent.

maintained the '408 Registration in 2020, and Respondent's statement to that effect to the USPTO was not false, much less fraudulent.

Respondent also renewed the '408 Registration in 2024 based on use of the registered mark on delivery trucks. We reproduce below the specimen of use supporting the renewal application:



The file history of the '408 Registration shows that the USPTO initially issued an Office Action regarding the sufficiency of the specimen, but ultimately accepted the specimen after Respondent argued that the use of marks on delivery trucks for goods is sufficient to show use of the marks for the goods, as it had been in the earlier maintenance of the '408 Registration.<sup>82</sup>

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<sup>82</sup> See generally TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") Section 904.03(c) (Nov. 2024) ("A specimen showing use of the trademark on a vehicle in which the goods are marketed to the relevant purchasers may constitute use of the mark on a container for the goods, if this is the normal mode of use of a mark for the particular goods" (citing *In re E.A. Miller & Sons Packing Co.*, Ser. No. 73337372, 1985 WL 72005, at \*4 (TTAB 1985)). Ms. Jackson testified that she understood that such use of a mark on a truck may be considered by the USPTO to be proper trademark use. Jackson Tr. 109:4-8 (58 TTABVUE 7).

The MOM'S MEALS NOURISHCARE mark was in use when Respondent renewed the '408 Registration in 2024, and Respondent's statement to that effect to the USPTO was again not false, much less fraudulent.

Petitioner did not prove that Respondent committed fraud in the maintenance of the '408 Registration, and that claim in its Second Amended Petition for Cancellation in Cancellation No. 92073705 is denied.

**V. Petitioner's Abandonment Claims Against the '266 and '408 Registrations in Cancellation Nos. 92073705 and 92078906**

Petitioner asserts abandonment claims against the '266 Registration in Cancellation No. 92073705 and the '408 Registration in Cancellation No. 92078906. 71 TTABVUE 19-28.

**A. Applicable Law on Petitioner's Abandonment Claims**

Under Section 45 of the Trademark Act, a mark shall be deemed abandoned:

When its use has been discontinued with intent not to resume such use. Intent not to resume use may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie abandonment. "Use" of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark.

*Adamson Sys. Eng'g, Inc. v. Peavey Elecs. Corp.*, Canc. No. 92076586, 2023 WL 7274674, at \*9 (TTAB 2023) (quoting 15 U.S.C. § 1127). "Under the statute, there are two elements to a nonuse abandonment claim: (1) use of the mark has been discontinued, (2) with intent not to resume use." *Id.* (citation omitted). "Proof of these elements is a matter of fact, not speculation." *Id.* (citations omitted).

“Since a mark registered on the Principal Register is presumed to be valid, 15 U.S.C. § 1057(b), ‘the burden of persuasion in a cancellation proceeding rests on the party seeking to cancel the registration.’” *Id.* (quoting *Cold War Museum*, 586 F.3d at 1356 (internal citation omitted)).

### **B. Petitioner’s Abandonment Claim Against the ’266 Registration**

Petitioner’s claim against the ’266 Registration is mischaracterized as an abandonment claim. Petitioner argues that “Respondent was not using the Mark in commerce as of the filing date of the Application [that matured into the ’266 Registration], as Respondent had never created, shipped, or marketed shelf stable or frozen foods under the mark as of the filing date,” and that “[b]ecause the Mark did not meet the use in commerce requirement, the Mark [sic] is void ab initio, and the Registration should be cancelled.” 71 TTABVUE 28. According to Petitioner, when “Respondent filed its use-based application, it had not yet begun using the Mark in commerce; more specifically, Respondent has never produced shelf stable or frozen meals under the Mark.” *Id.* at 29.

The ’266 Registration issued on April 9, 2013, and thus was more than five years old when Petitioner commenced Cancellation No. 92073705 on March 12, 2020. As the Board previously advised Petitioner in an order addressing Respondent’s motion to dismiss Petitioner’s amended petition to cancel in Cancellation No. 92073705, 29 TTABVUE 6 n.12, Section 14(3) of the Trademark Act enumerates the grounds on which a registration that is more than five years old may be cancelled, 15 U.S.C. § 1064(3), and bars a claim for cancellation based on unenumerated grounds. A claim

of non-use of a mark in a use-based application when the application is filed is one of the “types of ‘void ab initio’ claims that have been found time-barred because they are not enumerated in Section 14(3).” *Thrive Nat. Care Inc. v. Nature’s Sunshine Prods., Inc.*, Canc. No. 92078465, 2023 WL 5287181, at \*4 (TTAB 2023) (citing *Maids to Order of Ohio*, 2006 WL 936993, at \*7 n.6). Petitioner’s non-use claim is thus time-barred under Section 14(3).

Petitioner did not offer any argument or evidence that the mark shown in the ’266 Registration was ever “abandoned” through non-use within the meaning of Section 45 of the Trademark Act. 71 TTABVUE 28-30. Petitioner’s purported abandonment claim against the ’266 Registration in Petitioner’s Second Amended Petition for Cancellation in Cancellation No. 92073705 is denied.

### **C. Petitioner’s Abandonment Claim Against the ’408 Registration**

The ’408 Registration shows the standard-character mark MOM’S MEALS NOURISHCARE for “Prepared, packaged meals consisting primarily of meat, fish, poultry or vegetables.” Petitioner argues that Respondent’s “President admitted during his discovery deposition in this matter that the mark is no longer in use.” 71 TTABVUE 32 (citing Exhibit 12 to Petitioner’s July 19, 2022 Notice of Reliance (39 TTABVUE 403-20)). As discussed above, Michael Anderson testified at his discovery deposition that the mark shown below was no longer in use on packaging or advertising:

Revised Mom's Meals Logo 2013 (Nourish Care added)



but he testified at trial that the mark remained in use on delivery trucks. Rick Anderson confirmed that portion of Michael Anderson's testimony. R. Anderson Decl. ¶ 13 (56 TTABVUE 4).

Petitioner did not prove what it called "the first prong of the abandonment test under 15 U.S.C. § 1127 – that use of the mark [shown in the '408 Registration] has been discontinued . . . ." 71 TTABVUE 32. Because Petitioner did not prove the threshold element of its abandonment claim against the '408 Registration, that claim in its Petition for Cancellation in Cancellation No. 92078906 is denied.

**Decisions:**

All of Petitioner's claims for relief in the oppositions and cancellations are dismissed or denied. Specifically:

In Opposition No. 91254642, Petitioner's Amended Notice of Opposition is dismissed.

In Opposition No. 91277104, Petitioner's Notice of Opposition is dismissed.

In Cancellation No. 92073705, Petitioner's Second Amended Petition for Cancellation is denied.

In Cancellation No. 92078906, Petitioner's Petition for Cancellation is denied.