This Opinion is not a Precedent of the TTAB

Mailed: October 26, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

———

Trademark Trial and Appeal Board

———

Ethika, Inc.
v.
Alexander Hage-Boutros d/b/a Ethik Clothing Co.

———

Cancellation No. 92063682

———

Kirsten L. Thomson, Nicole E. Reifman and Andrea K. Orth of McDonnell Boehnen Hulbert & Berghoff LLP for Ethika, Inc..

Alexander Hage-Boutros d/b/a Ethik Clothing Co., pro se.

———

Before Greenbaum, Adlin and Hudis, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Respondent Alexander Hage-Boutros d/b/a Ethik Clothing Co. owns a registration of the mark shown below:

ETHIK
CLOTHING CO.

(CLOTHING CO. disclaimed) for "athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; graphic t-shirts; short-sleeved or long-

sleeved t-shirts; t-shirts" in International Class 25 (the "Registration").[1] In its second amended petition for cancellation, Petitioner Ethika, Inc. alleges prior use and registration of the mark ETHIKA, in typed form[2] as well as the design form shown below

[3],

both for "clothing, namely, boxer shorts, underwear, and headwear," and, in the case of the design form of the mark, "t-shirts." As grounds for cancellation, Petitioner alleges that use of Respondent's mark is likely to cause confusion with Petitioner's marks.[4] In his answer, Respondent denies the salient allegations in the second amended petition for cancellation.[5]

---

[1] Registration No. 4834883, issued October 20, 2015. The Registration includes this description of the mark: "The mark consists of the wording 'ETHIK CLOTHING CO.' with a series of interconnecting straight lines arranged in a manner that spells out 'ETHIK', with the word 'ETHIK' below the lines and the wording 'CLOTHING CO.' beneath it." The Registration also states that: "The English translation of the word 'ETHIK' in the mark is 'ETHIC.'"

[2] Registration No. 3313394, issued October 16, 2007; renewed. The registration states that: "The English translation of the word ETHIKA in the mark is 'ethics.'" There is no substantive difference between "standard character" marks and marks in "typed" form. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) ("until 2003, 'standard character' marks formerly were known as 'typed' marks, but the preferred nomenclature was changed in 2003 to conform to the Madrid Protocol … we do not see anything in the 2003 amendments that substantively alters our interpretation of the scope of such marks").

[3] Registration No. 3618319, issued May 12, 2009; renewed.

[4] Petitioner also asserted a claim of nonownership, but did not pursue the claim at trial or in its Trial Brief, and it is therefore waived. *Alcatraz Media, Inc. v. Chesapeake Marine Tour Inc.*, 107 USPQ2d 1750, 1753 (TTAB 2013), *aff'd* 565 F. App'x 900 (Fed. Cir. 2014).

[5] Respondent also asserted a number of "Defenses" most of which merely amplify his denials, or are more applicable to tort cases than trademark registration proceedings. In any event, Respondent did not pursue any true affirmative defenses at trial, and they are therefore

I. The Record and Evidentiary Objections

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Respondent's involved Registration. In addition, Petitioner introduced:

> Notice of Reliance on its pleaded registrations, Respondent's responses to certain discovery requests and Petitioner's discovery deposition of Respondent ("Resp. Disc. Tr."), and Internet printouts ("Pet. NOR").[6] 30 TTABVUE.[7]
>
> Testimony Declaration of Angela Tsay, Chief Executive Officer and Creative Director of Oaklandish, and the exhibit thereto ("Tsay Dec."). 31 TTABVUE.
>
> Testimony Declaration of Danny Evans, Petitioner's Vice President of Marketing, and the exhibits thereto ("Evans Dec."). 32 TTABVUE.
>
> Testimony Declaration of Darius Burton, Petitioner's Key Account Manager in the Specialty Account Sales department, and the exhibit thereto ("Burton Dec."). 33 TTABVUE.
>
> Testimony Declaration of Kenneth White, Petitioner's Vice President, Business and Legal Affairs, and the exhibits thereto ("White Dec"). 34 TTABVUE.
>
> Testimony Declaration of Matt Cook, its Chief Executive Officer, and the exhibits thereto ("Cook Dec."). 35 TTABVUE.

---

waived. *Miller v. Miller*, 105 USPQ2d 1615, 1616 n.3 (TTAB 2013); *Baroness Small Estates Inc. v. Am. Wine Trade Inc.*, 104 USPQ2d 1224, 1225 n.2 (TTAB 2012).

[6] Petitioner also introduced its own initial and pretrial disclosures, but a party may not introduce its own disclosures by notice of reliance and therefore they have been given no consideration. Trademark Rule 2.120(k)(5).

[7] Citations to the record reference TTABVUE, the Board's online docketing system. The number preceding "TTABVUE" corresponds to the docket entry number(s), and any number(s) following "TTABVUE" refer to the page number(s) of the docket entry where the cited materials appear.

> Testimony Declaration of Mike Lindahl, Senior Specialty Sales Account Manager in Petitioner's Specialty Account Sales department, and the exhibits thereto ("Lindahl Dec."). 36 TTABVUE.
>
> Rebuttal NOR on Internet printouts ("Pet. Rebuttal NOR"). 54 TTABVUE.
>
> Rebuttal Testimony Declaration of Mr. Cook, and the exhibit thereto ("Cook Rebuttal Dec."). 55 TTABVUE 2-42.
>
> Rebuttal Testimony Declaration of Mr. Evans, and the exhibits thereto ("Evans Rebuttal Dec."). 55 TTABVUE 43-60.

Respondent introduced:

> Notice of Reliance on its involved Registration and a related registration, Petitioner's responses to certain of Respondent's discovery requests and Internet printouts ("Resp. NOR").[8] 40 TTABVUE.
>
> Testimony Declaration of Nathalie Chapin, a buyer for KNWA International ("Chapin Dec."). 41 TTABVUE 2-3.
>
> Testimony Declaration of Respondent ("Hage-Boutros Dec."). 41 TTABVUE 4-6.

Only Petitioner filed a Trial Brief.

Petitioner objects to portions of Exhibit G to Respondent's NOR, 40 TTABVUE 383-562 and 726-819, because while the materials purport to be Internet printouts, Respondent failed to provide the URL or date the materials were accessed. The objection is sustained and we have not considered this evidence. Trademark Rule 2.122(e).

[8] Respondent also introduced his own disclosures which have been given no consideration. Trademark Rule 2.120(k)(5).

Similarly, Petitioner objects to Exhibit I of Respondent's NOR, 40 TTABVUE 567-651, because the materials are neither Internet printouts which include the URL and date of access, nor otherwise admissible under Trademark Rule 2.122(e). This objection is also sustained and we have not considered this evidence.

As for Petitioner's remaining objections, suffice it to say, "we simply accord the evidence whatever probative value it deserves, if any at all … Ultimately, the Board is capable of weighing the relevance and strength or weakness of the objected-to testimony and evidence in this specific case, including any inherent limitations, and this precludes the need to strike the testimony and evidence." *Hunt Control Sys. Inc. v. Koninkijke Philips Elecs. N.V.*, 98 USPQ2d 1558, 1564 (TTAB 2011). *See also Grote Indus., Inc. v. Truck-Lite Co., LLC*, 126 USPQ2d 1197, 1200 (TTAB 2018) ("We also remind the parties that our proceedings are tried before judges not likely to be easily confused or prejudiced. Objections to trial testimony on bases more relevant to jury trials are particularly unnecessary in this forum.") (citing *U.S. Playing Card Co. v. Harbro LLC*, 81 USPQ2d 1537, 1540 (TTAB 2006)); *RxD Media, LLC v. IP Application Dev. LLC*, 125 USPQ2d 1801, 1804 (TTAB 2018); *Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1478 (TTAB 2017) (quoting *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1479 (TTAB 2017)). For example, we need not strike evidence that is inadmissible for the truth of the matter asserted, but instead consider the evidence for whatever it may show on its face.

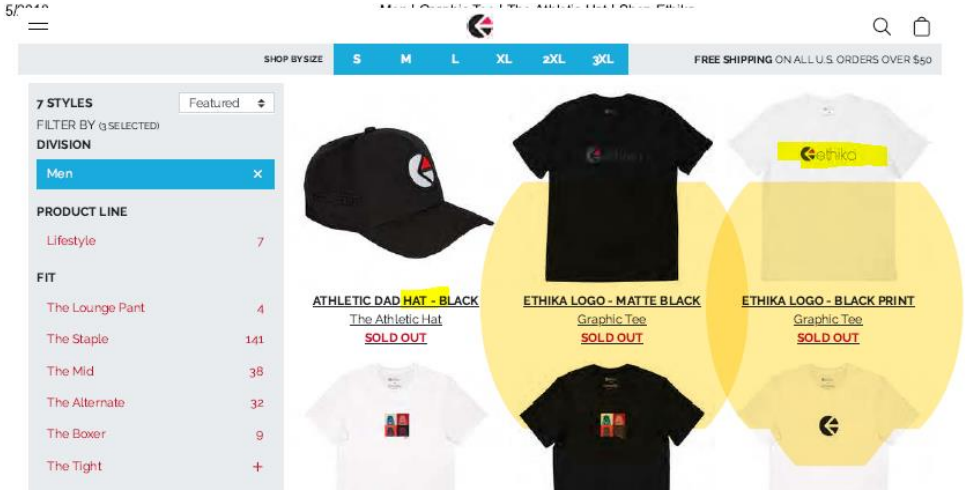
II. The Parties, Their Marks, Goods and Marketing Strategies and Tactics

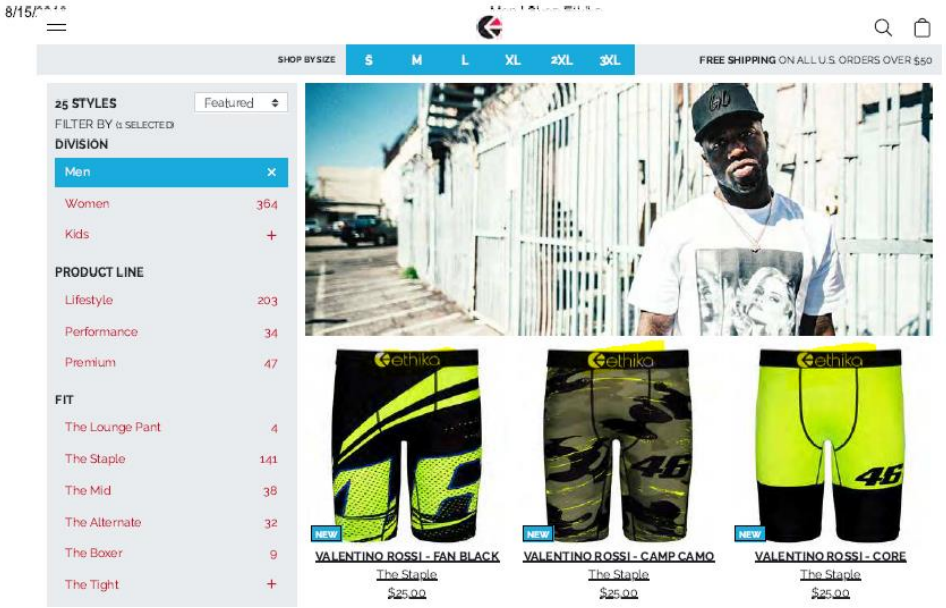
The parties both sell "streetwear," i.e. casual clothing typically worn by young people, often in cities. Streetwear is commonly associated with youth subcultures such as skateboarding and hip hop.

A. Petitioner

Petitioner was founded in 2001 and refers to itself as a "lifestyle brand," with "deep roots in action sports, such as BMX, X-games, Motocross, Supercross, etc." 35 TTABVUE 2-3 (Cook Dec. ¶¶ 3, 5).

Petitioner primarily sells underwear, but also offers headwear and t-shirts, and has done so since its founding. *Id.* at 4 (Cook Dec. ¶ 8). In fact, Petitioner's website features t-shirts and hats, as well as underwear bearing the mark ETHIKA:





Id. at 5, 10, 16 (Cook Dec. ¶¶ 19 and Ex. 1). The posts reproduced below from Petitioner's Facebook page predate Respondent's filing date and depict: (1) "Travis Pastrana, a well-known professional motorsports competitor and stunt performer, wearing a t-shirt bearing the ETHIKA mark;" (2) "a pink t-shirt for breast cancer awareness bearing the ETHIKA mark;" and (3) a hat bearing the ETHIKA mark:

Id. at 4, 179, 181, 187 (Cook Dec. ¶¶ 9, 10, 12 and Exs. 5, 6, 9).

B. Respondent

Respondent's clothing business, which is in fact a "d/b/a" rather than a separate entity, was founded in 2010. 41 TTABVUE 4 (Hage-Boutros Dec. ¶ 3). The "original content" of Respondent's ETHIK brand "was based largely around the Occupy Wall Street ideology." 30 TTABVUE 168 (Respondent's response to Interrogatory No. 1).

Respondent "used the meaning behind the name of the company to draw parallels between the questionable ethics of corporations and other large entities." *Id.* In his deposition, Respondent further explained that ETHIK refers to: (1) "a work ethic;" (2) "ethic and moral grounds, or, you know, right and wrong grounds;" and (3) "ethic in German." 30 TTABVUE 329-30 (Resp. Disc. Tr. 127-28).

Since 2010 (date unspecified), Respondent has sold clothing, including t-shirts, hats and caps, under its ETHIK marks. 41 TTABVUE 4 (Hage-Boutros Dec. ¶ 4).[9] Respondent's brand appeals to "artists, lyrical MCs, [and] extreme sport participants (snowboarders, skateboards, BMX riders, etc.)," as well as "rap cultures." 30 TTABVUE 169, 182 (Respondent's responses to Interrogatory No. 2 and Request for Admission No. 12). Thus, Respondent "sponsor[s] extreme sports athletes and has targeted social media accounts for those interests," and his "main demographic is men ages 13-30." 30 TTABVUE at 170, 277 (Respondent's response to Interrogatory No. 5 and Disc. Tr. At 75). Respondent "uses Care Packages, which include free merchandise or promotional materials, that are given to individuals to wear as part of [a] 'ground marketing' campaign." 30 TTABVUE at 173 (Respondent's response to Interrogatory No. 16).

C. The Parties' Consumers and Marketing Strategies and Tactics

Petitioner markets its goods to athletes and artists, including through social media sites such as Facebook, Twitter and Instagram. 32 TTABVUE 3-4 (Evans Dec.

[9] While Respondent claimed in response to an interrogatory that his mark "was first printed onto a t-shirt in my off-campus dorm room … in October 2010," 30 TTABVUE 168, this by itself does not constitute trademark "use" under 15 U.S.C. § 1127. According to Respondent's involved Registration, his date of first use of the mark in commerce was January 15, 2011.

¶¶ 6, 10). Respondent also markets its goods to athletes and artists, and also uses Facebook, Twitter and Instagram. 30 TTABVUE 169, 170, 182, 230, 233, 277, 309-312 (Respondent's responses to Interrogatory Nos. 2 and 5, Request for Admission No. 12 and Disc. Tr. at 28, 31, 75, 107-110).

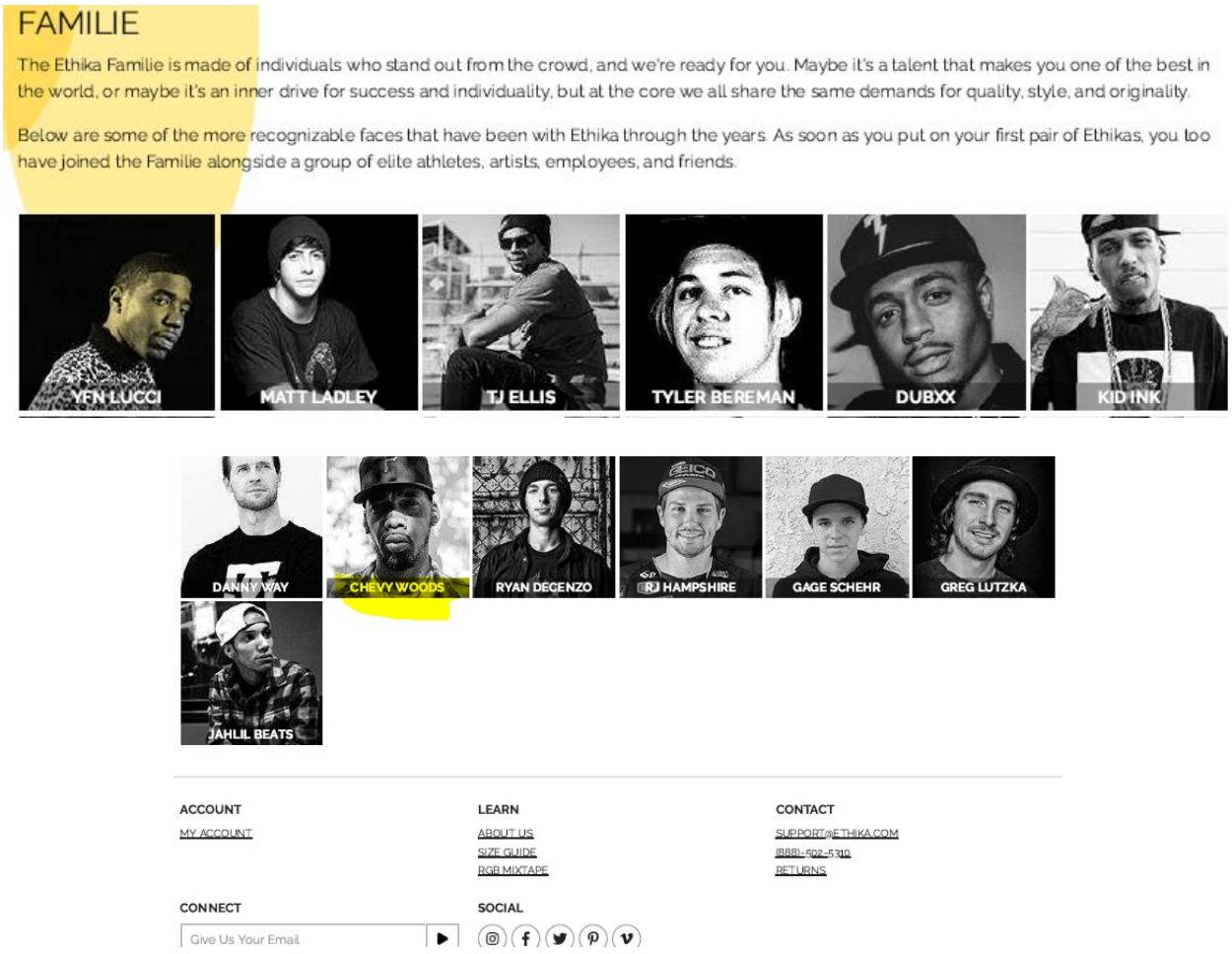
Petitioner participates in trade shows, including the Agenda "lifestyle fashion trade show." 32 TTABVUE 3 (Evans Dec. ¶ 8). Respondent also participates in the Agenda Show. *Id.* The exhibitors list for the 2017 Agenda Show listed the parties consecutively:

Las Vegas – Agenda Show
000183

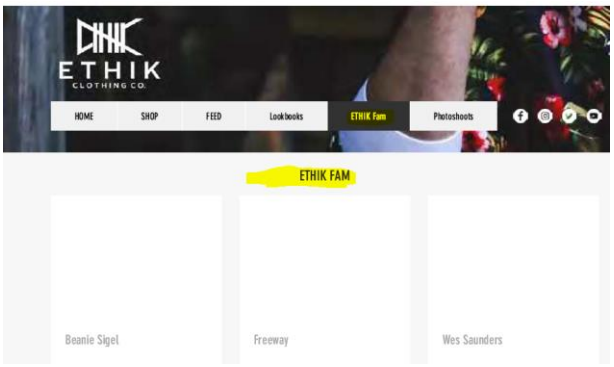
DROPSHIP WIZ	(http://dropshipwiz.com)
EBETTS FIELD FLANNELS	(http://ebbets.com)
EFFECTUS CLOTHING	(http://effectusclothing.com)
ELBOWGREASE ATHLETICS	(http://elbowgrease.com)
ELWOOD	(http://elwoodclothing.com)
EMBELLISH	(http://embellishnyc.com)
EPTM.	(http://eptmusa.com)
ETHIK CLOTHING CO.	(http://ethikny.com)
ETHIKA	(http://ethika.com)

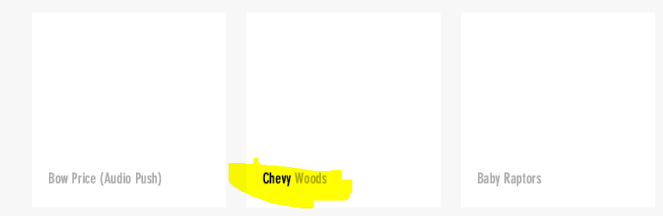
Id. at 3, 69 (Evans Dec. ¶ 9 and Ex. 4).

Petitioner uses the term "Ethika Familie" to describe those who wear and help promote Petitioner's clothes, such as Chevy Woods:



Id. at 4, 5, 13, 15 (Evans Dec. ¶¶ 12, 15 and Ex. 1). Respondent uses the term "Ethik Fam" on its website, which also features Chevy Woods:





Id. at 47, 49 (Evans Dec. Ex. 2).[10]

Petitioner sponsored a live webcast of a Machine Gun Kelly concert. 40 TTABVUE 325 (Petitioner's response to Interrogatory No. 16). Machine Gun Kelly helps promote Respondent's goods:

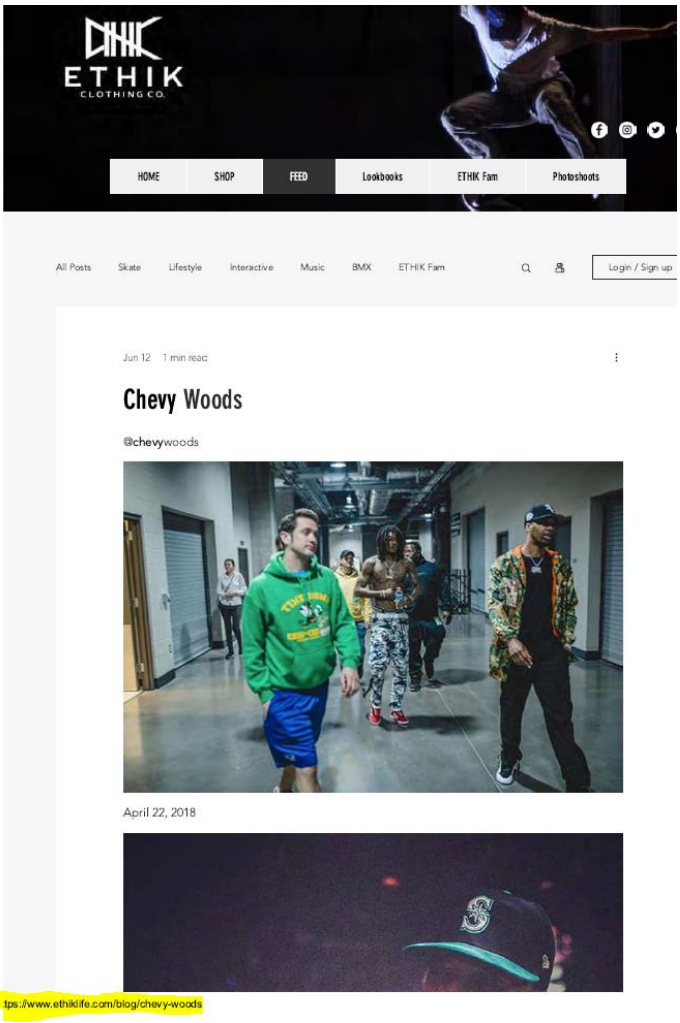
30 TTABVUE 429 (Petitioner's NOR Ex. Q).

Petitioner offers a "Mystery Box" promotion, depicted below on the left. 32 TTABVUE 4 (Evans Dec. ¶ 13). Respondent also offers a "Mystery Box" promotion, depicted below on the right. *Id.*; 30 TTABVUE 258-59 (Hage-Boutros Disc. Tr. 56-57).

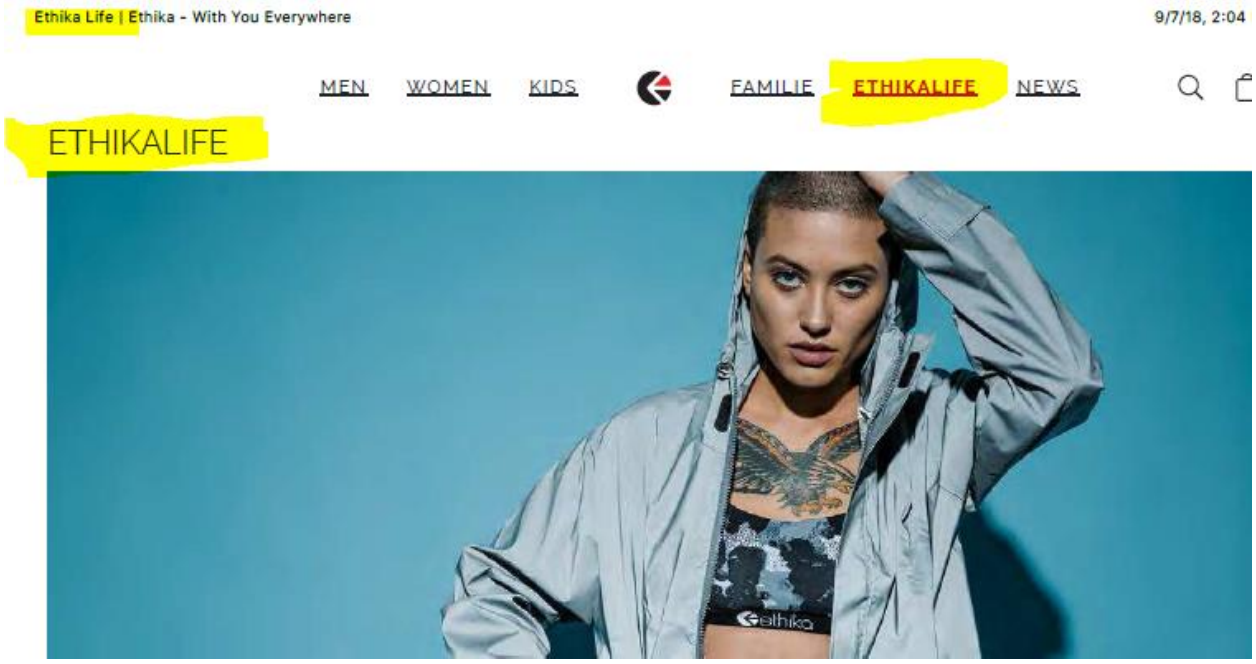
[10] Only the names of "Ethik Fam" members appear in Evans Dec. Ex. 2, which does not include their photographs.

32 TTABVUE 4, 250, 254 (Evans Dec. ¶ 13 and Exs. 14, 16).

Respondent offers an "Ethiklife" blog on its "ethiklife.com" website:



*Id.*at 5, 54 (Evans Dec. ¶ 16 and Ex. 2). Petitioner's website includes an ETHIKALIFE section:



Id. at 5, 17 (Evans Dec. ¶ 16 and Ex. 1).

Respondent "admits that [Respondent's] products and [Petitioner's] products are marketed and sold to the same target consumers." 30 TTABVUE 181 (Respondent's Response to Request for Admission No. 11).

D. Alleged Actual Confusion

Petitioner alleges that retailers and potential customers have been actually confused between Petitioner and Respondent. Specifically:

> Ms. Tsay of Oaklandish, an apparel company which carries Petitioner's goods, received a "brand book" from Respondent, and "[b]ased on the name of the brand and apparel designs," thought "this brand book was part of [Petitioner's] clothing line." She did not understand "why a different representative was reaching out" to her. She then forwarded the e-mail to Mr. Burton stating "this is the streetwear brand I was confused about." 31 TTABVUE 2-6

> (Tsay Dec. ¶¶ 2-6 and Ex. 1); 33 TTABVUE 2 (Burton Dec. ¶ 4).
>
> A 2016 Agenda Show Facebook post depicts Travis Pastrana wearing Petitioner's ETHIKA shorts, but "tags" Respondent rather than Petitioner. 34 TTABVUE 4, 58 (White Dec. ¶ 15 and Ex. 9).
>
> A few social media and web posts "tag" both "#ethika" and "#ethik." *Id.* at 4, 60, 63-98, 102-114, 117-122 (White Dec. ¶ 16 and Ex. 10).[11]
>
> The vendor/distributor "Joe@ClothingTown" forwarded a picture of an ETHIK rug to Petitioner requesting one for his own store. 36 TTABVUE 2, 5 (Lindahl Dec. ¶ 4 and Ex. 1).
>
> Petitioner made a sales call to Evolve, which responded that it was already working with "Jonathan," who it was later revealed worked for Respondent. *Id.* at 3, 7-15 (Lindahl Dec. ¶ 6 and Ex. 2)

On the other hand, Ms. Chapin testified that when she was a buyer for apparel retailer KPG Enterprise d/b/a Nexus, the company's stores stocked both Petitioner's ETHIKA products and Respondent's ETHIK products, but she "never encountered, nor have been made aware of, any instances of actual confusion." 41 TTABVUE 2-3 (Chapin Dec. ¶¶ 4-7). Respondent himself is also not aware of any actual confusion. 41 TTABVUE 4-6 (Hage-Boutros Dec. ¶¶ 2-14).

III. Petitioner's Section 2(d) Claim

Before addressing whether the parties' marks are likely to be confused, we must first consider whether Petitioner is entitled to bring this proceeding. If it is we must

[11] Exhibit 10 includes multiple copies of several of the posts.

then consider whether Petitioner has established priority. *See* 15 U.S.C. §§ 1052(d) and 1064.

A. Petitioner's Entitlement to Statutory Cause of Action[12]

To establish entitlement to a statutory cause of action under Section 14 of the Trademark Act, such as a cause of action for likelihood of confusion, a plaintiff must demonstrate a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at *3 (Fed. Cir. 2020); *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). Here, Petitioner's pleaded registrations, which were properly made of record, 35 TTABVUE 3, 22-177 (Cook Dec. ¶ 6 and Exs. 3, 4), establish that Petitioner is entitled to seek cancellation of Respondent's involved Registration on the ground of likelihood of confusion. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000).

B. Priority

Because both parties own registrations, priority is at issue. *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409 at *4 (TTAB 2019). Respondent failed to

[12] Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of "standing." We now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable.

introduce any evidence of the specific date of first use of its involved mark, and is therefore limited to relying on the filing date of his application which matured into the involved Registration, September 16, 2014. *See Brewski Beer Co. v. Brewski Bros. Inc.*, 47 USPQ2d 1281, 1284 (TTAB 1998) (a party "may rely on its registration for the limited purpose of proving that its mark was in use as of the application filing date"). Petitioner's pleaded registrations issued well before that date, and in any event, Petitioner submitted testimony establishing its prior use of its pleaded marks. 35 TTABVUE 4-5 (Cook Dec. ¶¶ 8-14). Petitioner therefore has priority.

C. Will the Marks and Sources of the Goods Be Confused?

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."). We also consider any likelihood of confusion factors about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Petitioner bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848; *West Florida Seafood, Inc. v. Jet Rest., Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1662 (Fed. Cir. 1994). Indeed, "a presumption of validity attaches to" Respondent's involved Registration. *West Florida Seafood*, 31 USPQ2d at 1662; *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989).

We focus here on Petitioner's pleaded Registration No. 3313394 for the mark ETHIKA in typed form. If we find confusion likely between Respondent's involved mark and Petitioner's mark in typed form, we need not consider the likelihood of confusion between Respondent's mark and the mark and goods in Petitioner's other pleaded registration. On the other hand, if we find no likelihood of confusion between Respondent's mark and Petitioner's mark in typed form, we would not find confusion likely between Respondent's mark and Petitioner's other pleaded mark. *In re Max Capital Grp.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

1. The Goods, Channels of Trade and Classes of Purchasers

The parties' goods are legally identical in-part because "headwear," identified in Petitioner's registration, encompasses the "hats and caps" identified in Respondent's involved Registration. We need not go beyond our finding that Petitioner's and Respondent's goods are legally identical in-part. It is sufficient for a finding of likelihood of confusion if legal identity is established for any item encompassed by the identification of goods in a particular class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981).

Because the goods are in-part legally identical, we must presume that their channels of trade and classes of purchasers are as well. *In re Viterra Inc.,* 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute,* 101 USPQ2d 1022, 1028 (TTAB 2011). In any event, as discussed above, the parties' trade channels and consumers overlap, and the parties' employ many of the same marketing strategies and tactics. These factors weigh heavily in support of finding a likelihood of confusion.

The identity of the goods and their overlapping channels of trade and classes of purchasers not only weigh heavily in favor of finding a likelihood of confusion, but also reduce the degree of similarity between the marks necessary to find a likelihood of confusion. *In re Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 94 USPQ2d at 1260; *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).

2. The Marks

The marks are quite similar "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772,* 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). Indeed, the dominant portion of Respondent's mark includes the entirety of Petitioner's mark, and merely adds an "a" to the end of it.

More specifically, ETHIK is the dominant portion of Respondent's mark because the disclaimed wording CLOTHING CO. is descriptive or generic and thus entitled to less weight in our analysis. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'") (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)).

Furthermore, while the term ETHIK in Respondent's mark is depicted in stylized lettering, this is irrelevant because Petitioner's mark is in typed form, and could therefore be displayed in any font, size or color, including in a manner similar to Respondent's display of the term ETHIK. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012).

Similarly, while Respondent's mark includes a design component, clothing consumers are likely to call for the goods by the term ETHIK, making this term more important than the design or the non-distinctive words CLOTHING CO. *In re Viterra*, 101 USPQ2d at 1911 ("the verbal portion of a word and design mark likely will be the dominant portion"); *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (holding that "if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services" and "because applicant's mark shares with registrant's mark that element responsible for creating its overall commercial impression, the marks are confusingly similar"). This principle is especially applicable here because

according to both the involved Registration itself, and Respondent's testimony, the design component of Respondent's mark consists of "interconnecting straight lines arranged in a manner that spells out 'ETHIK'." Registration; 41 TTABVUE 4 (Hage-Boutros Dec. ¶ 5) (referring to design component of Respondent's involved mark "as a stylistic spelling of the word 'ethik'"). In other words, the design merely highlights and calls further attention to the term ETHIK.

Obviously, Petitioner's mark ETHIKA and the dominant ETHIK portion of Respondent's mark look and sound almost identical. Moreover, consumers familiar with Petitioner's mark who encounter Respondent's may not notice that it omits the "A" at the end. In fact, we must focus on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (citing *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975)). *See Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.,* 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971) (finding a likelihood of confusion due in part to "the fallibility of memory over a period of time"). Some consumers could even perceive Respondent's mark as a modification of Petitioner's mark which identifies the same source.

The marks also convey similar meanings. A Transworld Business article introduced by Respondent quotes Petitioner's founder Malcolm McCassy as saying that ETHIKA has come to "stand for Ethnicity, **Ethics**, and Athletics." 40 TTABVUE 701 (emphasis added). Respondent's mark ETHIK also conveys ethics, and "ethik" is German for "ethic." 30 TTABVUE 168 (Respondent's response to Interrogatory No. 1)

and 329-30 (Resp. Disc. Tr. 127-28). Even consumers who are unaware of the meaning of either party's mark may very well take from ETHIK the same meaning they take from ETHIKA, particularly when the marks are used on identical goods.

In short, the dominant portion of Respondent's mark is highly similar to Petitioner's mark in sound, appearance and meaning, and the marks create similar commercial impressions, especially when used on identical goods. This factor also weighs in favor of finding a likelihood of confusion.[13]

3. Alleged Actual Confusion

Actual confusion "is strongly indicative of a likelihood of confusion." *Thompson v. Haynes*, 305 F.3d 1369, 64 USPQ2d 1650, 1655 (Fed. Cir. 2002). Here, while Petitioner has presented some evidence which suggests, at least, that Respondent's mark may call to mind Petitioner's or vice versa, we do not find it particularly probative of actual confusion.

Specifically, it is not clear that Ms. Tsay did anything more than notice the similarities between the parties' marks and goods, and to the extent her testimony reveals temporary confusion, the issue seems to have been cleared up quickly. In fact, Ms. Tsay was apparently not confused to the point of accepting Respondent's goods as Petitioner's, but rather seems to have merely inquired of Petitioner about any connection and to have been told that there was no connection.

[13] There is no evidence or argument concerning the strength of Petitioner's marks. We find that Petitioner's pleaded marks are inherently distinctive, and entitled to protection against similar marks used for related goods.

The evidence of mistaken social media "tags" is superficial, and not supported by any testimony or other evidence regarding exactly what the social media users thought, or why they "tagged" the posts the way they did. Similarly, it is not clear exactly what "Joe@ClothingTown" or Evolve thought about any perceived connection between Petitioner and Respondent, and it appears that neither purchased one party's goods assuming they were connected somehow to the other party. This type of evidence would be significantly more persuasive if "Joe@ClothingTown" or a witness with Evolve testified (and were subject to cross-examination). *See Corporate Fitness Programs, Inc. v. Weider Health and Fitness, Inc.*, 2 USPQ2d 1682, 1691 ("we agree with applicant's contention that the testimony is of little probative value in the absence of testimony from the third persons themselves as to whether they were confused and, if so, what caused their confusion"); *Toys "R" Us, Inc. v. Lamps R Us*, 219 USPQ 340, 346 (TTAB 1983) ("One important defect, which might have been revealed had the involved customers been available for cross-examination, is that there is nothing to indicate whether the reason for the question as to affiliation was the result of the similarity of the marks. While this might possibly be inferred from the absence of any other apparent reason, the point is too important to be established by means of an inference … The fact that questions have been raised as to the possible relationship between firms is not by itself evidence of actual confusion of their marks."). This factor is neutral.

IV. Conclusion

Because the parties' goods are in-part identical, the channels of trade and classes of consumers are presumed to and in fact do overlap and the marks are similar, confusion is likely.

Decision: The petition to cancel Respondent's Registration No. 4834883 on the ground of likelihood of confusion is granted.