

This Opinion is Not a  
Precedent of the TTAB

Mailed: August 12, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*SY Custom, Inc.*  
*v.*  
*The Tailory, LLC*  
—

Cancellation No. 92070569  
—

Cherie Sauer of AMD Law Group  
for Petitioner SY Custom, Inc.

Anthony Lopes of Lopes Law, LLC  
for Respondent The Tailory, LLC.

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Before Lykos, Adlin and Heasley,  
Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Respondent The Tailory, LLC owns a Supplemental Register registration for the term THE TAILORY, in standard characters, for “custom tailoring or dressmaking” in International Class 40 (the “Registration”).<sup>1</sup> Petitioner SY Custom, Inc., which “offers and provides services for custom tailoring and dressmaking ... under the trade

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<sup>1</sup> Supplemental Register Registration No. 5466584, issued May 8, 2018 based on first use in commerce on July 5, 2013.

name “The Tailory New York,” 1 TTABVUE 4,<sup>2</sup> seeks to cancel the Registration on the ground that THE TAILORY is generic.<sup>3</sup> In its answer, Respondent denies the salient allegations in the petition for cancellation.<sup>4</sup>

## I. The Record

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:

First Notice of Reliance (“Pet. NOR 1”) on Respondent’s responses to Petitioner’s discovery requests. 15 TTABVUE.<sup>5</sup>

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<sup>2</sup> Citations to the record refer to 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 electronic page number(s) of the docket entry where the cited materials appear.

<sup>3</sup> Petitioner also alleges that THE TAILORY is merely descriptive or “merely informational and thus incapable of functioning as a mark,” 1 TTABVUE 7-8, and likely to be confused with Petitioner’s trade name and purported mark, but did not pursue these claims at trial, and they are therefore waived. *Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 (TTAB 2013), *aff’d mem.*, 565 Fed. Appx. 900 (Fed. Cir. 2014). In any event, merely descriptive terms may be registered on the Supplemental Register, and therefore descriptiveness is not a ground for cancellation of a Supplemental Register registration. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1685 n.9 (Fed. Cir. 2010) (“A descriptive term lacking secondary meaning may not appear on the Principal Register, but may appear on the Supplemental Register.”); *In re Bush Bros. & Co.*, 884 F.3d 569, 12 USPQ2d 1058, 1059 (Fed. Cir. 1989) (“a mark that is ineligible for registration on the Principal Register because it is ‘merely descriptive’ of the goods or services ... may be registered on the Supplemental Register”).

<sup>4</sup> Respondent also admits, in response to Petitioner’s now-waived likelihood of confusion claim, that its trade name and what it alleges to be Petitioner’s “infringing and illegally obtained trade name ... are nearly indistinguishable;” that the parties “provide some similar services;” and that confusion is likely. 4 TTABVUE 6, 7 (Answer ¶¶ 7, 8, 10). In response to Petitioner’s untenable descriptiveness claim, Respondent affirmatively asserts that its trade name has acquired distinctiveness, but because Petitioner did not pursue the descriptiveness claim, the assertion of acquired distinctiveness is irrelevant in this case.

<sup>5</sup> Petitioner included with Pet. NOR 1 some of the documents Respondent produced in response to Petitioner’s discovery requests. While produced documents are not generally

Testimony affidavits of:

Zachary C. Jobe of Transatlantic Textiles (“Jobe Aff.”);

Alan Horowitz, owner of Alan Horowitz Custom (“Horowitz Aff.”); and

Leonard Logsdoil, President Leonard Logsdoil Bespoke Tailors (“Logsdoil Aff.”).

16 TTABVUE.

Testimony affidavits of:

Jack Wu, President of Control Sector, LLC (“Wu Aff.”);

Wing Gian of Qingdao Shang Lan Commercial and Trading Co., Ltd. (“Gian Aff.”);

Lincuntai, Founder of Qingdao DAdong Garment Co. Ltd. (“Lincuntai Aff.”);

Victoria Pasche, CEO of Dapper Boi, Inc. (“Pasche Aff.”);

Layla Zhang, Cindy Wang<sup>6</sup>, Evie Yang, Nicole Liu, Daisy Cheng and Becky Xiu, all Customer Service Representatives of Qingdao kutesmart Co., Ltd. (“Zhang Aff.,” “C. Wang Aff.,” “Evie Yang Aff.,” “Liu Aff.,” “Cheng Aff.” and “Xiu Aff.,” respectively);

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admissible under notice of reliance alone, Respondent did not object to their introduction into evidence, and we have considered them. *See generally Exec. Coach Builders, Inc. v. SPV Coach Co.*, 123 USPQ2d 1175, 1176 n.9 (TTAB 2017); *Maids to Order of Ohio, Inc. v. Maid-To-Order, Inc.*, 78 USPQ2d 1899, 1901-02 (TTAB 2006).

<sup>6</sup> It appears that Ms. Wang previously signed a different affidavit, apparently in her individual capacity, a month earlier than the affidavit submitted as a Customer Service Representative of Qingdao kutesmart. *Compare* 17 TTABVUE 18-20 *to* 17 TTABVUE 35-37. For the reasons set forth below, we need not attempt to resolve the ambiguities or any inconsistencies arising out of these dueling affidavits.

Beth Amason, Cindy Huang, Eric Yang, Yesenia Lavin, Eugenia Chang and Ma Han Moe Tin, all workers in the “clothing industry” without further specification (“Amason Aff.,” “Huang Aff.,” “Eric Yang Aff.,” “Y. Lavin Aff.,” “Chang Aff.” and “Tin Aff.,” respectively);

Faith Wozniak of Gladson Ltd. (“Wozniak Aff.”);

Sylvia Wang, a personal assistant/office manager working in the “clothing industry” (“S. Wang Aff.”);

Heather Falconer of Falconer Agency LLC (“Falconer Aff.”);

Samantha Gifaldi, Daniel M. Churgin, Hui-Jin (David) Yang, Edward Lavin and Vicky Rendon, all consumers “of products in the clothing industry” (“Gifaldi Aff.,” “Churgin Aff.,” “H. Yang Aff.,” “E. Lavin Aff.” and “Rendon Aff.,” respectively);

Nik Kacy, President of Nik Kacy Footwear (“Kacy Aff.”);

ManSee Kong, Operations Director of Classic Metal Combs, Inc. (“Kong Aff.”);

Bryan Park, President of BYP Inc. (“Park Aff.”);

Danielle Cooper, Founder of Shes a Gent (“Cooper Aff.”); and

Chanique Shanee Quinones, Owner of Geek Junky (“Quinones Aff.”).

17 TTABVUE.

Second Notice of Reliance (“Pet. NOR 2”) on printed publications and Internet printouts. 18 TTABVUE.<sup>7</sup>

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<sup>7</sup> Some of the materials Petitioner submitted with this notice of reliance do not include the URL or date they were accessed, in violation of Trademark Rule 2.122(e). As explained in

Applicant did not take any testimony or introduce any evidence. Both parties filed Trial Briefs.<sup>8</sup>

## II. Petitioner's Entitlement to a Statutory Cause of Action<sup>9</sup>

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at \*3 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A party in the position of plaintiff may seek to cancel registration of a mark when doing so is within its zone of interests and it has a reasonable belief in damage that is proximately caused by continued registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \* 6-7 (Fed. Cir. 2020) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and a reasonable belief in damage by the registration of a mark, which demonstrates damage proximately caused by registration of the mark).

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footnote 5, however, Respondent did not object to these materials, and we have considered them for whatever probative value they might have.

<sup>8</sup> After Petitioner filed its Trial Brief early, it filed another version of its Trial Brief late. Respondent successfully moved to strike the late-filed brief, and thus we rely on the earlier version of Petitioner's Trial Brief (19 TTABVUE). *See* 23 and 27 TTABVUE.

<sup>9</sup> 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.

Here, while Petitioner did not introduce any probative evidence that it used a mark or name similar to THE TAILORY,<sup>10</sup> Respondent effectively conceded the point. In fact, Respondent conceded in its Trial Brief that Petitioner at some point<sup>11</sup> began “using a mark almost identical to the mark owned by” Respondent. 25 TTABVUE 9. This establishes Petitioner’s entitlement to a statutory cause of action. *Books on Tape, Inc. v. Booktape Corp.*, 836 F.2d 519, 5 USPQ2d 1301, 1302 (Fed. Cir. 1987); *Alcatraz Media*, 107 USPQ2d at 1760 (finding “standing” based on petitioner being a competitor and using a similar term); *Kistner Concrete Products, Inc. v. Contech Arch Technologies, Inc.*, 97 USPQ2d 1912, 1918 (TTAB 2011); *Stuart Spector Designs, Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1553 (TTAB 2009); *Saint-Gobain Corp. v. 3M Co.*, 90 USPQ2d 1425, 1428 (TTAB 2007); *Plyboo America Inc. v. Smith & Fong Co.*, 51 USPQ2d 1633, 1634 (TTAB 1999).<sup>12</sup>

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<sup>10</sup> While Petitioner introduced Internet printouts which appear to show its use of THE TAILORY NEW YORK, Internet materials are not admissible for the truth of the matter asserted absent accompanying testimony. *Ayoub, Inc. v. ACS Ayoub Carpet Serv.*, 118 USPQ2d 1392, 1399 n.62 (TTAB 2016); *Nat’l Pork Bd. and Nat’l Pork Producers Council v. Supreme Lobster and Seafood Co.*, 96 USPQ2d 1479, 1483 (TTAB 2010); *Safer Inc. v. OMS Inv. Inc.*, 94 USPQ2d 1031, 1037 n.14 and 1040 (TTAB 2010). Petitioner took no testimony.

<sup>11</sup> Because Petitioner waived its likelihood of confusion claim by failing to pursue it, the specific date of Petitioner’s first use of a similar term or name is not relevant.

<sup>12</sup> Respondent’s argument that Petitioner does not have “standing” because it failed to register its trade name with New York’s Secretary of State is unpersuasive. *See generally Stock Pot Rest., Inc. v. Stockpot, Inc.*, 737 F.2d 1576, 222 USPQ 665, 668 (Fed. Cir. 1984); *Brewski Beer Co. v. Brewski Bros. Inc.* 47 USPQ2d 1281, 1286 (TTAB 1998); *WMA Grp. Inc. v. West. Int’l Media Corp.*, 29 USPQ2d 1478 (TTAB 1993).

### III. Genericness

“In order to qualify for registration on the Supplemental Register, a proposed mark ‘must be capable of distinguishing the applicant’s goods or services.’” *In re Emergency Alert Sols. Grp., LLC*, 122 USPQ2d 1088, 1089 (TTAB 2017) (quoting 15 U.S.C. § 1091(c)). Generic terms do not qualify for registration because “by definition [they] are incapable of indicating a unique source.” *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1267 (Fed. Cir. 2015) (citing *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987)); *see also Clairol, Inc. v. Roux Distrib. Co.*, 280 F.2d 863, 126 USPQ 397, 398 (CCPA 1960) (“The generic name by which a product is known is not a mark which can be registered on the Supplemental Register under [S]ection 23 because such a name is incapable of distinguishing applicant’s goods from goods of the same name manufactured or sold by others.”), *quoted in In re Katch, LLC*, 2019 USPQ2d 233842, \*2 (TTAB 2019).

The ultimate test for determining whether a term is generic, and thus ineligible for a Supplemental Register registration, is its primary significance to the relevant public. *See* Section 14(3) of the Trademark Act, 15 U.S.C. § 1064(3). *See also In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999); *Magic Wand Inc. v. RDB, Inc.*, 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991). Petitioner “bears the burden of proving that the term is generic ... by a preponderance of the evidence.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018).

We must make a two-step inquiry to determine whether THE TAILORY is generic: First, what is the genus (category or class) of the services at issue? Second, is THE TAILORY understood by the relevant public primarily to refer to that genus of services? *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986). “The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question.” *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1634 (Fed. Cir. 2016) (quoting *Marvin Ginn*, 228 USPQ at 530).

#### **A. The Genus**

Neither party addresses the appropriate genus, but typically “a proper genericness inquiry focuses on the description of services set forth in the certificate of registration.” *In re Cordua Rests.*, 118 USPQ2d at 1636 (quoting *Magic Wand*, 19 USPQ2d at 1552). Here, we find, and neither party disputes, that the genus is coextensive with Respondent’s identification of services: “custom tailoring or dressmaking.”

In considering this genus, we keep in mind the definitions of “tailor,” which when used as a noun means “a person whose occupation is making or altering garments (such as suits, jackets, and dresses) **typically to fit a particular person;**” and when used as a verb means “to make or adapt **to suit a special need or purpose.**” 18



TTABVUE 9 (emphasis added).<sup>13</sup> Based on these definitions, we find that the word “custom” in Respondent’s identification is essentially superfluous, because all tailoring may be considered “custom” tailoring.<sup>14</sup>

### **B. Relevant Public and Types of Probative Evidence**

The “relevant public” consists of consumers of custom tailoring or dressmaking services, whether the services be simple, everyday tasks such as hemming pants, or more sophisticated and artistic work such as customizing a wedding dress. *See Magic Wand*, 19 USPQ2d at 1553-54. Evidence of this relevant public’s understanding of the term at issue may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers, and other publications. *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985).

We must consider how the relevant public perceives the term THE TAILORY in its entirety:

[E]ven in circumstances where the Board finds it useful to consider the public’s understanding of the individual words in a compound term as a first step in its analysis, the Board

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<sup>13</sup> <https://www.merriam-webster.com/dictionary/tailor>.

<sup>14</sup> Along the same lines, we acknowledge that while Respondent’s focus appears to be on sophisticated, “custom” tailoring services, especially work on wedding dresses, Respondent promotes more pedestrian tailoring services as well. 18 TTABVUE 30 (“The Tailory’s specialties include tailoring and alterations for bridal gowns **and menswear** ... We have performed everything from the **simplest garment alterations** to the most complex clothing re-stylizing.”) (emphasis added). Our ultimate decision in this case would be the same if we found the genus to be “tailoring services” generally rather than the more specifically identified “custom tailoring or dressmaking” services. *See generally Alcatraz Media*, 107 USPQ2d at 1761.

must then consider available record evidence of the public's understanding of whether joining those individual words into one lends additional meaning to the mark as a whole.

*Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1832-33 (Fed. Cir. 2015). Thus, we may not ignore the word THE, or consider the term TAILORY in isolation. At the same time, however, the most significant portion of THE TAILORY is obviously the term TAILORY. See e.g. *In re The Place Inc.*, 76 USPQ2d 1467, 1468 (TTAB 2005) (finding THE GREATEST BAR merely descriptive, and that “the definite article THE and the generic term BAR are not distinctive terms”); *Conde Nast Publ'ns Inc. v. Redbook Publ'g Co.*, 217 USPQ 356, 357 (TTAB 1983) (“The fact that the slogan also includes the article ‘The’ is insignificant.”). The term TAILORY is thus the essence of the term THE TAILORY.

**C. Does the Relevant Public Understand THE TAILORY to Refer to Custom Tailoring or Dressmaking Services?**

Petitioner's evidence consists of a single dictionary definition, Internet evidence and testimony from a variety of people involved in the clothing industry in one capacity or another. We find the dictionary definition probative, but the remaining evidence much less so.

**1. Dictionary Evidence**

Petitioner's most persuasive evidence in this case is a single dictionary definition of the term “tailory:”

**TAILORY**—“the work or business of a tailor” and “clothing made by a tailor”<sup>15</sup>

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<sup>15</sup> merriam-webster.com/dictionary/tailor.

18 TTABVUE 7. This is strong evidence that TAILORY is at best merely and highly descriptive of Applicant's services. It also establishes that TAILORY is quite apt for custom tailoring or perhaps even dressmaking services. At the same time, however, "the presence or absence of a term in dictionaries is not controlling on the question of whether a term is generic." *In re ActiveVideo Networks, Inc.*, 111 USPQ2d 1581, 1603 (TTAB 2014)

Moreover, aptness "is not the correct test for genericness." *In re American Fertility Society*, 51 USPQ2d at 1836. Rather, we must determine whether this record establishes that the relevant public uses or understands THE TAILORY to refer to custom tailoring services. *In re Dial-A-Mattress Operating Corp.*, 57 USPQ2d at 1811 (evidence did not support finding that 1-888-M-A-T-R-E-S-S is generic, because "[t]here is no record evidence that the relevant public refers to the class of shop-at-home telephone mattress retailers as '1-888-M-A-T-R-E-S-S'"); *In re American Fertility Society*, 51 USPQ2d at 1837 (vacating finding that AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE is generic in part because "the PTO produced no evidence at all of the public's understanding of the phrase as it relates to the Society's services"). We therefore turn to the evidence relating to how the relevant public uses and understands the term THE TAILORY.

## **2. Testimony**

Petitioner introduced 32 testimony declarations. The quantity of this evidence is impressive. The quality is not.

With one exception, each of the declarations – essentially identical and obviously drafted by someone other than the witness, presumably Petitioner's counsel –

consists of form, typed paragraphs with blanks or boxes to be filled in by the witness, as illustrated below:

DECLARATION OF Jack Wu  
(NAME)

Pursuant to 28 U.S.C. § 1746, the above-named declares as follows:

1. I am the President (Title), of Control Sector, LLC (The Company), located at 53 Bond Street, NY, NY, 10012 (Address). I submit this declaration in order to provide facts regarding the business activities and services of the above-named company.
2. The Company conducts business in the clothing industry, began operations in the year 2013, and has offices in the following locations:  
New York City
3. The Company uses the terms "tailory," "tailor," "tailoring," and /or other similar terms related to clothing services and products. The Company uses these terms:
  - a) in daily use; and/or,
  - b) as, or as part of, its company name; and,
  - c) \_\_\_\_\_ (Other or N/A);to designate a place to find tailored clothing, tailory services, other clothing, and accessories related to the same, i.e., clothing and fashion accessories.
4. The Company uses and hereby states the terms, "tailory," "tailor," "tailoring," are generic to the industry for custom tailored clothing and clothing accessories.
5. The Company opposes registration of the mark "The Tailory" on the USPTO principal and supplemental registers and considers the registration a threat to the industry and its

business. This opposition to registration includes registration in any class related to custom tailoring, clothing, and clothing accessories.


6. The Company performs the following services and/or sells the following products under its name:
  - Custom clothing
  - Custom tailoring
  - Clothing Design
  - Dressmaking
  - Alterations
  - Other Clothing Sales
  - Wholesale and retail store services
  - Ecommerce store services
  - Fashion accessories
  - Bridal accessories
  - Veils
  - Handbags
  - Clothing
  - Hats
  - Other headwear
  - Housewares
  - Jewelry

Other \_\_\_\_\_

7. The Company services the following number of customers:

- Choose not to answer
- Under 100
- 100-1000
- 1000+

I declare under penalty of perjury that the foregoing is true and correct.

  
SIGNATURE  
8/19/20  
DATE

17 TTABVUE 3-5. See also 16 TTABVUE 5-8 and 17 TTABVUE 6-85. These declarations, representing 31 out of the 32 declarations submitted, suffer from a

litany of deficiencies, problems and ambiguities. In fact, they are all unintelligible, to one extent or another.

First, and most glaringly, the key section in each of the declarations, Paragraph No. 3 in the declaration reproduced above,<sup>16</sup> provides:

The Company uses the terms ‘tailory,’ ‘tailor,’ ‘tailoring,’ and/or other similar terms related to clothing services and products. The Company uses these terms: a) in daily use; and/or b) as, or as part of, its company name; and, c) \_\_\_\_\_ (Other or N/A); to designate a place to find tailored clothing, tailory services, other clothing, and accessories related to the same, i.e. clothing and fashion accessories.

*See e.g.* 17 TTABVUE 3 (Wu Dec. ¶ 3). Because of the way this key paragraph is drafted, it is impossible to glean whether it has anything at all to do with TAILORY, the term in question. Indeed, as drafted this paragraph provides no evidence that any witness or company has **ever** used the word TAILORY, as opposed to “tailor,” “tailoring,” or unspecified “similar terms.” The problem is the inclusion of “and/or,” which broadens the terms “used” well beyond just TAILORY, to include not only other forms of the word “tailor” that are not at issue in this case, but also unspecified “similar terms.”

Second, this paragraph is inconsistent with and calls into question the following paragraph in the Wu declaration (and 29 other declarations) which states: “The Company uses and hereby states the terms, ‘tailory,’ ‘tailor,’ ‘tailoring,’ are generic in

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<sup>16</sup> While 31 of the 32 witnesses provided “form” or “cookie cutter” declarations, this key paragraph is not Paragraph No. 3 in all of them. In some declarations it has another paragraph number, but is substantively identical.

the industry for custom tailored clothing and clothing accessories.” *See e.g.* 17 TTABVUE 3. Specifically, Paragraph 3 in the Wu declaration (and its equivalent in the other declarations) indicates that the company uses one or more terms which may or may not include TAILORY in connection with “clothing services and products” of an unspecified nature. The very next paragraph, by contrast, indicates that the company uses “tailory,” “tailor” **and** “tailoring” in connection with “custom tailored clothing and clothing accessories.” If not directly contradictory, these paragraphs are unclear at best, both as to the specific term(s) used and the specific products or services to which the term(s) refer. More importantly and generally, only one witness out of 32 specifically testified to any use by anyone of TAILORY (the term in question), in connection with tailoring services.<sup>17</sup>

Third, most of the witnesses declined to choose among the options presented in the key paragraph or other paragraphs, or declined to fill in one or more blanks. 17 TTABVUE 3, 15, 18, 21, 24, 27, 30, 35, 44, 48, 51, 53, 56, 59, 65, 72, 84. Similarly, while Mr. Wu identified his company in Paragraph 1 of the declaration reproduced above (unlike many of the declarants), there is no indication what his company does, other than that it “conducts business in the clothing industry.” 17 TTABVUE 3 (Wu Dec. ¶ 2). This is unhelpful, because trucking companies that transport clothes, caterers that serve lunch at “clothing industry” meetings and event planners who manage fashion conventions also work in the “clothing industry.” Merely working in

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<sup>17</sup> The declarations would have been more persuasive if they included specific examples, preferably quotations, showing exactly how the term was used, by who, and in what context. If there were written examples of the use, those should have been provided.

the “clothing industry” does not necessarily make someone a relevant consumer. In short, we have no idea what Mr. Wu’s company does, whether it is part of the relevant public or whether Mr. Wu is in a position to know how the relevant public perceives the term in question.

Fourth, a number of declarants do not indicate that they or their companies are American or that they are testifying about use or understanding in the United States. 6 TTABVUE 5-6; 17 TTABVUE 6-11, 15-32, 35-37, 51-52.<sup>18</sup> We are only concerned here with how the relevant United States public uses and understands the word TAILORY. *In re Consolidated Cigar Corp.*, 13 USPQ2d 1481, 1483 (TTAB 1989) (generic use of term in foreign country not probative of “consumer perception in this country”).

Fifth, most of the declarants work in the “clothing industry” (a term which the declarations often do not further specify). This represents “a very small part of the relevant purchasing public,” which includes general consumers seeking to have their clothes tailored. *See Magic Wand*, 19 USPQ2d at 1553-54. The evidence therefore has “limited probative value.” *Id.*

Finally, and more generally, these types of “form” or “cookie cutter” declarations are inherently suspect. *In re Nordic Naturals, Inc.*, 755 F.3d 1340, 111 USPQ2d 1495, 1498 (Fed. Cir. 2014) (finding unpersuasive declarations from retailers of the

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<sup>18</sup> A number of the declarations include a blank for witnesses to fill in the year their companies began operating and the U.S. States or Territories in which their companies operate, but the cited declarations do not fill in or otherwise provide this information. It appears that some or all of these may be foreign witnesses testifying about foreign companies.

applicant's goods which "were prepared primarily by [the applicant], with the declarants providing only personal information"); *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1633 (Fed. Cir. 2003) ("nearly identical" and "conclusorily worded" affidavits not the type of "competent evidence" which would establish a prima facie case). *See also In re MK Diamond Prods., Inc.*, 2020 USPQ2d 10882 \* 25 (TTAB 2020) ("the probative weight of the declarations is lessened by the fact that they are identical in form and are not composed individually," and therefore they are "less persuasive than statements expressed in a declarants' own words"); *Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1507 (TTAB 2017) (probative value of declarations "vitiating" because they were identical in form, not composed individually, conclusory and there was no evidence they were representative of others' views); *In re Pohl-Boskamp GmbH & Co. KG*, 106 USPQ2d 1042, 1051 (TTAB 2013).

There is one declaration, Mr. Jobe's, that is somewhat different from the others, and appears to have been drafted with input from Mr. Jobe or his company. 16 TTABVUE 3-4. While this declaration does not contain all of the flaws that the others do, it is, like the others, not probative on the issues in question. Mr. Jobe testifies that he works for Dormeuil, a French company with offices around the world, including not just France, but also New York, the United Kingdom, Japan, Italy, India, China and Australia. *Id.* at 3 (Jobe Dec. ¶ 3). Mr. Jobe testifies that Dormeuil "uses and hereby states the terms, 'tailory,' 'tailor,' 'tailoring,' are generic to the industry for custom tailored clothing and clothing accessories." *Id.* (Jobe Dec. ¶ 4).



Mr. Jobe's statement that the three forms of "tailor" are "generic" is a legal conclusion about the ultimate issue in this case, not a factual statement. The Board, not a witness, must reach its own "ultimate conclusion on the entire record." See *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 153 (CCPA 1978); *Quaker Oats Co. v. St. Joe Processing Co.*, 232 F.2d 653, 109 USPQ 390, 391 (CCPA 1956) (a witness's opinion "obviously is not binding upon either the tribunals of the Patent Office or the courts"); *Sunnen Prods. Co. v. Sunex Int'l Inc.*, 1 USPQ2d 1744, 1746 n.8 (witness testimony "on questions pertaining to ultimate issues of trademark law" entitled to less weight).

In the last paragraph, Mr. Jobe broadens his testimony, stating that Dormeuil "commonly uses the terms 'tailory,' 'tailor,' 'tailoring' and other similar terms related to clothing services, products, and related goods in industry communications, collateral and as part of its service or product offerings, all to designate products or services related to a place to find its clients' tailored clothing, tailory services, other clothing and accessories related to the same, *i.e.* clothing and fashion accessories." While this passage includes the term "tailory services," the statement is so broad and focused on clothing and fashion accessories that it does not clearly support a finding that TAILORY is generic for tailoring services. More importantly, it only indicates what Dormeuil does, not the relevant public, and isn't specific to the United States. In fact, there is no evidence that Dormeuil uses the terms mentioned in the United States.

In short, Petitioner's testimony declarations raise more questions than they answer, and are vague, incomplete and inherently suspect. They do not establish that THE TAILORY is generic for custom tailoring or dressmaking services and are not probative.

### 3. Internet Evidence

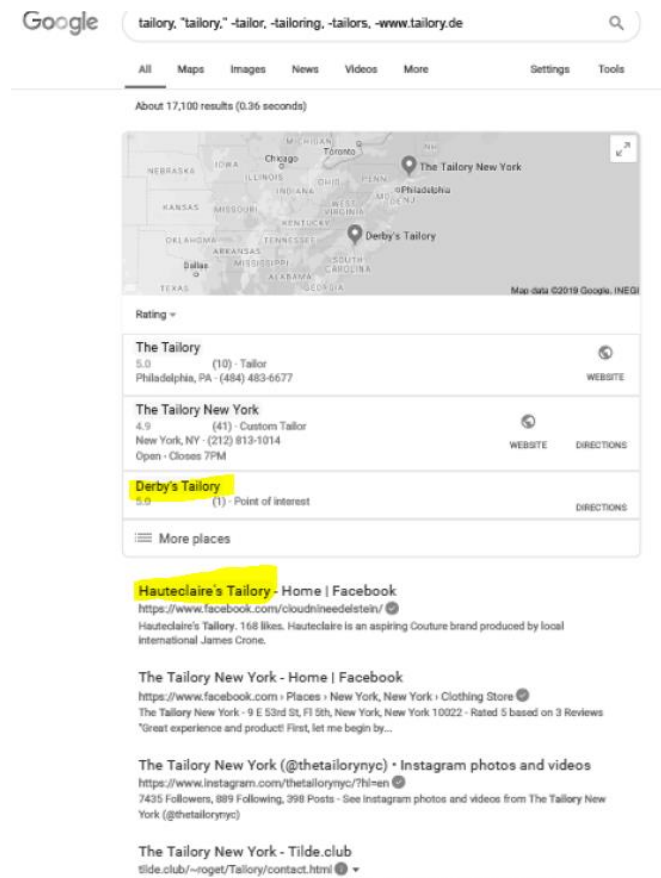
Petitioner introduced the truncated results of pages from a Google® search for “tailor, ‘tailory,’ –tailor, -tailoring, -tailors, -www.tailory.de.”<sup>19</sup> 18 TTABVUE 12-21. This type of evidence has little probative value, because it does not typically show how a term is used in connection with any particular genus. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833-34 (Fed. Cir. 2007) (finding Google search result summaries of “lesser” and “little” probative value where there was “very little context of the use of ASPIRINA on the webpages linked to the search report”); *In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1715 (TTAB 2011); *In re Tea and Sympathy, Inc.*, 88 USPQ2d 1062, 1064 n.3 (TTAB 2006); *In re Thomas*, 79 USPQ2d 1021, 1026 (TTAB 2006); *In re King Koil Licensing Co.*, 79 USPQ2d 1048, 1050 (TTAB 2006); *In re Remacle*, 6 USPQ2d 1222, 1223 n.2 (TTAB 2002); *In re Fitch IBCA Inc.*, 64 USPQ2d 1058, 1060 (TTAB 2002).

Petitioner's specific Google search results amply illustrate this general problem. As shown below, on the first page of results from Petitioner's search, if we ignore the

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<sup>19</sup> Of the six search terms entered, only “tailory” is directly relevant. While Petitioner also searched a domain name including the term “tailory,” this appears to be a foreign website and there is no evidence the site is intended for United States consumers of custom tailoring or dressmaking services or that it reflects use of TAILORY in the United States.

vast majority of the results, which refer to either Petitioner or Respondent, we find that “tailory” is used, but not how it is used:



18 TTABVUE 12. The listing for Derby’s Tailory indicates that it is a “point of interest,” but provides no additional information, and it is therefore impossible to determine how TAILORY is being used; it does appear, however, that TAILORY is not being used in connection with tailoring services, because tailors are not generally referred to as a “point of interest.” The search also identifies and links to “Hauteclair’s Tailory’s” Facebook page. While this name sounds much more like the name of a business that provides tailoring, the minimal information provided by the result indicates that the business is “an aspiring Couture brand,” which sounds more like a provider of fashion goods than tailoring services. The remaining pages from the

search by and large refer to either The Tailory NYC (Petitioner) or The Tailory in Philadelphia (Respondent), with the remaining results having no probative value because, like the examples above, the context is unclear, or if clear does not relate to tailoring or the use or understanding of TAILORY in the United States. *Id.* at 12-21.<sup>20</sup> The results showing use of TAILOR or TAILORING as opposed to TAILORY are even further afield, and include what appears to be an app (“Download Tailor”); a restaurant (“The Tailor and the Cook reservations” on OpenTable); a singer-songwriter (“Tailor is a Singer-Songwriter from South Africa”); a film (“Tinker Tailor Soldier Spy”); and healthcare (“Tailoring Capabilities for Connected Health”). *Id.* at 23-29.

Petitioner also introduced certain pages resulting from a Google® search of “video game tailor.” *Id.* at 56-60. While most of the context is lacking in these results as well, and, importantly, these results are largely illegible,<sup>21</sup> there is enough there for us to observe that there might be a tailoring shop, referred to as a “tailory,” in a video game or video games. Perhaps relatedly, Petitioner submitted printouts from what appears to be a United Kingdom website (“hollowworld.co.uk”) which seems to concern

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<sup>20</sup> For example, one entry identifies Hangzhou Tailory Garments Co., Ltd. as a “China Importer, Exporter,” others link to entities in the Philippines and Malaysia, and another identifies “Tailory Road” as the address for a spray paint shop in Mangalore. 18 TTABVUE 12-21.

<sup>21</sup> Much of the Internet evidence Petitioner introduced, perhaps especially the printouts from Respondent’s Facebook page and some of the Google results, are illegible. We cannot base decisions on illegible evidence. It was Petitioner’s responsibility to submit evidence which is “clear and legible.” Trademark Rule 2.126(a)(2); *Alcatraz Media*, 107 USPQ2d at 1758 n.16; *Hard Rock Café Licensing Corp. v. Elsea*, 48 USPQ2d 1400, 1404 (TTAB 1998). A party fails to comply with the Rule at its own risk.

“Medieval and Fantasy Minecraft Roleplaying,” and which includes a discussion of “Njorun’s Tailory.” *Id.* at 61. Petitioner did not submit any other evidence that would shed light on what Njorun’s Tailory or Hollow World are, whether they are known in the United States or what “tailory” refers to as used on the site.<sup>22</sup> In any event, the genus is custom tailoring services, which has nothing to do with video games or role-playing games, and Petitioner does not link what may happen in any games to what happens in real world United States commerce.

Petitioner also relies on uses of the terms “tailory,” “tailor,” “tailored,” “tailors” or “tailoring” on Respondent’s website. *Id.* at 30-51. However, in the examples of record, Respondent uses “The Tailory,” in initial capital letters, only to identify itself, rather than tailoring or related services. Respondent does not use the word “tailory” by itself. Respondent does use “tailor,” “tailors,” “tailored” and “tailoring” descriptively or generically, but those are not the terms in question, and their use on Respondent’s website does not dispose of the question before us.

Finally, Petitioner introduced somewhat more legible website printouts, but they display the terms “tailor,” “tailoring” and “tailored” rather than “tailory,” the term in question, and many of the sites appear to be foreign. *Id.* at 71-76, 78-89. Petitioner

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<sup>22</sup> Similarly, Petitioner submitted mostly indecipherable printouts related to what appear to be video or role-playing games, one apparently named Rage Zone, in which the words “tailory” and “tailoring” are used in some context. 18 TTABVUE 62-70. Again, however, the context is unclear, as is whether the games are played or known in the United States.

also introduced printouts from its own website and social media sites showing its own trade name use of TAILORY, the term in question. *Id.* at 77, 90-105.<sup>23</sup>

Thus, Petitioner’s Internet evidence only clearly shows use of the term TAILORY as a trade name or purported mark by Petitioner and Respondent. While it appears that one or more role-playing or video games may feature a “tailory” shop which may relate to tailoring services in some way, this evidence is of limited value. Indeed, it is unclear whether these games reflect real world use of the term “tailory,” whether the “tailory” shop in any game purports to perform tailoring-related services or whether these games are played in the United States.

#### **4. Weighing the Evidence**

When we consider the record as a whole, we find that Petitioner failed to meet its burden of proving that United States consumers of custom tailoring services use or understand THE TAILORY to refer to tailoring services. The dictionary definition certainly suggests that relevant consumers might so use or understand the term, but this suggestion stands alone, and is not borne out by the remaining evidence of record. In fact, with the exception of perhaps a small number of video or role-playing games which the record reveals little if anything about, and not even where and by whom they are played, it appears that the overwhelming majority of uses of TAILORY are by either Petitioner or Respondent. There is no evidence that either Petitioner or

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<sup>23</sup> The results from a search of “the tailory” on the Google Play app store, and the Reddit and Instagram printouts, are unhelpful because there is no context or way to determine how the term is being used. 18 TTABVUE 106-111. The YouTube and LinkedIn search results show Petitioner’s use of the term, or include illegible results or results without context. *Id.* at 112-115.

Respondent uses TAILORY to refer to tailoring services specifically; rather, the parties both use TAILORY in their trade names to identify themselves.

In *Alcatraz Media*, the record included not just dictionary definitions, but also a variety of articles, some of which tended to support a finding of genericness. Nonetheless, because the record in that case was “mixed” and “ambiguous,” the record failed “to establish that the primary significance of ANNAPOLIS TOURS to the relevant public is guided tour services of cities, rather than a guided tour service of cities provided by a particular entity.” *Alcatraz Media*, 107 USPQ2d at 1763. Here, Petitioner has introduced less evidence supporting a genericness finding than the petitioner in *Alcatraz Media*. Moreover, most or all of the uses of THE TAILORY revealed by the record refer to Petitioner or Respondent. See *In re Merrill Lynch*, 4 USPQ2d at 1143 (reversing finding of genericness where the record “showed recognition in a substantial number of publications that the source of the CASH MANAGEMENT ACCOUNT was the appellant”) and *In re America Online, Inc.*, 77 USPQ2d 1618, 1623 (TTAB 2006) (reversing finding that INSTANT MESSENGER is generic where “the majority of the articles refer to applicant”).

Given the dictionary definition, we acknowledge that had Petitioner built a different (more extensive and directly relevant) record here, the result could have been different. But on the “mixed” and “ambiguous” record submitted, much of which is illegible, we find that Petitioner has not met its burden of proving that THE TAILORY is generic for tailoring services or the more specifically identified custom

tailoring or dressmaking services. Here we find, as in *Alcatraz Media, Dial-A-Mattress, American Fertility Society* and other cases that the evidence falls short.<sup>24</sup>

#### IV. Conclusion

“[G]enericness is a fact-intensive determination and the Board’s conclusion must be governed by the record which is presented to it.” *Alcatraz Media*, 107 USPQ2d at 1763 (quoting *In re Country Music Ass’n*, 100 USPQ2d 1824, 1832 (TTAB 2011)). On this “mixed” and “ambiguous” record, Petitioner has not met its burden of proving by a preponderance of the evidence that THE TAILORY is generic for “custom tailoring or dressmaking.” In fact, the single dictionary definition suggesting that the term may be generic essentially stands alone, unsupported by legible, persuasive evidence that consumers of tailoring services use or understand THE TAILORY to refer to tailoring services generally or custom tailoring or dressmaking specifically.

**Decision:** The petition for cancellation is denied.

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<sup>24</sup> Petitioner’s reliance on *In re Reed Elsevier Properties, Inc.*, 77 USPQ2d 1649 (TTAB 2005), *aff’d* 482 F.3d 1376, 82 USPQ2d 1378 (Fed. Cir. 2007) and *In re Meridian Rack & Pinion*, 114 USPQ2d 1462 (TTAB 2015), 19 TTABVUE 17, is misplaced. In both of those cases, in contrast to this one, there was evidence that the applicants and third-parties were making generic use of the term in question. Here, by contrast, there is no clear evidence that anyone other than Petitioner and Respondent are using THE TAILORY.