

This Opinion is not a  
Precedent of the TTAB

Mailed: January 27, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Mario's LLC*  
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Serial No. 98460342  
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Ashley D. Johnson of Dogwood Patent and Trademark Law,  
for Mario's LLC.

David Brookshire, Trademark Examining Attorney, Law Office 114,  
Nicole Nguyen, Managing Attorney.

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Before Goodman, Cohen and O'Connor,  
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Mario's LLC ("Applicant") seeks registration on the Principal Register of the mark

MARIO'S (in standard characters) for

Beanies; Boots; Dresses; Gloves; Hats; Headwear;  
Leggings; Pants; Shirts; Shoes; Shorts; Skirts; Slippers;  
Socks; Suspenders; Sweatshirts; Vests; Belts for clothing;  
Caps being headwear; Leather belts for clothing; Clothing  
belts; Clothing belts made out of cloth; Clothing jackets;  
Waist belts in International Class 25<sup>1</sup>;

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<sup>1</sup> Application Serial No. 98460342 was filed on March 21, 2024, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant's claim of first use anywhere and

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the mark MARIO'S 3.10 (in standard characters)<sup>2</sup> for "Retail apparel stores" in International Class 35.<sup>3</sup>

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

### I. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, or to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) ("*DuPont*"). See

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first use in commerce since at least as early as March 20, 2023. Applicant also seeks registration for Class 18 goods which are not the subject of this appeal.

The name(s), portrait(s), and/or signature(s) shown in the mark identifies Mario Rodriguez Fuentes, whose consent(s) to register is made of record.

Citations in this opinion to the file history of the involved application are to pages in the downloadable .pdf version of the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO"). References to the briefs on appeal refer to the Board's TTABVUE docket system. Applicant's brief is at 4 TTABVUE; the Examining Attorney's brief is at 6 TTABVUE.

<sup>2</sup> Registration No. 3306186 issued October 9, 2007, renewed.

<sup>3</sup> The Examining Attorney had refused registration based on multiple other MARIO formative registrations but on May 28, 2025 withdrew these cited registrations as a basis for refusal.

also *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. See, e.g., *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019); *In re Country Oven, Inc.*, No. 87354443, 2019 TTAB LEXIS 381, at \*2.

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods or services. See *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”). These factors, and others, are discussed below.

#### A. Similarity or Dissimilarity of the Goods and Services

The second *DuPont* factor considers “[t]he similarity or dissimilarity and nature of the goods [or services] as described in an application or registration.” *DuPont*, 476 F.2d at 1361. See *In re i.am.symbolic, llc*, 866 F.3d at 1327; *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990).

As indicated above, Applicant’s goods are identified as “Beanies; Boots; Dresses; Gloves; Hats; Headwear; Leggings; Pants; Shirts; Shoes; Shorts; Skirts; Slippers; Socks; Suspenders; Sweatshirts; Vests; Belts for clothing; Caps being headwear; Leather belts for clothing; Clothing belts; Clothing belts made out of cloth; Clothing

jackets; Waist belts,” while the cited registration identifies “Retail apparel stores.” The services of the cited registration involve the retail sale of apparel,<sup>4</sup> which is the same goods as clothing, as identified in Applicant’s application.

Retail store services have frequently been found to be related to goods sold by those retail stores. *See, e.g., In re Hyper Shoppes*, 837 F.2d 463, 464 (Fed. Cir. 1988) (affirming that confusion is likely between marks for retail grocery and general merchandise store services on the one hand and furniture on the other); *In re Country Oven, Inc.*, 2019 TTAB LEXIS 381 at \*6-7 (holding bread buns and retail bakery stores and shops related on its face); *Wet Seal, Inc. v. FD Mgmt., Inc.*, No. 91157022, 2007 LEXIS 21 at \*34-35 (finding women’s clothing stores and fragrances to be related); *Genesco Inc. v. Martz*, No. 91121296, 2003 TTAB LEXIS 123 at \*28 (finding applicant’s clothing items related to opposer’s retail and mail order services in the field of clothing); *see also* 3 J. Thomas McCarthy on Trademarks and Unfair Competition § 24:25 (5th ed. December 2025 update) (“Where the services consist of retail sales services, likelihood of confusion is found when another mark is used on goods which are commonly sold through such a retail outlet.”). We find the goods and services – clothing items and apparel stores – related on their face.

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<sup>4</sup> We take judicial notice of the definition of “apparel” which is defined as “personal attire : clothing of a particular kind.” MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, accessed January 21, 2026). The Board may take judicial notice of dictionary definitions in print and online format. *In re Red Bull GmbH*, No. 75788830, 2006 TTAB LEXIS 136 at \*8-9.

## B. Third-party Registrations

The sixth *DuPont* factor, “[t]he number and nature of similar marks in use on similar goods,” *DuPont*, 476 F.2d at 1361, “is a measure of the extent to which other marks weaken the assessed mark.” *Spireon Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (citing *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1373 (Fed. Cir. 2005)). There are two types of strength: conceptual and commercial.<sup>5</sup> *Id.* (citing *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010)). The strength of the cited mark affects the scope of protection to which a mark is entitled.

Evidence of third-party use bears on the strength or weakness of a mark. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338 (Fed. Cir. 2015) (citing *Palm Bay Imps.*, 396 F.3d at 1373). “[T]he purpose of a defendant introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers ‘have been educated to distinguish between different such marks on the bases of minute distinctions.’” *Palm Bay Imps.*, 396 F.3d at 1373 (citation omitted). Evidence of third-party registrations for marks “on similar goods [or services] can bear on a mark’s conceptual strength.” *Spireon*, 71 F.4th 1363 (citing *Juice Generation*, 794 F.3d at 1339).

Applicant submitted third-party registrations of MARIO formative marks for clothing goods or footwear (shoes) in Class 25, which we consider for conceptual

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<sup>5</sup> As is normally the case in ex parte proceedings, the fifth *DuPont* factor is neutral. *See In re Thomas*, No. 78334625, 2006 TTAB LEXIS 135, at \*18 n.11.

strength, along with evidence of use for some of the registrations, which we can consider for both conceptual and commercial strength.<sup>6</sup> Applicant's March 12, 2025 Response to Office Action pp. 106-109, 115, 118, 121-123, 125-126; January 8, 2025 Response to Office Action pp. 96-99, 105, 108, 111-113, 115-116. We also consider any of the third-party registrations cited by the Examining Attorney that were not submitted by Applicant. March 11, 2025 Office Action at pp. 9-38. The registrations are for the following marks:

MARIO MILLIONS<sup>7</sup>

CHEERFUL MARIO<sup>8</sup>

THE SUPER MARIO BROS MOVIE<sup>9</sup>

SUPER MARIO BROS<sup>10</sup>

SUPER MARIO<sup>11</sup>

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<sup>6</sup> Although the Examining Attorney argues these third-party registrations are not of record, because of abbreviated TSDR printouts, May 25, 2025 Office Action p. 4, eleven of these MARIO formative registrations are the ones initially cited by the Examining Attorney and later withdrawn; they are already in the record.

As to the third-party registrations not submitted by the Examining Attorney, the TSDR printouts reflect pertinent information: registration number, mark, goods, and current status. While the bottom portions of the TSDR printouts are not shown, we find these excerpted printouts sufficient to make these third-party registrations of record. Applicant resubmitted this evidence in the January 8, 2025 response, which was unnecessary. Applicant's March 12, 2025 Response to Office Action pp. 104, 105, 90-94, 111-114, 116, 117, 119, 120, 124; January 8, 2025 Response to Office Action pp. 94, 95, 100-104, 106, 107, 109, 110, 114. Applicant's excerpts of the TSDR printouts do not show the owner of the marks.

<sup>7</sup> Applicant's March 12, 2025 Response to Office Action, p. 104; January 8, 2025 Response to Office Action p. 94.

<sup>8</sup> *Id.* at 105; 95.

<sup>9</sup> *Id.* at 111; 101.

<sup>10</sup> *Id.* at 117; 107.

<sup>11</sup> *Id.* at 119; 109.

MARIOKART<sup>12</sup>

MARIO SCAGNETTI CLOTHING COMPANY and design<sup>13</sup>

MARIO'S BOHEMIAN CIGAR STORE<sup>14</sup>

MARIO'S BOHEMIAN CIGAR STORE MARIO and design<sup>15</sup>

JOY&MARIO<sup>16</sup>

JOY&MARIO<sup>17</sup>

MMMM MARIO'S<sup>18</sup>

MARIO CALDI<sup>19</sup>

MARIO BERLUCCI<sup>20</sup>

MARIO FAGNI<sup>21</sup>

MARIO VALENTINO<sup>22</sup>

MARIO VALENTINO<sup>23</sup>

MARIO ROSSI<sup>24</sup>

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<sup>12</sup> *Id.* at 116; 106.

<sup>13</sup> *Id.* at 112; 102.

<sup>14</sup> *Id.* at 113; 103.

<sup>15</sup> *Id.* at 120; 110.

<sup>16</sup> *Id.* at 114; 104.

<sup>17</sup> *Id.* at 124; 114.

<sup>18</sup> *Id.* at 107; 97. Cited by Examining Attorney.

<sup>19</sup> *Id.* at 108; 98. Cited by Examining Attorney.

<sup>20</sup> *Id.* at 109; 99. Cited by Examining Attorney.

<sup>21</sup> *Id.* at 115; 105. Cited by Examining Attorney.

<sup>22</sup> *Id.* at 121; 111. Cited by Examining Attorney.

<sup>23</sup> *Id.* at 106; 96. Cited by Examining Attorney.

<sup>24</sup> *Id.* at 122; 112. Cited by Examining Attorney.

MARIO SAMELO<sup>25</sup>

MARIO · PELLINO and Design<sup>26</sup>

MARIO BEMER USA<sup>27</sup>

MARIO HERNANDEZ<sup>28</sup>

MARIO HERNANDEZ and design<sup>29</sup>

MARIO HERNANDEZ<sup>30</sup>

As shown from the list, twenty-four third-party registrations cover the relevant clothing and/or footwear goods, although clearly some of these marks appear to emanate from the same registrant (e.g., SUPER MARIO BROS MOVIE, SUPER MARIO BROS., SUPER MARIO, MARIOKART;<sup>31</sup> MARIO'S BOHEMIAN CIGAR STORE and MARIO'S BOHEMIAN CIGAR STORE MARIO and design; JOY&MARIO; MARIO HERNANDEZ and MARIO HERNANDEZ and design; and MARIO VALENTINO).<sup>32</sup>

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<sup>25</sup> *Id.* at 123; 113. Cited by Examining Attorney.

<sup>26</sup> *Id.* at 125; 115. Cited by Examining Attorney.

<sup>27</sup> *Id.* at 126. Cited by Examining Attorney.

<sup>28</sup> *Id.* at 118; 108. Cited by Examining Attorney.

<sup>29</sup> March 11, Office Action p.34. Cited by the Examining Attorney.

<sup>30</sup> *Id.* at 31, 23. Cited by the Examining Attorney.

<sup>31</sup> We take judicial notice of entries from Encyclopaedia Britannica which identify SUPER MARIO, SUPER MARIO BROS, and MARIO KART as part of the Nintendo Company Inc. video console game franchise and THE SUPER MARIO BROS MOVIE as a live action movie inspired by the video game. Encyclopaedia Britannica (accessed January 23, 2026), [www.britannica.com/topic/Super-Mario-Bros#ref1325097](http://www.britannica.com/topic/Super-Mario-Bros#ref1325097); [www.britannica.com/topic/electronic-vehicle-game](http://www.britannica.com/topic/electronic-vehicle-game). The Board may take judicial notice of encyclopedia entries. *In re Broyhill Furniture Industries Inc.*, No. 75473959, 2001 TTAB LEXIS 612, at \*9 n. 5 (Board took judicial notice of the Encyclopedia of Furniture).

<sup>32</sup> One of the submitted third-party registrations, ML MARIO LEVI, covers animal skins. Because it is for different goods, it lacks probative value and is not listed above. Applicant's

Applicant argues that MARIO is commonly used in connection with Class 25 clothing, is in a “crowded field,” that MARIO marks should be “narrowly construed,” and that “consumers have become conditioned by a plethora of similar marks for clothing that they have been educated to distinguish between different marks that include the term MARIO on the basis of minute distinctions.” 4 TTABVue 18. Applicant submits that “the MARIO’S mark can coexist with the cited Registration without risk of consumer confusion.” *Id.*

While Applicant’s third-party registration and internet evidence shows that a number of manufacturers of clothing utilize the term MARIO in their brand names, we are not persuaded that Registrant’s MARIO mark is as weak as Applicant contends it to be. Many of these registrations (and uses) do not contain MARIO/MARIO’S standing alone or in combination with generic or descriptive wording and are far more dissimilar than the cited mark.

In particular, although the marks MARIO CALDI, MARIO BERLUCCI, MARIO FAGNI, MARIO VALENTINO, MARIO ROSSI, MARIO SAMELO, MARIO PELLINO and design, MARIO BEMER USA, MARIO HERNANDEZ, and MARIO SCAGNETTI CLOTHING COMPANY and design contain the term MARIO, the addition of a surname to MARIO distinguishes these marks’ commercial impression. When considered with clothing or footwear, each of these marks engenders the impression of a fashion designer, with the first name of less (or equal) prominence

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March 12, 2025 Response to Office Action, p. 110; January 8, 2025 Response to Office Action p. 100.

than the surname. The distinctions among the marks are not minute, and each mark is different from Applicant's mark MARIO'S. The Examining Attorney recognized this by withdrawing the 11 cited registrations against Applicant's mark. We also find the two JOY&MARIO marks have a different commercial impression due to the use of two personal names. Similarly, we find that the three SUPER MARIO marks and the MARIOKART mark have the commercial impression of a Nintendo video game and are distinguishable. The two MARIO BOHEMIAN CIGAR STORE marks give the impression of a cigar store, not a clothing designer or clothing store, so these marks are distinguishable as well.

That leaves the third-party registration MMMM MARIO'S, which we find most probative, and CHEERFUL MARIO, and MARIO MILLIONS which are somewhat probative, all showing the personal name MARIO/MARIO'S as a component of a mark with other matter. But these registrations are too few in number to establish that the MARIO'S component of Registrant's mark is relatively weak and entitled only to limited protection. *Compare Juice Generation*, 794 F.3d at 1337 & 1339 n.1 (at least twenty-six relevant third party uses or registrations powerful on its face) *with In re Inn at St. John's, LLC*, No. 87075988, 2018 TTAB LEXIS at 170, at \*12 (four third-party registrations of varying probative value (two for non-identical services and the other two for non-identical terms) is not a significant amount of evidence to show weakness).

Applicant also points to a prior registration, Registration No. 5253858, for the mark MARIO for Class 25 clothing that coexisted with the cited registration as

evidence that its mark can coexist with the cited registration. 4 TTABVUE 19-20. Registration No. 5253858 was filed in 2016 for use on apparel in Class 25; however, its current status is cancelled. March 12, 2025 Response to Office Action pp. 102-103; January 8, 2025 Response to Office Action, pp. 20-73. The fact that the cited mark and the now-cancelled mark at one time coexisted on the register does not prove that they coexisted during that time without confusion in the marketplace. And Applicant has not identified any presently coexisting MARIO registrations.

Since the MARIO Registration No. 5253858 for clothing is now cancelled, it has little or no probative value other than to show that it once issued. *See Action Temp. Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 1566 (Fed. Cir. 1989) (“[A] cancelled registration does not provide constructive notice of anything.”); *Sunnen Prods. Co. v. Sunex Int’l, Inc.*, No. 91069733, 1987 TTAB LEXIS 92, at \*7 (An expired registration “has no probative value other than for what it shows on its face, i.e., that the registration issued.”).

We find the sixth *DuPont* factor neutral.

C. Third-party Registrations of other Personal Name or Full Name Marks for Clothing Goods

Applicant relies on third-party prior registrations for marks that consist of a possessive personal name other than MARIO’S for Class 25 clothing goods (e.g., BEN’S, DAVID’S, JOE’S, JUDY’S)<sup>33</sup> as well as third-party registrations for Class 25

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<sup>33</sup> Although the Examining Attorney indicated to Applicant in a May 28, 2025 Office Action p. 4 that these registrations were not of record because of abbreviated TSDR printouts, the printouts are sufficient to show the mark, the status, and the goods; we consider them.

clothing or footwear goods for marks with a personal name and surname (e.g., BEN DAVIS, BEN SHERMAN & BEN HOGAN; MICHAEL KORS, MICHAEL SOHO & MICHAEL BASTIAN; DAVID TAYLOR, DAVID CHARLES & DAVID WOOD; GARY PLAYER, GARY MAJDELL SPORT & GARY BANANAS & design; MARK LORD, MARK CROSS & MARK LAUREN; JOE YELLINO, JOE SUGG, & JOE VINCE; JUDY BOND, JUDY TURNER & JUDY KNAPP; DANIEL SMART, DANIEL RICCIARDO & DANIEL ROSEBERRY) that do not include the name MARIO/MARIO's. March 12, 2025 Response to Office Action pp. 127-192. Applicant has provided these registrations to show the Office's treatment of similar marks for similar goods and that they coexist with other marks which consist solely of the same personal name or possessive personal name. 4 TTABVUE 19. Applicant argues that the Examining Attorney's refusal is "contradictory and inconsistent with prior determinations by the USPTO" and leads to conflicting results with similar types of marks. *Id.*

"We note that 'the third-party registrations relied on by applicant cannot justify the registration of another confusingly similar mark.'" *In re Toshiba Med. Sys. Corp.*, No. 79046106, 2009 TTAB LEXIS 447, at \*19 (citations omitted). In this regard, prior decisions and actions of other examining attorneys in registering other different marks have little evidentiary value and are not binding upon the USPTO or the Board. *In re Nett Designs Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court"). It

has been noted many times that each case is decided on its own facts, and each mark stands on its own merits. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1568 (Fed. Cir. 1984); *In re Binion*, No. 76590702, 2009 TTAB LEXIS 701, at \*16.

Since none of these third-party registrations include the term MARIO'S or MARIO, they have no persuasive value in our determination of whether the use of the personal name MARIO/MARIO'S is so prevalent in the clothing industry that marks including the term MARIO are entitled to only a limited scope of protection. *See In re Toshiba Med. Sys. Corp.*, 2009 TTAB LEXIS 447, at \*19 (evidence that six pairs of registrations for similar marks for MRI and ultrasound equipment registered that are different than the involved and cited mark cannot justify the registration of another confusingly similar mark). In particular, the marks provided by the third-party registrations "are so different from the present case that, even if they were relevant, they would merely stand for the principle that the Office determines each case on its own merits." *In re Embiid*, No. 88202890, 2021 TTAB LEXIS 168 at \*50-52 ("The 'paired' COBRA and SOLE marks here similarly are so different from the involved marks TRUST THE PROCESS as to have no probative value.").

#### D. Similarity or Dissimilarity of the Marks

We consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression under the first *DuPont* factor. *Palm Bay Imps.*, 396 F.3d at 1371 (citing *DuPont*, 476 F.2d at 1361). Similarity in any one of these elements may be sufficient to find the marks confusingly similar. *In re Davia*, No. 85497617, 2014 TTAB LEXIS 214, at \*4.

The similarity or dissimilarity of the marks is determined based on the marks in their entireties; the analysis cannot be predicated on dissecting the marks into their various components. *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). On the other hand, different features may be analyzed to determine whether the marks are similar. *Id.* There is nothing improper in giving more or less weight to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Id.*

The focus is on the recollection of the average purchaser, who normally retains a general, rather than specific, impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, No. 91196527, 2014 TTAB LEXIS 166, at \*17; *Sealed Air Corp. v. Scott Paper Co.*, No. 91055167, 1975 TTAB LEXIS 236, at \*6. The test, under the first *DuPont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods and services offered under the respective marks is likely to result. *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012).

Applicant's mark is MARIO'S and the cited mark is MARIO'S 3.10.

While there is no rule that marks are automatically considered similar where one mark encompasses the entirety of another, the fact that Applicant's mark is subsumed within the cited mark MARIO'S 3.10 increases the similarity between them. *See, e.g., In re Mighty Leaf Tea*, 601 F.3d 1342, 1347-48 (Fed. Cir. 2010) (applicant's mark ML is similar to registrant's mark ML MARK LEES);

*DowntownDC Bus. Improvement Dist. v. Clarke*, No. 91275100, 2024 TTAB LEXIS 412, at \*67-68 (DOWNTOWNDC DISTRICT OF FASHION similar to DISTRICT OF FASHION); *Hunter Indus., Inc. v. Toro Co.*, No. 91203612, 2014 TTAB LEXIS 105, at \*33 (PRECISION mark confusingly similar to PRECISION DISTRIBUTION CONTROL mark) (citations omitted).

Applicant argues that the marks are different in appearance and sound given the additional term 3.10 in the cited mark. 4 TTABVUE 17.

Comparing the marks in terms of appearance and sound, the marks look and sound similar to the extent that they both begin with the term MARIO'S. We agree that there are some differences in appearance and sound because of the presence of the number 3.10 in Registrant's mark but find that MARIO's is dominant in the cited mark MARIO'S 3.10.

MARIO'S is the first term in Registrant's mark and the term is mostly likely to be remembered by the consumer. *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, No. 91074797, 1988 TTAB LEXIS 60, at \*8 ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"); *see also In re Detroit Ath. Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018) ("The identity of the marks' initial two words is particularly significant because consumers typically notice those words first."); *Palm Bay Imps.*, 396 F.3d at 1372 ("VEUVE nevertheless remains a 'prominent feature' as the first word in the mark and the first word to appear on the label"). Thus, although the marks are not identical in terms of appearance and sound

due to the addition of 3.10 in the cited mark, we find that they are very similar due to the presence of the lead term MARIO'S.

As to connotation and commercial impression, Applicant argues that its mark creates the commercial impression of a reference to Mario Rodriguez for items provided and sold by Mario LLC, while the cited mark creates the commercial impression of a reference to Mario Biso of Portland, Oregon. 4 TTABVUE 17.

But neither of the surnames Rodriguez or Biso appears in the marks. It is axiomatic that we must compare the marks as they appear in the Application and cited registration. *In re Aquitaine Wine USA, LLC*, No. 86928469, 2018 LEXIS 108 at \*11 (we do not consider how marks are used in the marketplace, and must compare the marks as they appear in the drawing of the application and in the cited registration) (citing *In re i.am.symbolic, llc*, 866 F.3d at 1324).

Both Applicant's mark and the cited mark connote and create the impression of a person, either the owner of a retail store (Registrant's mark) or the designer or purveyor of clothing (Applicant) since retail clothing stores or clothing lines are often identified by the names of real people, personal names, or a fictional person. As to the number 3.10, it appears to suggest that there is more than one MARIO'S retail store and this is the third store or perhaps, the third iteration of the retail store.

The presence of the number 3.10 in the cited mark does lend a slightly different connotation to it than Applicant's MARIO'S mark.<sup>34</sup> However, we find that the

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<sup>34</sup> The Examining Attorney requested judicial notice in the appeal brief of a definition of "version" from a computer dictionary. "Version" is defined as "[a] specific release of a software or hardware product that is identified by a version number or a date (such as 2003)." WEBSTERS NEW WORLD COMPUTER DICTIONARY. We take judicial notice of this definition.

similarity in connotation resulting from the presence of the word MARIO'S in each mark outweighs any difference in connotation resulting from the presence of the potentially suggestive number 3.10 in the cited mark.

In terms of overall commercial impression, we find, again, that the marks are similar because of the shared term MARIO'S. This fundamental similarity in the source-indicating commercial impression created by both marks is not altered by the presence of the potentially suggestive term 3.10. Even if purchasers, with their imperfect recollections, notice and recall that one of the marks includes the number 3.10, they also will recall that both marks include the lead word MARIO'S. Consumers familiar with the MARIO'S 3.10 mark are likely to perceive MARIO'S as a product line of that brand. *See, e.g., Double Coin Holdings Ltd. v. Tru Dev. Canc. No. 92063808, 2019 TTAB LEXIS 347, at \*23* (“ROAD WARRIOR looks, sounds, and conveys the impression of being a line extension of WARRIOR.”).

We recognize that the marks ultimately must be compared in their entirety. When this comparison is made, we find that Applicant's mark is very similar to Registrant's mark in sound, appearance, meaning and commercial impression.

The first *DuPont* factor favors a finding of likelihood of confusion.

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*See In re Well Living Lab Inc.*, No. 86440401, 2017 TTAB LEXIS 156 at \*9, n.9 (judicial notice taken of definition attached to an applicant's appeal brief). Nonetheless, we do not find this definition particularly relevant because Registrant's services are retail store services and not software.

### E. Classes of Consumers and Conditions of Sale

Under the fourth *DuPont* factor we consider “[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 476 F.2d at 1361.

Purchaser sophistication or degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay Imps., Inc.* 396 F.3d at 1376. We must make our determination based on the least sophisticated consumer. *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1325 (Fed. Cir. 2014). Here, the purchasers of clothing items are ordinary consumers.

Applicant argues that customers of Applicant’s goods and the cited mark’s services are sophisticated because they are purchasing apparel which is a “fashionable category of items” and that the target consumers would distinguish the marks and associated products. 4 TTABVue 18.

Because there is no evidence in the record regarding purchasing conditions, and this is mere argument by Applicant, we find this factor neutral. *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005) (“Attorney argument is no substitute for evidence.”).

### II. Conclusion as to Likelihood of Confusion

As a final step, we “weigh the *DuPont* factors used in [our] analysis and explain the results of that weighing.” *In re Charger Ventures*, 64 F.4th 1375, 1384 (Fed. Cir. 2023) (emphasis omitted). The similarity of the marks and the relatedness of the

goods and services weigh in favor of a finding of likelihood of confusion. The number and nature of marks on similar goods or services and conditions of sale are neutral. We find confusion likely.

**Decision:** The Section 2(d) refusal to register Applicant's mark MARIO'S in Class 25 is affirmed. The application will proceed in Class 18 which was not subject to final refusal.