

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: March 17, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Jetharam Nemaram Gehlot

v.

Scott MacDonald

Opposition No. 91283147

Jeff Goehring of Nixon & Vanderhye P.C.
for Jetharam Nemaram Gehlot.

Rhett V. Barney of, Lee & Hayes, P.C.
for Scott MacDonald.

Before Adlin, Goodman and Brock,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Applicant, Scott MacDonald, seeks registration on the Principal Register of the mark NASHÉ BEAUTY (standard characters, BEAUTY disclaimed), for a variety of hair, skin and body care goods including, among others:

Hair care products and preparations, soaps and cleansers, perfume, cosmetics, preparations for the body, preparations for bath and shower, skin care preparations in solid and liquid form, massage products and

preparations, and sun care preparations for skin, in International Class 3.¹

We discuss the pertinent goods later in this decision.

Opposer, Jetharam Nemaram Gehlot, opposes registration on the ground of priority and likelihood of confusion based on his ownership of Registration No. 6836542 for the mark NISHA (standard characters) for the following goods:

Henna for cosmetic purposes; hair color; hair dye; mehndi preparations in the nature of henna for cosmetic purposes; hair shampoo; hair treatment preparations for cosmetic purposes and hair conditioner in International Class 3.²

Opposer also alleges ownership of application Serial No. 90614275 for the mark NISHA (standard characters) for a variety of personal care products that include:

Hair bleach, cosmetics, depilatory preparations, skincare preparations, cosmetic soaps, hair oils, teeth cleaning products, hand cleaning preparations, and face cleaning preparations in International 3.³

¹ Application Serial No. 90780658 was filed on June 17, 2021 based on Applicant's assertion of a bona fide intent to use the mark under Trademark Act Section 1(b), 15 U.S.C. 1051(b). The English translation of NASHÊ in the mark is "note" in the Kurdish language or, in the Shona language, "to go with God."

² 1 TTABVUE. The registration issued September 6, 2022, and was filed under Section 1(a) with an application filing date of March 31, 2021, alleging a date of first use and first use in commerce of March 31, 2016. The wording in the mark has no meaning in a foreign language. Plaintiff's notice of reliance, 14 TTABVUE 5-11.

References to trial record and briefs refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

The citation form in this opinion is in a form provided in the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 101.03(a) (2024). For decisions of the Board, this order employs citation to the Lexis database.

³ 1 TTABVUE. During the pendency of the proceeding, this Section 1(b) application matured into Registration No. 7176804. The registration has not been properly made of record,

Opposer alleges common law rights in NISHA for a wide range of skin, haircare, and hand care products.⁴ Opposer also alleges that Applicant lacked a bona fide intention to use the mark in commerce.⁵

Applicant filed an answer denying the salient allegations and asserting amplifications of its denials which are not true affirmative defenses.⁶ Applicant also filed a counterclaim to cancel Opposer's pleaded Registration No. 6836542 on the grounds of abandonment and nonuse, and non-ownership. 6 and 12 TTABVUE.

Opposer denied the salient allegations in the counterclaim. 8 TTABVUE.

I. Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the involved application.

Opposer provided by notice of reliance:

although referenced in both parties' notices of reliance. Opposer and Applicant's notices of reliance, 14 TTABVUE and 15 TTABVUE. It was not attached to Opposer's notice of reliance and was omitted from submission. Applicant's submission was a plain copy of the registration and not a certified copy; this submission does not make Registration No. 7176804 of record. Applicant's notice of reliance, 15 TTABVUE 9-10.

⁴ 1 TTABVUE paragraphs 3, 4 & 5.

⁵ Opposer's also alleges an ownership claim and argued this claim in its brief. The ownership claim is not an available ground for opposition of a Section 1(b) trademark application. Applicant's response and opening brief, 17 TTABVUE 17-19. *See Norris v. PAVE*, 2019 TTAB LEXIS 345, at *12-13 (TTAB 2019) ("a claim that an applicant is not the rightful 'owner' of the applied-for mark is not available when the application is not based on use of the mark in commerce."). Therefore, we give the ownership claim in the brief no consideration. *Id.* at *16.

⁶ Applicant alleged "no likelihood of confusion" and "no impairment or harm" as defenses. Applicant initially alleged acquiescence and estoppel defenses but in response to Opposer's motion to strike these defenses, 9 TTABVUE, Applicant filed an amended answer omitting them. Amended answer, 11& 12 TTABVUE. Applicant also alleged abandonment, failure to use a mark on goods, and non-ownership as defenses; these are not defenses but are the proper subject of and have been asserted by Applicant in a counterclaim. Answer and amended answer and counterclaim, 6 & 12 TTABVUE. The Board stated at 13 TTABVUE that the operative answer to the counterclaim is at 8 TTABVUE.

- an electronic printout of its pleaded Registration No. 6836542⁷
- copies of the subject application file Serial No. 90780658⁸
- screenshots from amainaturals.com and nashebeaute.com, and
- corporate records from British Columbia relating to Nashé Beauty.

Applicant provided by notice of reliance⁹:

- a plain copy of Opposer's pleaded Registration No. 6836542;
- a copy of Applicant's involved application Serial No. 90780658¹⁰
- copies of the Office Action and Response to Office action for Applicant's involved application Serial No. 90780658¹¹

⁷ As indicated at note 3, Opposer omitted an electronic printout of the registration for its pleaded application, although listed in the notice of reliance.

⁸ The submission of the subject application file was unnecessary as it was already of record pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b).

⁹ Applicant's request for judicial notice regarding the Yutika Natural Board (17 TTABVUE 8) via a weblink is denied as this is not the type of fact that is subject to judicial notice; it is not a commonly known fact nor does the Board access mere hyperlinks. Fed. R. Evid. 201; *In re HSB Solomon Assocs., LLC*, 2012 TTAB LEXIS 79, at *9 (TTAB 2012). ("A reference to a website's internet address is not sufficient to make the content of that website or any pages from that website of record."). But Opposer admitted in its answer to the counterclaim that "Jetharam Nemaram Gehlot is one of the directors of Yutika Natural Private Limited." Amended Answer and Counterclaim paragraph 10, 12 TTABVUE; Answer, paragraph 10, 8 TTABVUE.

¹⁰ Portions of this application file are illegible. It appears that this submission is a printout of the application file from the USPTO's Trademark Status and Document Retrieval (TSDR) electronic database. Submission of the subject application file was unnecessary, see note 8.

¹¹ Other than admissions against interest, the statements made in responses to office actions are hearsay and generally not admissible in Board proceedings. *Sunbeam Corp. v. Battle Creek Equip. Co.*, 1982 TTAB LEXIS 199, at *3 n.3 (TTAB 1982) ("statements made in an application for registration do not constitute admissible evidence in inter partes trademark proceedings"); *Lia Jene Inc. v. Vitabath, Inc.*, 1969 TTAB LEXIS 103, at *6 (TTAB 1969) ("certain statements made by a party in an ex parte proceeding may, under particular circumstances, be considered to be admissions against interest in a subsequent inter partes proceeding").

- internet website materials, and
- Opposer's answers to interrogatories and documents produced in connection with one of the interrogatory responses under Fed. R. Civ. P. 33(d).¹²

II. Entitlement to a Statutory Cause of Action

A plaintiff's entitlement to invoke a statutory cause of action for an opposition or cancellation is a necessary element in every inter partes case. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1304 (Fed. Cir. 2020).

To establish entitlement to a statutory cause of action under Trademark Act Section 13, 15 U.S.C., § 1063, a plaintiff must demonstrate "an interest falling within the zone of interests protected by the statute and ... proximate causation." *Corcamore*, 978 F.3d 1303 (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-134 (2014)); *see also Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 1070 (Fed. Cir. 2022). Stated another way, a plaintiff is entitled to bring a statutory cause of action by demonstrating 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, 1374-75 (Fed. Cir. 2020); *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 1275 (Fed. Cir. 2014).

Opposer submitted an electronic copy of its pleaded registration from the TSDR electronic database. Trademark Rule 2.122(d)(2), 37 C.F.R. § 2.122(d)(2). Opposer's

¹² Introduction by notice of reliance is permissible for documents provided under Fed. R. Civ. P. 33(d) as an interrogatory response. *Kohler Co. v. Baldwin Hardware Corp.*, 2007 TTAB LEXIS 3, at *5-6 (TTAB 2007).

notice of reliance, 14 TTABVUE 5-13. “Because Opposer’s registration[] [is] of record, Opposer has established its [entitlement] to bring a Section 2(d) claim that is not wholly without merit.” *New Era Cap Co. v. Pro Era, LLC*, 2020 TTAB LEXIS 199, at *17 (TTAB 2020); *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 2016 TTAB LEXIS 604, at *6 (TTAB 2016) (entitlement, formerly known as standing, established based on pleaded registration made of record). Once a plaintiff has shown entitlement on one ground, it has the right to assert any other ground in the proceeding. *See Hole in 1 Drinks, Inc. v. Lajtay*, 2020 TTAB LEXIS 9, at *10 (TTAB 2020) (citing cases).

Applicant has entitlement to a statutory cause of action as counterclaimant “by virtue of [his] position as defendant in the opposition.” *Carefirst of Md., Inc. v. FirstHealth of the Carolinas, Inc.*, 2005 TTAB LEXIS 406, at *29 (TTAB 2005).

III. Applicant’s Counterclaims

Abandonment, Nonuse and Ownership

We address Applicant’s counterclaims first, because if successful they would impact our analysis of Opposer’s claims. *See Robinson v. Hot Grabba Leaf, LLC*, 2019 TTAB LEXIS 96, at *16-17 (TTAB 2019) (electing to consider counterclaim to cancel pleaded registrations first because cancellation of those registrations was potentially dispositive of petitioner’s likelihood of confusion claim) (subsequent history omitted). Applicant must prove these claims by a preponderance of the evidence. *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1087 (Fed. Cir. 2000) (abandonment); *Wonderbread 5 v. Gilles*, 2015 TTAB LEXIS 261, at *20 (TTAB 2015)

(ownership); *United States Shoe Corp. v. J. Riggs West, Inc.*, 1984 TTAB LEXIS 203, at *6 (TTAB 1984) (nonuse).

Applicant also has raised an unpleaded naked licensing claim for which no amendment to the counterclaim was sought. There was no express consent to try this claim, so we consider whether the naked licensing claim was tried by implied consent. Fed. R. Civ. P. 15(b)(2). *See Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 2020 TTAB LEXIS 269, at *8 (TTAB 2020) (citation omitted), *appeal dismissed-in-part, aff'd-in-part, vacated-in-part on other grounds, and remanded*, 17 F.4th 129 (Fed. Cir. 2021).

Our reading of the record shows that the naked licensing claim was tried by implied consent as contemplated by Fed. R. Civ. P. 15(b)(2). Opposer discussed the merits of this claim in its response brief. *See, e.g., Giersch v. Scripps Networks, Inc.*, 2009 TTAB LEXIS 72, at *12 (TTAB 2009) (Board deemed pleading amended to conform to the evidence under Fed. R. Civ. P. 15(b) on abandonment defense where petitioner did not object on that ground in his reply brief, and instead addressed the merits of the defense).

Accordingly, Applicant's counterclaim is amended to allege the naked licensing (abandonment) claim. Fed. R. Civ. P. 15(b).

Unpleaded Counterclaim to Cancel Registration No. 7176804

In its brief, Applicant seeks to assert abandonment, nonuse (including partial abandonment and partial nonuse) claims against Opposer's pleaded application

(Serial No. 90614275) which matured into a registration (Registration No. 7176804) during the pendency of this proceeding.¹³

However, any cancellation against Registration No. 7176804 is unpleaded, and Opposer has objected to consideration of these claims. Opposer's reply and response brief, 18 TTABVue 4. Moreover, no fee has been paid to cancel this registration. Under Trademark Rule 2.111, 37 C.F.R. § 2.111, the payment of a fee is required to institute a counterclaim against a registration. Therefore, we give no consideration to the purported abandonment and nonuse counterclaims against Registration No. 7176804.

Applicant's Abandonment Claim: Registration No. 6836542

There are two elements to an abandonment claim: nonuse of the mark and intent not to resume use. *Noble House Home Furnishings, LLC v. Floorco Enters., LLC*, 2016 TTAB LEXIS 100, at *14 (TTAB 2016). "Abandonment is a question of fact" and "any inference of abandonment must be based on proven fact." *Yazhong Investing Ltd. v. Multi-Media Tech. Ventures, Ltd.*, 2018 TTAB LEXIS 168, at *20 (TTAB 2018) (citing *Stock Pot Rest., Inc. v. Stockpot, Inc.*, 737 F.2d 1576, 1578 (Fed. Cir. 1984) and Section 45 of the Trademark Act).

Abandonment may be based on at least three consecutive years of nonuse, or alternatively, a period of nonuse less than three years coupled with an intent not to resume use. *Otto Int'l Inc. v. Otto Kern GmbH*, 2007 TTAB LEXIS 62, at *5 (TTAB

¹³ Applicant also alleges a non-ownership claim against this registration but since the application was filed as a Section 1(b) application, this claim would be unavailable. See note 5.

2007) citing *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, (Fed. Cir. 1990). Since the registration at issue originated from a use-based application, the three-year period of nonuse would commence on March 31, 2021, the filing date of the application.¹⁴ See *ShutEmDown Sports, Inc. v. Lacy*, 2012 TTAB LEXIS 44, at *22 (TTAB 2012) (citations omitted). Applicant's counterclaim was filed on March 20, 2023. Therefore, Applicant has not alleged and could not allege three years of nonuse for Registration No. 6836542.¹⁵ *Id.* Applicant's theory of abandonment is that the goods were either never in use or were abandoned with an intent not to resume use. Answer and Amended Answer and Counterclaim, paragraph 6, 6 & 12 TTABVUE. See *ShutEmDown Sports*, 2012 TTAB LEXIS 44, at *22 (citations omitted) (abandonment may be based on the theory that the defendant has never used his mark).

Applicant states that “[e]vidence shows that Opposer abandoned his marks in connection with at least some, if not all, of the listed goods.”¹⁶ Applicant's response and opening brief, 17 TTABVUE 15. The listed goods in Opposer's registration are “Henna for cosmetic purposes; hair color; hair dye; mehndi preparations in the nature

¹⁴ Applicant's allegations in the counterclaim relating to the filing of the “statement of use” are implausible given the registration was based on use in commerce under Section 1(a) of the Trademark Act.

¹⁵ “The presumption of validity of a registration under 15 U.S.C. § 1057(b) entitles respondent to rely on the filing date of his application to claim use of his mark, and sets the critical period for petitioner to make a prima facie showing of abandonment.” *ShutEmDown Sports*, 2012 TTAB LEXIS 44, at *23-24.

¹⁶ In his brief, Applicant argues that the mark has not been used in connection with the goods for three years, or alternatively, the mark was never used in connection with the goods. Applicant's response and opening brief, 17 TTABVUE 15, 16.

of henna for cosmetic purposes; hair shampoo; hair treatment preparations for cosmetic purposes and hair conditioner.” Applicant states that in discovery “Opposer only provided documentation demonstrating use in commerce of hair dye, shampoo, conditioner, hand wash, and soap,” and specifically identifies “Henna for cosmetic purposes and mehndi preparations in the nature of henna for cosmetic purposes” as allegedly abandoned from the subject registration. Applicant’s response and opening brief, 17 TTABVUE 16-17, 25-26; Applicant’s reply brief, 19 TTABVUE 9.

To the extent that Applicant is alleging abandonment or nonuse of only certain identified goods, Applicant is seeking, in essence, a partial cancellation to restrict the identification of goods. *Johnson & Johnson v. Obschestvo s Ogranitchennoy*, 2012 TTAB LEXIS 192, at *5 (TTAB 2012). Therefore, by Applicant’s own statements in its brief, it appears that Applicant’s abandonment claim in connection with Registration No. 6836542 is one for partial abandonment. *Saul Zaentz Co. v. Bumb*, 2010 TTAB LEXIS 236, at *5 n.7 (TTAB 2010) (statements in brief “may have probative value as admissions against interest”) (citing TBMP § 706).

To show abandonment (and nonuse), Applicant introduced through notice of reliance printouts of internet materials: Nisha Amazon storefront, Nisha Walmart storefront, Yutika Natural Pvt Ltd’s LinkedIn page, and Yutika Natural Pvt Ltd’s website homepage, all with internet access dates of March 7, 2024, which is nearly twelve months after the filing of the counterclaim and less than three years from the

registration's application filing date of March 31, 2021.¹⁷ Applicant's notice of reliance, 15 TTABVUE 58-81. There is no accompanying testimony for these exhibits. Because these exhibits are hearsay, they are admissible only for what they show on their face.¹⁸ See *Spiritline Cruises LLC v. Tour Mgmt. Servs., Inc.*, 2020 TTAB LEXIS 3, at *7 (TTAB 2020) (internet printouts and other materials properly introduced under a notice of reliance without supporting testimony considered only for what they show on their face rather than for the truth of the matters asserted); *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 TTAB LEXIS 283, at *5-6 (TTAB 2019) (articles from the internet, unaccompanied by testimony, may not be considered for the truth of the matters asserted but are admissible for what they show on their face). In any event, abandonment cannot be established by pointing out that certain websites do not show trademark use; the mark in question could be used elsewhere.

For its abandonment and nonuse claims, Applicant also relies on Opposer's interrogatory responses nos. 1, 6 and 12, provided under Applicant's notice of reliance, claiming that the documentation accompanying the interrogatory response does not show use on all the goods.¹⁹ Applicant's response and opening brief, 17

¹⁷ Applicant is essentially requesting that the Board infer from these 2024 webpages that Opposer was not using the NISHA mark in connection with the identified henna goods for some prior period.

¹⁸ Some webpages show on their face these statements: "Natural henna extracts with sunflower & avocado oils 100% grey coverage with ultra soft deep shine." And "Natural Henna Based Hair Color." Applicant's notice of reliance, 15 TTABVUE 58, 60, 63.

¹⁹ Applicant obliquely references in its brief documents produced in connection with the interrogatory responses but in support only provides licensing documents from November 2021 that accompanied interrogatory response no. 12. Applicant's notice of reliance, 15 TTABVUE 5, 91, 95-101. See note 12.

TTABVUE 17, 25-26; Applicant's notice of reliance, 15 TTABVUE 4-5, 82-94. These interrogatory responses are not verified or sworn; they are only signed by counsel.²⁰ "[U]nsigned and unverified answers to interrogatories do not qualify as answers under Fed. R. Civ. P. 33" and "unverified answers to interrogatories are not competent evidence." *Daniel J. Quirk, Inc. v. Village Car Co.*, 2016 TTAB LEXIS 474, at *19 n.28 (TTAB 2016) (citing *Cabales v. U.S.*, 51 F.R.D. 498, 499 (S.D.N.Y. 1970), *aff'd*, 447 F.2d 1358 (2d Cir. 1971)); *see also Keystone Consol. Indus. v. Franklin Inv. Corp.*, 2024 TTAB LEXIS 290, at *23-25 (TTAB 2024) (same). But in any event, these responses and documents do not establish abandonment of all of the goods in the subject registration or even abandonment of the henna goods alone.²¹ As indicated, the only documents Applicant has submitted are licensing documents provided under Fed. R. Civ. P. 33(d). These documents provide for worldwide licenses for Class 3 goods under the NISHA mark, which would include all identified goods. In addition,

²⁰ The interrogatories were signed on September 8, 2023 which is less than three years from the March 31, 2021 application filing date. *Cf. ShutEmDown Sports*, 2012 TTAB LEXIS 44, at *24 (Board considered interrogatory responses provided in the Board proceeding to establish a prima facie case of three years nonuse: "the more than three-year lapse of time, from respondent's March 15, 2006 application filing date to the August 4, 2009 date of his admission that he has never used the mark for the bulk of the identified goods is sufficient for a prima facie showing of abandonment as to the goods not in use.").

²¹ Opposer's response to interrogatory no. 1 states: "Opposer has used its mark in connection with all the recited goods beginning in 2016 and intends to spread the business across the United States of America for all products namely, Mehendi, shampoo, lotion, hair colour, lip balm, etc." Applicant's notice of reliance, 15 TTABVUE 88. Etcetera is defined as "a number of unspecified additional persons or things." MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, accessed March 14, 2025). The Board may take judicial notice of dictionaries in print and online format. *In re Red Bull GmbH*, 2006 TTAB LEXIS 136, at *6-9 (TTAB 2006). The two other responses, nos. 6 and 12, identified in the notice of reliance by Applicant as relevant, relate to users of the mark; interrogatory no. 12 identifies Opposer "as a director, shareholder, and promoter" of the corporate licensees.

as Opposer points out, 18 TTABVUE 4, there is no evidence in the record relating to Opposer's intent.

Based on the evidence presented, Applicant has not established by a preponderance of the evidence abandonment with no intent to resume use of all of the goods or the henna goods for Registration No. 6836542. Nor has Applicant established that Opposer never used the mark in connection with all of the goods or the henna goods.

Applicant's Naked Licensing Abandonment Claim Registration No. 6836542

Applicant also asserts abandonment based on naked licensing because Opposer failed to exercise the requisite control over the nature and quality of the goods. Applicant's response and opening brief, 17 TTABVUE 22. *See Paris Glove of Canada Ltd. v. SBC/Sporto Corp.*, 2007 TTAB LEXIS 84, at *25 (TTAB 2007); *Nobelle.com, LLC v. Qwest Communs. Int'l, Inc.*, 2003 TTAB LEXIS 43, at *20 (TTAB 2003) (abandonment based on a course of conduct). "Whether, in fact, sufficient control is exercised is a question of fact in each case and the burden of proving lack of control or insufficient control is in the party claiming the abandonment." *Nestle Co. v. Nash-Finch Co.*, 1987 TTAB LEXIS 63, at *14 (TTAB 1987).

Applicant argues that "none of Opposer's licenses contain any quality control conditions, and thus, they are invalid naked licenses." Applicant's response and opening brief, 17 TTABVUE 22. Opposer argues that the evidence is lacking to support this claim, also asserting that Opposer provides sufficient control as a

director of the licensee, Yutika Natural Pvt Ltd. Opposer's Reply and Response brief, 18 TTABVUE 7-8.

"The absence, ... of an express contract right to inspect and supervise a licensee's operations does not mean that the plaintiff's method of licensing failed to comply with the requirements of the Lanham Act. Plaintiff may in fact have exercised control in spite of the absence of any express grant by licensees of the right to inspect and supervise." *Stockpot, Inc. v. Stock Pot Rest., Inc.*, 1983 TTAB LEXIS 83, at *23 (TTAB 1983), *aff'd* 737 F.2d 1576 (Fed. Cir. 1984). Other than the licensing agreements, there is no other evidence Applicant relies on, and there is no testimony in the record relating to Opposer's quality control activities.

As a result, we find that Applicant has not met its burden by a preponderance of the evidence to establish abandonment based on naked licensing by relying solely on the licensing agreements. As the caselaw makes clear, lack of an express provision of quality control in a licensing agreement alone does not establish naked licensing. Moreover, "[t]here is nothing in the record to suggest" that the goods "were in any way whatsoever unsatisfactory." *Brewski Beer Co. v. Brewski Bros.*, 1998 TTAB LEXIS 116, at *28 (TTAB 1998).

In addition, Opposer admitted in the answer to the counterclaim that he is on the Board of Directors of licensee Yutika Natural Pvt Ltd., which manufactures the goods; this provides some evidence of a special relationship for adequate quality control and oversight. Counterclaim and Answer paragraphs 5 and 10, 6, 8 and 12 TTABVUE. Adequate quality control may be established in the absence of a formal

agreement in cases where the parties have a “close working relationship.” *See, e.g., Woodstock’s Enters. Inc. (Cal.) v. Woodstock’s Enters. Inc. (Or.)*, 1997 TTAB LEXIS 21, at *22-23 (TTAB 1997) (quoting *Taco Cabana Int’l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1121 (5th Cir. 1991), *aff’d*, 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615 (1993), *aff’d*, 152 F.3d 942 (Fed. Cir. Mar. 5, 1998) (unpublished)); *see also Doeblers’ Pa. Hybrids, Inc. v. Doeblner*, 442 F.3d 812, 824 (3rd. Cir. 2006) (in connection with naked licensing claim, the court found that a special relationship may exist based on “a high degree of interlocking ownership and control”).

Based on the evidence presented, Applicant has not established by a preponderance of the evidence abandonment based on naked licensing.

Conclusion as to Abandonment

In view thereof, Applicant’s abandonment or partial abandonment counterclaims against Registration No. 6836542 are denied.

Whether Opposer’s Registration No. 6836542 is Void ab Initio for Nonuse?

Under Section 1(a) of the Trademark Act, a mark may not be registered unless it is “used in commerce.” “An application based on use of the mark in commerce under Section 1(a), ... is void ab initio if the mark was not in use in commerce in connection with the goods identified in the application at the time the application was filed.” *Fender Musical Instruments Corp. v. Win-D-Fender, LLC*, 2022 TTAB LEXIS 482, at *11-12 (TTAB 2022) (redesignated as precedent). Nonuse on some of the goods is not treated as a complete failure to use the mark before the filing date of the application and does not render the registration void ab initio from the application filing date.

Grand Canyon West Ranch, LLC v. Hualapai Tribe, 2006 TTAB LEXIS 82, at *5-6 (TTAB 2006).

Applicant relies on the aforementioned internet webpage evidence from March 7 2024, which is hearsay. The unverified interrogatory responses do not establish non-use as to all of the identified goods on the application filing date. Applicant acknowledges that Opposer demonstrated use of the mark in commerce on hair dye, shampoo, and conditioner, which is a statement against interest.²² Applicant's response and opening brief, 17 TTABVUE 16. *Saul Zaentz Co. v. Bumb*, 2010 TTAB LEXIS 236, at *5 n.7. Therefore, we find there is no evidence in the record that Opposer has failed to use the mark on all of the goods by the application filing date to render Registration No. 6836542 void ab initio.

As to partial nonuse from the application filing date, Applicant states that Opposer provided a date of first use of its goods in interrogatory responses but then failed to provide documentation for all of the goods, focusing on the henna goods in Registration No. 6836542 as being subject to nonuse and without documentation of use. Applicant's response and opening brief, 17 TTABVUE 16. As stated, the above-mentioned internet evidence is hearsay. And the unverified interrogatory responses are insufficient evidence of nonuse of the henna goods. The only documents submitted by Applicant in connection with Opposer's interrogatory response no. 12 are the licensing documents for worldwide licenses of the NISHA mark which cover Class 3

²² Applicant also has not indicated what other documentary records were provided in connection with the interrogatory responses with respect to Registration No. 6836542.

goods, (which would include the identified henna goods). Such use under a license would inure to Opposer's benefit. *Pneutek, Inc. v. Scherr*, 1981 TTAB LEXIS 15, at *29 (TTAB 1981). We find that no inference can be made of partial nonuse of Opposer's henna goods on the filing date of the application due to an incomplete evidentiary picture. Therefore, Applicant has not met its burden on the nonuse or partial nonuse claim.

Conclusion on Nonuse Claim

The counterclaim against Registration No. 6836542 based on nonuse or partial nonuse is denied.

Applicant's Non-ownership claim: Registration No. 6836542

Only the owner of a mark may apply to register it. Trademark Act, 15 U.S.C. § 1051(a). A use-based application filed by a person who does not own the mark at the time of filing is void ab initio. *Lyons v. Am. Coll. Of Veterinary Sports Med. & Rehab.*, 859 F.3d 1023, 1027 (Fed. Cir. 2017); *Huang v. Tzu Wei Chen Food Co. Ltd.*, 849 F.2d 1458, 1460 (Fed. Cir. 1988) (affirming Board's holding that an application was void ab initio because the applicant was not the owner of the mark on the filing date); *UVeritech, Inc. v. Amax Lighting, Inc.*, 2015 TTAB LEXIS 242, at *7 n.6 (TTAB 2015) ("if Respondent was not the owner of the mark when application was made for registration, then the registration is void ab initio"); *see also* Trademark Rule 2.71(d), 37 C.F.R. § 2.71(d) ("An application filed in the name of an entity that did not own the mark as of the filing date of the application is void."). Ownership "must be

determined on a case by case basis dependent on the particular facts adduced in each case.” *In re Briggs*, 1986 TTAB LEXIS 139 at *5-6 (TTAB 1986).

Applicant argues that although Opposer is shown as the owner of the registration, he has “provided absolutely no evidence establishing that he has ever used the mark in his individual capacity since its creation” and failed to allege the proper owner. Applicant’s response and opening brief, 17 TTABVUE 20. Applicant submits that the actual owner is Yutika Natural Pvt Ltd., and bases this assumption on the internet webpages and LinkedIn pages it submitted under notice of reliance. *Id.* at 20, Applicant’s notice of reliance, 15 TTABVUE 73-81. As already indicated, these internet exhibits that Applicant relies on are unaccompanied by any testimony, are hearsay, and do not go to the truth of matter. *See Spiritline Cruises*, 2020 TTAB LEXIS 3, at *7.

Therefore, we cannot find non-ownership based on these internet documents.

We further note that two licensing agreements are in the record, submitted as documents by Opposer in connection with its interrogatory response no. 12 under Fed. R. Civ. P. 33(d) and executed on November 16, 2021.

Under Board precedent, rights to a mark may be acquired and maintained through the use of that mark by a controlled licensee, even when the only use of that mark has been and is by the licensee. *Pneutek, Inc. v. Scherr*, 1981 TTAB LEXIS 15, at *29; *see also ABC Moving Co. v. Brown*, 1983 TTAB LEXIS 206, at *9-10 (TTAB 1983) (same).

Applicant argues that these licensing agreements only provide the licensees with rights in India and relate to Indian trademarks. Applicant's notice of reliance, 15 TTABVUE 96-101. Applicant's response and opening brief, 17 TTABVUE 21; Applicant's reply brief, 19 TTABVUE 4.²³

However, the licensing documents identify the trademark as NISHA for Class 3 goods and indicate the territory is "worldwide." Applicant's notice of reliance, 15 TTABVUE 96-101. Additionally, while a license generally is written, a valid license may be oral or implied by the relationship between the parties or the parties' conduct. So even if there is no written agreement addressing the United States NISHA trademark, a license can be implied based on the parties' conduct. *See McCoy v. Mitsuboshi Cutlery, Inc.*, 67 F.3d 917, 920 (Fed. Cir. 1995) ("the entire course of conduct between a ... trademark owner ... may create an implied license.") (citing *Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1559 (Fed.Cir.1983); *Sock It to Me v. Fan*, 2020 TTAB LEXIS 201, at *12-13 (TTAB 2020) (even without a formal written agreement, a license can be implied; it can also be an oral license); *Woodstock's Enters. Inc. (Cal.) v. Woodstock's Enters. Inc. (Or.)*, 1997 TTAB LEXIS 21, at *23-24 (TTAB 1997) ("Both parties here agree that there is no formal, written agreement between them covering use of the WOODSTOCK'S marks. It is settled, however, that a license

²³ Applicant also claims that the worldwide license is contrary to the territoriality doctrine since it relates to an Indian trademark. 19 TTABVUE 5. "The concept of territoriality is basic to trademark law; trademark rights exist in each country solely according to that country's statutory scheme." *Person's Co. v. Christman*, 900 F.2d 1565, 1568-1569 (Fed. Cir. 1990).

can be implied. ... [T]he reality of the situation is akin to an informal, implied license from respondent to petitioner to use the registered mark in California.”).

Because a licensing arrangement can inure to Opposer’s benefit, and because we cannot consider the internet responses, we find that the evidentiary record is not sufficiently developed to meet Applicant’s burden of proof to find non-ownership of Registration No. 6836542.

Conclusion as to Non-ownership

We find that Applicant has not established that Opposer is not the owner of the trademark NISHA, and the counterclaim against Registration No. 6836542 based on non-ownership is denied.

IV. Likelihood of Confusion²⁴

Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 951 (Fed. Cir. 2000). Because Opposer’s pleaded registration is of record, and Applicant’s counterclaims have been denied, priority is not an issue with respect to the goods identified in pleaded Registration No. 6836542. *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 1402 (CCPA 1974).

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

²⁴ While Opposer alleged in the notice of opposition Applicant’s lack of bona fide intention to use the mark on the identified goods, it did not pursue this claim. Therefore, we deem the lack of bona fide intent claim forfeited or waived. *See JNF LLC v. Harwood Int’l Inc.*, 2022 TTAB LEXIS 328, at *4 n.8 (TTAB 2022) (finding asserted defenses not pursued either waived or forfeited). We already indicated that the ownership claim, which Opposer has argued in the brief, is unavailable for a Section 1(b) application. *See* note 5.

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 also *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003). Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 988 (Fed. Cir. 2020) (citation omitted). 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.*, 2019 TTAB LEXIS 381, at *2 (TTAB 2019).

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 and differences in the marks.”). These factors, and others, are discussed below.

Similarity or dissimilarity of the goods

The second *DuPont* factor considers “[t]he similarity or dissimilarity and nature of the goods as described in an application or registration.” *DuPont*, 476 F.2d at 1361.

In determining the similarity or dissimilarity of the goods, we must focus on the

goods as they are identified in the involved application and cited registration. *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). It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application or registration. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981).

Applicant's goods include 3-in-1 hair shampoos, baby shampoos, dry shampoos, non-medicated shampoos for curly hair, straight hair, and enhancing hair curls, and hair conditioners, oils for hair conditioning, and cosmetic preparations for the hair and scalp.

Opposer's goods include hair shampoo; hair treatment preparations for cosmetic purposes and hair conditioner.

Opposer's hair shampoo encompasses 3 in-1 hair shampoos, baby shampoos, dry shampoos, and non-medicated shampoos. *See In re Hughes Furniture Indus.*, 2015 TTAB LEXIS 65, at *10 (TTAB 2015) ("Applicant's broadly worded identification of 'furniture' necessarily encompasses Registrant's narrowly identified "residential and commercial furniture."); *S.W. Mgmt., Inc. v. Ocinomled, Ltd.*, 2015 TTAB LEXIS 176, at *60-61 (TTAB 2015) ("where an applicant identifies its services broadly, we must presume that the services encompass all services of the type identified") (citation omitted). Opposer's hair conditioner and Applicant's hair conditioner are identical; Opposer's hair conditioner encompasses Applicant's oils for hair conditioning.

Applicant's cosmetic preparations for the hair and scalp is broad enough to encompass Opposer's hair treatment preparations for cosmetic purposes.

We find the goods identical in part. The second *DuPont* factor weighs in favor of likelihood of confusion.

Established, likely-to-continue trade channels, and the classes of purchasers

Under the third *DuPont* factor, we consider the "similarity or dissimilarity of established, likely-to-continue trade channels." *DuPont*, 476 F.2d at 1361. We also consider the classes of consumers. We base our consideration of the channels of trade and classes of consumers on the goods recited in the application and pleaded registration. *Octocom Sys.*, 918 F.3d at 942. ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application, regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.").

There are no restrictions as to trade channels or classes of consumers for Applicant's and Opposer's identified goods. Because the goods are legally identical in part, we must presume that those legally identical goods will move in the same trade channels and be offered to the same classes of purchasers. *See In re Viterro Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 754 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

The similarity of the trade channels and classes of purchasers for the identical in part goods also weighs in favor of likelihood of confusion.

Conditions of sale

The fourth *DuPont* factor concerns “[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. When considering this factor, we are bound by the identifications of goods in the application and the cited registration. *See In re Guild Mortg. Co.*, 2020 TTAB LEXIS 17, at *16 (TTAB 2020). 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.*, 396 F.3d at 1376. We must make our determination based on the least sophisticated consumer. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 1325 (Fed. Cir. 2014).

Considering the identification of goods for the involved application and pleaded registration, there are no limitations on price points or intended consumers, and we must presume that the goods are sold at all price points and to all types of consumers, both sophisticated and ordinary.

Opposer argues that cosmetics and personal care items are relatively inexpensive making them susceptible to impulse purchase, which increases the risk of consumer confusion. Opposer’s brief, 16 TTABVUE 6.

Applicant argues that the “evidence establishes the level of consumer sophistication is high,” that the goods are not subject to impulse purchases and that

“many of Applicant’s goods are sold at the high price point of around \$60-\$90 for 30ml of product.” Applicant’s response and opening brief, 17 TTABVUE 13. In support, Applicant cites to Applicant’s website. *Id.* Opposer’s notice of reliance, 14 TTABVUE 79. Applicant argues that Opposer’s products such as hair dyes “that result in a permanent modification of a consumer’s image are not purchased without ‘careful consideration.’” Applicant’s response and opening brief, 17 TTABVUE 13.

As already discussed, absent testimony, Applicant’s webpages provided under Opposer’s notice of reliance are hearsay. *See Spiritline Cruises*, 2020 TTAB LEXIS 3, at *7. But in any event, we cannot read a higher price point into Applicant’s unrestricted identification based on extrinsic evidence such as the webpages. *See In re Bercut-Vandervoort & Co.*, 1986 TTAB LEXIS 124, at *6-7 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

Other than the internet webpages, neither Applicant nor Registrant has submitted evidence to support their contentions regarding purchasing conditions or consumers, relying on mere attorney argument. *See In re Iolo Techs. LLC*, 2010 TTAB LEXIS 223, at *12 (TTAB 2010) (“Applicant urges us to consider consumer sophistication as a factor. However, applicant has submitted no evidence that either its consumers or those of registrant would be sophisticated.”); *see also Enzo Biochem v. Gen-Probe, Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005) (“Attorney argument is no substitute for evidence.”).

As to the nature of the goods themselves, while there may be some purchasers who will exercise care in purchasing hair care products or hair color, there is no evidence that the least sophisticated potential consumers of the goods will exercise anything more than ordinary care in their purchases.

We find the fourth *DuPont* factor is neutral.

Similarity or dissimilarity of the marks

Under the first *DuPont* factor, we consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005) (quoting *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*, 2014 TTAB LEXIS 214, at *4 (TTAB 2014) (citations omitted).

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 offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012).

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 a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 2014 TTAB LEXIS 166, at *17 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 1975 TTAB LEXIS 236, at *6 (TTAB 1975).

Applicant's mark is NASHÉ BEAUTY (BEAUTY disclaimed) while Opposer's mark is NISHA. Applicant's mark is a combination of a foreign word with an English word. The dominant portion of Applicant's mark is NASHÉ because BEAUTY is generic or at best descriptive and disclaimed. *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407 (Fed. Cir. 1997) (generic disclaimed term café in mark given less weight in the analysis).

Opposer argues that its mark and the dominant portion of Applicant's mark are similar (or nearly identical) because they contain the letters N_SH_, and have similar letter patterns and sounds (or structure and cadence), which results in visual and phonetic similarity. Opposer's brief, 16 TTABVUE 4; Opposer's reply and response brief, 18 TTABVUE 3. Opposer points out that in view of the identical goods, the marks need not be as similar as would be required with merely related goods. Opposer's brief, 16 TTABVUE 4. Opposer also asserts that the mark NISHA is strong because it is arbitrary as applied to the identified goods. Opposer's brief, 16 TTABVUE 7.

In response, Applicant argues that the marks are visually and phonetically distinct and that the pronunciations of each mark are distinct. Applicant's response and opening brief, 17 TTABVUE 11.

A determination of likelihood of confusion is not made on a purely mechanical basis. *See In re John Scarne Games, Inc.*, 1959 TTAB LEXIS 311 at *1 (TTAB 1959) ("Purchasers ... do not engage in trademark syllable counting[;] they are governed by general impressions made by appearance or sound, or both."). "[I]n determining whether there is a likelihood of confusion, we must consider the marks in their entirety. Purchasers are not expected to, and do not, count the number of letters which marks have in common." *Am. B.D. Co. v. N.P. Bevs., Inc.*, 1981 TTAB LEXIS 117, at *2-3 (TTAB 1981) citing *P&G v. Dart Drug Corp.*, 1974 TTAB LEXIS 165, at *3 (TTAB 1974) ("while it is true as stressed by opposer that 'PAMPERS' and 'RUMPERS' are both comprised of seven letters, the last five of which are identical, these marks, when considered in their entirety differ substantially in both appearance and sound, and the connotations thereof are distinctly different."); *R. J. Reynolds Tobacco Co. v. Am. Brands, Inc.*, 1972 TTAB LEXIS 46, at *4 (TTAB 1972) ("in determining whether there is a likelihood of confusion, we must look to the marks in their entirety and not dissect them letter by letter. Customers are not expected to, and will not, count the number of letters ... in common ...").

To the extent NISHA and NASHÉ have certain letters in common, there are some similarities in appearance. But there are also some dissimilarities in their

appearance due to the differences in the initial and end vowels for the terms NISHA and NASHÉ as well as the addition of an accent mark on the end vowel in NASHÉ.

As to pronunciation, it is well established that there is no correct pronunciation of a trademark that is not a recognized English word. *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 1331-32 (Fed. Cir. 2014) (citing *In re Belgrade Shoe Co.*, 411 F.2d 1352, 1353 (CCPA 1969)). We consider “all the reasonable possibilities” for their pronunciation. *Inter IKEA Sys.*, 2014 TTAB LEXIS 166, at *18 n.19 (citing *Centraz Indus. v. Spartan Chem. Co.*, 2006 TTAB LEXIS 20, at *10 (TTAB 2006)).

The terms NISHA and NASHÉ, with the most likely standard English pronunciations, would not sound the same. Considering reasonable possibilities, the marks differ in their initial vowel sounds. As to the end vowels, the accent mark over the letter “e” may alter the pronunciation (as “ay”) and gives the word NASHÉ a foreign flair, even if consumers are not familiar with the Kurdish or Shona languages. If consumers did not notice the accent mark or understand the effect of the accent mark on pronunciation with respect to the end vowel for NASHÉ, based on standard English pronunciation, the end vowel “e” could be silent²⁵ while the end vowel “a” for NISHA could be a short “a.” There are many ways in which these marks could sound different, even though we recognize the possibility that they could sound similar in part. Based on all reasonable pronunciations, we find significant differences in sound between NASHÉ and NISHA. And of course, there are differences in appearance and

²⁵ Even if we consider that a consumer may pronounce the “SHÉ” portion of Applicant’s mark as “she,” the marks would still likely result in different end vowel sounds.

pronunciation between NASHÉ BEAUTY and NISHA when we consider the marks in their entireties. Lastly, even if we consider consumers' penchant for shortening marks, *In re Bay State Brewing Co.*, 2016 TTAB LEXIS 46, at *9 (TTAB 2016), we consider NISHA and NASHÉ significantly different in appearance and sound.

As to connotation, neither NISHA and NASHÉ is a recognized English word. Applicant's mark NISHA has no meaning in a foreign language while NASHÉ is a foreign word in the Kurdish or Shona languages, although most consumers might not be aware that meaning. We find that consumers would likely view NISHA and NASHÉ as coined, made-up, or foreign terms with no particular meaning, or at least no known meaning in the United States. With regard to connotation of NASHÉ BEAUTY, even without knowing the meaning of NASHÉ, consumers will at least understand the goods relate to products that enhance one's beauty. The same is not true of NISHA.

Overall, we find the marks are dissimilar. When we consider the marks in their entirety, we find there are significant differences in appearance, pronunciation and commercial impression.

The first *DuPont* factor weighs heavily against a finding of likelihood of confusion.

Conclusion as to Likelihood of Confusion

The goods are identical in part and the trade channels and classes of consumers are presumed to overlap for the identical in-part goods, which weighs in favor of likelihood of confusion. The fourth *DuPont* factor is neutral.

The similarity of the marks heavily weighs against likelihood of confusion, and we find the first *Dupont* factor is dispositive such that confusion is not likely. *See Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 1381-82 (Fed. Cir. 2016) (“[A] single *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks”) (quoting *Odom’s Tenn. Pride Sausage, Inc. v. FF Acquisition, LLC*, 600 F.3d 1343, 1346-47 (Fed. Cir. 2010) (“[E]ven if all other relevant *DuPont* factors were considered in [opposer’s] favor, as the board stated, the dissimilarity of the marks was a sufficient basis to conclude that no confusion was likely.”)).

Decision:

The opposition is dismissed under Section 2(d), and the ownership claim is given no consideration. The counterclaims for abandonment, nonuse and ownership are denied.

Brock, Administrative Trademark Judge, concurring in part and dissenting in part:

I concur in part with the majority opinion. I respectfully dissent only with the decision to dismiss the opposition under Section 2(d) and would sustain. I agree with the majority’s findings that the goods are identical in part and that the trade channels and classes of purchasers are also identical; however, I find that these factors weigh heavily in favor of finding a likelihood of confusion in our analysis. In comparing the marks, when the goods are legally identical, the degree of similarity necessary to find

likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012). I find that the overall appearance of the marks is similar—N (vowel) SH (vowel)—and that vowels are pronounced differently regionally. Since the marks are coined terms or non-English words, there is no clear meaning or difference in meaning. Given the infallibility of memory, I would find that the marks are sufficiently close in overall commercial impression such that confusion is likely, especially given our findings as to the second and third *DuPont* factors.