

This Opinion is Not a
Precedent of the TTAB

Hearing: March 10, 2022

Mailed: May 27, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Creel Abogados, S.C. and Carlos Creel Carrera

v.

Creel, García-Cuéllar, Aiza y Enríquez, S.C.

Opposition No. 91217047

Ira Cohen of Ira Cohen, P.A. for Creel Abogados, S.C. and Carlos Creel Carrera.

Laura Popp-Rosenberg and Shelby P. Rokito of Fross Zelnick Lehrman & Zissu,
P.C. for Creel, García-Cuéllar, Aiza y Enríquez, S.C.

Before Kuczma, Adlin, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

William Shakespeare famously asked “What’s in a name?”¹ In the case of the name “Creel,” the answer is nearly eight years of contentious litigation between two sets of Mexican lawyers over the right to register the name in the United States for legal services. One firm, Creel, García-Cuéllar, Aiza y Enríquez, S.C. (“Applicant”), seeks registration on the Principal Register of the standard-character marks CREEL and

¹ WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2.

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ.² A second firm, Creel Abogados, S.C. (“Creel Abogados”), and one of its partners, Carlos Creel Carrera (“Carlos Creel”)³ (jointly “Opposers”), oppose registration of Applicant’s marks on the grounds that: (1) both marks are “deceptive” within the meaning of Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a) or, alternatively, “deceptively misdescriptive” of Applicant’s services within the meaning of Section 2(e)(1) of the Act, 15 U.S.C. § 1052(e)(1); (2) both marks falsely suggest a connection with Opposers, in violation of Section 2(a) of the Act; and (3) both marks consist of or comprise the name of Carlos Creel without his written consent, in violation of Section 2(c) of the Act, 15 U.S.C. § 1052(c); and (4) the CREEL mark is “primarily merely a surname” within the meaning of Section 2(e)(4) of the Act, 15 U.S.C. § 1052(e)(4).

² Application Serial No. 86080973 to register CREEL and Application Serial No. 86080991 to register CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ were both filed on October 2, 2013. The CREEL application was filed under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use of the mark on December 1, 1936 and first use of the mark in commerce on April 19, 1976. The CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ application was filed under Section 44(e) of the Trademark Act, 15 U.S.C. § 1026(e), based on Applicant’s Mexican Registration No. 1129697, which issued on November 6, 2009.

³ One of Applicant’s trial witnesses testified that “[i]n Mexico, individuals traditionally have two surnames, with the first being the father’s family name and the second being the mother’s family name,” and that the “first surname would equate to what Americans would call a person’s last name.” Declaration of Carlos Ricardo Aiza Haddad (“Aiza Declaration”) ¶ 3 n.1 (114 TTABVue 3). Accordingly, “Creel” would be considered the surname of opposer Carlos Creel Carrera. Except where necessary for clarity, we will refer to the various Mexican attorneys identified in this case by the first of their two surnames.

The case is fully briefed,⁴ and counsel for the parties appeared at a video hearing before the panel on March 10, 2022.⁵ We dismiss the opposition.

I. The Record

The record consists of the operative pleadings,⁶ the file histories of the two opposed applications, by operation of Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1), and the following materials submitted by the parties:

⁴ Citations in this opinion to the briefs and other materials in the case docket refer to TTABVUE, the Board's online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. The parties designated certain materials as "Confidential" under the Board's Standard Protective Order and filed those materials under seal. Opposers' main brief appears at 130 TTABVUE and its reply brief appears at 140 TTABVUE. Applicant's redacted brief appears at 136 TTABVUE.

⁵ About a week after the hearing, Applicant filed a document captioned "Post-Hearing Communication to the Board," which purported "to respond to two questions posed by Judge Kuczma during the oral hearing in this proceeding held on March 10, 2022." 148 TTABVUE 2. Applicant's filing addressed the composition of Applicant's law firm and cited two cases for the proposition that evidence of acquired distinctiveness in the record in an opposition proceeding could be considered when it had not been presented to the United States Patent and Trademark Office ("USPTO") during prosecution of the opposed application. *Id.* at 2-3. A week later, Opposers filed a document captioned "Opposers' Motion to Strike Applicant's Post-Hearing Communication to the Board." 149 TTABVUE. Opposers' filing argued that Applicant's "Post-Hearing Communication to the Board" should be stricken because Section 802.08 of the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") does not provide for "any post-hearing briefing, evidence, or arguments." 149 TTABVUE 3. Two weeks later, Applicant filed a document captioned "Opposition to Opposers' Motion to Strike," in which Applicant stated that it "want[ed] to be on record as objecting to the Motion to Strike so that it is not granted as conceded." 150 TTABVUE 2. We decline to consider Applicant's "Post-Hearing Communication to the Board," which renders moot Opposers' subsequent motion to strike and Applicant's opposition thereto. "Board practice does not allow parties to submit additional comments or clarify their positions after oral hearing, unless specifically requested to do so by the Board," TBMP Section 802.01, and no such request was made to either party. In reaching our decision, all relevant evidence in the record and all applicable legal authorities have been considered.

⁶ The operative pleadings are Opposers' First Amended Consolidated Notice of Opposition, filed by stipulation of the parties, 6 TTABVUE 4-9, and Applicant's First Amended Answer to the First Amended Consolidated Notice of Opposition, 10 TTABVUE 2-12, which Applicant filed in redacted form because one of the exhibits was designated as Confidential. Applicant

Opposers

- The Declaration of Alonso Castellanos Armella (“Castellanos Declaration”),⁷ and Exhibit 1 thereto, 110 TTABVUE 2-16, submitted during Opposers’ trial period;
- Opposers’ Notice of Reliance covering Exhibits 2-6 thereto, 111 TTABVUE 2-236, submitted during Opposers’ trial period;
- Opposers’ Second Notice of Reliance covering Exhibits 7-11 thereto, 122 TTABVUE 2-201, submitted during Opposers’ rebuttal period;
- The Declaration of Carlos Loperena Ruiz (“Loperena Declaration”), offered as an expert witness on Mexican law, and Exhibits 1-2 thereto, 123 TTABVUE 2-38, submitted during Opposers’ rebuttal period; and
- The Declaration of Carlos Creel (“Creel Declaration”), and Exhibits 1-9 thereto, 125 TTABVUE 2-71, submitted during Opposers’ rebuttal period.⁸

Applicant

- The Aiza Declaration, and Exhibits CR1-CR27 thereto, 114 TTABVUE 2-414;⁹
- Applicant’s Notice of Reliance on Printed Publications covering Exhibits CR28-CR89 thereto, 116 TTABVUE 2-433;
- Applicant’s Notice of Reliance on Official Records covering Exhibits CR90-CR119, 117 TTABVUE 2-114; and

denied most of the salient allegations in the First Amended Consolidated Notice of Opposition, and interposed the affirmative defenses of contractual estoppel, waiver, acquiescence, and unclean hands. We address those affirmative defenses below.

⁷ We will cite all declarations by paragraph and exhibit number (e.g., “Castellanos Decl. ¶ 2; Ex. 1”), as well as by TTABVUE page cites (e.g., “110 TTABVUE 2”).

⁸ The Creel Declaration was executed on August 14, 2017, more than three years before trial began, and was originally submitted in opposition to Applicant’s summary judgment motion. 71 TTABVUE. Nevertheless, it meets the requirement of Trademark Rule 2.123(a), 37 C.F.R. § 2.123(a) and we have considered it, subject to our discussion below regarding its submission during Opposers’ rebuttal period.

⁹ Certain exhibits to the Aiza Declaration were designated as “Confidential” and were redacted from the public filing. The unredacted Aiza Declaration appears at 115 TTABVUE.

- The Declaration of Alonso Rivera Gaxiola (“Rivera Declaration”), offered as an expert witness on Mexican law, and Exhibits CR120-CR122 thereto, 118 TTABVUE 2-7.

II. The Parties and Their Marks and Businesses

The parties disagree about virtually everything, including the history of Applicant’s law firm that forms the backdrop for this litigation. The Aiza and Creel Declarations present somewhat different versions of that history. Aiza Decl. ¶¶ 3-5 (114 TTABVUE 3-4); Creel Decl. ¶¶ 2-16 (125 TTABVUE 2-4). The Aiza Declaration also authenticates an English-language translation of a transcription of a video presentation that Carlos Creel made to Applicant’s employees on February 10, 2012, while Carlos Creel was one of Applicant’s partners, about Applicant’s history. Aiza Decl. ¶ 3; Exs. 1-2 (114 TTABVUE 3, 19-46).¹⁰ Carlos Creel’s presentation is an important piece of evidence regarding Applicant’s history, particularly because it occurred before the commencement of this litigation. We note below where his description of Applicant’s history in 2012 deviates from, or is supplemented or explained by, testimony in his 2017 Declaration, testimony in the Aiza Declaration, and summaries of Applicant’s history on its website or in materials generated by third parties. Aiza Decl. ¶¶ 18-20, 27; Exs. CR10-CR11, CR17 (114 TTABVUE 9, 27, 149-51, 163, 172, 324, 327, 333, 337, 343).

¹⁰ Opposers did not challenge the accuracy of the translation or transcription of the video, or object to its contents. Carlos Creel’s presentation is not hearsay because it constitutes an opposing party’s statement under Rule 801(d)(2) of the Federal Rules of Evidence. We will cite the transcription of the video presentation by page and line numbers (e.g., “Tr. 4:13-14”) as well as by TTABVUE page cites.

Carlos Creel began his presentation by stating that “it’s a privilege for me, being the son of our founder.” Tr. 4:13-14 (114 TTABVUE 24). He explained that “[w]e’re first going to talk about the biography of our founder, of Mr. Luis Creel Lujan, and then I want to go on to the history of the office, since its foundation, trying to split it by decades, until the present day.” Tr. 4:19-24 (114 TTABVUE 24).

He stated that “[i]n 1936, Mr. Luis “founded Creel Abogados.”¹¹ Tr. 7:4 (114 TTABVUE 24). He explained that Luis Creel Carrera, Luis Creel Luján’s eldest son and Carlos Creel’s elder brother, joined the firm, then operating as Creel y Ogarrio, in 1965, Tr. 10:12-13 (114 TTABVUE 30), and that the firm subsequently again adopted the name Creel Abogados. Tr. 10:21-22 (114 TTABVUE 30).¹² In the second half of the 1970s and into the 1980s, the nature of the firm changed “[f]rom the firm’s initial structure and orientation, a family-owned firm with great knowledge in mining and tax issues” to “embark[ing] on a gradual development towards the North American model of a corporate firm, which would allow offering a more extensive array of services for its national and international clients.” Tr. 11:17-12:4 (114

¹¹ In his 2017 Declaration, Carlos Creel testified that “[m]y father, Luis Creel Luján, graduated from law school in Mexico in 1936, and started working as an associate at the law firm of Sánchez Mejorada y Velasco, S.C., where he remained until 1952 when his mentor Carlos Sánchez Mejorada Domínguez passed away,” Creel Decl. ¶ 2 (125 TTABVUE 2), and that “[i]n 1952, my father joined Carlos Sánchez Mejorada Rodríguez, son of Carlos Sánchez Mejorada Domínguez, to form the law firm of Sánchez Mejorada y Creel, S.C.” Creel Decl. ¶ 3 (125 TTABVUE 2). There was no reference to a firm called Sánchez Mejorada y Velasco, S.C. either in Carlos Creel’s 2012 presentation or in various materials in the record that describe Applicant’s history.

¹² In his 2017 Declaration, Carlos Creel testified that the firm his brother joined was called Creel y Ogarrio, S.C., that that firm was dissolved in 1972 following Mr. Ogarrio’s retirement, and that Luis Creel Luján and Luis Creel Carrera formed Creel Abogados, S.C. in 1972. Creel Decl. ¶¶ 5-6 (125 TTABVUE 2).

TTABVUE 31-32). An attorney named Carlos Muggenberg joined the firm in 1974, Tr. 12:4-5 (114 TTABVUE 32), and an attorney named Samuel García-Cuellar joined the firm as a partner in 1976. Tr. 12: 19-20 (114 TTABVUE 32).

Luis Creel Luján died in 1977, and his eldest son Luis Creel Carrera assumed the management of the firm and “focuse[d] on the transformation process of the original model to a corporate firm, relying for this purpose on the solid corporate law practice of Samuel Garcia-Cuellar and in the industrial property specialty of Carlos Muggenberg, who becomes a partner in 1978.” Tr. 13:11-17 (114 TTABVUE 33).¹³ Carlos Creel joined the firm, then doing business as Creel Abogados, in 1986, Tr. 14:7-8 (114 TTABVUE 34),¹⁴ and became a partner in Creel Abogados in 1989. Creel Decl. ¶ 12 (125 TTABVUE 3).

In 1990, “the partners decided to change the corporate name of the firm to Creel, Garcia-Cuellar, and Muggenberg.” Tr. 14:21-24 (114 TTABVUE 34). Luis Creel Carrera retired from the firm under a leave of absence in 2000, briefly rejoined the firm, and retired finally in 2001. Tr. 16:9-13 (114 TTABVUE 36). The firm’s most profound transition began in the year 2000, and Carlos Creel was appointed as managing partner that year. Tr. 17:13-17 (114 TTABVUE 37). He served in that

¹³ In his 2017 Declaration, Carlos Creel testified that following his father’s death, his elder brother carried on the practice of Creel Abogados until 1983, when that firm’s name was changed, and almost simultaneously a new firm called Creel Abogados, S.C. was formed by his brother and other lawyers. Creel Decl. ¶¶ 7-8 (125 TTABVUE 3).

¹⁴ In his 2017 Declaration, Carlos Creel testified that the firm formed in 1983 as Creel Abogados changed its name in 1984, and that almost simultaneously a new firm called Creel Abogados, S.C. was formed by his brother and other lawyers. Creel Decl. ¶¶ 9-10 (125 TTABVUE 3). He testified that he joined that firm in 1984 and returned to it in 1986 after working briefly in the United States. Creel Decl. ¶ 11 (125 TTABVUE 3).

capacity from 2000 until 2007. Carlos Creel Decl. ¶ 12 (125 TTABVUE 3). The firm “focused its efforts on designing a full-service corporate firm, conserving its area of practice - -, mergers, acquisitions, and banking and finances, which, at the same time was capable of advising clients on complex and diverse projects, covering an increasing gamut of legal specialties.” Tr. 17:25-18:7 (114 TTABVUE 37). “As part of this effort, the firm defined, also as part of its strategy, the necessity to strengthen its national and international presence.” Tr. 18:12-15 (114 TTABVUE 38). “[I]n the international space, the strategy is focused on the establishment and development of tight professional relationships with the most prominent law firms in the United States and Europe, Central and South America.” Tr. 18:16-20 (114 TTABVUE 38).

Following the retirement of Carlos Müggenberg and another partner at the end of 2008, the firm briefly adopted the name Creel and García-Cuéllar, Tr. 21:10-14 (114 TTABVUE 14), and in 2009, the firm adopted its current name Creel, García-Cuéllar, Aiza, y Enríquez. Tr. 21:17-25 (114 TTABVUE 14).

Carlos Creel concluded his presentation by describing it as “a brief recount of the 76 years of our firm until our current 2012.” Tr. 22:21-22 (114 TTABVUE 42). He ended with the following wish: “may the memory of that story that our founder began in the year 36 always stay with us.” Tr. 24: 4-6 (114 TTABVUE 44).

Applicant’s English-language, public-facing website and other materials, and English-language legal publications discussing Applicant, also refer to Applicant’s founding many years ago by Luis Creel Luján. Aiza Decl. ¶¶ 19-20, 22, 27; Exs. CR10-CR13, CR15, CR17 (114 TTABVUE 9-11, 151, 163, 166, 169, 171-72, 177, 183, 275,

324, 327, 333, 337). Some of these materials were published while Carlos Creel was one of Applicant's partners. Aiza Decl. Ex. CR17 (114 TTABVUE 324 ("Legal Latin America" (published in 2012)), 327 ("Mexico" (published in 1991)), 333 ("Mexico • a market for the 21st century" (published in 2000 "in association with Creel, García-Cuéllar y Müggemberg"), 337 ("Latin America" (published in 1992)).

In September 2013, Carlos Creel and certain other attorneys at Creel, García-Cuéllar, Aiza, y Enríquez resigned from the firm and formed Opposer Creel Abogados. Aiza Decl. ¶¶ 29-30 (114 TTABVUE 12). Applicant and the departing attorneys negotiated a Settlement Agreement, which was executed on September 25, 2013. Aiza Decl. ¶ 30; Exs. CR22-CR23 (115 TTABVUE 12-13, 409-501).¹⁵ Since Carlos Creel's departure in 2013, Applicant has continued to operate in Mexico as Creel, García-Cuéllar, Aiza, y Enríquez and to use logos that emphasize the name Creel in Applicant's firm name. Aiza Decl. ¶¶ 5, 9-14, 28; Exs. CR4, CR18-21 (114 TTABVUE

¹⁵ The Settlement Agreement was designated as Confidential under the Board's Standard Protective Order and was filed under seal at 115 TTABVUE. The Settlement Agreement is governed by Mexican law and forms the basis of Applicant's affirmative defenses of contractual estoppel, waiver, and acquiescence, First Amend. Answ. ¶¶ 37-50 (10 TTABVUE 7-10), on which Applicant bears the burden of proof. *See, e.g., Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *2 (TTAB 2019). Applicant previously moved for summary judgment on its contractual estoppel defense, and the Board denied that motion without prejudice, finding that "the parties agreed that interpretation of the Agreement lay solely with the courts of Mexico," 92 TTABVUE 4, and that it was "appropriate for the Board to honor the parties' Agreement concerning jurisdiction." *Id.* at 5. The Board maintained the suspension resulting from the filing of the summary judgment motion "to afford the parties an opportunity to commence appropriate proceedings in Mexico," and gave the parties 60 days "to notify the Board that an appropriate proceeding has been filed in a Mexican court on the issue of contractual estoppel, namely, whether the terms of the Agreement involve use of the name CREEL alone, and whether the scope of the Agreement is worldwide or is limited to Mexico." *Id.* No proceeding in a Mexican court was ever initiated, and proceedings in this case were resumed. 103 TTABVUE 1. Because Applicant never sought a decision from a Mexican court construing the Settlement Agreement under Mexican law, we have given no consideration to the Agreement, or to the related Loperena and Rivera Declarations.

4-6, 51-79, 347-407). Carlos Creel acknowledged Applicant's ownership of Mexican registrations of Creel, García-Cuellar, Aiza, y Enríquez and logos that emphasize the name Creel in Applicant's firm name. Creel Decl. ¶ 18 (125 TTABVUE 5).

III. Opposers' Entitlement to a Statutory Cause of Action¹⁶

Using the Board's previous "standing" rubric for a party's entitlement to oppose, Opposers acknowledge that "[s]tanding is a threshold issue that must be proven by the plaintiff in every *inter partes* case." 130 TTABVUE 14. *See Sabhnani*, 2021 USPQ2d 1241, at *14-15 (citing *Chutter*, 2021 USPQ2d 1001, at *10 (citing *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (2021))).

A plaintiff may oppose registration of a mark if its claim is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and if it has a reasonable belief in damage that is proximately caused by registration of the mark. *Sabhnani*, 2021 USPQ2d 1241, at *14. "When a notice of opposition is filed by joint opposers, each opposer must plead, and ultimately prove, that it has a 'real interest,' i.e., a direct and personal stake, in the outcome of the proceeding, as well as a 'reasonable basis'

¹⁶ "Board decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act under the rubric of 'standing.'" *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *13 n.14 (TTAB 2021). "We now refer to what previously had been called standing as 'entitlement to a statutory cause of action.' But our prior decisions and those of the Federal Circuit interpreting 'standing' under §§ 13 and 14 remain applicable." *Id.* (quoting *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, at *10 n.39 (TTAB 2021)).

for its belief of damage.” *Wise F&I, LLC v. Allstate Ins. Co.*, 120 USPQ2d 1103, 1107 (TTAB 2016).

Opposers adequately pleaded their entitlement to bring a statutory cause of action by alleging the following:

- “On June 19, 2014, Carlos Creel filed Application Serial No. 86314608 to register the mark CREEL ABOGADOS for ‘legal services’ in Class 45” (First. Amend. Cons. Not. of Opp. ¶ 15 (6 TTABVUE 6));
- “Carlos Creel has licensed Creel Abogados to use the mark CREEL ABOGADOS in Mexico. He intends to grant a similar license to Creel Abogados in the United States” (First. Amend. Cons. Not. of Opp. ¶ 16 (6 TTABVUE 6));
- “Carlos Creel and Creel Abogados have standing in this proceeding because they reasonably believe that Application Serial No. 86314608 will be refused if Application Serial Nos. 86080973 and 86080991 mature to registration” (First. Amend. Cons. Not. of Opp. ¶ 17 (6 TTABVUE 6)); and
- “Carlos Creel and Creel Abogados have standing in this proceeding because the registrations sought by Applicant will, if granted, cloud their ability to register and use the mark CREEL ABOGADOS in the United States.” (First. Amend. Cons. Not. of Opp. ¶ 18 (6 TTABVUE 6)).

That does not end our analysis, however, because Opposers are “not entitled to standing solely because of the allegations in” their First Amended Consolidated Notice of Opposition. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). Pleading an entitlement to oppose is a necessary part of a plaintiff’s case, but “it does not follow that the facts affording a party standing, which as pleaded are sufficient as a matter of law, do not have to be proved by that party.” *Id.* The issue is whether each Opposer subsequently proved his and its entitlement to bring a statutory cause of action for opposition at trial during Opposers’ case-in-chief. *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs.*,

Inc., 123 USPQ2d 1844, 1848 (TTAB 2017) (“The facts regarding standing . . . are part of [a plaintiff’s] case and must be affirmatively proved.”), *rev’d pursuant to settlement*, (S.D. Cal. Apr. 11, 2021) (quoting *Lipton Indus.*, 213 USPQ at 189).

Opposers argue in their main brief that they “have established their standing to oppose registration of the subject Applications, having properly made the pleaded Applications of record and, further, can facilely show that they are no mere intermeddlers” because “Carlos Creel filed an Application with USPTO to register the mark CREEL ABOGADOS for legal services in Class 45” and “intends to grant a similar license to CREEL ABOGADOS in the United States.” 130 TTABVUE 15. According to Opposers, they have “standing in connection with the instant proceeding inasmuch as they reasonably believe that the above-described (Opposers’) Application for CREEL ABOGADOS, the ’608 Application, will be refused registration in the event that either (or both) of the Applicant’s two (2) pending Applications . . . ever mature to registered status at USPTO.” *Id.* at 15-16. Opposers also argue that the USPTO has issued a suspension of Carlos Creel’s application based on a possible citation of the opposed applications. *Id.* at 16. Finally, Opposers argue that they “enjoy standing in the instant proceeding inasmuch as the registrations sought by the Applicant . . . would, if granted by USPTO, cloud the ability of Opposers not only to register and use their mark, CREEL ABOGADOS, but to license or otherwise lawfully utilize their own mark in the United States.” *Id.*¹⁷

¹⁷ This argument tracks the allegation in paragraph 18 of Opposers’ First Amended Consolidated Notice of Opposition. First Amend. Cons. Not. of Opp. ¶ 18 (6 TTABVUE 6).

Applicant responds that “[e]ven assuming such assertions are true, and even assuming these ‘facts’ would be sufficient to give both [Carlos Creel] and Creel Abogados standing, there is no evidence for these ‘facts’ in Opposers’ case-in-chief.” 136 TTABVUE 23. Applicant argues that “Opposers have not submitted into evidence the trademark application on which they base their standing, nor is there any evidence in Opposers’ case-in-chief submissions that Creel Abogados is a licensee of [Carlos Creel], including in the United States,” *id.* at 23-24, and that there is no “evidence in Opposers’ case-in-chief that either Opposer has conducted any business under any CREEL-inclusive name or mark in the United States.” *Id.* at 24.

In their reply brief, Opposers discuss multiple theories of entitlement to oppose, 140 TTABVUE 10-13, including on a claim of likelihood of confusion under Section 2(d) of the Trademark Act, which Opposers have not asserted, *id.* 11-12, but Opposers’ reply brief points to no record evidence, submitted during their case-in-chief, that supports their entitlement to oppose under their pleaded theory. Instead, Opposers cite their allegation in Paragraph 15 of their First Amended Consolidated Notice of Opposition that “[o]n June 24, 2014, Carlos Creel filed Application Serial No. 86314608 to register the mark CREEL ABOGADOS for ‘legal services’ in Class 45,” *id.* at 9 (quoting First Amend. Cons. Not. of Opp. ¶ 15 (6 TTABVUE 10)), and Applicant’s response thereto in its First Amended Answer that it “denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 of the Notice of Opposition, but defers to the records of the United States Patent and Trademark Office with respect to the particulars of the trademark

application referenced in that paragraph.” *Id.* (quoting First Amend. Answ. ¶ 15 (10 TTABVUE 5)).¹⁸

Opposers claim that Applicant’s “response expressly referenced and incorporated the ’608 Application into the record of this proceeding” and, “[w]hat is more, the Applicant deferred to the USPTO record with respect thereto.” *Id.*¹⁹ According to Opposers, Applicant’s response constitutes an “admission against interest” that is the exception to what Opposers call the “general rule” that “factual allegations made in pleadings are not evidence of the matters” *Id.* (citing *Baseball Am. Inc. v. Powerplay Sports, Ltd.*, 71 USPQ2d 1844, 1846 n.6 (TTAB 2004)). Opposers misread *Baseball Am.*, which stands for the proposition that statements in a pleading are not evidence on behalf of the pleader making the statements, but may have evidentiary value for the adverse party as admissions against the pleader’s interest.

The operative principle in this case is much simpler: Allegations in a complaint may be established as facts if they are admitted by the answering party. The question here is whether Applicant “expressly referenced and incorporated the ’608 Application into the record of this proceeding” after denying having knowledge or

¹⁸ A denial of knowledge or information sufficient to form a belief about the truth of an allegation “has the effect of a denial.” Fed. R. Civ. P. 8(b)(5). Applicant also denied the allegations in paragraphs 16-18 of Opposers’ First Amended Consolidated Notice of Opposition on this basis. First Amend. Answ. ¶¶ 16-18 (10 TTABVUE 5).

¹⁹ Opposers also argue that “Applicant did not raise the issue [of entitlement to oppose] in its Answer or as an affirmative defense in this case.” 140 TTABVUE 9. Applicant had no obligation to do so because Opposers, not Applicant, bear the burden of proof on that threshold issue. *Apollo Med. Extrusion Techs.*, 123 USPQ2d at 1848.

information sufficient to form a belief as to the referenced application, and “defer[ring] to the USPTO record with respect thereto.” 140 TTABVUE 9.

A defendant’s admission in its answer that the plaintiff owns a pleaded pending application may support a finding that the plaintiff is entitled to oppose based on its ownership of the application. *See WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1040 (TTAB 2018) (the applicant’s admission of the opposer’s allegation that the opposer was “the owner of trademark application Serial No. 86138495 for the mark WEAPONX,” coupled with the applicant’s concession in its trial brief that “[b]ecause the applicant was the senior user, the opposer’s application was suspended and the applicant’s application proceeded with prosecution,” was sufficient to demonstrate the opposer’s standing).²⁰ *See also Peterson v. Awshucks SC, LLC*, 2020 USPQ2d 11526, at *5-6 (TTAB 2020) (finding that the petitioner was entitled to petition to cancel the respondent’s registration based on the respondent’s admission in its answer that the petitioner owned the pleaded application, the petitioner’s trial testimony regarding the refusal of its application based on the respondent’s registration, and the respondent’s assertion in its brief that it assumed the correctness of the petitioner’s allegation that its application was refused based on the respondent’s registration).

Applicant did not admit Carlos Creel’s ownership of the referenced application, much less its refusal based on the opposed applications, when Applicant “den[ied]

²⁰ *WeaponX* explains how a party seeking to rely on its pleaded application to establish its entitlement to oppose may make the application of record. *WeaponX*, 126 USPQ2d at 1040 (citing *Giersch v. Scripps Networks*, 90 USPQ2d 1020, 1022 (TTAB 2009)).

knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 of the Notice of Opposition, but defer[red] to the records of the United States Patent and Trademark Office with respect to the particulars of the trademark application referenced in that paragraph.” First Amend. Answ. ¶ 15 (10 TTABVUE 5). When considered in its entirety, Applicant’s response has the effect of denying Opposers’ allegations regarding the referenced application, while averring that the records of the USPTO can provide “the particulars of the trademark application referred to in that paragraph” about which Applicant lacks “knowledge or information sufficient to form a belief.” Applicant’s denial of Opposers’ allegation in paragraph 15 of their First Amended Consolidated Notice of Opposition falls short of even admitting that Carlos Creel is listed in the USPTO records as the owner of the referenced application, and such an admission was found not to constitute an admission of an opposer’s ownership of a pleaded registration in *Sterling Jewelers Inc. v. Romance & Co.*, 110 USPQ2d 1598, 1602 & n.5 (TTAB 2014). Applicant’s response to paragraph 15 does not “incorporate[] the ’608 Application into the record of this proceeding,” 140 TTABVUE 9, or prove Carlos Creel’s ownership of it or the USPTO’s treatment of it during prosecution. Establishing those matters was Opposers’ responsibility during their case-in-chief, *Sprague Elec. Co. v. Elec. Utils. Co.*, 209 USPQ 88, 93 (TTAB 1980) (“[I]f a prima facie case has not been established during the regular trial period, the plaintiff . . . cannot, through the guise of rebuttal,

create a prima facie case or plug holes in its own case-in-chief which may have been overcome by the defendant.”), and they did not do so.²¹

Opposers also argue in their reply brief that “Opposers and Applicant are competitors, for legal services; that fact also provides entitlement to maintain this proceeding.” 140 TTABVUE 12. Opposers raised this “competitor” theory for the first time in their reply brief, and it is unsupported by any evidence submitted by Opposer in their case-in-chief.²² As discussed above, however, we may look to Applicant’s First Amended Answer to Opposers’ First Amended Consolidated Notice of Opposition to see if facts supporting Opposers’ entitlement to oppose were established by Applicant’s admissions of Opposer’s allegations, or by other statements made in Applicant’s pleading.

In its First Amended Answer, Applicant admitted that “Carlos Creel is a Mexican lawyer and that Creel Abogados, S.C. is a law firm in Mexican [sic] City,” First Amend. Ans. ¶ 1 (10 TTABVUE 2-3); that “Carlos Creel is the son of Luis J. Creel Luján and the brother of Luis J. Creel Carrera,” First Amend. Ans. ¶ 2 (10

²¹ Opposers complain that it is “wholly inappropriate and disingenuous for the Applicant, after 7 years lying and waiting in the reeds, now to claim the ’608 Application is not part of the record in these proceedings and, thus, results in Opposers’ lack of entitlement to bring a statutory cause of action.” 140 TTABVUE 10. As noted above, Opposers bear the burden of proof on entitlement, and cannot blame Applicant for Opposers’ failure to take the simple steps discussed in *WeaponX* to make the pleaded application of record during their case-in-chief.

²² Opposers cite the Creel Declaration for the propositions that he owns Mexican registrations of the marks CREEL ABOGADOS and LUIS J. CREEL, that he has licensed those marks to Creel Abogados in Mexico, and that Opposers and Applicants are competitors. 140 TTABVUE 12. The Creel Declaration was submitted during Opposers’ rebuttal period, not during their trial period, and his testimony does not establish either Opposer’s entitlement to oppose as part of their case-in-chief.

TTABVUE 3); that “Carlos Creel became a partner of Creel Abogados, S.C. in 1989 and became Managing Partner of the firm (which by then had changed its name) in 2000,” and “continued as Managing Partner until 2006,” First Amend. Ans. ¶ 9 (10 TTABVUE 4); that “Carlos Creel and certain others resigned from Applicant effective September 30, 2013; that “Carlos Creel was one of the founders of a new law firm named Creel Abogados, S.C.,” First Amend. Ans. ¶ 12 (10 TTABVUE 4); and that “Opposer Creel Abogados, S.C. has never been connected with the legal services provided by Applicant.” First Amend. Ans. ¶ 26 (10 TTABVUE 6).

Applicant also alleged in its Affirmative Defenses in its First Amended Answer that “since Carlos Creel resigned from Applicant, he and Opposer Creel Abogados, S.C. have misrepresented themselves – including the nature of their relationship to Applicant – to the public generally and to clients of Applicant and prospective clients of Opposers in particular,” First Amend. Ans. ¶ 51 (10 TTABVUE 10); that “Creel Abogados, S.C.’s website misrepresents the history of the firm, reciting the history of [Creel Abogados] as if the firm were a continuation of Applicant, which it is not,” First Amend. Ans. ¶ 54 (10 TTABVUE 10); that “Opposer Creel Abogados, S.C. purposefully misstates its history on its website in an effort to mislead and deceive the public and in the hopes that the public will believe, incorrectly, that Creel Abogados, S.C. is merely the newest incarnation of Applicant,” First Amend. Ans. ¶ 57 (10 TTABVUE 11); and that “Carlos Creel directed and/or was involved in the activity described above.” First Amend. Ans. ¶ 58 (10 TTABVUE 11).²³

²³ Because these allegations appear in Applicant’s Affirmative Defenses, there have been no responses from Opposers. We consider Applicant’s allegations to the extent that they are

Finally, Applicant avers in its brief that “Opposer [Carlos Creel], a grandson [sic] of Applicant’s founder Luis Creel Luján, joined Applicant as an associate attorney in the mid-1980s, later becoming a partner of the firm,” 136 TTABVUE 10; that in 2013 “[Carlos Creel] and a handful of other attorneys resigned from Applicant to form a new law firm, Opposer Creel Abogados,” *id.*; and that “[l]eading up to [Carlos Creel’s] resignation from Applicant, Opposers and Applicant engaged in protracted negotiations over the terms of a detailed disassociation agreement, and the parties ultimately signed a binding agreement.” *Id.*

Taken together, Applicant’s admissions and averments in its First Amended Answer to Opposers’ First Amended Consolidated Notice of Opposition, and Applicant’s statements in its brief, establish that Opposers and Applicants are competitors in the market for legal services, and that Opposer and Applicant claim rights to the name “Creel” in connection with those services. That is sufficient to give Carlos Creel, a lawyer who has the surname Creel, and Creel Abogados, S.C., a law firm named Creel, direct and personal stakes in the outcome of this proceeding and reasonable beliefs in damage resulting proximately from Applicant’s registration of the marks CREEL and CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ for legal services in the United States. *See, e.g., Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d 1477, 1479 (TTAB 2017) (standing found based “on the inclusion of AZEKA in Opposer’s corporate name, and the fact that it is also the surname of Opposer’s president”);

admissions against interest on the issue of Opposers’ entitlement to oppose, *Baseball Am.*, 71 USPQ2d at 1846 n.6, not as substantive evidence on Applicant’s affirmative defenses or otherwise.

Miller v. Miller, 105 USPQ2d 1615, 1618-19 (TTAB 2013) (Opposer Mitchell Miller, a professional corporation doing business as Miller Law Group, found to have standing to oppose registration of MILLER LAW GROUP for legal services because of his “commercial interest in using MILLER LAW GROUP and derivations thereof to identify services that are essentially identical to those recited in the involved application.”). Once Opposers have established their entitlement to oppose based on their interests in the name Creel, they may oppose on any other ground. *Azeka Bldg. Corp.*, 122 USPQ2d at 1479.

IV. Opposers’ Claims of Deceptiveness Under Section 2(a) of the Trademark Act and Deceptive Misdescriptiveness Under Section 2(e)(1) of the Trademark Act (Count I)

Opposers’ claims of deceptiveness under Section 2(a) of the Trademark Act and deceptiveness misdescriptiveness under Section 2(e)(1) of the Trademark Act are intertwined because the Section 2(a) claim subsumes the Section 2(e)(1) claim. A mark is “deceptive” within the meaning of Section 2(a) if (1) it is misdescriptive of the character, quality, function, composition or use of the goods or services, (2) prospective purchasers are likely to believe that the misdescription actually describes the goods or services, and (3) the misdescription is likely to affect a significant portion of the relevant consumers’ decision to purchase the goods or services. *In re White Jasmine LLC*, 106 USPQ2d 1385, 1391-92 (TTAB 2013) (citing *In re Budge Mfg. Co.*, 857 F.2d 773, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988)). Section 2(a) is “an absolute bar to the registration of deceptive matter on either the Principal Register or the Supplemental Register.” *Id.* at 1391.

A mark is “deceptively misdescriptive” within the meaning of Section 2(e)(1) if it (1) misdescribes the goods or services, and (2) consumers are likely to believe the misdescription. *In re Hinton*, 116 USPQ2d 1051, 1052 (TTAB 2015). Deceptively misdescriptive marks may be registered on the Principal Register through a showing of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). “‘The key difference between ‘deceptively misdescriptive’ marks under § 2(e)(1) and ‘deceptive’ marks absolutely barred under § 2(a) is that a ‘deceptive’ mark is one in which the misdescription or falsity is ‘material’ in that it is likely to significantly induce a purchaser’s decision to buy.’” *Id.* at 1055 (quoting 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 11:55 (4th ed. Sept. 2015)). Given the overlapping nature of these claims, if Opposers cannot establish that Applicant’s marks are “deceptively misdescriptive,” Opposers cannot establish that Applicant’s marks are “deceptive.” We will thus focus primarily on Opposers’ deceptive misdescriptiveness claim.

Opposers alleged in their First Amended Consolidated Notice of Opposition that Applicant’s marks “CREEL and CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ are misdescriptive of the legal services offered by Applicant because they falsely indicate that a lawyer with the surname ‘Creel’ is a partner in Applicant’s firm;” that “[c]lients or prospective clients of Applicant who encounter the marks CREEL and CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ are likely to mistakenly believe that Applicant is affiliated with Carlos Creel or Creel Abogados, S.C.,” that the “mark CREEL, and the inclusion of the surname ‘Creel’ in the mark CREEL, GARCÍA-

CUÉLLAR, AIZA Y ENRÍQUEZ, will likely affect the decision of a significant number of clients or potential clients to use Applicant's services, because of the reputation for excellence, in the fields of mergers, acquisitions and corporate law, developed over many years by Luis J. Creel Luján, Luis J. Creel Carrera and Carlos Creel, none of whom are presently affiliated with Applicant;" that "the marks CREEL and CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ have not become distinctive of Applicant's services through use on or in connection with Applicant's services in commerce;" and that the marks are deceptive or, alternatively, deceptively misdescriptive. First Amend. Cons. Not. of Opp. ¶¶ 19-24 (6 TTABVUE 6-7). Applicant denied these allegations. First Amend. Answ. ¶¶ 19-24 (10 TTABVUE 5-6).

Opposers' arguments on these claims in their main brief parrot their allegations in their First Amended Consolidated Notice of Opposition. 130 TTABVUE 22-23, 25-26. According to Opposers, the "marks CREEL and CREEL, GARCÍA-CUELLAR, AIZA Y ENRÍQUEZ are deceptive as to the legal services offered by Applicant because they falsely indicate that a lawyer with the surname 'CREEL' is a partner in the Applicant's law firm." *Id.* at 22. Opposers argue that "[c]lients or prospective clients of Applicant who encounter the marks CREEL and CREEL, GARCÍA-CUELLAR, AIZA Y ENRÍQUEZ are likely to believe mistakenly that Applicant (a Mexican law firm with no 'CREEL'-named Attorneys) is somehow affiliated with Carlos Creel and/or Creel Abogados, S.C." *Id.*²⁴ Opposers further argue that "the

²⁴ This argument appears to assert a likelihood of confusion under Section 2(d) of the Trademark Act. 15 U.S.C. § 1052(d). It is echoed in Opposers' reply brief, in which they argue that a "claim of likelihood of confusion that is not wholly without merit creates standing," 140 TTABVUE 11; that "[i]n spinning its web of deception and false connection, Applicant

mark CREEL, and the inclusion of the surname ‘CREEL’ in the mark CREEL, GARCÍA-CUELLAR, AIZA Y ENRÍQUEZ, likely will affect the decision of a significant number of clients and/or potential clients to retain and utilize the Applicant’s legal services because of the Opposers’ reputation for excellence, particularly in the fields of merger and acquisitions and corporate law, developed over decades by the father, the brother, and the son – the ‘Creel’ trinity – not one of which individuals (as to those who yet live) is presently affiliated with the Applicant.” *Id.*

Opposers argue in the alternative that “the term is misdescriptive of, at the very least, the character, feature, and quality of the legal services touted by the Applicant,” and that this alleged “misdescription is, on its face, quite believable” because “the prospective clients (purchasers of legal services) are likely to believe that the misdescription actually describes the services offered and by whom (i.e., which attorney) they are offered,” and “is likely to affect the prospective clients’ decisions to hire and retain the Applicant’s law firm.” *Id.*

With respect to Opposers’ misdescriptiveness claim, Applicant responds that “[n]ot only does Opposers’ brief fail to cite a single case where the Board has found a surname to be a descriptive term, but Opposers do not even set out the test for descriptiveness, let alone provide any explanation of how Applicant’s Marks ‘immediately convey’ to the consuming public the legal services that Applicant

may well have created a reverse confusion scenario vis-à-vis Opposers;” and that Applicant’s continued use of “Creel” in its firm name “tends to show the grave indifference of Applicant to Opposers’ prior use and superior rights and failure to take precautions to avoid a likelihood of confusion.” 140 TTABVUE 11, 19. As noted above, Opposers have never asserted a likelihood of confusion claim, and we have given these arguments no consideration.

provides.” 136 TTABVUE 26-27. Applicant further argues that Opposers have also failed to show that the marks misdescribe Applicant’s services because

[w]hile it is true that there is currently no attorney member of Applicant with the name Creel, that is beside the point. The record—including statements by Opposer [Carlos Creel] himself—makes clear that the CREEL portion of Applicant’s Marks refers to its founder. . . . In maintaining the name of its deceased founder, Applicant follows common practice among law firms to keep as part of their name the surname of a retired or deceased partner. This is as true in Mexico as it is in the U.S. . . . Because it is common practice for law firms to include in their firm name the name of a deceased partner, and particularly that of a founding partner, consumers understand that the inclusion of a particular attorney’s name in the name of law firm does not necessarily mean that attorney is still practicing at the firm.

. . .

Because the CREEL in Applicant’s Marks refers to Applicant’s deceased founder, and because common practice and rules of professional conduct condone inclusion of deceased partners’ names in a law firm name, there is nothing misdescriptive in Applicant’s inclusion of the term CREEL in Applicant’s Marks and Opposers’ claims fail.

Id. at 27-28.

Opposers’ response in their reply brief consists largely of ad hominem attacks on the improper motives and immorality of Applicant and its partners in continuing to operate under the marks CREEL and CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ following Carlos Creel’s departure in 2013. 140 TTABVUE 16-20. Opposers argue that “Applicant’s firm was not named after its deceased ‘founder,’ Luis Creel Lujan, who started his career in 1936” because “‘Father Creel’ died in 1977, long before the Applicant even existed (starting in 1984);” that “the ‘Creel’ in

Applicant's 1984 iteration of the law firm . . . was a reference to [Carlos Creel's] brother, Luis Creel Carrera, not his father;" that there were several versions of firms called "Creel Abogados," with "Creel Abogados I being "the firm of founder (Father) Creel;" and that the 1984 iteration of the firm "was not a continuation of any prior Creel law firms (I or II)," but that nevertheless "Applicant maintains that the Creel in its name is 'Father Creel,' *i.e.*, the founder, the Lawyer Creel from 1936!" *Id.* at 16. Opposers further argue that "'Father Creel' never was a partner of Applicant" because "he died years before it was formed as an entity," and that "Applicant is not, and never was 'Father' Creel's firm, and not a successor firm." *Id.* at 17.

Opposers' Count I claims have two fundamental problems. The first is the absence of any legal authority that a surname such as CREEL may also be merely descriptive of goods or services, the threshold element of Opposers' Count I claims. The second is the absence of record evidence to prove that CREEL is merely descriptive of legal services and to prove the other elements of their claims.

As discussed in Section VI below, Opposers proved that when CREEL is used in connection with the legal services identified in Applicant's application, it is "primarily merely a surname" within the meaning of Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), which prohibits registration of such a mark on the Principal Register without a showing of acquired distinctiveness. At the same time, however, Opposers claim that CREEL is "deceptively misdescriptive" of those services within

the meaning of Section 2(e)(1) of the Act, which also prohibits registration of such a mark on the Principal Register without a showing of acquired distinctiveness.²⁵

The Board has held that these two distinct sub-sections of Section 2(e) of the Trademark Act serve similar purposes, but they appear to address different types of marks. “The purpose behind Section 2(e)(4) is to keep surnames available for people who wish to use their own surnames in their business, in the same manner that merely descriptive terms are prohibited from registration because competitors should be able to use a descriptive term to describe their own goods or services.” *In re Binion*, 93 USPQ2d 1531, 1540 (TTAB 2009). The Board’s discussion of these two sub-sections in *Binion* begs the question of whether a proposed mark that is “primarily merely a surname” can simultaneously be a “merely descriptive term.”

In support of their Count I claims, Opposers cite cases involving the marks LOVEE LAMB, WHITE JASMINE, SUPER SILK, LONDON, PERRY NEW YORK, COLAGNAC, BAHIA, CEDAR RIDGE, AMERICAN LIMOGES, SHEFFIELD, and IVORY WOOD, 130 TTABVUE 24-25,²⁶ but they do not cite a single case in which

²⁵ Opposers are, of course, free to assert inconsistent claims, Fed. R. Civ. P. 8(d)(3), but Opposers do not argue that CREEL is either “primarily merely a surname” or “deceptively misdescriptive” or “deceptive.” Under Opposers’ pleaded theory that the marks “CREEL and CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ are misdescriptive of the legal services offered by Applicant because they falsely indicate that a lawyer with the surname ‘Creel’ is a partner in Applicant’s firm,” First Amend. Cons. Not. of Opp. ¶ 19 (6 TTABVUE 6), “Creel” must be understood to be a surname, to the exclusion of any other meaning of the word “creel,” including the non-surname meanings argued by Applicant on Opposers’ surname claim.

²⁶ The only case cited by Applicant that involved a mark containing a possible surname is *In re Perry Mfg. Co.*, 12 USPQ2d 1751 (TTAB 1989), 130 TTABVUE 24, in which the Board found that a mark consisting of the words “perry new york” above a depiction of the New York skyline was deceptive when used in connection with clothing. The Board’s finding had nothing to do with the possible surname “perry” and everything to do with the fact that “purchasers seeing clothing bearing applicant’s mark, which incorporates the words ‘New

the Board found a surname to be merely descriptive of any goods or services, and we have not found such a case.²⁷

We have difficulty seeing how a surname could describe “an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services” with which it is used. *In re Fallon*, 2020 USPQ2d 11249, at *7 (TTAB 2020) (quoting *In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1598 (TTAB 2018) (citing *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); and *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978)).²⁸ Opposers’ theory of

York’ and the New York skyline, would immediately assume that such clothing has a connection with New York, either in its manufacture or its design.” *Id.* at 1752.

²⁷ There appear to be two precedential decisions in which claims under both Section 2(e)(1) and Section 2(e)(4) were asserted, but neither found that a surname could also be merely descriptive of the involved goods or services. In *Miller*, another case involving dueling law firms, the opposer pleaded multiple claims against the applicant’s mark MILLER LAW GROUP for legal services, including that the mark was primarily merely a surname, merely descriptive, and generic. *Miller*, 105 USPQ2d at 1616. The Board did not reach the mere descriptiveness and genericness claims because it sustained the opposition on the ground that the mark was primarily merely a surname and had not acquired distinctiveness. *Id.* at 1625. In *Michael B. Sachs, Inc. v. Cordon Art, B.V.*, 56 USPQ2d 1132 (TTAB 2000), the opposer asserted multiple claims against the applicant’s mark M.C. ESCHER for a variety of goods, including that the mark was primarily merely a surname, merely descriptive, and generic. *Id.* at 1133. The Board rejected both the surname and mere descriptiveness claims, finding that the mark was not primarily merely a surname because it “convey[ed] the impression that it is a personal name, namely, that of the well known Dutch artist,” *id.* at 1136, and that the mark was likely not merely descriptive, even if used in connection with reproductions and images of M.C. Escher’s art, because there was “no reason why an artist’s name also would not be inherently distinctive as applied to products which bear reproductions or images from the artist’s works of art.” *Id.* at 1137. The Board dismissed the descriptiveness and genericness claims without prejudice because the opposed application was an intent to use application, and the Board held that it could not “evaluate the claims of mere descriptiveness and genericness in view of the lack of evidence of use.” *Id.*

²⁸ In that regard, we note that marks that are primarily merely a surname, or merely descriptive (or deceptively misdescriptive), are all registrable on the Principal Register through proof of acquired distinctiveness under Section 2(f) of the Trademark Act. The acquired distinctiveness analysis with respect to a surname focuses on whether there is

descriptiveness is that the surname CREEL in Applicant's marks "describes the services offered and by whom (i.e., which attorney) they are offered." 130 TTABVUE 22. This theory is akin to the theory of descriptiveness discussed in *In re Major League Umpires*, 60 USPQ2d 1059 (TTAB 2001), in which the Board held that "[i]t is well-established that a term which describes the provider of goods or services is also merely descriptive of those goods and services." *Id.* at 1060. But *Major League Umpires* involved the term MAJOR LEAGUE UMPIRE, not a surname, and the scope of its "provider" theory was limited recently by the Board in *In re Recreational Equip., Inc.*, 2020 USPQ2d 11386 (TTAB 2020), in which the Board reversed a descriptiveness refusal to register CO-OP for bicycles and related goods.

In *Recreational Equip.*, the Board held that *Major League Umpires* did not create a per se rule that "all terms that describe something about the source of goods are per se unregistrable as merely descriptive of the goods," *id.*, at *3, and "should **not** be

"[e]vidence of 'long and exclusive use which changes its significance to the public from a surname of an individual to a mark for particular goods or services,'" and the use of a surname must "be 'substantially' exclusive." *Miller*, 105 USPQ2d at 1623. In *Binion*, the Board noted that "[g]enerally, a statement of five years' use will be sufficient to establish acquired distinctiveness." *Binion*, 93 USPQ2d at 1540. We find below in Section VI that the surname "Creel" has acquired distinctiveness in the United States under these standards. In assessing the registrability of a merely descriptive term, however, the Federal Circuit has held that the Board must first "determine its degree of descriptiveness" because "the greater the degree of descriptiveness the term has, the heavier the burden to prove that it has attained secondary meaning." *In re Sausser Summers, PC*, 2021 USPQ2d 618, at *7 (TTAB 2021) (finding that ONLINETRADEMARKATTORNEYS.COM was highly descriptive of legal services and had not acquired distinctiveness) (quoting *Royal Crown Cola Co v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1048 (Fed. Cir. 2018) (internal quotation omitted)). A "highly descriptive" term may require more than just a showing of long and substantially exclusive use of the term as proof of acquired distinctiveness. *Id.*, at *13-15. We have difficulty seeing how we could determine the "degree of descriptiveness" of the surname CREEL under Opposers' theory that it "describes the services offered and by whom (i.e., which attorney) they are offered," 130 TTABVUE 22, particularly when CREEL appears in the mark CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ together with three other surnames.

read as supporting a per se rule of law,” *id.*, at *4 (emphasis in original), but was “simply an example of a situation where the evidence showed the mark was merely descriptive of **both the source and other aspects of the goods**, e.g. the nature of the designer and a portion of the classes of consumers.” *Id.*, at *3 (emphasis added).

As far as we are aware, the “provider” theory of descriptiveness discussed in *Recreational Equip.* and *Major League Umpires* has never been applied to a surname,²⁹ and we have doubts about its applicability to that type of potential mark. Even if it applies to surnames, however, the surname CREEL in Applicant’s marks must do more than simply “describe[] something about the source or provider” of the legal services identified in Applicant’s application to be merely descriptive of those services. *Recreational Equip.*, 2020 USPQ2d 11386, at *5. That “is not enough by itself to find that consumers would perceive [CREEL] as merely describing a quality, feature, or characteristic of the applied-for [services].” *Id.* To establish mere descriptiveness under the “provider” theory, “[e]vidence is needed to make the critical determination of whether the mark is merely descriptive of the goods or services.” *Id.*, at *4.

Therein lies Opposers’ second problem, the absence of sufficient evidence introduced in their case-in-chief to prove, prima facie, the threshold mere

²⁹ In *Recreational Equip.*, the Board noted that the Trademark Manual of Examining Procedure (“TMEP”) similarly does not employ a per se rule in the section that advises examining attorneys that “[t]erms that identify the source or provider of a product or service **may be** merely descriptive under 15 U.S.C. § 1052(e)(1) or generic.” *Recreational Equip.*, 2020 USPQ2d 11386, at *4 (quoting TMEP Section 1209.03(q) (emphasis supplied by the Board)). The Board cases cited in Section 1209.03(q) involved the marks ELECTRIC CANDLE COMPANY, MAJOR LEAGUE UMPIRE, PSYCHOLOGY PRESS, PAINT PRODUCTS COMPANY, and THE PHONE COMPANY.

descriptiveness element of their deceptive misdescriptiveness and deceptiveness claims, or any of the other elements of those claims. The only record evidence cited by Opposers in their main brief in support of any element of their Count I claims is Applicant's response to Opposer's Interrogatory No. 1, in which Applicant listed its partners as of December 2014, 130 TTABVUE 25 (citing 111 TTABVUE 14-15), and American Bar Association ("ABA") Model Rule 7.1 captioned "Communications Concerning a Lawyer's Services" and comments thereto. *Id.* (citing 111 TTABVUE 36-39). Applicant's interrogatory answer establishes only that Applicant did not have a partner named Creel at the time of the response, and the ABA Model Rule is not evidence of the consuming public's perception of the significance of the name CREEL in Applicant's marks.³⁰

Opposers' numerous claims regarding consumer perception of the name CREEL in Applicant's marks are based solely on arguments of its counsel, which are "no substitute for evidence." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d

³⁰ Applicant cites multiple ethics decisions from various state bars regarding law firm names. 130 TTABVUE 26-28. Our task is to decide Opposers' claims under Sections 2(a) and 2(e)(1) of the Trademark Act, not the ethical propriety of any use of Applicant's marks in these states, and there is no evidence that Applicant's attorneys are even practicing law in these states, as Applicant and Opposers provide what they both describe as "cross-border legal services," Aiza Decl. ¶ 14 (114 TTABVUE 6, Creel Decl. ¶ 17b (125 TTABVUE 4), for clients located in the United States, primarily with respect to matters in Mexico such as mergers and acquisitions. Aiza Decl. ¶ 14 (114 TTABVUE 6-8). In any event, the state bar ethics opinions, like the ABA Model Rule, are not probative of the public's perception of Applicant's marks. It is perhaps ironic that while Opposers accuse Applicant of all manners of unethical, immoral, and illegal conduct in the United States, Applicant has continued to operate since 2013 in Mexico under the mark CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ, and logos displaying CREEL prominently, Aiza Decl. ¶¶ 9-11; Ex. CR4 (114 TTABVUE 5-6, 51-79), suggesting that it is "normal (and legally and ethically appropriate) for a Mexican law firm to continue to use a former partner's surname in its law firm name after that partner has passed." Aiza Decl. ¶ 5 (114 TTABVUE 4).

1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.2d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)). “Many types of evidence can shed light on what a term means within a particular context, but no such evidence is of record here,”³¹ *Recreational Equip.*, 2020 USPQ2d 11386, at *5, to support Opposers’ sweeping assertions that (1) consumers of legal services in the United States would understand that the presence of the name “Creel” in Applicant’s marks “falsely indicate[s] that a lawyer with the surname ‘CREEL’ is a partner in the Applicant’s law firm;” (2) CREEL “is misdescriptive of, at the very least, the character, feature, and quality of the legal services touted by the Applicant;” (3) this alleged “misdescription is, on its face, quite believable;” and (4) the “misdescription actually describes the services offered and by whom (i.e., which attorney) they are offered.” 130 TTABVUE 22.

In a rhetorical flourish characteristic of Opposers’ briefing, Opposers’ counsel cites John Adams’s observation, during his defense of British soldiers accused of perpetrating the Boston Massacre, that “[f]acts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence.” *Id.* at 25. But **missing** “[f]acts are [equally] stubborn things; and whatever may be [Opposers’] wishes, [their] inclinations, or the dictates of [their] passion, [attorney argument] cannot alter the state of facts and evidence.” The record simply lacks “facts and evidence” “showing what consumers are likely to

³¹ Opposers argue that “evidence of the manner in which a mark is used may support a finding of deceptiveness or deceptive misdescriptiveness,” 130 TTABVUE 30, but they point to no such evidence here.

think when they see the [CREEL and CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ] mark[s]” in connection with legal services. *Recreational Equip.*, 2020 USPQ2d 11386, at *5.

Opposers’ utter failure to establish a prima facie case during their case-in-chief that “Creel” describes a feature, attribute, or characteristic of legal services, and that consumers of legal services are likely to believe mistakenly that the name “Creel” in Applicant’s marks indicates that Applicant’s firm currently has a partner named “Creel,”³² dooms their deceptive misdescriptiveness claim under Section 2(e)(1) and their deceptiveness claim under Section 2(a).³³ Opposers’ claims in Count I are accordingly dismissed with prejudice.

³² Opposers “do not disagree with [the] general proposition” that “it is perfectly normal, and ethical, and customary to keep a deceased partner’s name in a law firm,” 140 TTABVUE 16, and, as discussed in Section VI below, it appears that a number of the names of the United States firms with which Applicant has been associated reflect that common practice.

³³ As noted above, Opposers rely in their reply brief on the Creel Declaration to address what they call “the less-than-accurate timeline presented by Applicant, and patently revisionist history of the Applicant’s firm name.” 140 TTABVUE 16. Opposers argue that “a fair reading of Carlos Creel Carrera’s Declaration . . . is most constructive” and that “[o]ne cannot help but conclude, first, the Applicant’s firm was not named after its deceased ‘founder’, Luis Creel Lujan, who started his career in 1936,” and who “died in 1977, long before the Applicant ever existed (starting in 1984),” that the 1984 iteration of the firm “was not a continuation of any prior Creel law firms,” and that the “Creel” in that firm “was a reference to [Carlos Creel’s] brother, Luis Creel Carrera, not his father.” 140 TTABVUE 16. Opposers further argue that “Applicant is not, and never was ‘Father’ Creel’s firm, and not a successor firm.” *Id.* at 17. These arguments lie ill in the mouth of Carlos Creel, who in his 2012 description of Applicant’s history described himself as “the son of our founder,” Tr. 4:13-14 (114 TTABVUE 24), provided “a brief recount of the 76 years of our firm until our current 2012,” Tr. 22:21-22 (114 TTABVUE 42), and concluded with the wish “may the memory of that story that our founder began in the year 36 always stay with us.” Tr. 24: 4-6 (114 TTABVUE 44). We find his 2012 description of the significance of the name “Creel” in Applicant’s firm name to be more credible than his subsequent contrary testimony in his 2017 declaration, but even if we were to credit his 2017 testimony, and consider it even though it was not offered in Opposers’ case-in-chief, *see Sprague Elec.*, 209 USPQ at 93, it is not probative of consumer perception of the name “Creel” in Applicant’s marks.

V. Opposers' Claims of a False Suggestion of a Connection Under Section 2(a) of the Trademark Act (Count II) and Use of the Name of Carlos Creel Without His Written Consent Under Section 2(c) of the Trademark Act (Count III)

We will address these two claims together because they involve the same ultimate issue: Did Opposers submit sufficient evidence during their case-in-chief to establish prima facie cases on these claims?

Section 2(a) of the Trademark Act prohibits registration of a mark that may falsely suggest a connection with a living or dead person. 15 U.S.C. § 1052(a). The elements of a false suggestion of a connection claim are (1) the mark is the same as, or a close approximation of, the name or identity previously used by another person or institution; (2) the mark would be recognized as such, in that it points uniquely and unmistakably to that person or institution; (3) the person or institution named by the mark is not connected with the activities performed by the applicant under the mark; and (4) the fame or reputation of the person or institution is such that, when the mark is used with the applicant's goods or services, a connection with the person or institution would be presumed. *U.S. Olympic Comm. v. Tempting Brands Neth. B.V.*, 20201 USPQ2d 164, at *17-18 (TTAB 2021) (citing *Pierce-Arrow Soc'y v. Spintek Filtration, Inc.*, 2019 USPQ2d 471774, at *14 (TTAB 2019); *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 703 F.2d 1372, 217 USQ 505, 508-10 (Fed. Cir 1983)).

Opposers allege that Applicant's marks "are the same as, or a close approximation of, a name or identity previously used by Carlos Creel and his licensee, Creel Abogados, in the provision of legal services;" that Applicant's marks "point

unmistakably to Carlos Creel and Creel Abogados, particularly when used in connection with legal services relating to mergers, acquisitions and corporate law;” that Opposers are not connected with the legal services provided by Applicant; and that the “reputations of Carlos Creel and Creel Abogados, particularly in the fields of mergers, acquisitions and corporate law, are such that when [Applicant’s marks] are used with Applicant’s services, a connection with Carlos Creel or Creel Abogados would be presumed.” First Amend. Cons. Not. of Opp. ¶¶ 25-28 (6 TTABVUE 7-8). Applicant admitted that Creel Abogados has never been connected with Applicant’s legal services, but denied Opposers’ remaining allegations. First Amend. Answ. ¶¶ 25-28 (10 TTABVUE 6). Opposers’ argument in their main brief in support of their Section 2(a) claim simply repeats the allegations in their First Amended Consolidated Notice of Opposition without citing any supporting record evidence. 130 TTABVUE 32-33.

Section 2(c) of the Trademark Act prohibits registration of a mark that “[c]onsists of or comprises a name . . . identifying a particular living individual except by his written consent” 15 U.S.C. § 1052(c). The Board has explained that

[w]hether consent to registration is required depends on whether the public would recognize and understand the mark as identifying a particular living individual. A consent is required only if the individual bearing the name in the mark will be associated with the mark as used on the goods or services, either because: (1) the person is so well known that the public would reasonably assume a connection between the person and the goods or services; or (2) the individual is publicly connected with the business in which the mark is used.

In re ADCO Indus. — Techs., L.P., 2020 USPQ2d 53786, at *8 (TTAB 2020).

Count III of Opposers' First Amended Consolidated Notice of Opposition pleads a claim under Section 2(c) that the "mark CREEL is the surname of a particular living individual, namely, Carlos Creel;" that "Carlos Creel is sufficiently well known in the fields of mergers, acquisitions and corporate law that clients or potential clients of Applicant who encounter the mark CREEL will assume that Applicant is in some way connection with Carlos Creel;" and that "Carlos Creel has not consented to the use or registration of the mark CREEL in the United States by Applicant." First Amend. Cons. Not. of Opp. ¶¶ 30-32 (6 TTABVUE 8). Applicant admitted that "Creel' is one of the surnames of Carlos Creel," but denied Opposers' remaining allegations. First Amend. Answ. ¶¶ 30-32 (10 TTABVUE 7).

Opposers' argument in their main brief in support of their Section 2(c) claim is as follows:

The mark, CREEL, is the surname of a particular living individual, attorney Carlos Creel . . . [and] Carlos Creel is sufficiently well-known, and certainly connected to the (law) business in which the mark is used that clients or potential clients of Applicant who encounter the mark CREEL will assume that Applicant is in some way connected to the use and registration of the marks including or incorporating the surname CREEL in the United States by Applicant.

130 TTABVUE 34 (citing Creel Decl. ¶ 1 (125 TTABVUE 2)). Opposers cite no evidence in support of their argument other than the Creel Declaration, which discusses the history of Applicant's firm, Carlos Creel's departure from Applicant and formation of Creel Abogados, and the ownership of various marks in Mexico, but says nothing about any renown enjoyed by Carlos Creel in the legal profession in the United States or even in Mexico.

In its brief, Applicant addresses Counts II and III together. Applicant argues that “[d]uring their initial trial period, Opposers submitted the Castellanos Declaration and First Notice of Reliance (110-111 TTABVUE), each of which attached exhibits that Opposers represented would be relevant to proving Counts I and IV, and in fact only relate to those counts,” and that Opposers’ “failure to submit evidence during its case-in-chief on Counts II and III dooms these claims.” 136 TTABVUE 24-25. Applicant further argues that “[a]lthough the [Creel] Declaration submitted during Opposers’ rebuttal period arguably has some (albeit very minimal) bearing on Counts II and III, Opposers cannot rely on such rebuttal evidence when they failed to make out a prima face case during their case-in-chief.” *Id.* at 25.

In their reply brief, Opposers also address Counts II and III together. They argue that the Castellanos Declaration “clearly relates also to Counts II and III,” and that “[t]he Declaration, of course, and its contents, speak for themselves.” 140 TTABVUE 14. We agree only with Opposers’ latter statement. The Castellanos Declaration merely authenticates pages from a search of the online archive of THE NEW YORK TIMES for articles containing the term “creel,” and makes no reference to Carlos Creel or Creel Abogados.³⁴ It does not support either Count II or Count III because it does not show the fame or reputation of Carlos Creel or Creel Abogados for purposes of Opposers’ Section 2(a) claim, or that Carlos Creel “is so well known that the public

³⁴ The results of the search for uses of the term “creel” in the NEW YORK TIMES online archive that are attached to the Castellanos Declaration contain only the date and title of each article and a short excerpt. Castellanos Decl. Ex. 1 (110 TTABVUE 4-16). None of the excerpts mentions Carlos Creel or Creel Abogados.

would reasonably assume a connection between [him] and [Applicant's] services,” *ADCO Indus.*, 2020 USPQ2d 53786, at *8, for purposes of Opposers’ Section 2(c) claim.

With respect to their Notice of Reliance and the exhibits thereto, Opposers concede that “it is accurate to say that most (but not all) of those Exhibits were said to be relevant to Counts I and IV.” 140 TTABVUE 14. Opposers argue, however, that Exhibit 4 (ABA Model Rule 7.1 and the comments thereto), which the Notice of Reliance states Opposers “offered to establish that Applicant’s use of CREEL to designate its services (whether alone or as part of the mark CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ) is likely to mislead consumers of Applicant’s legal services because it suggests that someone with the surname CREEL is a partner of Applicant’s firm,” 111 TTABVUE 3, also “clearly relates to Counts II and III as well as to other Counts such as I and IV.” 140 TTABVUE 14. But like the excerpts from the articles in THE NEW YORK TIMES online database, ABA Model Rule 7.1 does not refer to Carlos Creel or Creel Abogados, and does not support Opposers’ Section 2(a) and 2(c) claims.

Opposers further argue that the Creel Declaration “contains evidence relevant to Counts II and III,” 140 TTABVUE 15, and should be considered in support of those Counts. Opposers concede that it “contains evidence that is relevant to Opposers’ Case in Chief” as well as rebuttal evidence, and that “[r]ebuttal evidence may not be filed to simply (solely) bolster Opposers’ case,” but argue that “that is not to say that

the Board will ignore other evidence in documents filed during that later period if they also contain evidence pertinent to some of Opposers' claims." *Id.*

We confess difficulty understanding Opposers' argument, but we reject it to the extent that it asks Board to consider testimony and documentary evidence in the Creel Declaration that may support Opposers' claims in Counts II and III. *See Sprague Elec.*, 209 USPQ at 93. But even if we were to consider the Creel Declaration, as discussed above, it says nothing about his prominence as a lawyer in the United States or Mexico in 2017, when it was executed, much less at the time of trial.

Finally, Opposers argue that "though filed later in time, it respectfully is submitted that this is one of those circumstances where evidence may be deemed stipulated into the record since Applicant raised no objection to the Carlos Creel Carrera Declaration and the non-offering party (*i.e.*, the Applicant) has treated that Declaration as of record." *Id.* We disagree. Applicant was under no obligation to move to strike the Creel Declaration on the ground that it contained improper rebuttal testimony because "objections to a notice of reliance, or to testimony, on substantive grounds, **such as that the proffered evidence contains hearsay or improper rebuttal**, or is incompetent, irrelevant, or immaterial, generally are not waived for failure to raise them promptly, unless the ground for objection is one which could have been cured if raised promptly." TBMP Section 707.04 (emphasis added) (citing, *inter alia*, *Moke America LLC v. Moke USA LLC*, 2020 USPQ2d 10400, at *3-9 (TTAB 2020)). Opposers could not have cured their use of improper rebuttal testimony in the Creel Declaration if Applicant had moved to strike it because the challenged

testimony should have been filed during Opposers' trial period, which had long since closed. Applicant objected to the improper rebuttal testimony in the Creel Declaration in their brief, 136 TTABVUE 12-13, 24-25, and did not treat his testimony as being of record.³⁵

Opposers were required to establish a *prima facie* case during their case-in-chief on their claims of a false suggestion of a connection under Section 2(a) (Count II) and the use of Carlos Creel's name without his written consent under Section 2(c) of the Trademark Act (Count III). Opposers completely failed to do so, and those claims are accordingly dismissed with prejudice.³⁶

³⁵ The cases cited by Opposers in support of this argument are unavailing. In *Int'l Dairy Foods Ass'n v. Interprofession du Gruyère*, 2020 USPQ2d 10892 (TTAB 2020), *aff'd*, 2021 WL 6286234 (E.D. Va. Dec. 15, 2021), *appeal filed* (4th Cir. Jan. 7, 2022), the Board considered two testimony declarations that were executed prior to the opening of the opposers' trial period because while the applicants objected to the contents of the declarations, they did not object to their untimely execution. *Id.*, at *3 n.12. There, unlike here, a prompt objection to the declarations would have enabled the opposers to cure the defect of untimely execution. In *Optimal Chem. Inc. v. Srills LLC*, 2019 USPQ2d 338409 (TTAB 2019), the Board considered Internet evidence offered by the respondent for the truth of the matters contained in the evidence because the petitioner "opined on the accuracy of the information contained in this evidence in its rebuttal testimony and rebuttal trial brief . . . and did not expressly object to the admissibility of this evidence on any grounds" and thus waived any such objections. *Id.*, at *14 n.90. In *TV Azteca, S.A.B. de C.V. v. Martin*, 128 USPQ2d 1786 (TTAB 2018), the Board found that although the respondent had improperly filed its initial disclosures with the Board, they were part of the record because the petitioner referred to and relied on them in presenting its case-in-chief. *Id.* at 1787 n.5. Here, by contrast, Applicant timely objected in its brief to consideration of the improper rebuttal testimony, and did not treat it as of record for purposes of Counts II and III.

³⁶ Because Opposers failed to submit any evidence supporting these claims during their case-in-chief, we need not address Applicant's arguments directed specifically to Opposers' failure to prove the several elements of each claim. 136 TTABVUE 30-35.

VI. Opposers' Surname Claim Under Section 2(e)(4) of the Trademark Act (Count IV)³⁷

Opposers alleged in their First Amended Consolidated Notice of Opposition that “[t]he mark CREEL shown in Application Serial No. 86080973 is primarily merely a surname,” and that “the mark CREEL has not become distinctive of Applicant’s services through use or in connection with Applicant’s services in commerce.” First Amend. Cons. Not. of Opp. ¶¶ 34-35 (6 TTABVUE 9). Applicant denied these allegations. First Amend. Answ. ¶¶ 34-35 (10 TTABVUE 7).

A. Is CREEL “Primarily Merely a Surname” Within the Meaning of Section 2(e)(4) of the Trademark Act?

Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), prohibits registration on the Principal Register of a mark that is “primarily merely a surname,” unless the mark has acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 2(f). “A mark is primarily merely a surname if the surname is the primary significance of the mark as a whole to the purchasing public.” *In re tapio GmbH*, 2020 USPQ2d 11387, at *8 (TTAB 2020) (quoting *Earnhardt v. Kerry Earnhardt, Inc.*, 864 F.3d 1374, 123 USPQ2d 1411, 1413 (Fed. Cir. 2017)).

“[T]here is no rule as to the kind or amount of evidence necessary to show that the applied-for mark would be perceived as primarily merely a surname[,]” and “[t]his question must be resolved on a case-by-case basis.” *Id.* (citing *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653 (Fed. Cir. 1985)). We must “examine

³⁷ Count IV is directed solely to the application to register CREEL.

the entire record to determine the primary significance of” Applicant’s proposed mark CREEL. *Id.*

There are multiple sources of evidence that may be probative of the possible surname significance of a proposed mark. The Board has often used a set of inquiries originating in *In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332 (TTAB 1995), including (1) the degree of a surname’s rareness; (2) whether anyone connected with applicant has that surname; (3) whether the term has any recognized meaning other than that of a surname; (4) whether the proposed mark has the “structure and pronunciation” of a surname; and (5) whether the stylization of lettering is distinctive enough to create a separate commercial impression. *tapio*, 2020 USPQ2d 11387, at *9 n.28 (citing *Benthin*, 37 USPQ2d at 1333-34).³⁸ “These inquiries are not exclusive, and any of these circumstances—alone or in combination—and any other relevant circumstances may be considered when making this determination.” *Id.*, at *9 (citing *In re Eximius Coffee, LLC*, 120 USPQ2d 1276, 1277-78 (TTAB 2016); *In re Adlon Brand GmbH*, 120 USPQ2d 1717, 1719 (TTAB 2016)).

“Creel” is, of course, the surname of several of the dramatis personae in this saga. In that regard, Applicant’s brief does not address *Benthin* inquiry (2), and, as noted above, several of Applicant’s arguments against Opposers’ other claims turn on the fact that there are persons with the surname “Creel” who have been involved with Applicant over the years. The fact that attorneys with the surname “Creel,” including

³⁸ “Where, as here, the mark is in standard characters, it is unnecessary to consider the fifth factor.” *tapio*, 2020 USPQ2d 11387, at *9 n.28 (citing *In re Yeley*, 85 USPQ2d 1150, 1151 (TTAB 2007)).

Opposer Carlos Creel, have been part of Applicant's law firm or its predecessors, makes it more likely that CREEL will be viewed as a surname than as something else when it is used as a mark for legal services. *See, e.g., Miller*, 105 USPQ2d at 1620. This supports a finding that CREEL is primarily merely a surname.

With respect to how rare the surname "Creel" is in the United States, Exhibit 6 to Opposers' Notice of Reliance, a page from the website of the U.S. Census Bureau captioned "Frequently Occurring Surnames from the 2010 Census," shows that "Creel" was then the 4,028th most common surname in the United States, and that 8,815 people had that surname. 111 TTABVUE 232-36. Exhibit 5 to Opposers' Notice of Reliance consists of news articles in which "Creel" appears as a surname, including as the surname of Tony Award-winning actor Gavin Creel.³⁹ *Id.* at 44, 48, 68, 73, 77, 89-90, 94, 98, 102, 107, 116, 118, 120, 125, 140-41, 143, 145-46, 150, 156, 159, 163, 168, 171-73, 175, 177, 180, 184-85, 187, 189, 191-92, 194, 196, 203, 209-11, 213, 220, 227, 229-30.

Applicant argues that

[w]ith respect to the news articles identifying individuals with the surname "Creel," there are just as many—actually, more—articles in the record that employ "creel" for a nonsurname purpose. As for the U.S. Census information, Opposers overplay it. 8,815 people with the surname "Creel" in a country with a population of more than 325 million is a drop in the ocean.

³⁹ Gavin Creel is the star of this evidentiary show, as he is mentioned in the majority of the articles.

136 TTABVUE 39. These arguments are unpersuasive. “The relevant question is not simply how frequently a surname appears . . . but whether the purchasing public for Applicant’s services is more likely to perceive Applicant’s proposed mark as a surname rather than as anything else.” *tapio*, 2020 USPQ2d 11387, at *9 (quoting *In re Beds & Bars Ltd.*, 122 USPQ2d 1546, 1551 (TTAB 2017)). In *tapio*, the Board found that “tapio” was primarily merely a surname, even though in the 2010 Census “Tapio” ranked at 65,244 in terms of popularity, specifically showing 304 occurrences of the Tapio surname in America,” with the Board noting that “given the massive number of surnames in the United States, even the most common surname would represent only a small fraction of the U.S. population.” *Id.* (citing *In re Gregory*, 70 USPQ2d 1792, 1795 (TTAB 2004)).⁴⁰ The record here shows that while “Creel” is not a common surname in the United States, it is not so rare that it is not likely to be perceived by the public as a surname when used in connection with legal services. The record “supports a finding that [CREEL] is likely to be perceived by the public as a surname.” *Id.*, at *11.

Applicant argues that “[s]ubstantial evidence in the record establishes that the term CREEL has numerous recognized non-surname meanings and does not have the

⁴⁰ Applicant argues that “[w]hile Opposers cite four cases in which less common surnames were nonetheless found to be primarily merely a surname, none of those cases involved terms that also had dictionary meanings.” 136 TTABVUE 39-40 (citing *In re Olin*, 124 USPQ2d 1327 (TTAB 2017); *Azeka*; *Binion*; and *In re Piano Factory Grp. Inc.*, 85 USPQ2d 1522 (TTAB 2007)). As discussed above, we must review the entire record in determining the primary significance of CREEL, and “there is no rule as to the kind or amount of evidence necessary to show that the applied-for mark would be perceived as primarily merely a surname[.]” *tapio*, 2020 USPQ2d 11387, at *8.

‘look and feel’ of a surname to the public,” 136 TTABVUE 35,⁴¹ and that Opposers’ evidence “does not outweigh Applicant’s submissions.” *Id.* at 39. Applicant argues specifically that there “is substantial evidence in this proceeding, including more than 90 exhibits submitted by Applicant comprising dictionary definitions, news articles, and third-party trademark registrations, clearly establishing that CREEL has well-known non-surname meanings including most notably in the contexts of fishing and weaving.” *Id.* at 36. Applicant also points to third-party registrations of marks for goods identified in the registrations as a “creel” or “creels.” *Id.* at 39 (citing 117 TTABVUE 8-114). Applicant delves into this evidence in great detail, as it surveys the use of the word “creel” in connection with fishing and weaving in multiple dictionaries and articles, *id.* at 36-38, concluding that “[t]his evidence is dispositive, as a name that is not *merely* a surname does not fall under the proscription in Section 2(e)(4) of the Lanham Act.” *Id.* at 38 (citing *In re Isabella Fiore, LLC*, 75 USPQ2d 1564 (TTAB 2005)).

We agree with Applicant that there is considerable evidence of the use of the word “creel” other than as a surname, but Applicant’s arguments totally miss the mark. To the extent that Applicant argues that if a mark has **any** understood non-surname meaning it cannot be “primarily merely a surname” under Section 2(e)(4), Applicant misstates the law. As the Board explained in *Miller*, “[t]he mere existence of other non-surname meanings of the mark does not preclude a finding that the mark is

⁴¹ Applicant does not elaborate on this latter argument under the fourth *Benthin* inquiry, or point to any record evidence supporting it. We thus find that it is neutral in our analysis.

primarily merely a surname. Rather, we consider both whether, and, if so, the degree to which, the public would associate any established meaning **with the goods or services in the application.**” *Miller*, 105 USPQ2d at 1621 (emphasis added). Although the Board took judicial notice in *Miller* that a “miller” was “one that operates a mill” and “any of various moths having powdery wings,” *id.* at 1620-21, the Board held that “[t]he question is not whether a mark having surname significance might also have a non-surname significance, but whether, **in the context of the goods or services at issue**, that non-surname significance is the mark’s primary significance to the purchasing public, thus eclipsing and relegating the mark’s surname significance to secondary rather than primary status.” *Id.* (emphasis added). The Board concluded that “the primary significance of MILLER, to the purchasing public for legal services, is that of a surname, rather than one who operates a mill (or a moth).” *Id.*

The Board’s analysis in *Miller* applies squarely here. We must consider the primary significance of CREEL in the context of legal services, and we agree with Opposers that “Applicant did not name its law firm after a fishing rod (Class 28) or a weaving loom (Class 7).” 140 TTABVUE 18. Rather, Applicant claims that it “follows common practice among law firms to keep as part of their name the surname of a retired or deceased partner,” a practice that Applicant claims “is as true in Mexico as it is in the U.S.,” 136 TTABVUE 27, and that Applicant has engaged in a “longstanding practice of using CREEL as a shorthand name to refer to the firm.” *Id.* at 17. We find that “the primary significance of [CREEL], to the purchasing public

for legal services, is that of a surname,” rather than a wicker basket, a spinning or weaving frame or rack, or fishing equipment. *Miller*, 105 USPQ2d at 1621. The record does not support a finding that the primary significance of CREEL to purchasers of legal services is other than as a surname.

We find that CREEL is primarily merely a surname when it is used in connection with legal services because Creel is a recognized surname in the United States, and it is the surname of lawyers who have been involved with parties on both sides of the caption in this case. While “creel” has non-surname meanings in other contexts, those meanings are not the primary significance of the mark when it is used in connection with legal services, and there is no evidence or serious argument regarding the mark’s “structure and pronunciation.”

On the basis of the record as a whole, we find that Opposers proved, by a preponderance of the evidence, *Miller*, 105 USPQ2d at 1622, that CREEL is primarily merely a surname when it is used in connection with legal services in the United States, and it is thus unregistrable on the Principal Register in the absence of a showing of acquired distinctiveness.

B. Has CREEL Acquired Distinctiveness in the United States as Applicant’s Mark for Legal Services?

As noted above, Opposers pleaded that “the mark CREEL has not become distinctive of Applicant’s services through use on or in connection with Applicant’s services in commerce.” First Amend. Cons. Not. of Opp. ¶ 35 (6 TTABVUE 9). Applicant denied this allegation. First Amend. Answ. ¶ 35 (10 TTABVUE 7).

In their main brief, “Opposers maintain that the mark CREEL has not become distinctive of Applicant’s services through use [on] or in connection with Applicant’s services in commerce.” 130 TTABVUE 34. Applicant responds that “even if CREEL were found to be primarily merely a surname, Opposers’ claim would still fail in light of the substantial evidence in the record which demonstrates that CREEL refers distinctly to Applicant as a result of Applicant’s many decades of use and extensive promotion of its services under the CREEL mark.” 136 TTABVUE 35.⁴² Applicant “requests to amend Application Serial No. 86080973 to add a claim of acquired distinctiveness under Section 2(f) of the Lanham Act on the weight of Applicant’s proof” if the Board finds that CREEL is primarily merely a surname. *Id.* at 40 n.6. We have discretion to grant this request at final decision, *see City of London Distillery, Ltd. v. Hayman Grp. Ltd.*, 2020 USPQ2d 11487, at *12-15 (TTAB 2020), and we exercise that discretion, and grant Applicant’s request, because the issue of whether CREEL has acquired distinctiveness as Applicant’s mark for legal services in the United States was both joined in the parties’ pleadings, First Amend. Cons. Not. of Opp. ¶ 35 (6 TTABVUE 9); First Amend. Answ. ¶ 35 (10 TTABVUE 7), and briefed by the parties. 130 TTABVUE 34; 136 TTABVUE 40-42. *Cf. Miller*, 105 USPQ2d at 1623 n.17 (“While acquired distinctiveness was not raised in the pleadings, applicant did raise the claim at trial and opposer also argued the claim in

⁴² In their reply brief, Opposers do not dispute Applicant’s claim that CREEL has acquired distinctiveness. Indeed, they acknowledge that “Applicant may very well have spent a great deal of money on business development and promotion of legal services under that name.” 140 TTABVUE 20.

its reply brief. Therefore, because the question of acquired distinctiveness has been tried by implied consent of the parties, and the record includes sufficient evidence to determine the question, the Board will rule on it.”). We turn now to whether Applicant showed that CREEL has acquired distinctiveness as a mark for legal services in the United States.

As the Board explained in *Miller*, to prove that a surname has acquired distinctiveness,

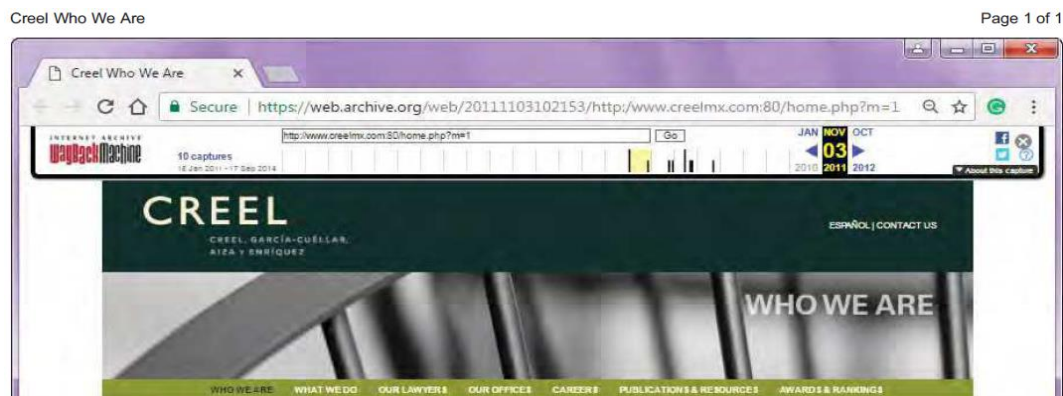
[e]vidence of “long and exclusive use which changes its significance to the public from a surname of an individual to a mark for particular goods or services” is necessary because surnames are shared by multiple individuals, and each individual may have an interest in using his/her surname in connection with his/her business. Section 2(f) underscored the common law by requiring an applicant’s use to be “substantially” exclusive.

Id. at 1623. In *Binion*, the Board noted that “[g]enerally, a statement of five years’ use will be sufficient to establish acquired distinctiveness.” *Binion*, 93 USPQ2d at 1540.

Applicant’s evidence of acquired distinctiveness with respect to the proposed mark CREEL consists of the February 2, 2021 Aiza Declaration and the exhibits thereto. Mr. Aiza testified, without contradiction,⁴³ that “[f]or decades, our firm has used the name and mark CREEL as its shorthand name,” and that the “public – including clients, potential clients, attorneys, legal organizations and others – know us by this

⁴³ Opposers did not cross-examine Mr. Aiza, and, as noted above, while the Creel Declaration states that it “respond[s] to several statements made by my former partner Carlos Ricardo Aiza Haddad,” Creel Decl. ¶ 17 (125 TTABVUE 4), those statements were made in Mr. Aiza’s “declaration supporting Applicant’s Motion for Summary Judgment,” Creel Decl. ¶ 17 (125 TTABVUE 4), not in his testimony declaration.

shorthand name in addition to our full firm name.” Aiza Decl. ¶ 6 (114 TTABVUE 4). He further testified that Applicant registered the domain name creel.mx in 2009, and that all firm email, which would include email to Applicant’s United States clients, comes from email addresses “@creel.mx,” Aiza Decl. ¶¶ 7, 12 (114 TTABVUE 4, 6); that the CREEL mark has appeared on the masthead of the firm’s website for many years from at least as early as November 2011, as exemplified below,



Aiza Decl. ¶ 8; Ex. CR3 (114 TTABVUE 5, 49); and that Applicant has used and exposed to clients, including clients in the United States, various logos that show the mark CREEL separate and apart from the full firm name. Aiza Decl. ¶¶ 7-10; Ex. CR3 (114 TTABVUE 4-5, 150-66). We display examples of the logos below:



Aiza Decl. ¶ 10 (114 TTABVUE 5). Mr. Aiza testified that the “CREEL logo appears in the formal signature block of all emails originating from our firm, as does a reference to the creel.mx domain name.” Aiza Decl. ¶ 12 (114 TTABVUE 6).

Carlos Creel acknowledged in his 2017 Declaration that “Applicant has long provided cross-border services to U.S. clients in conjunction with American law firms.” Creel Decl. ¶ 17b. (71 TTABVUE 4). In his 2012 presentation regarding Applicant’s history, he explained that by the 1980s, Applicant, then doing business as Creel Abogados, S.C., “already had an international presence,” Tr. 13:17-22 (114 TTABVUE 33), and that beginning in the year 2000, Applicant, then doing business as Creel, García-Cuellar and Müggemberg, began the “most profound transformation in our firm,” Tr. 17:13-15 (114 TTABVUE 37), which included strengthening its international presence, by “focus[ing] on the establishment and development of tight professional relationships with the most prominent law firms in the United States, Central and South America.” Tr. 18:17-20 (114 TTABVUE 38).

Mr. Aiza testified that Applicant has handled more than 2,500 matters related to U.S.-based clients in the last five years, Aiza Decl. ¶ 13 (114 TTABVUE 6), and he gave multiple examples of such engagements for United States companies such as Brown-Forman Corporation, Carestream Health, Inc., Hill Street Capital LLC, Charlesbank Capital Partners, Blackstone, General Electric, Howard Midstream Energy Partners, LLC, KKR, Colfax, Advent International, and The Mexico Fund, Inc. Aiza Decl. ¶¶ 14, 16; Exs. CR5-CR7, CR9 (114 TTABVUE 6-8, 80-96, 104-48). He further testified that in such engagements and “[i]n connection with our work for U.S. clients, [Applicant] has close working relationships with numerous top-tier law firms across the U.S.,” including placing Applicant’s attorneys as visiting attorneys with those firms. Aiza Decl. ¶ 18 (114 TTABVUE 9). The referenced United States firms

include Cleary, Gottlieb, Steen & Hamilton; Cravath Swaine & Moore; Davis Polk & Wardwell; Dechert Goodwin; Gunderson Dettmer; Kirkland & Ellis; Latham & Watkins; Milbank; Morrison & Foerster; Orrick; Simpson Thacher & Bartlett; Skadden, Arps, Slate, Meagher & Flom; and Sullivan & Cromwell. Aiza Decl. ¶ 18 (114 TTABVUE 9).

Applicant also maintains an English-language website to market its legal services to prospective clients in the United States. Aiza Decl. ¶ 19; Exs. CR10-CR11 (114 TTABVUE 9, 149-75). Mr. Aiza authenticated versions of the website from 2016 and 2021, each of which uses CREEL as a stand-alone mark prominently in its masthead, and in the body of the website, to refer to Applicant, and the 2016 version also quotes legal publications that refer to Applicant as “Creel.” Aiza Decl. Exs. CR10-CR11 (114 TTABVUE 151, 166-75). Mr. Aiza also testified that Applicant maintains profiles on LinkedIn.com and Martindale.com to promote the firm’s legal services to U.S. and other clients. Aiza Decl. ¶ 20; Exs. CR12-CR13 (114 TTABVUE 9-10, 176-83). Like Applicant’s website, its LinkedIn and Martindale pages make prominent use of CREEL as a stand-alone mark, as shown below:



Aiza Decl. Ex. CR12 (114 TTABVUE 177) (LinkedIn).



Aiza Decl. Ex. CR13 (114 TTABVUE 183) (Martindale.com). Other English-language promotional materials and publications generated by or in conjunction with Applicant also use CREEL prominently as a stand-alone mark. Aiza Decl. ¶¶ 21-23; Exs. CR14-CR16 (114 TTABVUE 10, 184-210, 235, 252, 257, 270, 275, 284, 301, 304-20).

Mr. Aiza testified that Applicant's marketing and business development expenditures relating to the United States between 2016 and early 2021 were approximately \$500,000. Aiza Decl. ¶ 25 (114 TTABVUE 11).

Mr. Aiza testified about and authenticated profiles of Applicant, and legal industry awards from Chambers, Legal 500, the Financial Times, and others, recognizing Applicant's expertise in a number of practice areas. Aiza Decl. ¶ 28; Exs. CR17-CR21 (114 TTABVUE 11-12, 321-407). Some of the materials regarding these awards display CREEL as a stand-alone mark or refer to Applicant (or quote others referring to Applicant) as "Creel." Aiza Decl. Exs. CR17-CR21 (114 TTABVUE 324, 358-60, 362, 376, 378, 402).

As noted above, for a surname to have acquired distinctiveness under Section 2(f) there must be proof of substantially exclusive use of the surname in connection with the relevant goods or services. *Miller*, 105 USPQ2d at 1625. In *Miller*, there was evidence showing that both parties used the MILLER surname in connection with

their respective legal practices in the United States, and that numerous third parties did so as well. *Id.* at 1623-25. The Board found, in view of this evidence, that the applicant “cannot in good faith, submit a verified statement with an affidavit or signed declaration under 37 C.F.R. 2.20 that the mark has become distinctive of her legal services through her ‘substantially’ exclusive use in commerce,” *id.* at 1625, thus dooming her Section 2(f) claim. *Id.*

Here, there is no evidence of any third-party use of a CREEL-formative mark in connection with legal services in the United States, and the only evidence of Opposers’ use of CREEL ABOGADOS in connection with legal services in the United States consists of statements in Carlos Creel’s 2017 Declaration agreeing that “Applicant has long provided cross-border services to U.S. clients in conjunction with American law firms,” Creel Decl. ¶ 17b. (71 TTABVUE 4), but averring that that “is also true of my current law firm, Creel Abogados IV. In fact, most of the services provided by Creel Abogados IV are provided to non-Mexican clients, and the majority of those non-Mexican clients are from the United States.” Creel Decl. ¶ 17b. (71 TTABVUE 4). Carlos Creel’s conclusory statements in August 2017 about his firm’s activities do not establish the nature, extent, or duration of Opposers’ use of the CREEL ABOGADOS mark in the United States at that point, and there is no evidence regarding Opposers’ use of the CREEL ABOGADOS mark in the United States at any time between August 2017 and the beginning of trial in October 2020. Carlos Creel’s testimony does not show that Applicant’s use of CREEL for legal services in the United States between some point in the 2000s and the beginning of trial in October

2020 has not been substantially exclusive. *Cf. Miller*, 105 USPQ2d at 1625 (“When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctive on which purchasers may rely is lacking under such circumstances.”) (quoting *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 940-41 (Fed. Cir. 1984)). We find that the requirement of substantially exclusive use of CREEL under Section 2(f) has been satisfied.

The USPTO may accept evidence of five years of substantially exclusive and continuous use of a mark as prima facie evidence of acquired distinctiveness. *Cf. Sausser Summers*, 2021 USPQ2d 618, at *14 (rejecting the applicant’s claim of five years’ of substantially exclusive and continuous use of the proposed mark ONLINETRADEMARKATTORNEYS.COM for legal services because the proposed mark was highly descriptive under Section 2(e)(1) of the Trademark Act). The record shows that the CREEL mark has been used by Applicant substantially exclusively and continuously in commerce with the United States in connection with legal services for at least 10 years, and there is additional evidence discussed above that Applicant has achieved recognition by United States law firms and clients under the mark CREEL. We find that Applicant’s CREEL mark has acquired distinctiveness for legal services and is entitled to registration on the Principal Register under Section 2(f) of the Trademark Act. Accordingly, Opposers’ claim under Section 2(e)(4) of the Trademark Act against Application Serial No. 86080973 to register CREEL is dismissed with prejudice.

Decision: The opposition is dismissed. Applicant's Application Serial No. 86080973 will be amended prior to registration to reflect a claim of acquired distinctiveness under Section 2(f) of the Trademark Act.