

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: August 30, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Chatham Imports, Inc.

v.

Driftless Pure, LLC

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Opposition No. 91243988

James D. Weinberger of Fross Zelnick Lehrman & Zissu PC for Chatham Imports, Inc.

Laura M. Konkell of the Michael Best & Friedrich LLP for Driftless Pure, LLC.

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Before Shaw, Greenbaum and Hudis, Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Driftless Pure, LLC (“Applicant”) seeks registration of two marks, FARMER FORWARD, in standard characters, and the composite mark,



both for goods identified as: “Alcoholic beverages, except beer; Gin; Spirits; Vodka,” in International Class 33.¹

Chatham Imports, Inc. (“Opposer”) opposes registration of Applicant’s mark on the ground of priority and likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). Opposer pleaded ownership of the registered mark FARMER’S, in standard characters, for use on “Alcoholic beverages, namely, distilled spirits,” in International Class 33.² A status and title copy of the registration was introduced by notice of reliance.³

Applicant denied the salient allegations of the notice of opposition. The case is fully briefed. We sustain the opposition in part, and dismiss in part.

¹ Application Serial Nos. 87814648 and 87814771, both filed on February 28, 2018 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), asserting a bona fide intent to use the marks in commerce.

The description of the mark in application Serial No. 87814771 reads: “The mark consists of the words ‘FARMER FORWARD’ and ‘DRIFTLESS PURE’ with a hummingbird in between the words, above the stylized word ‘LA CROSSE’ with parallel lines around the lower case letters, above a star followed by ‘EST. 2017’ and another star, above the words ‘DISTILLING CO.’, above the words ‘GENUINE WISCONSIN SPIRIT.’” The wording DRIFTLESS PURE, LA CROSSE, EST. 2017, DISTILLING CO. and WISCONSIN are disclaimed apart from the mark as shown.

² Reg. No. 3829294, issued August 3, 2010, and renewed.

³ Opposer’s Notice of Reliance, 55 TTABVUE.

With its Notice of Reliance, Opposer also introduced a status and title copy of Registration No. 3871604 for the mark FARMER’S BOTANICAL, in standard characters, for use on “Gin,” in International Class 33. Opposer did not plead ownership of this registration in its Notice of Opposition or in its Amended Notice of Opposition. A plaintiff may not use an unpleaded registration as the basis for an opposition. *See FUJIFILM SonoSite, Inc. v. Sonoscape Co., Ltd.*, 111 USPQ2d 1234, 1235 (TTAB 2014); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE, § 314 (June 2022). However, our finding of a likelihood of confusion is based on Opposer’s FARMER’S mark in determining likelihood of confusion. We therefore need not decide whether Opposer’s unpleaded registration for the FARMER’S BOTANICAL mark is properly of record for determining likelihood of confusion. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the files of the involved applications. In addition, the parties submitted the following evidence.

For Opposer:

1. Opposer's Notices of Reliance on: Opposer's registrations; discovery materials; deposition transcripts of Chad Staehly, part owner of Applicant, and Nicholas Weber, Founder and President of Applicant; and internet documents.⁴
2. The Trial Declaration of Stephen Ziegler, Opposer's Executive Vice President of Sales, and exhibits attached thereto.⁵
3. The Rebuttal Declaration of Stephen Ziegler, and exhibits attached thereto.⁶

For Applicant

1. The Trial Declaration of Logan Kirby, Accounting Manager of third-party restaurant group, Farmers Restaurant Group, LLC, and exhibits attached thereto.⁷
2. The Trial Declaration of Meaghan O'Shea, Vice President, Marketing & Communications at Farmers Restaurant Group, LLC, and exhibits attached thereto.⁸
3. The Trial Declaration of Chad Staehly, and exhibits attached thereto.⁹
4. Applicant's Notice of Reliance on: the deposition transcript of Stephen Ziegler, and exhibits thereto; disclosures and discovery responses; printed publications; and official records.¹⁰

⁴ 55-58 TTABVUE.

⁵ 59 TTABVUE.

⁶ 71-72 TTABVUE.

⁷ 60-61 TTABVUE.

⁸ 62 TTABVUE.

⁹ 63-64 TTABVUE.

¹⁰ 65-68 TTABVUE.

5. The Trial Declaration of Rick Wasmund, Chief Executive Officer of third-party distillery, Copper Fox Distillery, and exhibits attached thereto.¹¹

II. Entitlement to Statutory Cause of Action¹²

Entitlement to a statutory cause of action must be proven by the plaintiff in every inter partes case. *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). To establish entitlement to a statutory cause of action under Trademark Act Section 13, 15 U.S.C. § 1063, a plaintiff must demonstrate “an interest falling within the zone of interests protected by the statute and . . . proximate causation.” *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *4 (Fed. Cir. 2020) *cert. denied sub. nom.*, 141 S. Ct. 2671 (2021), (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067-70 (2014)). Stated another way, a plaintiff is entitled to bring a statutory cause of action by demonstrating a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 (Fed. Cir. 2020), *reh’g en banc denied*, 981 F.3d 1083, 2020 USPQ2d 11438 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (2021); *see also Empresa Cubana*, 111 USPQ2d at 1062.

¹¹ 69-70 TTABVUE.

¹² Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of “standing.” Mindful of the Supreme Court’s direction in *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014), we now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable.

As noted above, Opposer introduced a copy of its pleaded FARMER'S registration printed from the USPTO's Trademark Status and Document Retrieval system showing the current status of and title to the registration. Because Opposer has properly introduced into evidence a copy of its pleaded registration, Opposer has established its entitlement to a Section 2(d)-based opposition that is not wholly without merit. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Indus. Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

III. Priority

Because Opposer's pleaded FARMER'S registration is of record, and Applicant did not counterclaim to cancel it, priority is not at issue as to the marks and goods covered by the registration. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)).

IV. Likelihood of Confusion

Our determination of the issue is based on an analysis of all the probative facts in evidence relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) ("*DuPont*"). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the goods or services and the similarities between the marks. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental

inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). We have considered each *DuPont* factor for which there is evidence and argument of record. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

A. The similarity or dissimilarity of the goods, trade channels, and purchasers

We first compare the goods as they are identified in the involved applications and Opposer’s registration, the second *DuPont* factor. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) and *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

Opposer’s goods are “Alcoholic beverages, namely, distilled spirits.” Applicant’s applied-for goods are “Alcoholic beverages, except beer; Gin; Spirits; Vodka.” The parties’ goods are thus, in part, legally identical inasmuch as both identify alcoholic beverages, namely, spirits. Applicant does not argue otherwise. It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods or services within a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

Because the parties’ goods are in-part legally identical without restriction, we also must presume that they are offered in all normal trade channels and to all normal classes of purchasers for such goods. *See Stone Lion*, 110 USPQ2d at 1161. Thus, we

consider Opposer's and Applicant's trade channels and classes of purchasers to be the same. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) ("With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and 'presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods. . . .") (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)). Again, Applicant does not argue otherwise.

We find the *DuPont* factors relating to the similarity of the goods, trade channels, and purchasers favor a finding of likelihood of confusion.

B. Strength of Opposer's mark

We next consider the strength of Opposer's mark in order to evaluate the scope of protection to which it is entitled. In determining strength of a mark, we consider both inherent or conceptual strength, based on the nature of the mark itself, and commercial strength. *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014); *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning)."); McCarthy, T. J., MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. June 2022) ("The first enquiry is for conceptual strength and focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another's use."). Moreover,

“the strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak.” *In re Coors*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003); *see also Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (“[F]ame varies along a spectrum from very strong to very weak.”) (internal citations omitted).

As noted above, conceptual strength is determined by the nature of the mark itself, i.e., whether the mark is arbitrary, suggestive, descriptive, etc. in relation to the goods or services or the degree of usage of the mark by third parties. *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017). Commercial strength may be measured indirectly by the volume of sales and advertising expenditures in connection with the goods sold under the mark, and other factors such as length of time of use of the mark; widespread critical assessments; notice by independent sources of the goods identified by the marks; and the general reputation of the goods. *Weider Publ’ns, LLC v. D & D Beauty Care Co.*, 109 USPQ2d 1347, 1354 (TTAB 2014); *see also Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1308 (Fed. Cir. 2002) (recognizing indirect evidence as appropriate proof of strength).

1. Conceptual strength

We begin with the conceptual strength of Opposer’s mark. “[W]e evaluate [the mark’s] intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary (or fanciful) continuum of words.” *In re Davia*, 110 USPQ2d 1810, 1815 (TTAB 2014). “Marks that are descriptive or highly suggestive are entitled to a narrower scope of protection, *i.e.*, are less likely to generate confusion over source

identification, than their more fanciful counterparts.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015). Conversely, word marks that are arbitrary, fanciful, or suggestive are “held to be inherently distinctive.” *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000) (“In the context of word marks, courts have applied the now-classic test originally formulated by Judge Friendly, in which word marks that are ‘arbitrary’ (‘Camel’ cigarettes), ‘fanciful’ (‘Kodak’ film), or ‘suggestive’ (‘Tide’ laundry detergent) are held to be inherently distinctive.”).

Applicant argues that “Opposer’s mark conveys the fresh and organic characteristics of its gin. The mark is therefore suggestive (or possibly even descriptive) and inherently conceptually weak.”¹³ Applicant introduced a dictionary definition of the term “farmer,” which is defined as “a person who cultivates land or crops or raises animals (such as livestock or fish).”¹⁴ To further support this argument, Applicant points to the confidential testimony of Stephen Ziegler, Opposer’s Executive Vice President of Sales, regarding how the FARMER’S mark was chosen:

We were trying to come up with a brand name that would give the imagery of freshness, wholesomeness, something organic, and we came up with Farmer’s because we thought of a farm stand that you get your best vegetables, you get your best fruit when it’s locally picked up. It just gives a

¹³ Applicant’s Br., p. 8, 76 TTABVUE 9.

¹⁴ <https://www.merriam-webster.com/dictionary/farmer>, exh. DX 14, 68 TTABVUE 917-25. Accessed March 12, 2020.

great image of a product that's wholesome, and that's why we used the name.¹⁵

In reply, Opposer explains why its FARMER'S mark is conceptually strong, entitling it to a broad scope of protection under the law:

There is nothing inherent about the FARMER'S Mark (nor any evidence found in the record) that suggests a connection between the mark and Opposer's alcoholic beverage products. Because the FARMER'S Mark comprises a commonly used term that bears no connection to the goods with which it is used, the mark is arbitrary. . . . As a result of being an arbitrary mark, the FARMER'S Mark is inherently distinctive, conceptually strong, and entitled to a broad scope of protection under the law.¹⁶

We disagree with Applicant that Opposer's FARMER'S mark is merely descriptive or inherently weak. Because it is registered on the Principal Register without a claim of acquired distinctiveness, FARMER'S is entitled to a presumption of validity under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), including that it is inherently distinctive for the identified goods. *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006).

“A mark is merely descriptive if it consists merely of words descriptive of the qualities, ingredients or characteristics of the goods or services related to the mark.” *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012) (internal quotations omitted). *See also In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (a mark is merely descriptive is if “someone who knows what the goods are will understand the mark to

¹⁵ Confidential Ziegler test., 65 TTABVUE 33; exh. 7, 65 TTABVUE 212.

¹⁶ Applicant's Br., p. 24-25, 74 TTABVUE 26-27.

convey” information about an “ingredient, quality, characteristic, feature, function, purpose or use of the goods”). FARMER’S conveys no such information about distilled spirits. Clearly it is not merely descriptive.

Regarding FARMER’S suggestiveness, a mark is suggestive if it requires imagination, thought, and perception on the part of someone who knows what the goods are to reach a conclusion about their nature from the mark. *Id.*, 118 USPQ2d at 1515. Although Opposer’s testimony stated that FARMER’S was chosen to convey “the imagery of freshness, wholesomeness, something organic,”¹⁷ the term FARMER’S could convey any number of other characteristics attributable to farmers, such as industry, thrift, patience, etc. Indeed, the definition of “farmer” establishes only that it is “a person who cultivates land or crops or raises animals (such as livestock or fish).”¹⁸ Multi-step reasoning is thus required to get from FARMER’S to the attributes of “freshness, wholesomeness, something organic” for distilled spirits. Conceptually, we find FARMER’S to be arbitrary or, at worst, mildly suggestive, and therefore entitled to a normal scope of protection afforded a registered mark.

2. Commercial strength

Commercial or marketplace strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Bd. of India*, 80 USPQ2d at 1899. To determine whether a mark has attained commercial strength, as part of our analysis we consider: prolonged exclusive use of the mark, extensive promotion and

¹⁷ Confidential Ziegler test., 65 TTABVUE 33; exh. 7, 65 TTABVUE 212.

¹⁸ <https://www.merriam-webster.com/dictionary/farmer>, exh. DX 14, 68 TTABVUE 917-25. Accessed March 12, 2020.

marketing, media publicity, critical acclaim and a very large dollar volume of sales of products bearing Opposer's mark. *Bridgestone Ams. Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012).

Opposer argues that its FARMER'S mark is "very strong."¹⁹ For support, Opposer points to ten years of sales, with recent sales increasing to \$600,000; widespread geographically availability, including online availability; extensive promotion, including \$250,000 spent annually in various advertising mediums; and unsolicited third-party coverage in newspapers, trade magazines, magazines, trade shows, online, and in social media.²⁰

Opposer's testimony and accompanying exhibits show that it has had recent success in growing its sales of FARMER'S spirits. However, by its own admission, FARMER'S is a "small batch"²¹ spirit, which also is noted in a number of third-party news stories, which mostly date from the 2010-2013 time period.²²

The sales and advertising information provided by Opposer's witness lacks context as to how these measures of commercial success compare with other distillers, making the information less probative. "Raw numbers of product sales and advertising expenses may have sufficed in the past to prove fame of a mark, but raw numbers alone in today's world may be misleading." *Bose*, 63 USPQ2d at 1309; *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1408 (TTAB 2009)

¹⁹ Opposer's Br., p. 26, 74 TTABVUE 28.

²⁰ *Id.* at 26-27; Ziegler decl., ¶¶ 9, 13, 16-19, 21, 22, 24, 59 TTABVUE 4-6.

²¹ Ziegler decl., ¶ 10, 59 TTABVUE 4.

²² *Id.* at 59 TTABVUE 175, 176, 186, 187.

(opposer’s advertising figures were “not particularly impressive” and “the problem that we have in assessing the effectiveness of the advertising expenditures is that there is no testimony or evidence regarding whether opposer’s advertising expenditures are large or small vis-à-vis other comparable medical products.”). *See also Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1690 (Fed. Cir. 2018) (contextual evidence needed “to arrive at a proper understanding of whether customers would recognize the mark”). Similarly, we find that the third-party media coverage is modest when considered over the twelve years the mark has been in use.

On this record, we find that Opposer has not established that its FARMER’S mark is commercially strong.

3. The number and nature of similar marks in use on similar goods

We next consider the number and nature of similar marks in use on similar goods, the sixth *DuPont* factor. In an inter partes proceeding, “[t]he purpose of [an applicant] introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different such marks on the bases of minute distinctions.” *Omaha Steaks*, 128 USPQ2d at 1693 (quoting *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)). *See also Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015); *Juice Generation*, 115 USPQ2d at 1675-76 (internal citations omitted). “Evidence of third-

party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay*, 73 USPQ2d at 1693.

Applicant argues that “Opposer’s mark already coexists with use and registration of many marks featuring FARMER for alcohol. This is powerful evidence that Opposer’s mark is weak.”²³ To show weakness of the term FARMER via third-party registration or use of the term on distilled spirits, Applicant introduced a variety of evidence, as follows.

i. Third-party FARMER marks for spirits

Applicant introduced two commonly-owned third-party registrations for the marks FOUNDING FARMERS²⁴ and KNOW YOUR FARMER. KNOW YOUR DISTILLER²⁵ both for use on distilled spirits. Opposer, however, has coexistence agreements with the owner of these two marks limiting aspects of the marks’ usage.²⁶ Applicant also introduced several Internet web page excerpts purporting to show third-party use of the term FARMER on ARCTIC HARVEST FROZEN FARMER vodka, FARMERS coffee flavored vodka, and LAWS WHISKEY HOUSE FARMERS SELECT bourbon.²⁷ No evidence was introduced regarding the sales volume of these products, or the degree of consumer recognition, if any.

²³ Applicant’s Br., p. 12, 76 TTABVUE 14.

²⁴ Registration No. 5207022, issued May 23, 2017.


²⁵ Registration No. 5538891, issued August 14, 2018.

²⁶ Ziegler decl., 72 TTABVUE 3; Exhs. PX 22-23, 72 TTABVUE 4-13.

²⁷ 68 TTABVUE 78-95. Applicant introduced evidence related to a number of pending and abandoned applications for FARMER-formative marks used on distilled spirits, some of

ii. Third-party registrations for FARM or FARMER-formative marks for other alcoholic beverages and related products

Applicant introduced thirty-five third-party registrations from the Office’s TSDR database for FARM or FARMER-formative marks, used on a variety of spirits, liquors, hard ciders, beer, wine, and mixers. Some of the third-party registrations, however, particularly those for marks used on spirits, are comprised of marks with foreign words that may translate to FARMER-formative terms. The following examples are most relevant.²⁸

Mark	Reg. No.	Goods
 <p>(ITALIAN ORGANIC WINE WINEMAKERS SELECTION FROM FARM TO TABLE VEGAN 750ML ALC 14% disclaimed)</p>	6158660	Wines and aperitifs with a distilled alcoholic liquor base.
<p>AGAVERO (The English translation of “AGAVERO” is “agave farmer”.)</p>	2091644	Tequila
<p>CAMPESINO</p>	6295707	Distilled spirits; Rum; Rum-based beverages

which abandoned after opposition by Opposer. *See, e.g.*, 59 TTABVUE 193-98, 206-19. Third-party applications are evidence only of the fact that they have been filed, *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009), and have no other probative value, *Interpayment Servs. Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003).

²⁸ 68 TTABVUE 107-636.

Mark	Reg. No.	Goods
(The English translation of CAMPESINO is “farmer” and/or “cowboy.”)		
COA DE JIMA (The English translation of COA DE JIMA is “tool of the farmer.”)	3763561	Liquor; Tequila
KEOKI (The English translation of KEOKI is “George” and “farmer.”)	2537951	Coffee Liqueur
BLUE ASH FARM (FARM disclaimed)	6030677	Spirits; whisky; bourbon; bourbon whisky; vodka; gin
EPS FARM CRAFTED PRAIRIE ORGANIC GIN 40% ALC. BY VOL. ED PHILLIPS & SONS USDA ORGANIC and design (FARM CRAFTED, ORGANIC GIN, 40% ALC. BY VOL. and USDA ORGANIC disclaimed)	5962437	Organic alcoholic beverages except beers; organic gin
DEAD FARMERS RECIPE 23 and Design (RECIPE disclaimed)	5179670	Non-alcoholic Bloody Mary cocktail mixes
FARMER MADE (Supplemental Register)	5000480	Non-alcoholic cocktail mixes
FEISTY FARMER	5515309	Hard cider
POOR FARMER HARD CIDER and design (HARD CIDER disclaimed)	5298026	Hard cider
FARMER’S BEAT	4768845	Beers
FARMERS BREWING CO. (BREWING CO. disclaimed)	5633508	Beer
FARMERS LIGHT (LIGHT disclaimed)	5633511	Beer
FARMER’S TAN RED ALE (TAN RED ALE disclaimed)	3223015	Beer
THE FARMER’S DAUGHTER	4271048	Ale

Mark	Reg. No.	Goods
FARMER'S FIZZ (FIZZ disclaimed)	4571140	Wine
FARMER'S FURY	4032546	Wines
FARMERS OF WINE	4703726	Wines
THE FARMER'S MUSE	5587762	Wines

iii. Third-party branding of spirits and other alcoholic beverages

To buttress the relevance of the foregoing third-party registrations for FARM and FARMER-formative marks used on alcoholic beverage products besides spirits, Applicant introduced evidence that some entities offer spirits as well as beer, wine, or cider under a single brand. For example, Applicant submitted evidence that the marks DOGFISH HEAD,²⁹ ROGUE,³⁰ NEW HOLLAND,³¹ TWO BROTHERS,³² THREE FLOYDS,³³ and CEDAR RIDGE³⁴ are registered for both distilled spirits and beer or wine, and are advertised on their respective websites. Similarly, Applicant introduced Internet webpage evidence that the brands ROUND BARN, KOENIG, RANSOM, FIORE, 1911, MOTHER EARTH, and BRICKWAY, among others, are used to identify both sprits and beer, wine, or hard cider.³⁵

²⁹ 68 TTABVUE 670-79.

³⁰ *Id.* at 680-95.

³¹ *Id.* at 696-709.

³² *Id.* at 715-36.

³³ *Id.* at 737-53.

³⁴ *Id.* at 769-80

³⁵ *Id.* at 754-894.

In response to Applicant’s third-party evidence of FARMER-formative marks, Opposer argues that it has actively opposed registration of other FARMER-formative marks for distilled spirits—except for the two Founding Farmers’ marks with which it has coexistence agreements—thereby keeping the register free from other FARMER marks used on distilled spirits. Opposer points to successful opposition of five applications for distilled spirits marks such as KNOW THY FARMER (91203706), FARMER TO STILL (91226953), THE FARMER’S WOLF (91254837), FARMER BOY (91255382), and MAD FARMER (91255868).³⁶

Opposer also introduced evidence documenting successful trademark enforcement efforts directed to parties using or seeking to register FARMER-formative marks in connection with alcoholic beverages that are closely-related to its distilled spirits. These marks include POLISH FARMER VODKA (Ser. No. 86254715), FARMER’S BASKET (Ser. No. 86317753), ISLAND FARMER (Ser. No. 88093367), SIMPLE FARMER, FARMER’S DAUGHTER, FEISTY FARMER, and POOR FARMER HARD CIDER.³⁷ According to Opposer, these efforts encouraged parties to either withdraw the relevant applications or “narrow the identification of goods in its trademark application so that it does not encompass ‘gin’ or ‘distilled spirits.’”³⁸

Lastly, Opposer argues that Applicant’s registration evidence also is lacking in probative value: “[b]ecause none of the cited third-party registrations relied upon by

³⁶ Ziegler test., ¶ 26, 59 TTABVUE 7.

³⁷ *Id.* at ¶ 27, exh. PX 21, 59 TTABVUE 7, 190-219.

³⁸ *Id.* at ¶ 27, 59 TTABVUE 7.

Applicant features a FARMER-inclusive mark for ‘distilled spirits’ (every cited registration is either for ‘hard cider,’ ‘beer,’ or ‘wine’), they have less probative value for purposes of the sixth *DuPont* factor.”³⁹

iv. Analysis of third-party FARMER marks

Regarding Applicant’s evidence of third-party use and registration of FARMER and FARM-formative marks, we find that Applicant’s evidence falls short of establishing weakness of FARMER’S in connection with distilled spirits.

Upon close examination, we find that, strictly speaking, Applicant submitted only two registrations for FARMER-formative marks registered for distilled spirits, both of which are commonly-owned and covered by a coexistence agreement with Opposer. *Cf. Anthony’s Pizza & Pasta Int’l Inc. v. Anthony’s Pizza Holding Co.*, 95 USPQ2d 1271, 1282 (TTAB 2009) (coexistence agreement with third party does not preclude a finding of likelihood of confusion).

The three web pages showing use of ARCTIC HARVEST FROZEN FARMER vodka, FARMERS coffee flavored vodka, and LAWS WHISKEY HOUSE FARMERS SELECT bourbon do not establish that FARMER’S is weak. They lack significant probative value because they are too few in number, and because we have no evidence regarding the length of time they have been available to consumers, or their respective degree of consumer recognition. *See Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1112 (TTAB 2007) (probative value of third-party use is “limited given the absence of any corroborating facts bearing on the extent of such

³⁹ Applicant’s Br., pp. 10-11, 77 TTABVUE 12-13.

use.”). *See also McDonald’s Corp. v. McKinley*, 13 USPQ2d 1895, 1899-1900 (TTAB 1989) (McDonalds’ failure to object to some other “MC” formative marks did not weaken its mark).

The other third-party registrations also include marks that contain significant additional elements, foreign words, FARM not FARMER, or simply have different overall commercial impressions, rendering many of them less similar to Opposer’s mark than FARMER FORWARD. *Cf. In re Inn at St. John’s*, 126 USPQ2d 1742, 1745-46 (TTAB 2018) (discounting probative value of third-party registrations “contain[ing] the nonidentical term ‘Fifth’” in showing that the cited registered mark 5IVESTEAK was weak), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019). We thus afford Applicant’s third-party registration evidence less probative value.

We find that the other third-party registrations are of less probative value as well because they either encompass alcoholic beverages besides distilled spirits or complementary products such as cocktail mixers. *See Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (“[T]hird-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered for similar goods or services.”).

Applicant nevertheless argues that the third-party registrations for other alcoholic beverages “still diminish the strength of Opposer’s mark. . . . Alcohol consumers are the relevant public and all alcohol is ‘similar’ to Opposer’s spirits for purposes of the Board’s strength analysis.”⁴⁰

⁴⁰ Applicant’s Br., pp. 20-21, 75 TTABVUE 22-23.

We agree that all of the third-party registrations for alcoholic beverages are relevant to our strength determination, but we disagree that they all are of equal weight. Opposer's FARMER'S mark is registered for use on distilled spirits, and Applicant seeks to register its marks for spirits as well. Thus, third-party marks registered for spirits are the most relevant. The strength of a mark is not "an all-or-nothing measure" in the context of likelihood of confusion. *Joseph Phelps Vineyards*, 122 USPQ2d at 1734. As explained above, it "varies along a spectrum from very strong to very weak." *Coors*, 68 USPQ2d at 1063.

Taking Applicant's third-party evidence as a whole, we find it establishes that FARMER is weak when used on beer, wine, and hard cider, but it does not establish that FARMER is weak when used on spirits. Opposer has been able to keep the distilled spirits segment of the alcoholic beverage market relatively free of FARMER-formative marks. As a result, Applicant's use of FARMER FORWARD on spirits places its marks much closer to Opposer's mark and goods than any of the other third-party marks. Put another way, even were we to assume, *arguendo*, that all FARMER-formative marks are weak for all alcoholic beverages including spirits, FARMER FORWARD is still closer to Opposer's mark and goods than all of the other marks. *See Nat'l Cable Television Ass'n, Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991) ("None of the third party marks and uses of ACE made of record are nearly as closely related to the activities of the parties as the virtually identical uses of the parties are to each other.").

4. Conclusion on strength

In sum, we find that Opposer's mark is at worst mildly suggestive, it is not commercially strong, and its strength is not diminished by third-party usage of similar marks for spirits. Accordingly, we hold Opposer's FARMER'S mark to be entitled to a normal scope of protection afforded a registered mark. That is, Opposer's mark is entitled to appropriate protection against the registration of confusingly similar marks. *King Candy*, 182 USPQ at 109; *Max Capital*, 93 USPQ2d at 1246.

This *DuPont* factor is neutral in our analysis of likelihood of confusion.

C. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression

Next, we consider the *DuPont* factor relating to the similarity of the marks. In comparing the marks, we must consider their appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. Similarity as to any one of these factors may be sufficient to support a finding that the marks are confusingly similar. *See Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion."); *Inn at St. John's*, 126 USPQ2d at 1746 ("Similarity in any one of these elements may be sufficient to find the marks confusingly similar.") (quoting *Davia*, 110 USPQ2d at 1812).

Although marks must be considered in their entireties, it is settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the similarity of the marks. *Viterra*, 101 USPQ2d at 1908; *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749,

751 (Fed. Cir. 1985) (“There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.”).

As noted above, Applicant’s marks are the standard character mark FARMER



FORWARD, and the composite mark

1. The FARMER FORWARD word mark

Regarding Applicant’s standard character mark, FARMER FORWARD, Opposer argues that it “incorporates in its entirety the FARMER’S Mark. Because the FARMER FORWARD Word Mark uses the identical term FARMER in the first and dominant portion of the mark, the parties’ marks are highly similar as a matter of law.”⁴¹ Further, according to Opposer, “Applicant’s use of the term FORWARD in the FARMER FORWARD Word Mark fails to distinguish it from the FARMER’S Mark because the term is part of a phrase (namely, “farmer forward”) and unlikely to be interpreted by consumers in a source-identifying manner.”⁴²

In response, Applicant first argues that “Opposer’s mark is so weak and entitled to such a narrow scope of protection that even slight differences will avoid any

⁴¹ Opposer’s Br., p. 21, 73 TTABVUE 23.

⁴² *Id.* at 22, 73 TTABVUE 24.

likelihood of confusion.”⁴³ Thus, according to Applicant, “adding matter to a weak mark like FARMER’S can avoid a likelihood of confusion, so Applicant’s use of FORWARD is very consequential.”⁴⁴

The dominant portion of Opposer’s mark is the term FARMER’S inasmuch as it is the only word in the mark. We find that FARMER is the dominant portion of Applicant’s FARMER FORWARD mark as well. It is not weak, it comes first in the mark, and it is modified by FORWARD—the official motto of the State of Wisconsin.⁴⁵ To consumers familiar with Wisconsin’s motto, FORWARD is likely to suggest an association with the state. To those consumers unfamiliar with the FORWARD motto, its use is likely to be seen as simply promoting support of, or an association with, farmers. Either way, FORWARD is not likely to engender a dominant and separate source-indicating connotation as compared with FARMER.

Applicant nevertheless argues that the marks differ in connotation and commercial impression because its mark conveys one of Applicant tenets:

The distinctive FARMER FORWARD tenet and its components are a nod to several aspects of Applicant’s spirits business: (1) Applicant’s location in Wisconsin, where the state motto is “Forward” . . . ; (2) the progressive (“forward”) nature of Applicant’s handcrafted spirits and environmentally-friendly business practices; and (3) Applicant’s business goals of showcasing local family farms in Applicant’s marketing and helping those farms advance

⁴³ Applicant’s Br., p. 24, 76 TTABVUE 25.

⁴⁴ *Id.* at 25, 76 TTABVUE 26.

⁴⁵ Exhs. DX 12, 13, 68 TTABVUE 907, 913.

(“move forward”) to new products, farming practices, and business opportunities.⁴⁶

We disagree that the marks differ significantly in connotation or commercial impression. The leading term FARMER in both marks conveys the same connotation of “a person who cultivates land or crops.” The addition of the term FORWARD to FARMER does suggest a slightly different overall connotation of “farmers,” as compared with FARMER’S alone. We find it likely, as noted above, that consumers, upon seeing both marks, would still think that FARMER FORWARD was either an association with Wisconsin or with a promotion of farmers generally. In other words, even if consumers understand Applicant’s mark to connote any of Applicant’s tenets, those connotations would still encompass the same meaning as FARMER’S in Opposer’s mark.

Although we disagree with Opposer that Applicant’s mark “incorporates in its entirety the FARMER’S Mark”—because Applicant’s mark lacks an apostrophe and the letters “S”—these are minor differences. The absence of the possessive form in Applicant’s mark FARMER FORWARD has little if any significance for consumers in distinguishing it from FARMER’S. *See In re Hyper Shoppes*, 837 F.2d 463, 6 USPQ2d 1025, 1025 (Fed. Cir. 1988) (BIGG’s for general merchandise store services is likely to cause confusion with BIGGS for furniture); *In re Binion’s* 93 USPQ2d 1531, 1534 (TTAB 2009) (BINION’S ROADHOUSE and BINION not distinguishable by use of

⁴⁶ *Id.* at 26-27, 76 TTABVUE 227-28.

the possessive form); *In re Curtices-Burns, Inc.*, 231 USPQ 990, 992 (TTAB 1986) (McKENZIE is virtually identical to McKENZIE’S).

For the foregoing reasons, we find FARMER FORWARD to be similar to FARMER’S.

2. The Composite mark



Applicant’s composite mark is . The words FARMER FORWARD appear in the upper left-hand corner of the mark. The words DRIFTLESS PURE, LA CROSSE, EST. 2017, DISTILLING CO. AND WISCONSIN have all been disclaimed apart from the mark. The only significant matter not disclaimed in the mark are the words FARMER FORWARD, the representation of a hummingbird, and the words GENUINE and SPIRIT.

Opposer argues that “[t]he phrase FARMER FORWARD appears in the top left corner of the FARMER FORWARD Design Mark and is likely to be seen first by consumers when the FARMER FORWARD Design Mark is read in the customary direction of left-to-right, top-to-bottom.”⁴⁷ Applicant argues that LA CROSSE, by virtue of its size and placement, is more likely to be seen first by consumers and, therefore, “[c]onsidering the very weak nature of FARMER’S, Applicant’s FARMER FORWARD and LA CROSSE Logo marks are without a doubt sufficiently different

⁴⁷ Opposer’s Br., p. 22, 73 TTABVUE 24.

in appearance, sound, connotation, and commercial impression to avoid any likelihood of consumer confusion.”⁴⁸

We agree with Applicant that La Crosse is the largest and most prominent term in the mark. Although text is generally read from left to right, as Opposer argues, Applicant’s mark is not plain text. Rather it is a mix of large and small text, some of which is curved, all interspersed with design elements. The wording LA CROSSE—with very large leading letters—angles across the center of the mark, and is accentuated by lines above and below. The disclaimer of LA CROSSE does not change the likely consumer perception. “The technicality of a disclaimer . . . has no legal effect on the issue of likelihood of confusion. The public is unaware of what words have been disclaimed during prosecution of the trademark application at the PTO.” *Nat’l Data*, 224 USPQ at 751. In contrast, the wording FARMER FORWARD is in the smallest typeface and, along with the other matter, is on the margins of the mark thus serving a subsidiary function.

When we consider the marks as a whole, as we must, given the dominance of the wording LA CROSSE in Applicant’s mark, we find that the marks differ significantly in appearance, sound, connotation and commercial impression. In terms of appearance, LA CROSSE dominates Applicant’s mark by virtue of its size, stylization, and placement, whereas FARMER’S has a very different appearance. In terms of sound, the marks are likely to be vocalized simply as LA CROSSE or

⁴⁸ Applicant’s Br., p. 26-27, 76 TTABVUE 27-28.

FARMER'S. In connotation and commercial impression, the marks are likely to be perceived as referring either to a city in Wisconsin or a farmer, respectively.

Although as discussed above, FARMER'S is not weak for spirits, neither is FARMER'S sufficiently strong by itself to create a similarity in appearance, sound, connotation and commercial impression when used in Applicant's composite mark as part of the phrase FARMER FORWARD. Accordingly, we think consumers who encounter both FARMER'S distilled spirits and the distilled spirits offered under Applicant's composite mark, including FARMER FORWARD, would not be likely to believe that the goods are related simply because both marks contain the designation FARMER. That is, consumers would likely think that Opposer's mark is evocative of a farmer, whereas Applicant's composite mark, including FARMER FORWARD, was merely supportive of farmers.

For the foregoing reasons, we find Applicant's composite mark to be dissimilar to Opposer's FARMER'S mark.

3. Conclusion on similarity of the marks

For the foregoing reasons, we find Applicant's FARMER FORWARD mark to be more similar than dissimilar to Opposer's FARMER'S mark. However, we find that Applicant's composite mark to be more dissimilar than similar to Opposer's FARMER'S mark.

The first *DuPont* factor weighs in favor of finding a likelihood of confusion as to the FARMER FORWARD mark, but against finding a likelihood of confusion as to the composite mark.

D. Consumer Sophistication

The fourth *DuPont* factor concerns the conditions under which and buyers to whom sales are made, i.e. “impulse” versus careful, sophisticated purchasing. *DuPont*, 177 USPQ at 567. “Purchaser sophistication may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect.” *Bd. of Regents, Univ. of Tex. Sys. v. S. Ill. Miners, LLC*, 110 USPQ2d 1182, 1193 (TTAB 2014).

Evidence shows that bottles of Opposer’s FARMER’S gin retails to consumers from \$27 to \$36 with an average price of about \$32.⁴⁹ Applicant’s spirits are sold to consumers at a retail price ranging from approximately \$15 to \$37.⁵⁰ These prices suggest that the parties spirits include both modestly priced spirits as well as more expensive ones directed toward a more discerning palate.

Because the descriptions of goods are not restricted by price point, however, we must presume that the parties offer or intend to offer various distilled spirits at all price points, including inexpensive ones, to the full range of usual consumers for such goods. *Stone Lion*, 110 USPQ2d at 1162 (stating that registrability must be decided based on the identification of goods or services “regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed”) (quoting *Octocom*, 6 USPQ2d at 1787); *In re Hughes Furn. Indus., Inc.*, 114 USPQ2d 1134,

⁴⁹ Ziegler Decl., ¶ 15, 59 TTABVUE 5.

⁵⁰ Staehly dep., p. 98, 56 TTABVUE 170,

1137 (TTAB 2015). Given our precedent which requires consumer care for likelihood of confusion purposes to be based “on the least sophisticated potential purchasers,” *Stone Lion*, 110 USPQ2d at 1163, we find the parties goods may be impulse purchases.

We find that the fourth *DuPont* factor favors a finding of likelihood of confusion.

E. Actual confusion

Applicant argues that “there has been direct competition and ample opportunity for confusion to occur, but it has not. This absence of actual confusion is probative and indicates that confusion is unlikely.”⁵¹ Opposer admits there has been no actual confusion, but argues that this lack of confusion “is not meaningful because there has been virtually no opportunity for such confusion to occur.”⁵²

This argument calls upon us to evaluate the seventh *DuPont* factor, the “nature and extent of any actual confusion,” and the eighth *DuPont* factor, the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567. This analysis requires us to look at actual market conditions. *See Guild Mortg.*, 2020 USPQ2d 10279, at *6 (“The eighth *du Pont* Cancellation factor, by contrast . . . requires us to look at **actual market conditions**, to the extent there is evidence of such conditions in the record.”). However, “a showing of actual confusion is not necessary to establish a likelihood of

⁵¹ Applicant’s Br., p. 29, 76 TTABVUE 30.

⁵² Opposer’s Br., p. 29 73 TTABVUE 31.

confusion.” *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002).

“The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by applicant of its mark for a significant period of time in the same markets as those served by opposer under its marks.” *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff’d*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *see also Barbara’s Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (probative value of the absence of actual confusion depends on there being a significant opportunity for actual confusion to occur).

Chad Staehly, Applicant’s part owner, testified that Applicant has not used the FARMER FORWARD standard character mark by itself on spirits.⁵³ Applicant has used the composite mark on spirits however, and Mr. Staehly provided testimony about Applicant’s use of that mark.⁵⁴

9. Applicant’s Marks have appeared on labels affixed to its Fieldnotes Vodka (including corn, potato, and rye varieties) and Fieldnotes Gin since at least as early as October 2018. Applicant’s Marks now appear on bottles for and labels affixed to many other spirits.

16. Applicant’s spirits have won several awards, including awards recognizing taste, packaging, and design.

⁵³ Staehly dep., p. 98, 56 TTABVUE 139, 150.

⁵⁴ Staehly decl., pp. 2-3, 64 TTABVUE 3-4.

17. Spirits bearing Applicant's Marks are sold at retail stores and served in restaurants and bars in Wisconsin, Minnesota, and Colorado.

18. Applicant sold substantial amounts of spirits in bottles featuring Applicant's Marks. For example, Applicant sold [approximately one million dollars] of Fieldnotes Vodka, High Rye Light Whiskey, Downtown Toodeloo Rock & Rye, Robber's Rye Whiskey, Fieldnotes Gin, and Navy Strength Gin to its distributors [between October 2018 and May 2021]. Applicant also sold many more bottles of spirits featuring Applicant's Marks directly to consumers in its restaurant and tasting room, and served many drinks ordered by consumers from menus featuring Applicant's FARMER FORWARD mark in its restaurant and tasting room.

20. I am not aware of any instance in which a consumer was confused, mistaken, or deceived as to whether Applicant's spirits originated from, were sponsored by, or were approved by Chatham Imports, Inc. or vice-versa.

Applicant's raw sales numbers appear impressive, but we have little to compare them to for context. More problematic is the fact that Applicant's goods have only been sold for approximately two and a half years, and are sold in only three states, Wisconsin, Minnesota, and Colorado, although Opposer admits it sells its spirits in these states.⁵⁵ Nevertheless, the relatively short period of overlap in sales and the limited geographic scope of Applicant's sales minimizes the opportunity for confusion

⁵⁵ Ziegler Decl., para 13, 59 TTABVUE 5.


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to occur, particularly as discussed above, the marks are dissimilar overall in appearance, sound, connotation and commercial impression. On this record we cannot say there has been a “appreciable and continuous use by applicant of its mark for a significant period of time in the same markets as those served by opposer under its marks.” *Citigroup*, 94 USPQ2d at 1660.

The seventh and eighth *DuPont* factors are neutral.

4. Conclusion

After considering all of the applicable *DuPont* factors, we find that Applicant’s mark, FARMER FORWARD, is likely to cause confusion with Opposer’s mark, FARMER’S, particularly because the marks are similar, and the goods, channels of trade, and consumers are in-part legally identical. However, despite the in-part identity of the goods, channels of trade and consumers, given the dissimilarity of

Applicant’s composite mark, , and Opposer’s FARMER’S mark, we find that confusion is not likely as to these marks.

Decision: The opposition is sustained under Trademark Act Section 2(d) as to Application Serial No. 87814648. The opposition is denied as to Application Serial No. 87814771.