

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: March 30, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Chatham Imports, Inc.
v.
Farmer's Creed Corp.
—

Opposition No. 91283157
—

James D. Weinberger and Brian Leary of Fross Zelnick Lehrman & Zissu. P.C.,
for Chatham Imports, Inc.

H. Michael Drumm, Trent E. Rinebarger and Ethan Larson of Drumm Law, LLC,
for Farmer's Creed Corp.

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Before Larkin, Allard, and O'Connor,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:

Farmer's Creed Corp. ("Applicant") originally sought registration on the Principal Register of the mark FARMER'S CREED (in standard characters) for "Alcoholic beverages, except beer," in International Class 33.¹

¹ Application Serial No. 97130349 was filed on November 17, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant's allegation of a bona fide intention to use the mark in commerce. The application also identifies goods in International Class 32, but these goods are not subject to the present proceeding. 1 TTABVUE 1. Indeed, Opposer in its brief acknowledges that it "does not oppose the registration of the mark for

Chatham Imports, Inc. (“Opposer”) opposed registration of the mark of the involved application as originally filed under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the basis of priority and likelihood of confusion with its marks FARMER’S (in standard characters) registered on the Principal Register for “Alcoholic beverages, namely, distilled spirits,” in International Class 33,² and FARMER’S BOTANICALS (in standard characters) registered on the Principal Register for “Gin,” in International Class 33.³ Opposer also claimed prior common law rights in these same marks for the same goods.⁴

In its Answer, Applicant denied the salient allegations of the Notice of Opposition and asserted several self-styled affirmative defenses.⁵

Shortly after filing its Answer, Applicant filed a motion to amend its identification of goods from “Alcoholic beverages, except beer” to “Hard seltzer.”⁶ The motion was filed without the consent of Opposer.⁷ Because the motion satisfied the requirements for acceptance of the amendment, the motion to amend was granted, and judgment was entered in favor of Opposer as to its Section 2(d) claim with respect to all goods

these [Class 32] goods.” 21 TTABVUE 16 n.1. Applicant agrees that only its Class 33 goods are subject to the proceeding. 23 TTABVUE 6.

² Registration No. 3829294, issued August 3, 2010; renewed. *See* 12 TTABVUE 5-19.

References to filings related to the appeal refer to TTABVUE, the Board’s online docketing system. The number preceding “TTABVUE” corresponds to the docket entry number; the number following “TTABVUE” refers to the page number(s) of that particular docket entry.

³ Registration No. 3871604, issued November 2, 2010; renewed. *See* 12 TTABVUE 21-32.

⁴ 1 TTABVUE 3-4 (paras. 2-4, 8).

⁵ 4 TTABVUE.

⁶ 5 TTABVUE.

⁷ 7 TTABVUE 1.

encompassed by Applicant's broader identification of goods, except for beer and hard seltzer.⁸ In that same Order, the Board directed the parties to file amended pleadings to conform to the application as amended.⁹

Accordingly, Opposer filed a First Amended Notice of Opposition, re-pleading its claim of priority and likelihood of confusion under Section 2(d) based on its ownership of the same two registered marks and its alleged prior common law rights in these same marks, this time tailoring its claim to Applicant's amended identification, namely, "Hard seltzers," in International Class 33.¹⁰

In its corresponding Answer, Applicant denied the salient allegations of the First Amended Notice of Opposition and asserted several self-styled affirmative defenses, alleging, for example, that there is no likelihood of confusion.¹¹ While not a true affirmative defense, this amplification of Applicant's denials, giving Opposer fuller notice of Applicant's position, is permissible. *See Mars Generation, Inc. v. Carson*, No. 91224726, 2021 TTAB LEXIS 386, at *4 (TTAB 2021) (amplifications of denials are not true affirmative defenses). Similarly, Applicant's challenge to Opposer's entitlement and its reservation of rights to raise more affirmative defenses are not true affirmative defenses.¹² In any event, because Applicant raised them in its

⁸ 7 TTABVUE 1-3.

⁹ 7 TTABVUE 3.

¹⁰ 9 TTABVUE.

¹¹ 10 TTABVUE 4.

¹² 10 TTABVUE 4. Lack of entitlement is not an affirmative defense; rather, Opposer must prove its entitlement to the statutory cause of action at issue (here, an opposition proceeding under 15 U.S.C. § 1063) as a threshold element of its claim. *U.S. Olympic Comm. v. Tempting Brands Netherlands B.V.*, No. 91233138, 2021 TTAB LEXIS 45, at *4 (TTAB 2021).

Answer but did not pursue them at trial, we consider them waived. *U.S. Olympic Comm.*, 2021 TTAB LEXIS 45, at *4-5; *see also In re Google Tech. Holdings, LLC*, 980 F.3d 858, 862-64 (Fed. Cir. 2020).

The matter is fully briefed.¹³ Opposer bears the burden of proving its entitlement to a statutory cause of action and its claim of likelihood of confusion by a preponderance of the evidence. *DowntownDC Bus. Improvement Dist. v. Clarke*, No. 91275100, 2024 TTAB LEXIS 412, at *1 (TTAB 2024). Having considered the evidentiary record, and the parties' arguments and applicable authorities, we find that Opposer has carried its burden. Accordingly, for the reasons set forth below, we sustain the opposition.

I. Record

The record includes the pleadings,¹⁴ and, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), the file history of the involved application.

In addition, Opposer introduced the following evidence:

Similarly, Applicant's attempt to reserve the right to add affirmative defenses is not in itself an affirmative defense. *Philanthropist.com, Inc. v. Gen. Conf. Corp. of Seventh-Day Adventists*, No. 92065178, 2021 TTAB LEXIS 205, at *6 n.6 (TTAB 2021), *aff'd mem.*, No. 21-2208, 2022 U.S. App. LEXIS 21811 (Fed. Cir. Aug. 8, 2022).

¹³ Opposer's brief appears at 21 TTABVUE (public)/22 TTABVUE (confidential); Applicant's brief appears at 23 TTABVUE; and Opposer's rebuttal brief appears at 24 TTABVUE (public)/25 TTABVUE (confidential).

We refer to information filed under seal in a manner sufficient to explain the basis of our decision to the parties, readers of this opinion, and any reviewing court. *See, e.g., Noble House Home Furnishings, LLC v. Floorco Enters., LLC*, No. 92057394, 2016 TTAB LEXIS 100, at *11 n.21 (TTAB 2016).

¹⁴ The operative pleadings are Opposer's First Amended Notice of Opposition and Applicant's Answer thereto. 9, 10 TTABVUE.

- Notice of Reliance on Trademark Status and Document Retrieval (TSDR) printouts of Opposer's pleaded registrations.¹⁵
- Trial Declaration of Stephen Ziegler, Opposer's Executive Vice President of Sales, and related exhibits.¹⁶
- Opposer's Notice of Reliance on Internet materials.¹⁷

Applicant introduced the following evidence:

- Notice of Reliance on plain copies of third-party certificates of registration, various Internet materials, and a Certification/Exemption of Label/Bottle Approval (COLA) label for gin offered under Opposer's pleaded FARMER'S mark.¹⁸
- Trial Declaration of David Lundell, Applicant's President, and accompanying exhibits.¹⁹

On rebuttal, Opposer introduced the following evidence:

- Rebuttal Declaration of Stephen Ziegler and related exhibits.²⁰
- Notice of Reliance on Applicant's responses to Opposer's discovery requests.²¹

II. Entitlement to a Statutory Cause of Action

Although Applicant does not dispute Opposer's entitlement to a statutory cause of action or even address the issue in its brief, it is a necessary element of the plaintiff's case in every inter partes proceeding. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298,

¹⁵ 12 TTABVUE.

¹⁶ 13 TTABVUE (confidential)/14 TTABVUE (redacted).

¹⁷ 15 TTABVUE.

¹⁸ 16 TTABVUE.

¹⁹ 17 TTABVUE.

²⁰ 18 TTABVUE (redacted)/20 TTABVUE (confidential).

²¹ 19 TTABVUE. We consider Applicant's responses to Opposer's document requests only to the extent that Applicant responds that there are no responsive documents. *RLP Ventures, LLC v. Panini Am., Inc.*, No. 91268816, 2023 TTAB LEXIS 380, at *16 n.18 (TTAB 2023).

1302-07 (Fed. Cir. 2020). To establish entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute, and (ii) a reasonable belief in damage proximately caused by the registration of the mark. *See Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 1070 (Fed. Cir. 2022); *Corcamore*, 978 F.3d at 1303.

Opposer has properly made of record TSDR printouts of its pleaded registrations, showing their current status and title.²² This evidence establishes Opposer's entitlement to a statutory cause of action. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945 (Fed. Cir. 2000) (registration establishes "standing"); *Monster Energy Co. v. Lo*, No. 91225050, 2023 TTAB LEXIS 14, at *15-16 (TTAB 2023) (pleaded registrations establish entitlement to oppose on the ground of priority and likelihood of confusion).

In addition, Opposer's Executive Vice President of Sales, Stephen Ziegler, testified that Opposer has been selling gin under its FARMER'S mark since 2010.²³ Based on its registrations and such common law use, Opposer has asserted a plausible likelihood of confusion claim against the involved application, thereby showing a real interest in this proceeding beyond that of a mere intermeddler and a reasonable basis for its belief of damage. *Id.* at *16.

²² 12 TTABVUE 5-32.

²³ 14 TTABVUE 2, 4-5 (paras. 1, 9-12).

III. Priority and Likelihood of Confusion

We turn now to Opposer's claim of likelihood of confusion. To prevail, Opposer must prove both priority and likelihood of confusion. *Barbara's Bakery, Inc. v. Landesman*, No. 91157982, 2007 TTAB LEXIS 9, at *6 (TTAB 2007). We consider each element in turn.

A. Priority

Because Opposer's pleaded registrations are of record and Applicant has not counterclaimed to cancel either of them, Opposer's priority is not at issue as to these registered marks and the goods identified in the registrations. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1400-01 (CCPA 1974).

In its First Amended Notice of Opposition, Opposer also alleged prior use of its marks and later it provided supporting testimony and evidence. Because we find priority based on Opposer's pleaded registrations, we need not separately consider Opposer's common law rights in the marks. *See Keystone Consol. Indus. v. Franklin Inv. Corp.*, No. 92066927, 2024 TTAB LEXIS 290, at *29-30 (TTAB 2024); *Nkanginieme v. Appleton*, No. 91256464, 2023 TTAB LEXIS 64, at *4-5 (TTAB 2023) (Board did not need to consider common law priority because it found it sufficient to rely on the pleaded registration in analyzing likelihood of confusion).

B. Likelihood of Confusion

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 1361 (CCPA 1973)

("*DuPont*"). See *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019). Varying weight may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 1355 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 1206 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 998 (Fed. Cir. 2020) (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406-07 (Fed. 1997)). “Any single factor may control a particular case.” *Id.*

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). We discuss below these factors and others for which there is evidence and argument.

We previously determined that Opposer established priority based on its two pleaded registrations. We focus the remainder of our decision on one of those registered marks: FARMER’S, which is registered for “Alcoholic beverages, namely, distilled spirits” (Reg. No. 3829294) (“the ’294 Registration”).²⁴ Because we find confusion likely as to this mark, we need not consider whether there is a likelihood of confusion between Applicant’s mark and Opposer’s other pleaded registered mark.

²⁴ 12 TTABVUE 5-19.

See Heil Co. v. Tripleye GmbH, No. 91277359, 2024 TTAB LEXIS 494, at *45-46 (TTAB 2024) (focusing the likelihood of confusion analysis on two of Opposer’s four pleaded registered marks).

1. Similarity or Dissimilarity and Nature of the Parties’ Goods, Established, Likely-to-Continue Channels of Trade, and Classes of Consumers

We turn first to the second and third *DuPont* factors, which assess the similarity or dissimilarity of the parties’ goods and their channels of trade. *DuPont*, 476 F.2d at 1361. Our determination must be based on the identifications of goods in the ’294 Registration and the involved application. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1322-23 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.”).

When considering the second and third factors, recall that Opposer’s pleaded FARMER’S registration identifies “alcoholic beverages, namely, distilled spirits” and that Applicant’s involved application identifies “hard seltzer.”

To support its argument that the parties’ goods are related, Opposer relies on the testimony of Stephen Ziegler, its Executive Vice President of Sales, and evidence attached to his testimony declaration. Although the relatedness of the parties’ goods is an element of Opposer’s case-in-chief, Opposer submitted evidence on the second

factor through Ziegler’s rebuttal testimony.²⁵ Applicant did not object to this evidence on this basis—or any basis for that matter—and instead attempted to address Opposer’s arguments on the merits.²⁶ Therefore, we have considered the evidence. *See Hunter Publ’g Co. v. Caulfield Publ’g, Ltd.*, No. 91068531, 1986 TTAB LEXIS 28, at *3 n.2 (TTAB 1986) (improper rebuttal testimony considered where no objection raised); *General Elec. Co. v. Graham Magnetics Inc.*, 1977 TTAB LEXIS 197, at *4 n.5 (TTAB 1977) (case-in-chief evidence improperly submitted under notice of reliance during rebuttal period considered where applicant did not object).

We find that the evidence of record establishes that the parties’ goods are related. As an initial matter, Ziegler testified that hard seltzers, as identified by Applicant, “are a form of alcoholic beverage made from seltzer water combined with an alcoholic base and, optionally, additional flavoring.”²⁷ According to Ziegler, “[a]lthough the alcoholic base may often derive from malt or sugar fermentation, many hard seltzers are also manufactured with distilled spirits, including gin.”²⁸

Evidence attached to his declaration corroborates this testimony. The record shows that (1) vodka-based and tequila-based hard seltzers are offered under the HIGH NOON brand;²⁹ (2) the brands NÜTRL, TRULY and WHITE CLAW are used

²⁵ 18 TTABVUE 3-4 (paras. 5-11).

²⁶ 23 TTABVUE 14-15.

²⁷ 18 TTABVUE 3 (para. 5).

²⁸ 18 TTABVUE 3 (para. 6).

²⁹ 18 TTABVUE 10-25.

on vodka-based hard seltzers;³⁰ and (3) both the brands SANDBAGGER and LONG DRINK are used on gin-based hard seltzers.³¹ Ziegler also testified that “[s]ome companies that are best-known for selling distilled spirits also sell spirits-based hard seltzers.”³² He cites, as examples, “the well-known vodka brand Smirnoff,” which sells vodka-based hard seltzers, “as does the vodka brand Aupale,” and he adds that “the tequila brand Onda sells tequila-based hard seltzers.”³³ Website printouts attached to his testimony declaration corroborate this testimony.³⁴

Applicant counters with several arguments that the parties’ goods are dissimilar, none of which are persuasive. For example, Applicant contends that hard seltzers are “typically sold as an alternative to beer and are sold in a variety of locations such as grocery stores and convenience stores” and in aluminum cans, while Opposer’s distilled spirits are usually sold in bottles via liquor stores.³⁵ For support, Applicant relies on the evidence showing that the “Alcohol and Tobacco Tax and Trade Bureau (TTB) classifies hard seltzers as beers.”³⁶ This argument is not persuasive for two reasons. First, the type and size of the packaging of the parties’ goods are irrelevant because Applicant seeks to register its mark in standard character format and Opposer’s mark is registered in standard character format; packaging is not part of

³⁰ 18 TTABVUE 26-36, 45-51.

³¹ 18 TTABVUE 9, 37-38, 42-44.

³² 18 TTABVUE 3 (para. 7).

³³ 18 TTABVUE 3 (para. 7).

³⁴ 18 TTABVUE 3 (para. 7), 53-70.

³⁵ 23 TTABVUE 14-15.

³⁶ 23 TTABVUE 14-15.

either party's mark and, moreover, can be changed at any time. *Kimberly-Clark Corp. v. H. Douglas Enters., Ltd.*, 774 F.2d 1144, 1147 (Fed. Cir. 1985) (“[A] distinction in trade dress cannot weigh against likelihood of confusion with respect to the registration of a simple word mark [because] such dress may well be changed at any time; only the word mark itself is to be registered.”); *Specialty Brands, Inc. v. Coffee Bean Distribs.*, 748 F.2d 669, 674 (Fed. Cir. 1984) (“Ordinarily, for a word mark we do not look to the trade dress, which can be changed at any time.”).

And, second, in our view, this classification by TTB is akin to classification of goods and services by the USPTO, i.e., it is an administrative act that has no bearing on the issue of relatedness of the goods or consumer perception for purposes of assessing likelihood of confusion. *Cf. In re Detroit Athletic Co.*, 903 F.3d 1297, 1307 (Fed. Cir. 2018) (“Classification is solely for the ‘convenience of Patent and Trademark Office administration,’ and ‘is wholly irrelevant to the issue of [likelihood of confusion].”) (quoting *Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 975 (Fed. Cir. 1993)).

Finally, Applicant's argument that each party's label, “showing where the products are manufactured and by whom,”³⁷ will eliminate confusion is also unavailing. Again, we focus, as we must, on the marks as they appear in the drawings in the involved application and '294 Registration, and do not consider other information that may appear in combination with them in the marketplace. *See* Trademark Rule 2.52 (“A drawing depicts the mark sought to be registered.”). *See also In re Aquitaine Wine USA, LLC*, No. 86928469, 2018 TTAB LEXIS 108, at *10

³⁷ 23 TTABVUE 15.

(TTAB 2018) (“Applicant’s mark is not the equivalent of a wine label, which necessarily contains more information pursuant to labelling requirements.”). *Cf. In re Bay State Brewing Co.*, No. 85826258, 2016 TTAB LEXIS 46, at *10 (TTAB 2016) (when ordering from a bartender or restaurant server, “many consumers ... will not have the opportunity to see a label”).

We turn now to the channels of trade under the third *DuPont* factor and consider the similarity or dissimilarity of the trade channels in which the goods identified in the involved application and the '294 Registration are marketed. *Detroit Athletic*, 903 F.3d at 1308.

There is no evidence that Applicant currently uses its mark in commerce for hard seltzer. According to Applicant’s discovery responses, when Applicant does begin offering its goods for sale, it intends to offer them to “the general public that is of legal age for alcohol consumption, and the Applicant’s Mark is intended to appeal directly to those involved in agriculture, aspire to a rural-interested lifestyle, or otherwise relate to the values of ‘The Farmer’s Creed.’”³⁸ Applicant also argues that the channels of trade for the parties’ goods will not overlap because Opposer’s distilled spirits are sold in liquor stores, while Applicant’s hard seltzer will be sold as an alternative to beer and will be available “in a variety of locations such as grocery stores and convenience stores.”³⁹

³⁸ 19 TTABVUE 10 (Response to Inter. No. 12). *See infra* at 41 (discussing the poem “The Farmer’s Creed” as it relates to connotation of Applicant’s mark).

³⁹ 23 TTABVUE 14-15.

As an initial matter, we note that neither the involved application nor the '294 Registration contain any restrictions as to channels of trade or classes of consumers. Absent restrictions in the application and registration, the identified goods are presumed to travel in all the normal channels of trade and to all prospective purchasers of these goods. *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 1370 (Fed. Cir. 2012).

Ziegler testified that Opposer sells its distilled spirits, i.e., gin, at wholesale prices to distributors, who in turn sell the gin to their licensed accounts and customers, who ultimately sell it to end consumers.⁴⁰ Here, Ziegler is describing the three-tiered system for alcohol sales in the United States. *See generally Tao Licensing, LLC v. Bender Consulting Ltd*, No. 92057132, 2017 TTAB LEXIS 437, at *33 (TTAB 2017) (“Under the three-tiered system for alcohol sales ..., ‘a manufacturer or an importer (such as [Opposer]) can only sell its product to a distributor, who can only sell its products to a retailer, who in turn only sells it to the public.’”). Opposer’s gin can be found, according to Ziegler, in a “variety of retailers and establishments, liquor stores, bars, restaurants, diners, night clubs, cafés, supermarkets, big box stores, and military bases.”⁴¹ He added that “FARMER’S gin is also available for purchase online from third-party retailers, including minibardelivery.com, reservebar.com, and wine.com, among others.”⁴²

⁴⁰ 14 TTABVUE 2, 5 (paras. 1, 15).

⁴¹ 14 TTABVUE 6 (para. 17).

⁴² 14 TTABVUE 6 (para. 18). *See also* 15 TTABVUE 33-47 (printouts from minibardelivery.com, reservebar.com, and wine.com).

The record shows that hard seltzer and distilled spirits, including gin, are offered in the same channels of trade, such as third-party wine and liquor stores, including Total Wine & More.⁴³ Additionally, the third-party websites demonstrating that the goods are related (e.g., website printouts showing Smirnoff and Aupale, both of which sell both distilled spirits (vodka) and vodka-based hard seltzers, and Onda, which offers both tequila and tequila-based hard seltzers)⁴⁴ also support a finding that the parties' goods move in the same channels of trade, i.e., third-party alcoholic beverage producer websites, and that they are sold to the same classes of consumers, namely, members of the general public who are of legal drinking age. *See, e.g., In re Charger Ventures LLC*, 64 F.4th 1375, 1382 (Fed. Cir. 2023) ("Because the record shows that companies are known to offer both residential and commercial services under the same mark and, often, on the same website, we find that substantial evidence supports the Board's finding[s]" that they are related and that there is "some overlap" in trade channels.); *In re Anderson*, No. 76511652, 2012 TTAB LEXIS 42, at *29-30 (TTAB 2012).

Based on this evidence, we find that the channels of trade for the parties' goods overlap and that the parties' goods are offered to overlapping classes of consumers. This overlap supports a finding, under the third *DuPont* factor, that a likelihood of confusion exists.

The second and third *DuPont* factors weigh in favor of a likelihood of confusion.

⁴³ 18 TTABVUE 10-34 (hard seltzer); 17 TTABVUE 25-29 (distilled spirits).

⁴⁴ 18 TTABVUE 3 (para. 7), 53-70.

2. Strength or Weakness of Opposer's FARMER'S Mark

“Two of the *DuPont* factors (the fifth and sixth) consider strength.” *Spireon, Inc. v. Flex LTD*, 71 F.4th 1355, 1362 (Fed. Cir. 2023). The fifth *DuPont* factor may enable Opposer to prove that its pleaded mark is entitled to an expanded scope of protection by adducing evidence of “[t]he fame of the prior mark (sales, advertising, length of use),” whereas the sixth *DuPont* factor may allow Applicant to contract that scope of protection by adducing evidence of “[t]he number and nature of similar marks in use on similar goods.” *Made in Nature, LLC v. Pharmavite LLC*, No. 91223352, 2022 TTAB LEXIS 228, at *23 24 (TTAB 2022) (quoting *DuPont*, 476 F.2d at 1361).

In evaluating the strength of a mark, we consider both its conceptual strength, based on the nature of the mark itself, and if there is probative evidence in the record, its commercial strength, i.e., its fame, based on marketplace recognition of the mark. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”); *New Era Cap Co. v. Pro Era, LLC*, No. 91216455, 2020 TTAB LEXIS 199, at *28-29 (TTAB 2020) (“In determining the strength of a mark, we consider both its inherent strength, based on the nature of the mark itself, and, if there is evidence in the record of marketplace recognition of the mark, its commercial strength.”). “[T]he strength of a mark is not a binary factor[]” and “varies along a spectrum from very strong to very weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1340 (Fed. Cir. 2015) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 1345 (Fed. Cir. 2003)).

Opposer argues that its FARMER'S mark is arbitrary and conceptually strong, as well as commercially strong.⁴⁵ Applicant, on the other hand, argues that Opposer's mark is "common"⁴⁶ and "at most suggestive if not descriptive."⁴⁷

a. Commercial Strength of Opposer's FARMER'S Mark

In considering commercial strength, we assess the extent to which the relevant public recognizes a mark as denoting a single source. *See, e.g., Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 1324-1325 (Fed. Cir. 2017); *accord Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1375 (Fed. Cir. 2005) (fame for confusion purposes arises as long as a significant portion of the relevant consuming public recognizes the mark as a source indicator). Commercial strength, or fame, "may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident." *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1319 (Fed. Cir. 2018) (quoting *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1371 (Fed. Cir. 2002)). Commercial strength may also be measured by "widespread critical assessments; notice by independent sources of the goods or services identified by the marks; the general reputation of the goods or services; and social media presence." *Heil Co.*, 2024 TTAB LEXIS 494, at *51. If proven, fame "plays

⁴⁵ 21 TTABVUE 26-31.

⁴⁶ 23 TTABVUE 13.

⁴⁷ 23 TTABVUE 16.

a dominant role in the process of balancing the *DuPont* factors.” *Palm Bay Imps.*, 396 F.3d at 1374 (cleaned up). “Because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it.” *Made in Nature*, 2022 TTAB LEXIS 228, at *35-36 (citing *Coach Servs.*, 668 F.3d at 1367).

In support of Opposer’s argument that its mark is commercially strong, Opposer’s Executive Vice President of Sales Stephen Ziegler testified that Opposer has been offering gin under the FARMER’S mark since 2010.⁴⁸ According to Ziegler, “FARMER’S gin is made in small batches from carefully selected botanicals and the purest non-GMO grains.”⁴⁹ The number of shipments and geographic coverage of shipments of FARMER’S gin “has generally increased since 2010,” and now FARMER’S gin is offered “throughout the United States.”⁵⁰

Opposer’s gin can be found in a variety of retailers and establishments, Ziegler testified, “including liquor stores, bars, restaurants, diners, night clubs, cafés, supermarkets, big box stores, and military bases.”⁵¹ While the availability of FARMER’S gin varies on a state-by-state basis, FARMER’S gin “is generally available at any establishment where other liquor is sold.”⁵² Opposer’s gin is also

⁴⁸ 14 TTABVUE 4 (para. 9).

⁴⁹ 14 TTABVUE 5 (para. 11).

⁵⁰ 14 TTABVUE 5 (para. 14).

⁵¹ 14 TTABVUE 6 (para. 17).

⁵² 14 TTABVUE 6 (para. 17).

available for purchase online from third-party retailers, including, as previously mentioned, minibardelivery.com, reservebar.com, and wine.com, among others.⁵³

Ziegler testified that revenue generated from sales of FARMER'S gin "has been steadily increasing each year since 2010."⁵⁴ Keeping in mind that the average price of a bottle of Opposer's gin is \$37.49,⁵⁵ Ziegler testified that "[i]n recent years, we have generated over \$700,000, on average, in annual revenue from sales of over 6,000 cases (36,000 bottles) of FARMER'S gin in the United States."⁵⁶

As for advertising, Opposer has advertised its FARMER'S gin "in a variety of media, including newspapers, trade magazines, magazines, trade shows, online, in social media, on cable news shows, and on merchandise."⁵⁷ Sample advertisements of record include six placed in *Wine Enthusiast Magazine* (July 2010; August 2010; October 2010; December 1, 2010; December 15, 2011; and August 2012); two placed in *Stoller Wholesale* (Autumn & Winter 2010/2011); two ads placed in *Sips Perfect Pour* (no date); two ads in *Edible* (Summer 2010; and September/October 2010); one placed in *Brooklyn Bread* (February 2011); and one placed in the *2016 Annual Report of the World's Best Bars*.⁵⁸ Also attached to Ziegler's testimony declaration were printer's proofs of certain ads;⁵⁹ however, there is no way to discern the name of the

⁵³ 14 TTABVUE 6 (para. 18).

⁵⁴ 14 TTABVUE 6 (para. 19).

⁵⁵ 14 TTABVUE 5 (para. 16).

⁵⁶ 14 TTABVUE 6 (para. 19).

⁵⁷ 14 TTABVUE 6 (para. 22).

⁵⁸ 14 TTABVUE 50.

⁵⁹ See 14 TTABVUE 12, 40-42.

publication in which the ads resulting from the printer's proofs were ultimately placed. Moreover, Opposer did not provide circulation figures for any of these publications, so we cannot discern the number of potential consumers who may have been exposed to the brand by these ads.

Opposer promotes the FARMER'S brand "through event sponsorships and through collaborations with influencers, celebrities, and other brands."⁶⁰ For example, Opposer has "collaborated with influencers at events such as SXSW and, during Coachella 2024, sponsored Kourtney Kardashian Barker's Camp Poosh events."⁶¹ According to Ziegler, "recent collaborations with other brands have included Sanzo, Dona Chai, Magnolia-Star Baking Supply, Madhava, Natalie's Orchid Island Juice Co., and Yes! Apples,"⁶² although no details about the number of consumers who, for example, may have seen any of the collaboration efforts are of record.

With regard to advertising and marketing expenditures, Ziegler acknowledged that Opposer "[does] not track the advertising and marketing expenditures for each of our brands independently," but he estimated that "approximately one quarter of total annual advertising expenditures are attributable to promoting the FARMER'S brand (on average)."⁶³ With this in mind, he estimated that between 2019-2024, "total annual advertising expenditures were between approximately \$650,000 and \$1

⁶⁰ 14 TTABVUE 6 (para. 23).

⁶¹ 14 TTABVUE 6-7 (para. 23).

⁶² 14 TTABVUE 7 (para. 23).

⁶³ 14 TTABVUE 7 (para. 24).

million.”⁶⁴ The probative value of this testimony is diminished, however, because it lacks specificity as to expenditures attributable to gin offered under the FARMER’S mark because it includes other brands offered by Opposer, namely, what it calls its “core four brands,”⁶⁵ three of which are not relevant to this proceeding. The record also lacks details about the reach of Opposer’s advertising. *See Keystone Consol.*, 2024 TTAB LEXIS 290, at *49 (general testimony about advertising was of limited probative value without evidence of the frequency, extent of distribution or reach of such advertising).

Opposer promotes its involved mark through brand-dedicated social media pages, including Instagram (@farmersgin) and Facebook (@farmersgin).⁶⁶ Printouts of Opposer’s Facebook page show that its account has 3,100 likes and 3,100 followers.⁶⁷ Turning to Instagram, Opposer enjoys 10,000 followers.⁶⁸ Although Applicant does not criticize this evidence, the low number of followers compared to those found in other cases to support fame suggest a modest social media presence. *Cf. Advance Mag. Publishers, Inc. v. Fashion Elecs., Inc.*, No. 91247034, 2023 TTAB LEXIS 223, at *30 (TTAB 2023) (finding that the VOGUE mark was commercially strong for magazines and online content where the opposer’s YouTube channel had almost 10 million

⁶⁴ 14 TTABVUE 7 (para. 24).

⁶⁵ 14 TTABVUE 3-4, 5 (paras. 8, 12).

⁶⁶ 14 TTABVUE 7 (para. 25).

⁶⁷ 14 TTABVUE 60.

⁶⁸ 14 TTABVUE 114-20.

subscribers and over 180 million video views, its Facebook page had over 10 million followers, and its Instagram account had over 40 million followers).

Opposer argues that its gin’s commercial success derives, at least in part, from the nature and volume of the unsolicited third-party media attention it has received. The record shows that *Drinkhacker* listed FARMER’S gin as one of “The Top 10 Gins of 2023” and in a review wrote: “An impressive gin, it’s ideal as a cocktail companion but also engaging enough for neat sipping.”⁶⁹ More recently, in 2024, *Uproxx* wrote that “[t]he crystal clear notes on this gin make for a spectacular martini” and recommended using FARMER’S gin in its Gin Collins recipe, where it makes “a mean cocktail.”⁷⁰ Also in a 2024 review, *Spirito Autoctono* wrote that FARMER’S gin is “ideal for a tasty Classic Martini with an intriguing personality.”⁷¹ Also in 2024, *Forbes* published an article that included a prominent photo of two bottles of FARMER’S gin but the article itself addressed the regenerative agriculture behind the FARMER’S gin grains.⁷²

Additional evidence of unsolicited media attention dates back to Opposer’s earliest use of its FARMER’S mark and evidence of record shows that it continues through January 2013:

- *Upfront*, January 2013, where FARMER’S GIN was the cover story, where it was described as “a fresh face in the crowded category of heritage brands, and what some mixologists are calling a ‘new gin for a new generation.’”⁷³

⁶⁹ 14 TTABVUE 152, 154.

⁷⁰ 14 TTABVUE 153, 155.

⁷¹ 14 TTABVUE 156.

⁷² 15 TTABVUE 20-25; *see also* 14 TTABVUE 7 (para. 26).

⁷³ 14 TTABVUE 122-24.

- *The New York Times*, June 2, 2010, where Opposer’s gin was reviewed. The author wrote that “I like it neat, on the rocks, with a generous squirt of lime.”⁷⁴
- *The New York Times*, October 4, 2012, where Opposer’s gin was included as part of an article about cocktails and poetry.⁷⁵
- *The New York Times* (no date), where it was mentioned as a spirit available in a new restaurant that was being reviewed.⁷⁶
- *Esquire*, March 26, 2012, where it was featured in an article titled, “Cocktail of the Week: Farmer Tom’s Collins.”⁷⁷
- *The Huffington Post*, June 2012, where Opposer’s gin was recommended as a gift in the Father’s Day Gift Guide.⁷⁸
- *Private Clubs Magazine*, October 18, 2010, where FARMER’S gin was deemed one of the “four ... best new organic sips that passed our taste test.”⁷⁹
- *The Tasting Panel*, December 2010, where Opposer’s gin was reviewed.⁸⁰
- *The Tasting Panel*, September 2012, where Opposer’s gin was featured.⁸¹
- *Liquor.com*, April 20, 2012, where it was one of several spirits recommended to readers.⁸²
- *Organic Gardening*, November 2011, where Opposer’s gin was indicated as “preferred” in a cocktail recipe.⁸³

⁷⁴ 14 TTABVUE 131, 134.

⁷⁵ 14 TTABVUE 125, 135.

⁷⁶ 14 TTABVUE 136-39.

⁷⁷ 14 TTABVUE 126, 157.

⁷⁸ 14 TTABVUE 159.

⁷⁹ 14 TTABVUE 130.

⁸⁰ 14 TTABVUE 140-41.

⁸¹ 14 TTABVUE 132-33.

⁸² 14 TTABVUE 161.

⁸³ 14 TTABVUE 127.

- *The Telegraph*, where the author wrote of his request for a “Farmer’s gin martini” as part of a larger story.⁸⁴

Ziegler also testified that the mark was featured in *Better Homes and Gardens* magazine,⁸⁵ but a copy of the article was not made of record.

The record shows that FARMER’S gin has received various awards, including, for example, at the 2023 ASCOT Awards from the American Spirits Counsel of Tasters, where FARMER’S gin won best in category for “Best Gin.”⁸⁶ At the 2022 and 2024 ASCOT Awards, FARMER’S gin was a “Platinum Winner” and “Gold Winner,” respectively.⁸⁷ As recently as 2024, FARMER’S gin earned a rating of “Double Gold Finalist” in the “Gin & Genever” award class.⁸⁸ Other awards include: a “Double Gold” at the 2021 World Spirits Competition in San Francisco;⁸⁹ a “Gold Winner” at the 2024 John Barleycorn Awards;⁹⁰ and a “Silver” rating at the 2024 London Spirits Competition.⁹¹

Opposer’s gin has consistently ranked high in the Ultimate Spirits Challenge, having received a score of “89 Very Good, Strong Recommendation” in 2017,⁹² “93

⁸⁴ 14 TTABVUE 128.

⁸⁵ 14 TTABVUE 7 (para. 26).

⁸⁶ 14 TTABVUE 158.

⁸⁷ 14 TTABVUE 164, 169.

⁸⁸ 14 TTABVUE 168.

⁸⁹ 14 TTABVUE 149.

⁹⁰ 14 TTABVUE 170.

⁹¹ 14 TTABVUE 171.

⁹² 14 TTABVUE 145.

Excellent, Highly Recommended” in 2018,⁹³ “89 Very Good, Strong Recommendation” in 2019,⁹⁴ “92 Excellent, Highly Recommended” in 2020,⁹⁵ and “92 Excellent, Highly Recommended” in 2022.⁹⁶

Also in support of its argument that its FARMER’S mark is commercially strong, Ziegler testified as to Opposer’s enforcement efforts. Opposer has initiated eleven opposition proceedings (including the present proceeding) before the USPTO, “against applicants seeking to register FARMER or FARMER-inclusive marks in connection with gin, distilled spirits, or alcoholic beverages in International Class 33.”⁹⁷ Apart from these formal proceedings, Opposer has resolved “numerous other disputes amicably ... often times by obtaining an agreement” that the applicant narrow the identification of goods in its trademark application “so that it does not encompass ‘gin,’ ‘distilled spirits,’ or other spirit-based products (e.g., narrowing ‘alcoholic beverages except beers’ to ‘wines’).”⁹⁸ “As a result of Opposer’s enforcement efforts,” Ziegler continues, “there are no registrations for FARMER or FARMER-inclusive marks in standard characters on the USPTO’s principal register that cover ‘gin’ or any gin-based products, including ‘hard seltzer,’ and that claim first use on or after May 2010 other than [Opposer’s pleaded] registrations.”⁹⁹

⁹³ 14 TTABVUE 147.

⁹⁴ 14 TTABVUE 148.

⁹⁵ 14 TTABVUE 150,

⁹⁶ 14 TTABVUE 166.

⁹⁷ 14 TTABVUE 8 (para. 28).

⁹⁸ 14 TTABVUE 8 (para. 29).

⁹⁹ 14 TTABVUE 8 (para. 30).

In addition to this testimony, the record contains documentary evidence of Opposer's enforcement efforts, including evidence of various agreements with third-parties, details of some of which are confidential,¹⁰⁰ and which we address in general terms. Opposer acknowledges in its brief that "in the rare circumstance that Opposer believes there is no likelihood of confusion or that the parties can appropriately mitigate such likelihood, Opposer may resolve a dispute with a third party by entering in settlement agreements."¹⁰¹ Opposer then lists two examples: (1) "an agreement with Founding Farmers, LLC, which operates restaurants and claimed use predating Opposer's first use of the FARMER'S Mark[;]"¹⁰² and (2) "an agreement with Farmers Restaurant Group, LLC-an affiliate of Founding Farmers, LLC[.]"¹⁰³ *Cf. Anthony's Pizza & Pasta Int'l Inc. v. Anthony's Pizza Holding Co.*, No. 91171509, 2009 TTAB LEXIS 718, at *39 (TTAB 2009) (coexistence agreement with third party does not preclude a finding of likelihood of confusion).

Ziegler testified—and Applicant does not point to evidence to the contrary—that apart from the registrations owned by Opposer, and Founding Farmers LLC and its affiliate Farmers Restaurant Group, there are no registrations for FARMER or FARMER-inclusive marks in standard characters on the USPTO's Principal Register

¹⁰⁰ 13 TTABVUE 7-8, 14-76 (paras. 27-30 and PX 7) (confidential); 14 TTABVUE 7-8, 14-193 (paras. 27-30 and PX 7) (redacted); 20 TTABVUE 2-3 (paras. 3-4) and 7-10, 12-15 (PX 15 & 16) (confidential); 18 TTABVUE 2-3 (paras. 3-4) (redacted).

¹⁰¹ 21 TTABVUE 15 (citing 20 TTABVUE 7-10, 12-15 (PX 15 & 16)).

¹⁰² 21 TTABVUE 15; 20 TTABVUE 7-8 (confidential agreement).

¹⁰³ 21 TTABVUE 15; 20 TTABVUE 12-13 (confidential agreement).

that cover gin, spirits, or any gin-based products, including ‘hard seltzer.’¹⁰⁴ While it is true that Opposer appears to have successfully defended its brand, none of the parties in the corresponding evidence acknowledge the strength of Opposer’s brand. Moreover, it could be that these third-parties acquiesced to Opposer’s demands or terminated an inter partes proceeding to avoid litigation rather than because it believed its mark was likely to cause confusion with Opposer’s mark. *Milwaukee Elec. Tool Corp. v. Freud Am., Inc.*, No. 92059634, 2019 TTAB LEXIS 384, at *60 (TTAB 2019) (“[W]e find that competitors likely acquiesced to Freud’s assertion of its exclusive right to use the color red on saw blades to avoid litigation.”); *In re Hikari Sales USA, Inc.*, No. 86439012, 2019 TTAB LEXIS 73, at *19-20 (TTAB 2019) (Applicant’s evidence “only shows” that “competitors ceased use of that term, but does not shed light on its competitors’ motivation for stopping their respective uses.”).

Applicant did not cross-examine Opposer’s witness or otherwise challenge Opposer’s evidence. Regardless, considering Opposer’s evidence as a whole, we find it lacking, particularly as it relates to Opposer’s sales and advertising numbers. Opposer’s annual revenues “in recent years” have been “over \$700,000, on average”¹⁰⁵ and its advertising expenditures between 2019-2024 range “between approximately \$650,000 and \$1 million.”¹⁰⁶ Neither Opposer’s sales revenues nor its advertising expenditures are nearly as large as those that have supported fame findings under

¹⁰⁴ 14 TTABVUE 8 (para. 30); 21 TTABVUE 16.

¹⁰⁵ 14 TTABVUE 6 (para. 19).

¹⁰⁶ 14 TTABVUE 7 (para. 24).

Section 2(d) in prior cases decided by the Court of Appeals for the Federal Circuit. *See generally Omaha Steaks*, 908 F.3d at 1319-20 (fame of OMAHA STEAKS mark supported by advertising expenditures of \$45 million in 2011 and over \$50 million in 2012 and 2013 and 100,000 orders per day during the December holiday season); *Kimberly-Clark*, 774 F.2d at 1146-47 (fame of HUGGIES mark supported by \$300 million in sales and over \$15 million in advertising in the year 1982 alone); *Bose*, 293 F.3d at 1372 (fame of ACOUSTIC WAVE mark for loudspeaker systems supported by \$50 million in annual sales and \$5 million in annual advertising); *Nina Ricci, S.A.R.L. v. E.T.F. Enters., Inc.*, 889 F.2d 1070, 1072 (Fed. Cir. 1989) (fame of NINA RICCI mark for fragrance products supported by \$350 million in retail sales and with advertising and sales promotion expenditures aggregating around \$37 million between 1981 and 1986).

While we acknowledge that *The New York Times* enjoys national circulation, overall Opposer did not provide the volume and geographic extent of any of the other listed publications' readership, so this evidence has somewhat limited probative value inasmuch as we cannot evaluate the purchasing public's exposure to the FARMER'S mark in these other publications without it. In sum, we find Opposer's FARMER'S mark to have average commercial strength for distilled spirits, causing this factor to be neutral in our analysis.

b. Conceptual Strength of Opposer's FARMER'S Mark

Conceptual strength is a measure of a mark's distinctiveness and may be placed "in categories of generally increasing distinctiveness[:] ... (1) generic; (2) descriptive;

(3) suggestive; (4) arbitrary; or (5) fanciful.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).

Opposer argues that, because in a prior *inter partes* proceeding, Opposer’s same registered FARMER’S mark was found to be “arbitrary or, at worst, mildly suggestive,” we “should again conclude that FARMER’S is arbitrary and, therefore, inherently distinctive.”¹⁰⁷ We are not bound by the finding in that case involving a different defendant and a different record. *Cf. Sage Therapeutics, Inc. v. SageForth Psychological Servs., LLC*, No. 91270181, 2024 TTAB LEXIS 139, at *23 (TTAB 2024) (citing *In re Nett Designs Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001)). However, considering the record in this case, we reach a similar conclusion. Because Opposer’s FARMER’S mark is registered on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), it is treated as inherently distinctive.¹⁰⁸ Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *see New Era Cap*, 2020 TTAB LEXIS 199, at *29 (“Opposer’s mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act.”).

Applicant’s argument that the mark is merely descriptive cannot be entertained because the ’294 Registration is more than five years old (and has also become incontestable).¹⁰⁹ 15 U.S.C. § 1064(3) (limiting the grounds on which a registration

¹⁰⁷ 21 TTABVUE 27 (citing *Chatham Imports, Inc. v. Driftless Pure, LLC*, No. 91243988, 2022 TTAB LEXIS 344, at *12 (TTAB 2022) (“We disagree with Applicant that Opposer’s FARMER’S mark is merely descriptive or inherently weak.”) (not a precedent)).

¹⁰⁸ 12 TTABVUE 5-19.

¹⁰⁹ 23 TTABVUE 16.

that is more than five years old may be cancelled, which do not include mere descriptiveness). Accordingly, Opposer's mark must be considered at worst suggestive.

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. Ziegler, Opposer's witness, testified that FARMER'S gin is made "in small batches from carefully selected botanicals and the purest non-GMO grains[.]" adding that "[t]he distillate is made from sustainably farmed grain grown in the United States and certified organic by the USDA."¹¹⁰ According to Ziegler, Opposer's gin "possesses a complexity and unique taste profile due to its remarkably balanced selection of botanicals, including juniper, elderflower, lemongrass, coriander, and angelica root."¹¹¹

Applicant argues that FARMER'S refers to the grains or fruit or botanicals, or other agricultural products, from which the gin stems.¹¹² According to Applicant, "Opposer makes this explicit on its product label, which boasts that 'We distill our spirit from grain grown by **family farmers**.'"¹¹³

¹¹⁰ 14 TTABVUE 5 (para. 11).

¹¹¹ 14 TTABVUE 5 (para. 11).

¹¹² 23 TTABVUE 15-16.

¹¹³ 23 TTABVUE 16 (Applicant's brief); 16 TTABVUE 88 (Opposer's label) (emphasis added by Applicant).

“Farmer” is defined as “a person who cultivates land or crops or raises animals (such as livestock or fish).”¹¹⁴ Multi-step reasoning is thus required to get from FARMER’S to an understanding of the attributes associated with the various botanicals selected for their inclusion in distilled spirits, or the result of their being organically and sustainably grown by a “family farmer.” Conceptually, we find FARMER’S to be somewhat suggestive, and therefore entitled to the normal scope of protection afforded a registered mark. *In re Great Lakes Canning, Inc.*, No. 733365360, 1985 TTAB LEXIS 75, at *7-8 (TTAB 1985) (“[T]he fact that a mark may be somewhat suggestive does not mean that it is a ‘weak’ mark entitled to a limited scope of protection.”).

Applicant seeks to diminish the scope of protection for Opposer’s mark, arguing that “many makers of alcoholic beverages in Class 33 ... incorporate the words FARM or FARMER.”¹¹⁵ To support its argument, Applicant made of record evidence of both third-party use and registration of FARMER-inclusive marks for a range of alcoholic beverages. “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.” *Apex Bank v. CC Serve Corp.*, 156 F.4th 1230, 1235 (Fed. Cir. 2025) (quoting *Palm Bay Imps.*, 396 F.3d at 1373). “The purpose of introducing evidence of

¹¹⁴ MERRIAM-WEBSTER DICTIONARY, accessed on March 13, 2026. <https://www.merriam-webster.com/dictionary/farmer?src=search-dict-hed>. *Monster Energy*, 2023 TTAB LEXIS 14, at *27 n.41 (“The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions.”) (citing *In re Cordua Rests. LP*, No. 85214191, 2014 TTAB LEXIS 94, at *6 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594 (Fed. Cir. 2016)).

¹¹⁵ 23 TTABVUE 13.

third-party use 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*, 908 F.3d at 1324 (cleaned up). Such evidence tends to indicate a lack of commercial strength, while third-party registration evidence without proof of use may bear on conceptual weakness if a term is commonly registered for similar goods. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed. Cir. 2015); *Juice Generation*, 794 F.3d at 1339-40.

We begin with Applicant’s third-party registration evidence, which generally falls into two groups: (1) marks registered for wine, and (2) marks registered for beer, ale or hard cider. We agree with Opposer that these registrations do not constitute evidence of use. *Weider Publ’ns, LLC v. D&D Beauty Care Co.*, No. 91199352, 2014 TTAB LEXIS 2, at *6 n.10 (TTAB 2014) (third-party registrations do not constitute evidence of use, and are thus of limited probative value to show mark is weak), *appeal dismissed per stipulation*, No. 14-1461 (Fed. Cir. Oct. 10, 2014). Nevertheless, third-party registrations may be considered to show the meaning of a mark, or a portion of a mark, in the same manner as a dictionary definition. *See Spireon*, 71 F.4th at 1363 (existence of third-party registrations for similar goods can bear on a mark’s conceptual strength by showing that an element common to both opposer’s and applicant’s marks has a normally understood and well-recognized descriptive or suggestive meaning).

First, Applicant made of record the following use-based registrations, all of which identify “wine”:¹¹⁶

- FARMER & FRENCHMAN and Design (Reg. No. 6187692);¹¹⁷
- FRIEND & FARMER (Reg. No. 5371796);¹¹⁸
- DIRT FARMER & CO. (Reg. No. 4804278);¹¹⁹
- FARMER’S LEAP (Reg. No. 5646016);¹²⁰
- FARMER’S HEART (Reg. No. 7331175);¹²¹
- FARMER’S FURY (Reg. No. 5646016);¹²²
- GENTLEMAN FARMER (Reg. No. 4309001);¹²³
- FARMER’S FIZZ (Reg. No. 4571140);¹²⁴
- THE FARMER’S MUSE (Reg. No. 5587762);¹²⁵
- FAMILY & FARMERS and Design (Reg. No. 5585323);¹²⁶ and

¹¹⁶ 23 TTABVUE 13 (citing 16 TTABVUE 7-24).

Applicant in its brief asserts that FOUNDING FARMERS is registered for whiskey (23 TTABVUE 13 (citing 16 TTABVUE 7-24)), but the registration is not of record. Therefore, we do not consider any argument as to this registration.

¹¹⁷ 16 TTABVUE 8.

¹¹⁸ 16 TTABVUE 9.

¹¹⁹ 16 TTABVUE 10.

¹²⁰ 16 TTABVUE 11.

¹²¹ 16 TTABVUE 12.

¹²² 16 TTABVUE 13.

¹²³ 16 TTABVUE 14.

¹²⁴ 16 TTABVUE 15.

¹²⁵ 16 TTABVUE 16.

¹²⁶ 16 TTABVUE 24.

- FARMERS AGAINST THE MACHINE (Reg. No. 7781029).¹²⁷

Second, Applicant made of record the following use-based, third-party registrations of marks for beer and ale and hard cider:

- LOST FARMER (Reg. No. 6436028);¹²⁸
- MELON FARMER (Reg. No. 5738847);¹²⁹
- FARMER ED'S (Reg. No. 4914946);¹³⁰
- LOST FARMER BREWING CO. and Design (Reg. No. 6429798);¹³¹
- FARMER'S WATER (Reg. No. 7582079);¹³²
- FARMER'S BEAT (Reg. No. 4768845);¹³³
- FATED FARMER SERIES (Reg. No. 5809980);¹³⁴
- THE FARMER'S DAUGHTER (Reg. No. 4271048);¹³⁵
- FARMER'S TAN RED ALE (Reg. No. 3223015);¹³⁶
- FARMER JOHN'S MULTI-GRAIN ALE (Reg. No. 4887647);¹³⁷ and

¹²⁷ 16 TTABVUE 25.

¹²⁸ 16 TTABVUE 67.

¹²⁹ 16 TTABVUE 68.

¹³⁰ 16 TTABVUE 69.

¹³¹ 16 TTABVUE 70.

¹³² 16 TTABVUE 71.

¹³³ 16 TTABVUE 72.

¹³⁴ 16 TTABVUE 73.

¹³⁵ 16 TTABVUE 74.

¹³⁶ 16 TTABVUE 75.

¹³⁷ 16 TTABVUE 77.

- PUT YOUR LIPS ON A FARMER (Reg. No. 5729731).¹³⁸

Additionally, the record includes the mark POOR FARMER HARD CIDER and design, the registration for which identifies “hard cider” (Reg. No. 5298026).¹³⁹ According to Applicant, all this evidence “further cement[s] that consumers are used to seeing [the term FARMER] in connection with alcoholic beverages and eroding any possibility that consumers would associate different alcoholic beverages [sic] products based simply on the use of that common word.”¹⁴⁰

None of the above-identified third-party registrations for wine, beer, ale and hard cider identify the distilled spirits encompassed by Opposer’s ’294 Registration or the “Hard seltzer” of Applicant’s involved application, and therefore they are not relevant absent record evidence that the goods in the third-party registrations are similar to the involved goods. Other than all being alcoholic beverages or identifying goods in Class 33, Applicant offers no argument, much less evidence, showing that wine, beer, ale or hard cider are similar to distilled spirits or hard seltzer for purposes of this *DuPont* analysis. *Cf. In re White Rock Distilleries, Inc.*, No. 77093221, 2009 TTAB LEXIS 601, at *7 (TTAB 2009) (“[t]here is no per se rule that holds that all alcoholic beverages are related” for purposes of the second *DuPont* factor). It is simply not enough for our purposes here that these goods can be broadly characterized as “alcoholic beverages” or classified in Class 33. *See Omaha Steaks*, 908 F.3d at 1325-

¹³⁸ 16 TTABVUE 67-77.

¹³⁹ 16 TTABVUE 17.

¹⁴⁰ 23 TTABVUE 14.

26 (that goods can be grouped into broad buckets like food products does not render them similar).

Turning to evidence of third-party use, Applicant argues that “[n]ot only does Opposer not have exclusive use of FARMER in Class 33, it does not have exclusive use for distilled spirits specifically.”¹⁴¹ In support of its argument, Applicant then lists six FARM- and FARMER-inclusive marks for which website screen shots of their use are of record.¹⁴² For a number of reasons, however, we find much of Applicant’s evidence is not probative.

Two of the website screen shots concern the FOUNDING FARMERS mark.¹⁴³ However, this mark is subject to a coexistence agreement with Opposer, which we discussed earlier.¹⁴⁴

Another one of the third-party marks—FARMERS RESERVE DISTILLERY for bourbon¹⁴⁵—is also the subject of an agreement with Opposer.¹⁴⁶ As before, the details of this agreement are confidential, but we find that Opposer’s actions have not allowed the strength of its FARMER’S mark to become diminished.

¹⁴¹ 23 TTABVUE 13.

¹⁴² 23 TTABVUE 13.

¹⁴³ 23 TTABVUE 13 (Applicant’s brief); 16 TTABVUE 27, 28 (third-party website screen shots).

¹⁴⁴ 24 TTABVUE 13 (Opposer’s reply brief); 20 TTABVUE 7-10 (confidential).

¹⁴⁵ 23 TTABVUE 13 (Applicant’s brief); 16 TTABVUE 29 (third-party website use).

¹⁴⁶ 24 TTABVUE 14 (Opposer’s reply brief); 13 TTABVUE 62-67 (confidential agreement).

As for another mark shown in the third-party website screen shots, GlenPharmer Distillery,¹⁴⁷ we do not find it probative of commercial weakness of “FARMER,” because the use of the term “PHARMER,” when combined with the personal name “GLEN,” engenders the commercial impression of a person’s name. Moreover, this mark is less similar to the involved marks than they are to each other and therefore is less probative of commercial weakness than marks incorporating the term FARMER. *See, e.g., Specialty Brands*, 748 F.2d at 675 (“None of these [third-party registered] marks has a ‘SPICE (place)’ format or conveys a commercial impression similar to that projected by the SPICE ISLANDS mark, and these third-party registrations are of significantly greater difference from SPICE VALLEY and SPICE ISLANDS than either of these two marks [are] from each other.”). Still further, the evidence of record simply consists of the website landing page with only the words, “GlenPharmer” and “GlenPharmer Distillery.”¹⁴⁸ We cannot determine based on this little information if distillery services are offered under this mark or, if goods are offered, the exact nature of such goods. Therefore, even if the mark were similar to Registrant’s mark, the evidence of record is too sparse for us to make a determination that the goods or services offered under it are similar to Registrant’s goods for purposes of our analysis.

We now turn to the two remaining website screen shots:

¹⁴⁷ 16 TTABVUE 30.

¹⁴⁸ 16 TTABVUE 30.

- R/FARM DISTILLING CO.;¹⁴⁹ and
- FARM BOY for bourbon whiskey.¹⁵⁰

Applicant neither argues nor offers evidence regarding the extent of use of these marks or of consumer exposure to them.¹⁵¹ In fact, only the FARM BOY mark appears on a bottle of whiskey with an “add to cart” feature,¹⁵² while the R/FARM mark appears on what looks like the website’s home page, is not associated with any particular goods, and does not provide the viewer with any pricing or availability information at all.¹⁵³

Applicant also argues that there are four seltzer products that incorporate the term FARMER.¹⁵⁴ Two of the marks are used for THC seltzers: The FARMER’S DAUGHTER by Del Ray and the FARMERS SECRET.¹⁵⁵ Considering these two in detail, there is no indication that these seltzers also include a distilled spirit or even alcohol at all; accordingly, without more, we do not consider THC seltzers related to “hard seltzers.”

That leaves us with two other seltzer products. One is a hard seltzer offered under THE FARMER’S DAUGHTER by Red Wagon Farm Brewery on what appears to be a menu available at redwagonfarm.com suggesting it is offered for sale; however,

¹⁴⁹ 16 TTABVUE 31.

¹⁵⁰ 16 TTABVUE 32.

¹⁵¹ 23 TTABVUE 13.

¹⁵² 16 TTABVUE 32.

¹⁵³ 16 TTABVUE 31.

¹⁵⁴ 23 TTABVUE 13 (citing 16 TTABVUE 33-41).

¹⁵⁵ 16 TTABVUE 41-42.

while its image also appears on untapped.com and Facebook.com, they appear without any “add to cart” or equivalent feature.¹⁵⁶ The last mark in this group is FARMER: THE FARMER by Vermont Hard Seltzer. This mark appears to be used with hard tea, not hard seltzer.¹⁵⁷ While there is no evidence that hard tea is a type of hard seltzer or otherwise related to it, we consider it to the extent that it contains a distilled spirit.

Unlike cases in which extensive evidence of third-party use and other evidence in the record was found to be “powerful on its face” inasmuch as “a considerable number of third parties” were shown to use similar marks, *Juice Generation*, 794 F.3d at 1339, Applicant’s evidence falls well short of the volume of evidence found convincing in *Jack Wolfskin* and *Juice Generation*. See, e.g., *In re Inn at St. John’s, LLC*, No. 87075988, 2018 TTAB LEXIS 170, at *10-12 (TTAB 2018) (two third-party registrations for related but not identical services and two registrations for identical services with a non-identical but similar mark were not sufficient to prove Registrant’s mark was conceptually or inherently weak), *aff’d per curiam*, 777 Fed. Appx. 516 (Fed. Cir. 2019); *In re I-Coat Co., LLC*, No. 86802467, 2018 TTAB LEXIS 171, at *16 (TTAB 2018) (Three third-party uses are “well short of the volume of evidence found convincing in *Jack Wolfskin* and *Juice Generation*.”).

Taken as a whole, the probative evidence consisting of four FARM- or FARMER-formative marks (R/FARM DISTILLING CO.; FARM BOY; THE FARMER’S

¹⁵⁶ 16 TTABVUE 36-40.

¹⁵⁷ 16 TTABVUE 34-35.

DAUGHTER; and FARMER: THE FARMER) does not show that consumers have been exposed to so many uses of FARMER(S) in trademarks for distilled spirits or similar goods that they have become accustomed to distinguishing between the marks based on minute differences. Accordingly, we find that Applicant was not successful in diminishing the scope of protection to be accorded to Opposer's mark.

c. Conclusion as to the Strength or Weakness of Opposer's FARMER'S Mark

Considering the fifth and sixth factors, because we find Opposer's FARMER'S mark to be of average commercial strength for distilled spirits, and because Applicant was not successful in diminishing the strength of Opposer's mark, we find that Opposer's mark is entitled to the ordinary scope of protection to which inherently distinctive marks are entitled. *See Bell's Brewery, Inc. v. Innovation Brewing*, 2017 TTAB LEXIS 452, at *20 (TTAB 2017) (citing *Joseph Phelps Vineyards*, 857 F.3d at 1325 (stating that likelihood of confusion fame varies along a spectrum from very strong to very weak)).

3. Similarity or Dissimilarity of the Marks

We now turn to the first *DuPont* factor, which assesses the similarity or dissimilarity of the marks. *DuPont*, 476 F.2d at 1361. We consider "the marks in their entirety as to appearance, sound, connotation and commercial impression." *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (quoting *DuPont*, 476 F.2d at 1361). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *Inn at St. John's*, 2018 TTAB LEXIS 170, at *13 (quoting *In re Davia*, No. 85497617, 2014 TTAB LEXIS 214, at *4).

The proper test “is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373 (Fed. Cir. 2018) (quoting *Coach Servs.*, 668 F.3d at 1368). “[S]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014) (quoting *Coors Brewing*, 343 F.3d at 1344).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entirety, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entirety of the marks, not just part of the marks. Nonetheless, 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 a consideration of the marks in their entirety. *Stone Lion*, 746 F.3d at 1322. The focus is on the recollection of the average purchaser, who normally “retains a general rather than a specific impression of marks.” *In re i.am.symbolic, llc*, No. 85916778, 2018 TTAB LEXIS 281, at *11 (TTAB 2018).

Recall that Applicant seeks to register the standard character mark FARMER’S CREED, while Opposer’s pleaded mark is FARMER’S, which is registered in standard characters.

Applicant argues that the term “Farmer’s Creed” specifically refers to a creed that is derived from a poem by that same name, written by Frank I. Mann of Illinois.¹⁵⁸ “The Farmer’s Creed,” according to Applicant, “stands for certain values and beliefs related to agriculture and farming.”¹⁵⁹ David Lundell, President of Applicant, and his wife are livestock farmers and members of the Ontario Federation of Agriculture.¹⁶⁰ Applicant argues that FARMER’S CREED was chosen as Applicant’s mark “to associate its products with the poem and the ethos contained therein, and to suggest that the products are created in accordance with the traditions and beliefs expressed in the poem.”¹⁶¹ Consumers would perceive this as such, according to Applicant, because “[Applicant] uses ‘The Farmer’s Creed’ poem on its website ... and also prints ‘The Farmer’s Creed’ poem on its beer labels.”¹⁶² Because of this, Applicant continues, its mark is a unitary mark and the combined terms create a distinct impression separate and apart from that of either individual term.¹⁶³

¹⁵⁸ 23 TTABVUE 11.

¹⁵⁹ 23 TTABVUE 11 (citing 17 TTABVUE 11-16, which are third-party website printouts of The Farmer’s Creed poem and related background).

Applicant itself acknowledges that it intends to offer its hard seltzer to the general public that is of legal drinking age, 19 TTABVUE 10 (Response to Inter. No. 12), not just farmers. The record contains no evidence, however, of the extent that the relevant public is familiar with “The Farmer’s Creed” poem.

¹⁶⁰ 17 TTABVUE 2 (paras. 2, 3).

¹⁶¹ 23 TTABVUE 11.

¹⁶² 23 TTABVUE 11 (citing 17 TTABVUE 3 (para. 8), 17 (website)). This argument is unpersuasive because beer is in a class of goods not at issue in this proceeding and there is no evidence that Applicant’s mark is in use with hard seltzer with or without the label bearing the poem.

¹⁶³ 23 TTABVUE 11.

Inasmuch as we must focus on the mark as it appears on the drawing page in the application, we cannot consider Applicant's argument based on use of its mark in combination with its label, which constitutes trade dress, as that may change at any time, or on its website. *Kenner Parker Toys, Inc. v. Rose Art Indust.*, 963 F.2d 350 (Fed. Cir. 1992) ("Ordinarily, for a word mark we do not look to the trade dress, which can be changed at any time."); *Aquitaine Wine*, 2018 TTAB LEXIS 108, at *10.

Even if, as argued by Applicant neither term in FARMER'S CREED is dominant because it is a unitary phrase, this does not render the marks dissimilar. The marks look and sound alike to the extent that they both incorporate the term FARMER'S. FARMER'S is the first term and a prominent part of Applicant's mark. *Cf. Palm Bay Imps.*, 396 F.3d at 1372-73 ("To be sure, CLICQUOT is an important term in the mark [VEUVE CLICQUOT], but VEUVE nevertheless remains a 'prominent feature' as the first word in the mark and the first word to appear on the label.").

Although the record shows that FARMER'S CREED is the title of a poem, the term FARMER'S in Applicant's mark has the same meaning as in Opposer's mark, i.e., "a person who cultivates land or crops or raises animals (such as livestock or fish)."¹⁶⁴ Applicant's addition of the term "creed" does not change this, and indeed the record shows, and Applicant argues, that "Farmer's Creed" "stands for certain values and beliefs related to agriculture and farming."¹⁶⁵ Thus the marks have similar meanings to the extent that they share the term "farmer's" and engender similar

¹⁶⁴ 17 TTABVUE 20 (MERRIAM-WEBSTER DICTIONARY).

¹⁶⁵ 23 TTABVUE 11 (citing 17 TTABVUE 11-16, which are third-party website printouts of The Farmer's Creed poem and related background).

commercial impressions to the extent they both extoll the virtues of one who is a farmer.

Moreover, because Opposer already uses and has registered the term FARMER'S, it is more likely that prospective consumers encountering Applicant's and Opposer's marks will perceive Applicant's mark as a mere extension of Opposer's product line, given that the term FARMER'S appears first and the goods are related, and keeping in mind that the general public retains a "general rather than specific impression" of marks. *Inn at St. John's*, 2018 TTAB LEXIS 170, at *14. Moreover, the record does not show any other marks with the structure FARMER'S plus an additional word for use with similar goods, as we discussed earlier,¹⁶⁶ except for Opposer's own FARMER'S BOTANICAL mark, further supporting the notion that Applicant's mark is likely to be perceived as an extension of Opposer's product line. *See Sage Therapeutics*, 2024 TTAB LEXIS 139, at *15-16 (parties' marks share the same structure, including the same dominant element, "sage," and then add a second word to create a sage-formative mark, resulting in marks that look like variations on a "sage" theme).

When comparing the marks in their entireties, we find that the marks are similar in sight, sound, meaning and commercial impression. As a result, the first factor weighs in favor of a likelihood of confusion.

¹⁶⁶ See discussion in Section III(B)(2)(b), *supra*.

4. Conditions Under Which and Buyers to Whom Sales are Made

The fourth *DuPont* factor considers the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 476 F.2d at 1361. Purchaser sophistication or degree of care may tend to minimize likelihood of confusion; conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay Imps*, 396 F.3d at 1376.

Opposer argues that the degree of consumer care is low and that, as a result, this factor supports a likelihood of confusion.¹⁶⁷ Applicant, for its part, argues that the conditions under which the goods are sold are different and weigh against confusion for a number of reasons, including (1) hard seltzer is “typically” sold as an alternative to beer and, as a result, sold in some locations where gin is not sold, such as grocery stores and convenience stores; (2) the parties’ goods are stocked in different sections of the store when sold under the same roof; and (3) consumers can differentiate between the parties’ goods by reading the required labels that identify the two different sources of the goods.¹⁶⁸

We agree with Opposer that because the descriptions of goods in the ’294 Registration and the involved application do not include any price restrictions, we must consider that the parties’ goods are sold at all of the normal price points for such goods, including inexpensive ones.¹⁶⁹ *Sock It To Me, Inc. v. Fan*, No. 91230554, 2020 TTAB LEXIS 201, at *24 (TTAB 2020) (where there are no limitations in the

¹⁶⁷ 21 TTABVUE 31.

¹⁶⁸ 23 TTABVUE 8, 14-15.

¹⁶⁹ 21 TTABVUE 32.

identification, goods encompass “all goods of the type identified, without limitation as to their nature or price”).

The evidence shows that Opposer’s distilled spirits, i.e., gin, is sold to the end-consumer at a retail price ranging from about \$34.99 to \$39.99, with an average price of about \$37.49,¹⁷⁰ but retailers may offer bottles at even lower prices. For example, Total Wine offers a 750 ml bottle of Opposer’s gin for as low as \$28.99.¹⁷¹ The record also shows that gin retails for as little as \$23.99 for a 750 ml bottle.¹⁷²

Although Applicant is not currently selling its hard seltzer, the record shows that hard seltzer is offered at relatively low prices, depending on how many are included in a pack: \$14.99 for an 8-pack of 12-ounce cans (\$1.87/can);¹⁷³ \$16.99 for an 8-pack of 12-ounce cans (\$2.12 per can);¹⁷⁴ and \$18.99 for an 8-pack (\$2.37/can).¹⁷⁵

Here, the low cost of hard seltzer suggests that it could be an impulse purchase, making it more likely that a hurried customer with a general rather than specific recollection of Opposer’s mark would assume a connection between the source of the parties’ goods when sold under similar marks. *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, No. 91194148, 2015 TTAB LEXIS 260, at *38-39 (TTAB 2015).

¹⁷⁰ 14 TTABVUE 5 (para. 16).

¹⁷¹ 17 TTABVUE 25.

¹⁷² 17 TTABVUE 26.

¹⁷³ 17 TTABVUE 37-38.

¹⁷⁴ 18 TTABVUE 26.

¹⁷⁵ 18 TTABVUE 9.

Accordingly, we find that the fourth *DuPont* factor slightly favors a finding of likelihood of confusion.

5. Lack of Evidence of Actual Confusion

Under the seventh and eighth *DuPont* factors, we consider the nature and extent of any actual confusion, in light of the length of time and conditions under which there has been contemporaneous use of the parties' subject marks. *DuPont*, 476 F.2d at 1361. These factors are interrelated.

Applicant argues, without elaborating, that “[t]here is no evidence of confusion and Opposer does not contend actual confusion.”¹⁷⁶ In its reply brief, Opposer counters that this factor is irrelevant inasmuch as Applicant has not used its involved mark in commerce and, as a result, there has been no opportunity for actual confusion.¹⁷⁷

Applicant's involved application was filed based on intent to use and there is no evidence of Applicant's use in commerce in the record. Indeed, David Lundell, Applicant's President, testified that the mark is in use in Canada and that Applicant “**intends** to expand into the United States market.”¹⁷⁸

Here, “the absence of evidence of actual confusion, under the seventh *du Pont* factor, by itself is entitled to little weight in our likelihood of confusion analysis unless there also is evidence, under the eighth *du Pont* factor, that there has been a

¹⁷⁶ 23 TTABVUE 14.

¹⁷⁷ 24 TTABVUE 16.

¹⁷⁸ 17 TTABVUE 2-3 (paras. 1, 3, 6) (emphasis added). *See also* 19 TTABVUE 8, 9 (Applicant's Answers to Opposer Interrogatory Nos. 5, 9).

significant opportunity for actual confusion to have occurred.” *In re Ass’n of the U.S. Army*, No. 76578579, 2007 TTAB LEXIS 52, at *27 (TTAB 2007) (citing *Gillette Canada Inc. v. Ranir Corp.*, No. 91082769, 1992 TTAB LEXIS 24, at *19-20 (TTAB 1992)). Inasmuch as there is no evidence that Applicant has used its mark in the United States, the lack of evidence of actual confusion is not meaningful. *See, e.g., Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (“This court has previously noted that actual confusion is not necessary to show a likelihood of confusion. A case involving an ITU application, where the disputed mark has not yet appeared in the marketplace, makes this point even more pertinent.”) (citation omitted); *see also Nina Ricci*, 889 F.2d at 1073 (absence of actual confusion “is of very little, if any, probative value” where there is little-to-no evidence of use); *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1338 (Fed. Cir. 2001) (lack of evidence of actual confusion not significant where no accompanying evidence of circumstances under which the products were together in the marketplace).

We therefore find the seventh and eighth factors to be neutral.

6. Variety of Goods on which a Mark Is or Is Not Used

Under the ninth *DuPont* factor, we consider the “variety of goods on which a mark is or is not used (house mark, ‘family’ mark, product mark).” *DuPont*, 476 F.2d at 1357. “If a party in the position of plaintiff uses its mark on a wide variety of goods, then purchasers are more likely to view a defendant’s related good under a similar mark as an extension of the plaintiff’s line.” *DeVivo v. Ortiz*, No. 91242863, 2020 TTAB LEXIS 15, at *44-45 (TTAB 2020).

Applicant argues that because Opposer only uses its mark for gin, and Applicant currently only uses its mark for beer with the intent to expand into hard seltzer, this favor weighs in favor of Applicant.¹⁷⁹

This factor does not apply in this matter. Here, the fact that Opposer only uses its mark on one product is irrelevant where, as discussed below, we find a likelihood of confusion based on that product. Thus, we find this factor to be neutral.

7. The Lack of Market Interface between the Parties

The tenth *DuPont* factor considers the market interface between the parties. *DuPont*, 476 F.2d at 1361. Applicant acknowledges that there is no evidence that there has been any interface between the parties, but argues that this factor favors Applicant.¹⁸⁰ We disagree. Inasmuch as there is no evidence of any interface between the parties, this factor is deemed to be neutral. *DeVivo*, 2020 TTAB LEXIS 15, at 46.

8. Conclusion: Summarizing the *DuPont* Factors

Because we determined that the goods are related and that the channels of trade for the parties' goods overlap, the second and third *DuPont* factors weigh in favor of a likelihood of confusion. Considering the fifth and sixth factors, we find that Opposer's mark is entitled to the ordinary scope of protection to which inherently distinctive marks are entitled. Because the marks are similar in sight, sound, meaning and commercial impression, the first factor weighs in favor of a likelihood of confusion. The fourth factor, regarding the conditions under which and buyers to

¹⁷⁹ 23 TTABVUE 17. See also 23 TTABVUE 7 (“Opposer only sells gin under its trademark.”).

¹⁸⁰ 23 TTABVUE.

whom sales are made, weighs slightly in favor of a likelihood of confusion to the extent Applicant's goods are subject to impulse purchase. The seventh, eighth, ninth and tenth factors are all neutral. Because all of the relevant factors either weigh in favor of confusion or are neutral, and none weigh against it, we find that confusion is likely.

Decision

The opposition to registration of the mark in Class 33 of Application Serial No. 97130349 is sustained on the ground of priority and likelihood of confusion under Section 2(d) of the Trademark Act. The application will proceed for issuance of a notice of allowance in Class 32 only.