

This Opinion is Not a
Precedent of the TTAB

Mailed: October 25, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

PepsiCo, Inc.
v.
Rockstar Industries LLC

Opposition No. 91247241 (parent)

PepsiCo, Inc.
v.
Rockstar LLC

Cancellation Nos. 92075918 & 92076204

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for Rockstar Industries LLC and Rockstar LLC.

Before Lynch, Thurmon, and Elgin, Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background¹

Plaintiff PepsiCo, Inc. (“PepsiCo”) opposes two applications owned by Rockstar Industries LLC and seeks to cancel three registrations owned by Rockstar LLC. The Board previously consolidated the opposition to the two applications with the two cancellation proceedings, all of which involve the same mark (ROCKSTAR in standard characters), the same plaintiff (PepsiCo), and defendants under common ownership (hereinafter referred to as “Defendants”).²

The opposed applications to register ROCKSTAR cover:

Jerky; Potato chips; Dip mixes; Dips; Dried beef, in International Class 29; Condiment, namely, oyster sauce; Corn chips; Hot sauce; Ketchup; Mustard; Salsa; Tortilla

¹ Citations in this opinion to the briefs and other materials in the case docket refer to TTABVUE, the Board’s online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, Opp. No. 91216455, 2020 TTAB LEXIS 199, *4 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Unless otherwise indicated, the TTABVUE citations are to Opposition No. 91247241, the parent case of these consolidated proceedings.

As part of an internal Board pilot citation program on broadening acceptable forms of legal citation, this order cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this order employs citations to the LEXIS legal database and cites only precedential decisions, unless otherwise specified. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 101.03 (2024). Proceeding and serial numbers also are included for decisions of the Board. Those Board decisions that issued on or after January 1, 2008 may be viewed in TTABVUE by entering the proceeding number, application number, registration number, expungement/reexamination number, mark, party, or correspondent. Many precedential Board decisions that issued from 1996 to 2008 are available through USPTO.gov in the TTAB Reading Room by entering the same information. Most TTAB decisions that issued prior to 1996 are not available in USPTO databases.

² 21 & 23 TTABVUE (consolidation orders). In the opposition, PepsiCo was preceded as the opposer by its predecessor-in-interest Rockstar, Inc., and PepsiCo was substituted as the opposer after it acquired Rockstar, Inc.’s relevant assets, including trademarks. 13 TTABVUE.

chips; Prepared horseradish; Savory sauces used as condiments, in International Class 30;³ and

Canned fruits and vegetables; Pickled vegetables; Pickles, in International Class 29.⁴

The challenged registrations for ROCKSTAR cover:

Meal replacement bars for weight loss purposes; Chocolate-based meal replacement bars for medical purposes; Fruit-based meal replacement bars for medical purposes; Nutritional supplement energy bars; Nutritional supplement meal replacement bars for boosting energy, in International Class 5; Fruit-based meal replacement bars; Fruit-based meal replacement bars for boosting energy, in International Class 29;⁵

Dietary and nutritional supplements, in International Class 5;⁶ and

Powdered nutritional supplement drink mix, in International Class 5.⁷

In all three of the now-consolidated proceedings, PepsiCo asserts likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d). In 2020, PepsiCo acquired energy drink business Rockstar, Inc. and its ROCKSTAR brand.⁸ PepsiCo

³ Application Serial No. 88152501 was filed October 12, 2018, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

⁴ Application Serial No. 88205171 was filed November 26, 2018, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

⁵ Registration No. 5956334 issued January 7, 2020, is the subject of Cancellation No. 92075918.

⁶ Registration No. 5439539 issued April 3, 2018, has been maintained, and is the subject of Cancellation No. 92076204.

⁷ Registration No. 5892882 issued October 22, 2019, is the subject of Cancellation No. 92076204.

⁸ 44 TTABVUE 5, 9.

relies on the following pleaded registrations, which are of record, and have been maintained:⁹

ROCKSTAR in standard characters for “Sports drinks, namely, energy drinks”;¹⁰

ROCKSTAR for “Sports drinks, namely, energy drinks,” in International Class 32;¹¹

ROCKSTAR ENERGY DRINK in typed form (ENERGY DRINK disclaimed) for “Sports drinks, namely, energy drinks” in International Class 32;¹²

ROCKSTAR JUICED in standard characters for “Sports drinks, namely, energy drinks” in International Class 32;¹³

ROCKSTAR PUNCHED in standard characters for “Energy drinks” in International Class 32;¹⁴ and

ROCKSTAR ROASTED in standard characters for “Energy drinks” in International Class 32.¹⁵

⁹ Although PepsiCo also pleaded Registration No. 2545247 for PARTY LIKE A ROCKSTAR for “Sports drinks, namely, energy drinks” in International Class 32, the registration has since expired for failure to file the required maintenance documents, and has been cancelled. We give the registration no further consideration. *Sunnen Prods. Co. v. Sunex Int’l Inc.*, Opp. No. 69733, 1987 TTAB LEXIS 92, *7 (TTAB 1987) (“An expired or cancelled registration is evidence only that it once issued”).

¹⁰ Registration No. 3398516; 41 TTABVUE 50-54.

¹¹ Registration No. 2784403; 41 TTABVUE 30-34.

¹² Registration No. 2613067; 41 TTABVUE 61-65. “[S]tandard character’ marks formerly were known as ‘typed’ marks,” and they are legally equivalent. *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012).

¹³ Registration No. 3190229; 41 TTABVUE 74-78.

¹⁴ Registration No. 3508269; 41 TTABVUE 79-83.

¹⁵ Registration No. 3423897; 41 TTABVUE 84-88.



In the cancellation proceedings, PepsiCo also pleaded (ENERGY DRINK disclaimed) for “Luggage; carrying cases; travel cases; backpacks; sports bags; school bags; sunshade parasols; umbrellas; parasols; and travelling bags” in International Class 18.¹⁶

The opposition also includes a claim of lack of bona fide intent to use as to all the goods in the opposed applications, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).¹⁷

Defendants’ Answers,¹⁸ filed before the proceedings were consolidated, deny PepsiCo’s salient allegations. Although the Answers included some affirmative defenses, Defendants did not pursue any at trial, so we consider them impliedly waived or forfeited.¹⁹ *See Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, Canc. No. 92050879, 2013 TTAB LEXIS 347, *5 n.6 (TTAB 2013), *aff’d*, 565 Fed. App’x 900 (Fed. Cir. 2014) (mem.).

¹⁶ Registration No. 4941724; 41 TTABVUE 66-73.

¹⁷ The Board granted PepsiCo’s motion to amend its Notice of Opposition to add the lack of bona fide intent claim, 9 TTABVUE, and the Amended Notice of Opposition appears at 8 TTABVUE 9-16.

¹⁸ Opp. No. 91247241 11 TTABVUE (parent); Cancellation No. 92076204, 4 TTABVUE; Cancellation No. 92075918, 4 TTABVUE.

¹⁹ We note the admonition of our primary reviewing court regarding the distinction between waiver and forfeiture. *See In re Google Tech. Holdings LLC*, 980 F.3d 858, 2020 USPQ2d 11465, at *3 (Fed. Cir. 2020) (“Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.” (internal quotation marks omitted)). Affirmative defenses that were asserted in an answer but then not pursued at trial may be deemed impliedly waived, while affirmative defenses that were never asserted may be deemed forfeited.

The consolidated proceeding is fully briefed. We sustain the opposition and grant both cancellations based on likelihood of confusion for the reasons discussed below.

II. Evidentiary Record

The record includes the pleadings and, pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the files of the opposed applications and challenged registrations. Both parties introduced additional materials, and neither party set out explicit evidentiary objections.

However, we note that in their Brief, Defendants assert that the evidence of three instances of alleged actual confusion from Amazon online reviews of Defendants' products contained in the Bonthuys Rebuttal Declaration "is both too little, and too late."²⁰ Defendants' Brief offers no further explanation, but cites a Board precedent with the statement that "evidence proffered by opposer to show that there has been actual confusion was wholly improper as rebuttal testimony."²¹ To the extent Defendants intended to object on the basis of improper rebuttal testimony, we overrule the objection. Defendants submitted, after the Bonthuys Declaration from PepsiCo's trial period, the declaration of Defendants' President and co-owner, Sam Keeler, stating that he was unaware of "a single instance of actual confusion that has occurred in the marketplace," and that he never received any "communication in which a person thought my companies were PepsiCo, its predecessor, the company

²⁰ 84 TTABVUE 44 (Defendants' Brief).

²¹ 84 TTABVUE 44 (Defendants' Brief).

that sells energy drinks, or had a relationship with those companies.”²² Referencing that testimony, Mr. Bonthuys responded by pointing to the reviews on Applicant’s Amazon sale platform in which reviewers state that while they like or use PepsiCo’s ROCKSTAR goods, they did not like Applicant’s goods.²³

On November 1, 2022, a customer commented in a review for Applicant’s powdered nutritional supplement drink mix that they “drink Rockstar Recovery Lemonade [a PepsiCo product] everyday [sic] and thought that this powder would be good too but it taste awful, I will stick to my Rockstar Lemonade Recovery drinks 1 a day.”

On November 21, 2022, a second customer commented that Applicant’s supplement “Tastes like a fountain drink with all of the ice melted. ... I like Rockstar drinks [PepsiCo’s ROCKSTAR products] but will not buy this again.”

On April 15, 2023, a third customer commented that they have “tried a LOT of preworkouts, and this is by far the WORST tasting one I’ve ever tried. There is no fruit punch flavor, which is why I bought it cause I really like rockstar fruit [p]unch [one of PepsiCo’s top-selling ROCKSTAR products]. Sadly this stuff tastes like sweet n low mixed with mushrooms and crushed Tylenol. It makes me wretch, it’s so foul. And the effects are mild at best.

The reviewers’ statements are phrased in such a way that they appear to have mistakenly assumed the goods all came from the same brand (PepsiCo’s). Because they were submitted through Defendants’ sale platform on Amazon, we consider these instances recounted in the Bonthuys Rebuttal Declaration sufficiently responsive to Mr. Keeler’s assertions that they constitute proper rebuttal.

²² 79 TTABVUE 10-11 (Keeler Declaration).

²³ 81 TTABVUE 4-5 (Bonthuys Rebuttal Declaration).

PepsiCo and Defendants otherwise agree on the contents of the record as set out in PepsiCo's Brief,²⁴ and we need not reprint the contents here. We have considered all the evidence of record,²⁵ although we refer only to certain materials as needed below. Some materials are designated as confidential, and we discuss them only in general terms, except for promotional materials that "cannot reasonably be considered confidential, notwithstanding a designation as such by a party." See Trademark Rule 2.116(g), 37 C.F.R. § 2.116(g) (providing that the Board may treat such materials as not confidential).

III. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action must be established in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1373 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 n.4 (2014)). A party in the position of plaintiff may oppose, or seek cancellation of, the registration of a mark when such proceedings are within the zone of interests protected by the statute and the plaintiff has a reasonable belief in damage that is proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020).

²⁴ 83 TTABVUE 9-10; 84 TTABVUE 10 ("[Defendants] agree[] with the substance of PepsiCo's description of the record.").

²⁵ In Defendants' fifth notice of reliance, portions of Exhibits R, S and T, 57 TTABVUE 128-505, are illegible, so we have considered only what we can read. See *Weider Publ'ns, LLC v. D&D Beauty Care Co.*, Opp. No. 91199352, 2014 TTAB LEXIS 2, *7 (onus is on party making submissions to ensure that, at a minimum, "all materials are clearly readable by the adverse party and the Board.").

In this case, Defendants explicitly concede that PepsiCo's pleaded registrations "give PepsiCo standing to bring the instant action."²⁶ We agree that PepsiCo's pleaded registrations, for which current status and title are established,²⁷ support PepsiCo's plausible likelihood of confusion claim against the involved applications and registrations, thereby showing its real interest in this proceeding, and a reasonable basis for its belief of damage. PepsiCo has demonstrated a statutory entitlement to oppose and petition to cancel. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1377 (Fed. Cir. 2012); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945 (Fed. Cir. 2000). Because PepsiCo has shown an entitlement to a statutory cause of action on one ground, it has the right to assert any other grounds in this proceeding. *See Coach Servs.*, 668 F.3d at 1377 (once standing shown on one ground, plaintiff has right to assert any other ground in proceeding).

IV. Priority

Defendants "do[] not dispute that PepsiCo's pleaded registrations should be given priority over [Defendants'] trademark in the event of a conflict."²⁸ PepsiCo properly

²⁶ 84 TTABVUE 27 (Defendants' Brief). "Board decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act [15 U.S.C. §§ 1063 and 1064] under the rubric of 'standing.'" *Sabhnani v. Mirage Brands, LLC*, Canc. No. 92068086, 2021 TTAB LEXIS 464, *17 n.14 (TTAB 2021). "We now refer to what previously had been called standing as 'entitlement to a statutory cause of action.' But our prior decisions and those of the Federal Circuit interpreting 'standing' under §§ 13 and 14 remain applicable." *Id.* (quoting *Chutter, Inc. v. Great Mgmt. Grp., LLC*, Opp. No. 91223018 (parent), 2021 TTAB LEXIS 365, at *12 n.39 (TTAB 2021), *rev'd on other grounds*, 90 F.4th 1333 (Fed. Cir. 2023)).

²⁷ 41 TTABVUE 4-6, 29-87 (Lee Declaration).

²⁸ 84 TTABVUE 27 (Defendants' Brief).

introduced the pleaded registrations set out above,²⁹ and Defendants have not counterclaimed to cancel them. Therefore, priority is not an issue as to the marks and goods covered by those registrations. *See Top Tobacco LP v. N. Atl. Op. Co.*, Opp. No. 91157248 (parent), 2011 TTAB LEXIS 367, *15 (TTAB 2011) (citing *King Candy, Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400 (CCPA 1974)); *see also Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 1403 n.6 (CCPA 1974) (“prior use need not be shown by a plaintiff relying on a registered mark unless the defendant counterclaims for cancellation”).

V. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d). The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003). A likelihood of confusion analysis often particularly focuses on the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper*

²⁹ *See* notes 10-16, *supra*.

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 consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortgage Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

For the likelihood of confusion analysis in this case, we focus on PepsiCo’s registration for ROCKSTAR in standard characters for “Sports drinks, namely, energy drinks.”³⁰ The mark and goods in this registration are among the most similar of PepsiCo’s pleaded registrations to Defendants’ mark and goods. If confusion is not likely based on this PepsiCo registration, it would not be likely based on the other pleaded registrations. PepsiCo bears the burden of proving its claim of likelihood of confusion by a preponderance of the evidence. *Cunningham*, 222 F.3d at 951.

A. Strength of PepsiCo’s Mark

PepsiCo characterizes its mark as “conceptually strong, and even arbitrary as applied to goods in the food and beverage space,”³¹ as well as “an extraordinarily well-known and valuable brand.”³² On one hand, Defendants concede that “PepsiCo’s ROCKSTAR-element trademarks may be strong in connection with energy drinks – the only product that PepsiCo sells under its brand (the fifth and sixth *DuPont*

³⁰ Registration No. 3398516; 41 TTABVUE 50-54.

³¹ 83 TTABVUE 34 (PepsiCo’s Brief).

³² 83 TTABVUE 11 (PepsiCo’s Brief).

factors)...”³³ but on the other hand, Defendants also assert that this strength may be “an open question given the results of [PepsiCo’s] own survey.”³⁴ Also, according to Defendants, “ROCKSTAR is an enormously popular name and trademark that many producers use to sell a wide range of goods and services.”³⁵ Ultimately, Defendants take the position that “[e]ven if PepsiCo’s ROCKSTAR-element trademarks are strong with energy drinks, that strength does not extend beyond those goods.”³⁶

“Two of the *DuPont* factors (the fifth and sixth) consider strength.” *Spireon, Inc. v. Flex LTD*, 71 F.4th 1355, 1362 (Fed. Cir. 2023). In determining the strength of PepsiCo’s ROCKSTAR-formative marks, we address both conceptual strength, based on the nature of the marks themselves, and commercial strength, based on marketplace recognition of the marks. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010); *see also Spireon*, 71 F.4th at 1362. The “fifth *DuPont* factor enables [PepsiCo] to prove that its pleaded marks are entitled to an expanded scope of protection by adducing evidence of ‘[t]he fame of the prior mark (sales, advertising, length of use),’” while “the sixth *DuPont* factor allows [Defendants] 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 v. Pharmavite LLC*, Opp. No. 9122335, 22022 TTAB LEXIS 228, **23-24 (TTAB 2022) (quoting *DuPont*, 476 F.2d at 1361).

³³ 84 TTABVUE 46 (Defendants’ Brief).

³⁴ 84 TTABVUE 56 (Defendants’ Brief).

³⁵ 84 TTABVUE 56 (Defendants’ Brief).

³⁶ 84 TTABVUE 55 (Defendants’ Brief).

1. Conceptual Strength

PepsiCo's pleaded registrations afford its registered marks a presumption of distinctiveness. See Trademark Act Section 7(b), 15 U.S.C. § 1057(b). Conceptual strength is a measure of a mark's distinctiveness, which falls "in categories of generally increasing distinctiveness: . . . (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful." *Spireon*, 71 F.4th at 1362 (quoting *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992)). Defendants do not propose a placement of ROCKSTAR on this spectrum of distinctiveness, but argue that in the food-related context, there are "many other ROCKSTAR users," pointing to third-party (and Defendants' own) registrations submitted under notice of reliance.³⁷ However, most of the registrations do not support that proposition and are unpersuasive because they pertain to unrelated goods and services (e.g., hair dryers and styling irons, centrifugal pumps, bicycles).³⁸ Thus, they fail to show any weakness of ROCKSTAR in the context of the goods at issue in this case. See *In re i.am.symbolic, llc*, 866 F.3d 1315, 1328 (Fed. Cir. 2017) (disregarding third-party registrations for goods in other classes where the proffering party "has neither introduced evidence, nor provided adequate explanation to support a determination that the existence of I AM marks for goods in other classes, ... support a finding that registrants' marks are weak with respect to the goods identified in their registrations"). The few even potentially relevant registrations are:

³⁷ 55 & 56 TTABVUE.

³⁸ 55 TTABVUE 15, 19, 25.

- ROCKSTAR for goods including “edible pet treats; pet beverages; pet food; consumable pet chews” in International Class 31,³⁹ but this is distinguishable because it is for animal food and beverages.
- ROCKSTAR for goods including “canteens; water bottles sold empty; water bottle belts for hiking, camping, and mountaineering” in International Class 21,⁴⁰ but we have no evidence of complementary use of these goods with energy drinks.
- ROCKSTAR for “seasoning mixes; barbecue dry rub; spice rubs; steak seasoning” in International Class 30,⁴¹ but these are not among the goods at issue and we have no evidence of their relatedness to the goods at issue.
- ROCKSTAR for “candy sprinkles” in International Class 30,⁴² but these are not among the goods at issue and we have no evidence of their relatedness to the goods at issue.
- ROCKSTAR CHEF (CHEF disclaimed) for “on-line retail store services featuring seasonings....,”⁴³ but these services do not feature the goods at issue and we have no evidence of their relatedness to the goods at issue.

Ultimately, none of these registrations are for energy drinks like PepsiCo’s, or even beverages for humans. Nor do they include any of the goods in Defendants’

³⁹ 55 TTABVUE 38 (Registration No. 6217251).

⁴⁰ 55 TTABVUE 67 (Registration No. 6064819).

⁴¹ 55 TTABVUE 97 (Registration No. 6064813).

⁴² 55 TTABVUE 174 (Registration No. 5384122).

⁴³ 56 TTABVUE 20-24 (Registration No. 7131471).

applications and registrations at issue in this proceeding. The only food items differ from the beverage and food items at issue significantly enough that without proof, we cannot find these registrations relevant to the strength of PepsiCo's registered marks.

Defendants also submitted third-party use evidence,⁴⁴ but it suffers from the same defect as the registration evidence. It shows use of ROCKSTAR on or in connection with various goods and services mostly quite far afield from the goods at issue in this case. For example, the record includes: the Rockstar Games website, offering games and promotional items;⁴⁵ the XD Wheels website offering Rockstar wheels;⁴⁶ and the Rockstar Barbershop.⁴⁷ *See Omaha Steaks Int'l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1325 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus "on goods shown to be similar"). The only potentially relevant third-party uses show:

- The website of Rockstar Shrimp restaurant, located in Riverside, California;⁴⁸
- The website of Rock Star Pizzeria, located in Brownsburg, Indiana;⁴⁹ and
- The website of Rockstar Bagels, located in Austin, Texas;⁵⁰

But again, none of these uses are for energy drinks or beverages, nor are there uses for the assertedly related goods in Defendants' applications and registrations, or are

⁴⁴ 57 TTABVUE.

⁴⁵ 57 TTABVUE 9-13 (rockstargames.com).

⁴⁶ 57 TTABVUE 15-19 (xdwheels.com).

⁴⁷ 57 TTABVUE 21 (rockstarbarbershop.business.site).

⁴⁸ 57 TTABVUE 30-32 (rockstarshrimprside.wixsite.com).

⁴⁹ 57 TTABVUE 34-36 (rockstarpizza.net).

⁵⁰ 57 TTABVUE 38-43 (rockstarbagels.com).

shown to be otherwise related. Instead, they appear to involve names of single-location restaurants. The evidence from the New York Secretary of State Division of Corporations and California Secretary of State Business Search only reflects trade name use, and none of it on its face refers to the relevant goods.⁵¹

Ultimately, given the lack of energy drink-related evidence, and the nature and limited quantity of use and registration evidence of ROCKSTAR marks in general, we do not find the third-party registrations and uses very probative of conceptual weakness. At best, we can infer from the popularity of ROCKSTAR as a mark in other contexts that perhaps the term generates a positive image. The term is not conceptually weak in the context of PepsiCo's marks, and instead appears to be arbitrary and strong.

2. Commercial Strength

Turning to commercial strength, “[a] mark with extensive public recognition and renown deserves and receives more legal protection than an obscure or weak mark.” *Omaha Steaks*, 908 F.3d at 1319 (quoting *Kenner Parker Toys Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 353 (Fed. Cir. 1992)). Such strength rests on the extent to which “a significant portion of the relevant consuming public . . . recognizes the mark as a source indicator.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 1324-25 (Fed. Cir. 2017) (citing *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1374-75 (Fed. Cir. 2005)). As the Federal Circuit has explained, “[w]hile dilution fame is an either/or proposition--fame

⁵¹ 57 TTABVue 100-125.

either does or does not exist--likelihood of confusion fame ‘varies along a spectrum from very strong to very weak.’” *Joseph Phelps Vineyards*, 857 F.3d at 1325 (quoting *Palm Bay Imps.*, 396 F.3d 1369 (internal quotation omitted)).

PepsiCo asserts that “[t]he commercial strength of the ROCKSTAR Brand cannot be disputed.”⁵² PepsiCo relies on the length of use of its mark, sales and promotional figures, marketing efforts, public exposure through broad trade channels, and unsolicited media attention. Sean Bonthuys, PepsiCo’s Senior Director of Brand Marketing, Energy Portfolio, testified in support of the commercial strength.⁵³ According to the Bonthuys Declaration, “The ROCKSTAR brand has been one of the top three or four energy drink brands in North America since at least as early as 2015 and remains so today.”⁵⁴ In 2017, the Global Energy Drinks Market Report dubbed ROCKSTAR one of the “key vendors.”⁵⁵ See *Weider Publ’ns v. D & D Beauty Care*, 2014 TTAB LEXIS 2, *19-23 (crediting indirect measures of commercial strength, including notice by independent sources and general reputation of the goods). We remain mindful, however, that we must focus on commercial strength in the United States. Cf. *New Era Cap v. Pro Era*, 2020 TTAB LEXIS 199, at *32 (“Because Opposer failed to break down sales and expenditures for the United States alone, the probative value of this evidence to prove commercial strength or fame is diminished.”); *Hard Rock Cafe Licensing Corp. v. Elsea*, Opp. No. 93436, 1998 TTAB LEXIS 124, at *13

⁵² 83 TTABVUE 34 (PepsiCo’s Brief).

⁵³ 44 TTABVUE.

⁵⁴ 44 TTABVUE 7.

⁵⁵ 44 TTABVUE 14.

(TTAB 1998) (“The renown of opposer’s marks outside the United States or exposure of the foreign public to opposer’s marks is irrelevant.”).

PepsiCo provided sales statistics of goods sold under the ROCKSTAR marks. From 2010 to 2022, “billions of total units” were sold under the mark, and “PepsiCo now sells more than 575,000,000 units of ROCKSTAR-branded products in the United States each year....”⁵⁶ The probative value of the sales is diminished somewhat because PepsiCo’s testimony does not place these figures in sufficient context in the U.S., such as by addressing the market share they now represent in the industry or by comparing them with competitor sales figures in the U.S.⁵⁷ *See e.g., Bose Corp. v. QSC Audio Prods.*, 293 F.3d 1367, 1375 (Fed. Cir. 2002) (“Large market shares of product sales or large percentages of advertising expenditures in a product line would buttress claims to fame.”); *see also Gen. Mills, Inc. v. Fage Dairy Proc. Indus. S.A.*, Opp. No. 91118482, 2011 TTAB LEXIS 280, *24 n.13 (TTAB 2011) (Board determines the likelihood of confusion at the time of trial, including fame, if it exists, as of the time of trial), *judgment set aside on other grounds*, 2014 TTAB LEXIS 5 (TTAB 2014). The Bonthuys Declaration indicates that PepsiCo sells its ROCKSTAR energy drinks “at grocery and convenience stores such as Walmart, Target, Kroger, 7-Eleven and Circle K” as well as “on e-commerce sites such as Amazon and Instacart.”⁵⁸

⁵⁶ 44 TTABVUE 13; 43 TTABVUE 147-59 (Confidential Exhibit C detailing sales and advertising).

⁵⁷ The testimony at 44 TTABVUE 14 that from 2001 to 2013, ROCKSTAR was “one of the top energy drinks in North America” does not supply the appropriate context in terms of territory (not limited to the U.S.) or currency (over 10 years ago).

⁵⁸ 44 TTABVUE 8-9.

Confidential advertising and promotional expenditures and marketing budget figures for PepsiCo's ROCKSTAR brand in 2022 and 2023 are very high.⁵⁹ Here, Mr. Bonthuys provided the additional context that "PepsiCo has made similar marketing, advertising and promotional expenditures over at least the last decade," and noted the somewhat stale comparative information that "Business Insider recognized in 2012 that Rockstar, Inc. spent 'more than double the industry average on promotion' of the ROCKSTAR brand."⁶⁰ In one of the most expensive and notable promotional efforts, PepsiCo featured its ROCKSTAR Energy Drink in a 2021 Super Bowl ad that generated over 2.5 billion commercial impressions.⁶¹ PepsiCo's promotional efforts span a variety of activities, including sports, music, and gaming.⁶² PepsiCo partners with sports teams, leagues, sporting events and venues, and athletes to promote ROCKSTAR energy drinks.⁶³ Examples include: with the Lucas Oil Off Road Racing Series;⁶⁴ with the Los Angeles Football Club (Major League Soccer);⁶⁵ as official energy drink sponsor of Formula Drift (motorsports);⁶⁶ and advertisements featuring

⁵⁹ 43 TTABVUE 13 (Confidential Bonthuys Declaration).

⁶⁰ 44 TTABVUE 13.

⁶¹ 44 TTABVUE 16; *see also* 49 TTABVUE 105-07.

⁶² *See generally* 43 TTABVUE 24-146 (Confidential exemplary annual brand plan introduced through Bonthuys Declaration)

⁶³ *See generally* 43 TTABVUE 94-109 (Confidential exemplary annual brand plan introduced through Bonthuys Declaration, noting ROCKSTAR sponsorship of motor sports and action sports, and detailing athlete sponsorship programs).

⁶⁴ 44 TTABVUE 14; *see also* 49 TTABVUE 141-42.

⁶⁵ 44 TTABVUE 14.

⁶⁶ 44 TTABVUE 15; *see also* 47 TTABVUE 456-57.

Olympic medalists Kyle Mack and Arielle Gold.⁶⁷ According to the Bonthuys Declaration, “[i]n 2019 alone, ROCKSTAR-affiliated athletes delivered 3,000 social media posts dedicated to the ROCKSTAR brand and generated more than 22 million views of ROCKSTAR video content. ROCKSTAR-affiliated athletes drive more than 1 billion ROCKSTAR brand impressions annually.”⁶⁸ An article touts the opening of “Houston’s \$25 Million Rockstar Energy Bike Park” that opened in 2019, described as the “largest complex in America.”⁶⁹

PepsiCo also promotes ROCKSTAR in conjunction with music. PepsiCo’s witness testified as to some activities in this regard including: partnering in 2022 with MTV “to reintroduce the iconic MTV Unplugged show and promote its ROCKSTAR UNPLUGGED product, which is anticipated to drive 1.1 *billion* impressions for the ROCKSTAR BRAND;” and presenting the ROCKSTAR DISRUPT touring music festival featuring various musical acts and drawing “tens of thousands of fans at venues across the United States and Canada.”⁷⁰

As an indication of what PepsiCo deems “its extraordinary brand value, PepsiCo acquired Rockstar, Inc. [the predecessor that started the ROCKSTAR energy drink business] and the ROCKSTAR brand in the spring of 2020 for \$3.85 billion.”⁷¹ Materials submitted under notice of reliance that are considered for what they show

⁶⁷ 44 TTABVUE 15.

⁶⁸ 44 TTABVUE 15; *see also* 44 TTABVUE 64-76, 89-96.

⁶⁹ 47 TTABVUE 465-66.

⁷⁰ 44 TTABVUE 17 (emphasis in italics in original).

⁷¹ 44 TTABVUE 9.

on their face – such as consumer exposure to published articles – include a May 2023 Statista blog post that reports Rockstar Energy Drink as having 73% “brand awareness in the United States in 2022,” and discusses the “[m]ost well-known energy drinks in the United States 2022,” identifying Rockstar Energy Drink as fourth.⁷² Other articles in the record that rank energy drink companies globally reflect consumer exposure to that ranking but are not direct proof of any market share or position, and regardless, are not limited to the U.S.,⁷³ which is the focus of our inquiry.

The Rockstar Energy Instagram account has more than one million followers, and its “likes” on Instagram, TikTok and Facebook number in the millions.⁷⁴ However, this social media evidence is too general and geographically unrestricted to be very probative for our purposes.

As previously discussed, Defendants did not introduce evidence of third-party uses in the *relevant* field that would establish any diminished commercial or marketplace strength of PepsiCo’s ROCKSTAR marks under the sixth *DuPont* factor, whose purpose is “to show that customers have become so conditioned by a plethora of ... 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 (. We also reject Defendants’ suggestion that PepsiCo’s survey, which we discuss in

⁷² 47 TTABVUE 449.

⁷³ *E.g.*, 49 TTABVUE 116-18 (“5 Biggest Energy Drink Companies in the World”).

⁷⁴ 44 TTABVUE 12-13.

more detail below in connection with actual confusion, undercuts its claim of commercial strength. Defendants mischaracterize the survey results by focusing on affiliation responses to the exclusion of association responses, and alleging that the “survey shows that consumers do not associate ROCKSTAR with energy drinks or PepsiCo.”⁷⁵

The length of use, the sales and advertising figures, consumer exposure through media, athletic sponsorships and popular music, and the other indirect evidence of consumer recognition, reflect substantial commercial strength of PepsiCo’s pleaded ROCKSTAR marks. On this record overall, under the considerations discussed in *Bose*, 293 F.3d at 1371-76, and *Omaha Steaks*, 908 F.3d at 1319-22, 1324-26, we find that PepsiCo has demonstrated significant commercial strength of the ROCKSTAR marks, although, lacking more robust context for the sales and advertising figures, and the reach and impact of the promotional efforts, not at the farthest end of the spectrum of fame. *Lacoste Alligator S.A. v. Maxoly Inc.*, Opp. No. 91177866, 2009 TTAB LEXIS 511, *7 (TTAB 2009) (“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.”).

PesiCo’s marks are conceptually and commercially strong.

⁷⁵ 84 TTABVUE 55 (Defendants’ Brief).

B. Similarity of the Marks

Turning to the first *DuPont* factor, we must compare Defendants' ROCKSTAR mark to PepsiCo's ROCKSTAR mark "in their entirety as to appearance, sound, connotation and commercial impression." *Palm Bay Imps.*, 393 F.3d at 1371 (quoting *DuPont*, 476 F.2d at 1361).

The standard-character marks are identical. Defendants "stipulate[] that the parties' trademarks are similar, the first *DuPont* factor."⁷⁶ The overall appearance and sound of PepsiCo's and Defendants' marks, and their connotations and commercial impressions, are identical or nearly identical. This factor weighs heavily in favor of likely confusion.

C. Relatedness of the Goods

Turning next to the *DuPont* factor addressing the similarity or dissimilarity of the goods, our assessment focuses on the identifications in Defendants' challenged applications and registrations and in PepsiCo's pleaded registrations for energy drinks. *Octocom Sys. v. Houston Comp. Servs.*, 918 F.2d 937, 942 (Fed. Cir. 1990). As PepsiCo notes in its Brief,⁷⁷ where marks are identical or highly similar, such as in this case, the necessary degree of similarity of the goods declines. *In re Embiid*, Serial No. 88202890, 2021 TTAB LEXIS 168 at *62 (TTAB 2021). Likelihood of confusion is established as to a class of goods in an application or registration if it exists as to any good in that class. *Sage Therapeutics, Inc. v. Sageforth Psych. Servs., LLC*, Opp. No.

⁷⁶ 84 TTABVUE 39 (Defendants' Brief).

⁷⁷ 83 TTABVUE 36 (PepsiCo's Brief).

91270181, 2024 TTAB LEXIS 139 at *19 n.41 (TTAB 2024). “With multiple class applications, the Board treats each class as a single class application, and the claims and evidence are considered as they bear on each class, separately.” *Monster Energy Co. v. Tom & Martha LLC*, Opp. No. 91250710, 2021 TTAB LEXIS 458, at *14 n.15 (TTAB 2021); *see also N. Face Apparel Corp. v. Sanyang Indus. Co.*, Opp. No. 91187593, 2015 TTAB LEXIS 328, *32 (TTAB 2015) (“Because each class in Applicant’s multi-class application is, in effect, a separate application, we consider each class separately, and determine whether Opposer has shown a likelihood of confusion with respect to each.”). Thus, considering the record as a whole, we will address each class of goods in each challenged application and registration.

PepsiCo relies on a variety of evidence to establish the relatedness of the goods at issue. PepsiCo submitted third-party use evidence and thirty-three third-party registrations in which energy drinks and some of Defendants’ goods are under the same mark.⁷⁸ For example:

- The B-and-design mark covers nutritional and dietary supplements formed and packaged as bars, powdered nutritional supplement drink mix, vitamin and mineral supplements, whey protein supplements, and energy drinks.⁷⁹

⁷⁸ 45 TTABVUE & 47 TTABVUE.

⁷⁹ 47 TTABVUE 215-18; Reg. No. 6904386.

- BLAST FAT FAST covers powdered nutritional supplement drink mix, dietary and nutritional supplements, nutritional and dietary supplements formed and packaged as bars, and energy drinks.⁸⁰
- LEMON DROP covers dietary supplement drink mixes, dietary and nutritional supplements, nutritional supplement energy bars, powdered nutritional supplement drink mix, and energy drinks (accompanying use evidence for these goods also provided).⁸¹
- DRINK IT LIVE IT covers nutritional and dietary supplements, Dietary supplement drink mixes, and energy drinks.⁸²
- The CULTIVATE mark is for goods that include potato chips, fruits and vegetables, meal replacement bars, and energy drinks.⁸³
- The GROWNUSA mark covers goods including nutritional supplements, potato chips, and energy drinks.⁸⁴
- The HELLO WELLNESS mark covers goods including powdered nutritional supplement drink mix, nutritional supplements, and energy drinks.⁸⁵

⁸⁰ 47 TTABVUE 219-22; Reg. No. 6251419.

⁸¹ 47 TTABVUE 253-266; Reg. No. 7007965.

⁸² 47 TTABVUE 231-36; Reg. No. 6632840.

⁸³ 47 TTABVUE 223-30; Reg. No. 5408108.

⁸⁴ 47 TTABVUE 237; Reg. No. 6555535.

⁸⁵ 47 TTABVUE 246; Reg. No. 6603746.

- The ATKINS-and-design mark covers energy drinks and nutritional and dietary supplements, as well as jerky, meal replacement bars, prepared food kits and refrigerated and frozen food packages including vegetables, sauces and seasonings.⁸⁶
- The K&G mark covers jerky, potato-based snack foods, corn-based snack foods, and energy drinks. PepsiCo also provided screenshots from Twitter where the owner of the K&G mark displays goods bearing the mark, including its potato chips and drinks.⁸⁷
- The TEAM Z-and-design mark covers nutritional supplements formed and packaged as bars, nutritional supplement drink mix, canned fruits, canned vegetables, beef jerky, potato chips, yogurt-based beverages, chocolate-based beverages with milk, and nutritional supplement shakes.⁸⁸
- The ALANI NU mark is registered for nutritional supplements and powdered nutritional supplement drink mix containing protein, and its website also shows the same mark on energy drinks.⁸⁹
- Registrations for GATORADE and GATORADE-formative marks cover powdered drink mix, fruit flavored non-alcoholic beverages containing vitamins and/or nutrients and/or protein, snack food chews enhanced with vitamins, soy-based and whey-based food bars, and sports drinks, and the

⁸⁶ 45 TTABVUE 345-47; Reg. No. 5581619.

⁸⁷ 47 TTABVUE 129-32; Reg No. 7883148.

⁸⁸ 47 TTABVUE 133; Reg. No. 5801988.

⁸⁹ 47 TTABVUE 142-45; Reg. No. 5726640.

company's website shows the sports drinks and whey protein bars "bundled" for sale together.⁹⁰

- The BUEN PROVECHO-and-design registration covers canned fruits and canned vegetables, pickled vegetables, potato chips, chili sauce, mustard, salsa, tortilla chips, and concentrates and powders used in the preparation of energy drinks. PepsiCo also introduced accompanying use evidence showing the same mark on beverages and drink mixes as well as pickled olives and some other food items.⁹¹
- The LINDORANUTRITION mark is registered for goods that include meal replacement bars for weight loss purposes, nutritional supplement energy bars, sauces, and energy drinks, and PepsiCo offered accompanying use evidence on some items.⁹²
- The LIVEMORE mark is registered for goods including dried fruits, frozen fruits, meal replacement bars, and energy drinks. The record includes use evidence for some items.⁹³
- The MEMBER'S SELECTION registered mark covers goods including vitamin supplements, powdered nutritional supplement drink mix, canned

⁹⁰ 47 TTABVUE 146-56; Reg. Nos. 848245, 2444436, 3838892, 4428963, 4557300, and 5025026. The record reflects some overlap between sports drinks and energy drinks, with Defendants' Google search results for "sports drinks" yielding hits that include Fast Twitch Energy Drink, C4 Drink Energy, and Zipfizz Energy Drink Mix, along with sports drinks such as Gatorade. 54 TTABVUE 15-21.

⁹¹ 47 TTABVUE 182-214; Reg. No. 5121797.

⁹² 47 TTABVUE 267-89; Reg. No. 6127417.

⁹³ 47 TTABVUE 292-95; Reg. No. 6119781.

fruits, frozen vegetables, processed olives, ketchup, sauces, tortilla chips, and energy drinks, and some screenshots corroborate online retail sales of some of these goods under the mark.⁹⁴

- The SPROUTS FARMERS MARKET registered mark covers powdered nutritional supplement drink mix, nutritional supplements, olives, ketchup, mustard, hot sauce, dipping sauces, processed goji berries, and energy drinks, while accompanying website evidence shows the same mark on potato chips, nutritional supplements, and jerky (for dogs) among other goods.⁹⁵
- The TITANIUM-and-design registration identifies goods such as fruit-based meal replacement bars for boosting energy, mustard, sauces being condiments, sports drinks and energy drinks, and accompanying use evidence shows electrolyte powder drink mix packets, energy bars and other snacks for sale on Amazon under the same mark.⁹⁶
- The ULTIMATE GAMER registration includes fruit-based snack food and vegetable-based snack food, meal replacement bars, energy bars, and energy drinks, and accompanying evidence shows some of these products, such as energy drinks, fruit-based snack food, and bars, under the same mark.⁹⁷

⁹⁴ 47 TTABVUE 296-316; Reg. No. 6384700.

⁹⁵ 47 TTABVUE 317-38; Reg. No. 6763121.

⁹⁶ 47 TTABVUE 339-71; Reg. No. 6809886.

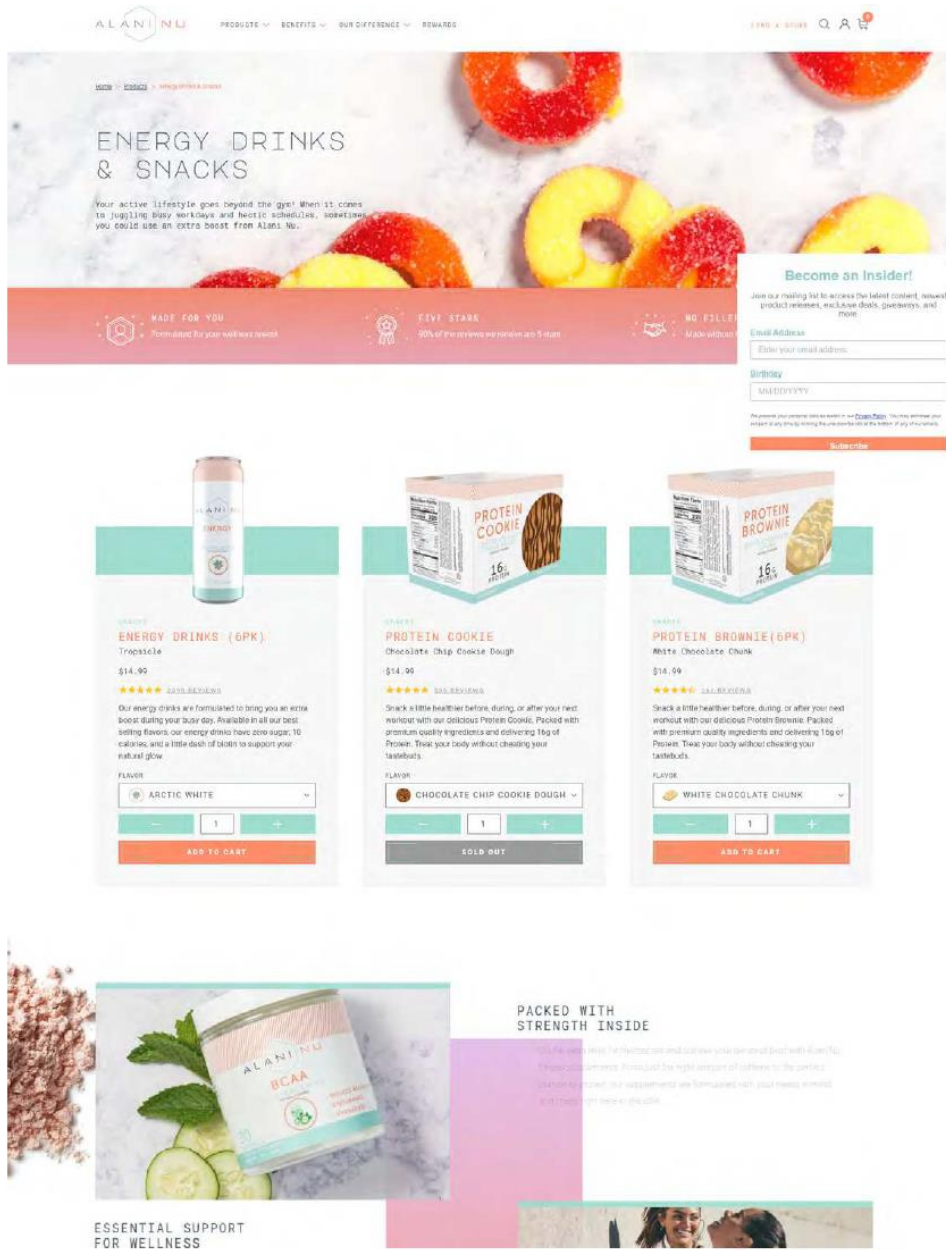
⁹⁷ 47 TTABVUE 381-90; Reg. No. 6119761.

PepsiCo argues that the third-party evidence reflects the general trend in the energy drink industry to expand to other products, including the type of products Defendants identify under their marks. According to the Bonthuys Declaration:

[S]ome of the fastest-growing energy brands offer other consumable products. For example, AlaniNu offers powders, shakes, protein bars, and energy drinks all as part of what they advertise as a healthy fitness lifestyle. C4 and Ghost offer standalone pre-workout supplements containing caffeine, BCCA aminos and other fat-burning or mental focus ingredients as well as canned beverages. Monster has expanded into waters and seltzers, etc. PepsiCo's own GATORADE brand is constantly developing new products and product functionalities, expanding beyond ready-to-drink sports drinks to include powders, pods, bars, bottles, towels, coolers, cups and beverage carriers – a host of products as shown on the GATORADE dedicated site at www.gatorade.com.⁹⁸

The screenshot below provides a corroborating example of ALANI NU for protein bars, energy drinks and a powdered supplement:

⁹⁸ 44 TTABVUE 4.



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As an additional corroborating illustration, the record includes screenshots of BANG pre-workout nutritional supplement beverage mix and BANG energy drink, showing these goods offered under the same mark.¹⁰⁰

⁹⁹ 47 TTABVUE 144.

¹⁰⁰ 47 TTABVUE 255-66.

The third-party use evidence supports the relatedness of the parties' respective relevant identified goods by showing that consumers are accustomed to encountering them offered under the same mark. *See Detroit Ath. Co.*, 903 F.3d 1297, 1306 (Fed. Cir. 2018) (crediting relatedness evidence that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”). The use-based, third-party registrations showing that the same entity has registered a single mark identifying the same sorts of goods as PepsiCo’s and Defendants’ goods are relevant to show that the respective goods are of a type that may emanate from a single source under one mark. *L’Oreal S.A. v. Marcon*, Opp. No. 91184456, 2012 TTAB LEXIS 77, *21-22 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 1993 TTAB LEXIS 36, *7-8 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 1988 TTAB LEXIS 11, *9 n.6 (TTAB 1988), *aff’d* (unpublished), No. 88-1444, 864 F.2d 149 (Fed. Cir. Nov. 14, 1988).

PepsiCo also contends that its own conduct, even in addition to the GATORADE expansion noted above, reflects the relatedness of Defendants’ goods to energy drinks. Although PepsiCo only offers energy drinks under its ROCKSTAR marks, its established marketing practices involve licensing and cross-marketing with other food and beverage goods that are similar to some of Defendants’ goods. For example, PepsiCo “regularly” cross-promotes its ROCKSTAR energy drinks with snack

products, including Doritos and Frito-Lay chips products, which are other PepsiCo brands.¹⁰¹ Mr. Bonthuys testified that, “for the second year in a row, we are working on a cross-promotion between ROCKSTAR and DORITOS within the gaming industry, recognizing that gamers are competing and playing late nights, where a burst of energy and flavorful snacks are a winning combination. That promotion, in partnership with Microsoft, has been a successful driver of sales.”¹⁰² The record also includes PepsiCo’s confidential marketing plan that features Target ads showing those goods together with the tagline, “Pick up must-have snacks & sips for gamers.”¹⁰³ Another Target ad shows ROCKSTAR Energy Drinks next to Doritos tortilla chips and Lays potato chips, and another offers incentives for purchasing these items together.¹⁰⁴ Another promotion shows a sweepstakes to win a year’s supply of PepsiCo beverages and Frito-Lay chips, in which a ROCKSTAR Energy Drink is shown with crackers and pretzels.¹⁰⁵ Mr. Bonthuys explains, “[i]t is especially common for food and beverages [under the same corporate umbrella] to be promoted together” in the industry.¹⁰⁶ The Bonthuys Declaration includes the following cross-promotions between Rockstar Energy Drinks and beef jerky, as well as potato chips:

¹⁰¹ 44 TTABVUE 11.

¹⁰² 44 TTABVUE 11-12.

¹⁰³ 43 TTABVUE 219 (Bonthuys Declaration confidential Exhibit E).

¹⁰⁴ 43 TTABVUE 164-65, 197-200 (Bonthuys Declaration confidential Exhibit E).

¹⁰⁵ 43 TTABVUE 178 (Bonthuys Declaration confidential Exhibit E).

¹⁰⁶ 44 TTABVUE 12.



These goods are also displayed and offered in some of the same areas of stores.¹⁰⁷

¹⁰⁷ E.g, 44 TTABVUE 11 (Bonthuys Declaration); 51 TTABVUE 433, 447-61 (Confidential).

PepsiCo also argues an inherent relationship between “performance-minded energy drinks and functional beverages,” as well as “snacks and condiments,” because of their shared purpose, because they are promoted together, and because purchasers are likely to buy them together.¹⁰⁸ According to PepsiCo, many of Defendants’ goods are “specifically for the purpose of providing energy,” or for improved mental or physical performance, or mood elevation, which are the purposes of energy drinks.¹⁰⁹ PepsiCo points out that Defendants’ Class 5 supplements and powdered nutritional supplement drink mix can be “interchangeable” with energy drinks.¹¹⁰ For example, PepsiCo’s ROCKSTAR Energy Water states prominently on its label that the beverage features B-vitamins, taurine and caffeine.¹¹¹ Some of PepsiCo’s brand information states that ROCKSTAR Recovery Tea Lemonade and ROCKSTAR EXDURANCE “contain[] Rockstar’s performance energy blend including Guarana, Ginseng, B-vitamins, Milk Thistle, Ginko-Biloba and Caffeine....”¹¹² Also according to PepsiCo’s brand information, ROCKSTAR Unplugged’s label prominently touts the inclusion of hemp seed as an ingredient.¹¹³ PepsiCo particularly highlights that Defendants’ “supplements and PepsiCo’s [ROCKSTAR] products include and promote

¹⁰⁸ 83 TTABVUE 37 (PepsiCo’s Brief).

¹⁰⁹ 83 TTABVUE 38 (PepsiCo’s Brief), citing the Bonthuys Declaration and exhibits.

¹¹⁰ 83 TTABVUE 39 (PepsiCo’s Brief).

¹¹¹ 43 TTABVUE 122 (promotion in Bonthuys Confidential Exhibit A).

¹¹² 43 TTABVUE 125, 131 (promotion in Bonthuys Confidential Exhibit A)..

¹¹³ 43 TTABVUE 143 (promotion in Bonthuys Confidential Exhibit A).

having the same ingredients such as caffeine, L-Arginine, Creatine Monohydrate, BCAAs (branched chain amino acids), guarana, green coffee, and ginkgo.”¹¹⁴

The Bonthuys Declaration states:

In marketing our energy drink products, which are sometimes called “functional beverages,” we often emphasize the products’ ingredients and their performance- and health minded value, including, for example, PepsiCo’s ROCKSTAR RECOVERY beverage, which includes coconut water, collagen and consumers’ 100% daily dose of vitamin C to help reset and hydrate for any activity and ROCKSTAR UNPLUGGED beverage, which includes hemp seed to relax your mind and uplift your mood. Indeed, retailers routinely label ROCKSTAR-branded products as “supplements.” (Ex. A, at p. 119 (ROCKSTAR03434); see also Ex. D, at p. 1 (ROCKSTAR05863), p. 4 (ROCKSTAR05904), and p. 9 (ROCKSTAR05940)).¹¹⁵

Some retailers characterize PepsiCo’s ROCKSTAR energy drink as a “Supplement.” Examples include:¹¹⁶

¹¹⁴ 83 TTABVUE 39 ((PepsiCo’s Brief), citing the Bonthuys Declaration.

¹¹⁵ 44 TTABVUE 10.

¹¹⁶ 44 TTABVUE 152.

Instacart offer:

The screenshot shows the Instacart website interface. At the top, there is a pink banner with the text "Free delivery on first 3 orders. Terms apply." Below this is the Instacart logo and a search bar. A navigation bar contains three icons: "Fast delivery" (Get in as fast as 1 hour), "It's all local" (Shop your favorites), and "Direct chat" (Connect with shoppers). The main content area is titled "Beverages > Energy Drinks" and features a large image of a Rockstar Energy Supplement can. To the right of the can, the product name "Rockstar Energy Supplement, Blueberry, Pomegranate, Acai" is displayed, along with the volume "16 fl oz". A prominent green button says "Buy now at Instacart". Below the button, there is a "100% satisfaction guarantee" badge and a link to "Browse 56 stores in your area". At the bottom of the product section, there are thumbnails for similar items and a "See more" link.

RiteAid offer:

The screenshot shows the RiteAid website interface. At the top, there is a blue banner with the text "Buy Online + Pickup Curbside: Get 25% off when you spend \$30 with code 25BOPJSUNE Shop Now". Below this is the RiteAid logo and a search bar. A navigation bar contains several icons: "Menu", "Pharmacy", "Your Store" (Select a Store), "Hi, Sign in Account", and a shopping cart icon. The main content area is titled "Home / Shop Rite Aid / Grocery / Beverages / Juice & Flavored Drinks" and features a large image of a Rockstar Energy Supplement can. To the right of the can, the product name "Rockstar Energy Supplement, Blueberry, Pomegranate, Acai - 16 fl oz" is displayed, along with a rating of "(0)". A prominent blue button says "Prices Vary by Store". Below the button, there is a "Find A Store" button and a note "Not available for shipping Usually ships in 2-3 business days". At the bottom of the product section, there is a "Contains Electrolytes" badge. At the bottom of the page, there is a "Roll over or click image to zoom in" instruction.

However, Defendants argue this *DuPont* factor most forcefully as the reason that confusion is unlikely, focusing especially on its nutritional supplements, and particularly highlighting statements from 2016 by PepsiCo's predecessor-in-interest about the unrelatedness of such goods to energy drinks. At that time, PepsiCo's predecessor successfully overcame a refusal to register an application for the mark ROCKSTAR BLACKOUT for energy drinks based on a likelihood of confusion with BLACKOUT for dietary and nutritional supplements, by arguing that the respective goods were "not related," "quite distinct," and that "consumers understand that energy drinks and supplements sold under identical or near-identical marks are not likely to emanate from the same source."¹¹⁷ Defendants now point to the statement by PepsiCo's predecessor-in-interest that nutritional supplements "are not traditional beverages, are not advertised as such, do not contain common energy drink ingredients such as b-vitamins, taurine, guarana, and ginseng, and therefore would not be considered an 'energy drink' by consumers."¹¹⁸

As Defendants acknowledge, "there is no 'file wrapper' estoppel in trademark law" that would bind PepsiCo to the statements by its predecessor-in-interest, made in 2016.¹¹⁹ See *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 928-29 (CCPA 1978) (finding that a likelihood of confusion argument made in support of an application for registration is a legal conclusion, and therefore, cannot constitute

¹¹⁷ 84 TTABVUE 30-31 (Defendants' Brief, citing 58 TTABVUE 208-11, 363-68; 57 TTABVUE 363).

¹¹⁸ 57 TTABVUE 209.

¹¹⁹ 84 TTABVUE 31-32 (Defendants' Brief).

an admission because only facts may be admitted); *Calypso Tech., Inc. v. Calypso Cap. Mgmt., LP*, Opp. No. 91184576, 2011 TTAB LEXIS 259, *37 (TTAB 2011) (recognizing that a party's position in a prior proceeding "is not an admission, but may be considered only as illuminative of shade and tone in the total picture"); *Anthony's Pizza & Pasta Int'l, Inc. v. Anthony's Pizza Holding Co.*, Opp. No. 91171509, 2009 TTAB LEXIS 718, *35-36 (TTAB 2009), *aff'd*, 415 F. App'x 222 (Fed. Cir. 2010) ("The doctrine of 'file wrapper estoppel' does not apply in trademark cases[]" nor does a party's position in a prior proceeding "rise to the level of an admission against interest."); *Taffy's of Cleveland, Inc. v. Taffy's, Inc.*, 1975 TTAB LEXIS 175, *9 (TTAB 1975) (fact that petitioner argued before examining attorney that its mark and that of respondent were not confusingly similar does not preclude petitioner from asserting likelihood of confusion as ground for cancellation). While we consider these statements from 2016, in the context of the record as a whole, we find they are far outweighed by persuasive evidence of the current, different state of the market showing that the parties' respective goods are related, as discussed herein.

Defendants insist that energy drinks and nutritional supplements are distinct products by definition.¹²⁰ Defendants also rely on guidance from the Food and Drug Administration (FDA), embraced by the American Beverage Association, of which PepsiCo's predecessor was a member, that beverages should not be marketed as dietary supplements.¹²¹ Defendants also point to materials offered under notice of

¹²⁰ 84 TTABVUE 32 (Defendants' Brief); 52 TTABVUE 11-85 (various definitions).

¹²¹ 84 TTABVUE 33-34

reliance, including search results for terms for some of the parties' respective goods and articles about grocery store layouts (i.e., that nutritional supplements appear in different aisles than energy drinks in brick-and-mortar grocery stores) as weighing against relatedness.¹²² The search results on Google, Amazon and Walmart purport to show that searches for "nutritional supplements" and "dietary supplements" do not yield hits for "energy drinks" or "sports drinks," and vice versa.¹²³

However, these materials under notice of reliance are considered only for what they show on their face. Even if we credited the search results without any accompanying testimony, the fact that a search for one type of good does not yield results for the other type of good fails to address the appropriate standard for relatedness of goods. The respective goods need not be identical. "[L]ikelihood of confusion can be found 'if the respective goods are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.'" *Coach Servs.*, 668 F.3d at 1369 (internal citations omitted). And the articles about grocery store layouts are admitted under notice of reliance cannot be relied on for the truth of their contents, and regardless, are countered by other marketplace evidence, including photos, of these types of goods in close proximity in stores.

¹²² 54 TTABVUE 30-91 (grocery store articles); 52 TTABVUE 86-141 (search results); 53 TTABVUE 1-222 (search results); 54 TTABVUE 1-29 (search results).

¹²³ 52 TTABVUE 115- 112 (22 pages of results for "dietary supplements"); 27 (23 pages of results for "energy drinks"), 32-53 TTABVUE 3-55 (23 pages of results for "sports drinks").

As additional support for the unrelatedness of the goods, Defendants rely on third-party registrations that were submitted by PepsiCo's predecessor-in-interest in the 2016 prosecution history noted above, which registrations were described as "identical, or near-identical marks for energy drinks and supplements owned by different owners."¹²⁴ PepsiCo criticizes Defendants' reliance on "outdated market-based arguments, including statements from seven-year-old Office Action responses."¹²⁵ Instead, PepsiCo points to the relatedness evidence it introduced in this proceeding, detailed above, as indicative of the current state of the market.

While the pairs of registrations submitted in 2016 (for which current status and title evidence has not been provided) may have some probative value as to the views of coexisting mark owners at the time, now eight years have passed since the pairs of registrations were submitted. We do not know which of the registrations remain live, and the views of coexisting owners in 2016 may no longer apply in the current market. In addition, we lack contextual information about the underlying marketplace at the time of the subsequent registration in each pair, any consent agreements, or other considerations that may be distinguishable from the case at hand. Finally, the coexistence of these pairs of registrations "does not prove that they coexisted during that time without confusion in the marketplace," or particularly here where the evidence is dated, that the registrations currently coexist without such confusion. *See In re Thomas*, Serial No. 78334625, 2006 TTAB LEXIS 135, *22 (TTAB 2006).

¹²⁴ 57 TTABVUE 368; *see also id.* at 258-331, 415-38.

¹²⁵ 85 TTABVUE 6 (PepsiCo's Reply Brief).

Defendants assert that the top energy drink producers in the U.S. do not sell supplements.¹²⁶ However, PepsiCo counters Defendants' assertion, noting that several brands including Gatorade, Alani Nu, and C4 offer both energy beverages and supplements.¹²⁷ As discussed above, corroborating documentary evidence supports this testimony about Gatorade and Alani Nu.¹²⁸ PepsiCo also points out that Defendants' interrogatory answers referred to "nutritional supplements, meal replacement bars and similar goods," and when questioned about the reference to "similar goods," Mr. Keeler later testified that he considered "any of the goods that [Defendants] sell" to be similar to nutritional supplements and meal replacement bars.¹²⁹

Having reviewed the evidentiary record on relatedness, as previously noted, we now must assess relatedness as to each class of goods in the challenged applications and registrations. To recap, the opposed applications to register ROCKSTAR cover:

Jerky; Potato chips; Dip mixes; Dips; Dried beef, in International Class 29; Condiment, namely, oyster sauce; Corn chips; Hot sauce; Ketchup; Mustard; Salsa; Tortilla chips; Prepared horseradish; Savory sauces used as condiments, in International Class 30;¹³⁰ and

¹²⁶ 57 TTABVUE 35-36.

¹²⁷ 44 TTABVUE 4.

¹²⁸ 47 TTABVUE 129-32; Reg No. 7883148; 47 TTABVUE 142-45; Reg. No. 5726640.

¹²⁹ 51 TTABVUE 50 (Confidential deposition testimony).

¹³⁰ Application Serial No. 88152501 was filed October 12, 2018, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

Canned fruits and vegetables; Pickled vegetables; Pickles, in International Class 29.¹³¹

And Defendants' challenged registrations for ROCKSTAR cover:

Meal replacement bars for weight loss purposes; Chocolate-based meal replacement bars for medical purposes; Fruit-based meal replacement bars for medical purposes; Nutritional supplement energy bars; Nutritional supplement meal replacement bars for boosting energy, in International Class 5; Fruit-based meal replacement bars; Fruit-based meal replacement bars for boosting energy, in International Class 29;¹³²

Dietary and nutritional supplements, in International Class 5;¹³³ and

Powdered nutritional supplement drink mix, in International Class 5.¹³⁴

PepsiCo has met its burden to establish the relatedness of its energy drinks, at least to jerky and potato chips in International Class 29, and at least to corn chips and tortilla chips, in International Class 30, as identified in Defendants' Application Serial No. 88152501. The cross-promotions between ROCKSTAR energy drinks, Matador beef jerky, Lays potato chips and Doritos tortilla chips, along with third-

¹³¹ Application Serial No. 88205171 was filed November 26, 2018, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

¹³² Registration No. 5956334 issued January 7, 2020, is the subject of Cancellation No. 92075918.

¹³³ Registration No. 5439539 issued April 3, 2018, has been maintained, and is the subject of Cancellation No. 92076204.

¹³⁴ Registration No. 5892882 issued October 22, 2019, is the subject of Cancellation No. 92076204.

party registrations,¹³⁵ and marketplace evidence of these types of goods under the same mark, show the relatedness of these food and beverage items.

PepsiCo also has met its burden to establish the relatedness of its energy drinks to the meal replacement bars in International Classes 5 and 29, as identified in Registration No. 5956334. In each class, some of Defendants' meal replacement bars are specifically for "boosting energy," the same purpose as energy drinks such as PepsiCo's. *See, e.g., Andrew Jergens Co. v. Sween Corp.*, Opp. No. 68874, 1986 TTAB LEXIS 129, *6 (TTAB 1986) (finding goods to be "closely related products used for the same purpose, namely, to cleanse the skin"); *Hollister Inc. v. Ident A Pet, Inc.*, 1976 TTAB LEXIS 132, *10 (TTAB 1976) (finding goods sharing the same purpose or function of identifying animals to be commercially related). The record also shows that consumers tend to use energy drinks and nutritional supplement meal replacement bars together. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567 (Fed. Cir. 1984) (relatedness based on complementary nature of bread and cheese because consumers buy and consume them together). Also, the third-party registrations¹³⁶ and marketplace evidence show consumer exposure to energy drinks and meal replacement bars offered under the same mark. As discussed above, the Bonthuys testimony additionally identified energy drink companies that market these types of Defendants' goods under a single mark.

¹³⁵ *E.g.*, Reg. Nos. 5581619, 7883148, 5801988, 5408108, 6555535, 5121797, 6384700, and 6809886.

¹³⁶ *E.g.*, Reg. Nos. 6904386, 5408108, 6251419, 7007965, 5581619, 5801988, 6127417, 6119781, 6809886, and 6119761.

We similarly find that PepsiCo proved that energy drinks are related to powdered nutritional supplement drink mix, in International Class 5, as identified in Registration No. 5892882, and dietary and nutritional supplements, in International Class 5, as identified in Registration No. 5439539. The record shows that third-party retailers often refer to ROCKSTAR energy drinks as supplements, that ROCKSTAR energy drinks contain many of the same ingredients found in some supplements and nutritional supplement drink mixes, that energy drink makers also offer supplements and nutritional supplement drink mixes under the same mark, that third-party registrations cover the parties' respective types of goods or very similar goods under the same mark,¹³⁷ and that these types of goods are promoted together, such as when Amazon displayed Defendants' nutritional supplement drink mix on the same page as PepsiCo's energy drink.¹³⁸ *Id.* (complementary products, often used in combination). Defendants repeatedly make factual assertions as to the distinct nature of these products, citing only the prior 2016 prosecution history statements of PepsiCo's predecessor-in-interest. However, as we have indicated, while we consider these arguments and factual statements from years ago, we generally find the current evidence more persuasive. For example, where testimony and multiple sources of documentary evidence reflect that energy drinks and powdered nutritional supplement drink mixes share ingredients in common in the current market, we find

¹³⁷ *E.g.*, Reg. Nos. 6904386, 6251419, 7007965, 5408108, 5801988, 6127417, 6809886, 6119761.

¹³⁸ *E.g.*, 45 TTABVUE 337.

the record in this regard more probative than the statements from 2016. We are more than satisfied that these goods of the parties are related.

Turning last to the canned fruits and vegetables, pickled vegetables and pickles, in International Class 29, as identified in Application Serial No. 88205171, although the evidentiary showing of relatedness specific to these goods is less than for the others, we find it sufficient in view of the strength of PepsiCo's marks and the identity of PepsiCo's and Defendants' marks. As noted above, we have several third-party registrations in the record covering energy drinks and one or more of these Class 29 goods (or very similar goods) under the same mark.¹³⁹ And PepsiCo's testimony about industry trends and practices, along with the third-party registrations and marketplace evidence, convincingly show the relatedness of energy drinks to a wide variety of snack foods. PepsiCo's evidence includes promotions inviting consumers to "Save on select snacks & energy drinks,"¹⁴⁰ as well as other combination promotions for ROCKSTAR energy drinks and snack foods (in addition to the jerky and chips previously discussed), such as sandwiches, candy bars, and cookies.¹⁴¹ We find that this evidence overcomes Defendants' argument that these types of goods are not displayed together.¹⁴² The record establishes that snack foods,

¹³⁹ *E.g.*, Reg. Nos. 5121797, 6384700, 5408108, 5801988 (canned fruits, canned vegetables, and broadly identified beverages that could include energy drinks), 6119761 (fruit-based snack foods and vegetable-based snack foods that could be canned, and energy drinks), 6763121 (energy drinks and olives, processed goji berries, fruit preserves), 6119781 (energy drinks and dried fruits, frozen fruits).

¹⁴⁰ 43 TTABVUE 233-34 (Bonhuys Declaration confidential Exhibit E).

¹⁴¹ 43 TTABVUE 250-58 (Bonhuys Declaration confidential Exhibit E).

¹⁴² 84 TTABVUE 54 (Defendants' Brief).

which could include the pickles, pickled vegetables, or canned fruits and vegetables, are complementary to energy drinks, that energy drinks and various snack foods are promoted together, and that energy drink providers also offer a wide variety of snack foods under the same marks as their energy drinks.

This *DuPont* factor weighs in favor of likely confusion for each of the challenged registrations and for each of the challenged applications.

D. Trade Channels, Classes of Consumers and Degree of Care in Purchasing

The third *DuPont* factor considers the established, likely-to-continue channels of trade and classes of consumers, *see Detroit Athletic Co.*, 903 F.3d at 1308 (citing *DuPont*, 476 F.2d at 1361), and the fourth *DuPont* factor considers “[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 476 F.2d at 1361. As with the second *DuPont* factor, we look to the language of the identifications to ascertain how the trade channels, classes of consumers, and degree of care in purchasing are delineated in the application and Opposer’s registrations. *See Stone Lion*, 746 F.3d at 1323-24.

Defendant Rockstar, LLC sells nutritional supplements both at retail, through its own website, Amazon and Walmart, and at wholesale to Amazon.¹⁴³ Defendant Rockstar Industries LLC sells nutritional supplements and nutritional supplement bars, as well as spices and “many other items” through its own website and through

¹⁴³ 79 TTABVUE 2 (Keeler Declaration).

Amazon.¹⁴⁴ PepsiCo also sells its energy drinks through Amazon and Walmart, as well as other brick-and-mortar and e-commerce sites.¹⁴⁵ Thus, the parties have some actual overlap in retailers for these goods. The record also shows that PepsiCo's energy drinks and Defendants' nutritional supplement drink mixes are featured by third-party retailers, sometimes intermixed on the same webpages.

PepsiCo introduced a consumer survey finding that 70.7% of respondents, who were actual or likely purchasers of "meal replacement products, energy bars, and/or dietary and nutritional supplements," also purchase energy drinks, and 41% purchase both types of goods on at least a monthly basis.¹⁴⁶

As to the snack foods like potato chips, jerky and tortilla chips, PepsiCo provided testimony that based on "data from [its] retail partners showing that purchasers of [its] ROCKSTAR-branded products are also buying snacks," PepsiCo arranges product placement with DORITOS and FRITO-LAY chips "via 'shippers' – moving products off the shelves and into endcaps and other surfaces throughout the store near companion snack products."¹⁴⁷ PepsiCo also provided photos from retail establishments of energy drinks presented next to tortilla chips and potato chips, in close proximity to sauces and salsas, and of energy drinks presented next to jerky.¹⁴⁸

¹⁴⁴ 79 TTABVUE 3 (Keeler Declaration).

¹⁴⁵ 44 TTABVUE 8-9 (Bonthuys Declaration).

¹⁴⁶ 40 TTABVUE 19 (Butler Declaration).

¹⁴⁷ 44 TTABVUE 11 (Bonthuys Declaration).

¹⁴⁸ 51 TTABVUE 433, 447-61 (Confidential Notice of Reliance).

Defendants base their trade channel arguments only on the statements by PepsiCo's predecessor-in-interest from the 2016 prosecution history.¹⁴⁹ We find that the evidence of current trade channels for the respective goods much more probative than the statements from 2016, particularly given the testimony about changes within this market.

Here, we find that the record discussed above shows that the respective goods are offered in some of the same trade channels, and the relevant consumers overlap.

Turning to the fourth *DuPont* factor, a heightened degree of care when making a purchasing decision may reduce the likelihood of confusion. *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 999-1000 (Fed. Cir. 1985) (because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED). Conversely, impulse purchases of inexpensive items may have the opposite effect. *Palm Bay*, 396 F.3d at 1376. Defendants argue this factor as to nutritional supplements only – that consumers exercise care in purchasing them.¹⁵⁰ PepsiCo argues this factor as to all the goods, asserting that they “are relatively low-cost items regularly purchased on impulse.”¹⁵¹

The identified goods in this case are not restricted by price, trade channel or type of purchaser, and we cannot read in restrictions. *See Packard Press, Inc. v. Hewlett-*

¹⁴⁹ 84 TTABVUE 37-38 (Defendants' Brief).

¹⁵⁰ 84 TTABVUE 40-41 (Defendants' Brief).

¹⁵¹ 83 TTABVUE 43 (PepsiCo's Brief).

Packard Co., 227 F.3d at 1268 (must focus on identifications, regardless of any actual marketplace evidence of “the class of purchasers to which sales of the goods or services are directed”). Nonetheless, actual pricing information of the parties’ goods, as well as prices of third-party goods of this type in the record, give some indication whether goods of these types are expensive or inexpensive. PepsiCo’s Bonthuys Declaration informs as to the price point of its energy drinks: “Generally, ROCKSTAR energy drink products are priced around the \$1.50 to \$2.50 range. For example, individual cans of ROCKSTAR energy drink have been sold to consumers for \$1.84 at 7-Eleven and for \$1.90 at Circle K.”¹⁵² PepsiCo points out that some of Defendants’ identified goods, like potato chips, pickles, and beef sticks (jerky) cost only \$3-\$4.¹⁵³ PepsiCo also cites evidence of Defendants’ meal replacement bars offered for \$3.99. According to PepsiCo, energy drinks and these snack foods and bars should be considered impulse purchases. We agree that the nature and low price of these goods suggest that consumers typically would exercise little care in purchasing them.

Some of Defendants’ other goods at issue appear to sell for prices in the higher range of \$19.95 (nutritional supplement powdered beverage mix) to \$29.99 (supplements).¹⁵⁴ On eBay, the supplements are offered for less, including offers for \$8.80, \$9.09 and \$11.99.¹⁵⁵ Defendants contend that “consumers select nutritional

¹⁵² 44 TTABVUE 12.

¹⁵³ 83 TTABVUE 44 (PepsiCo’s Brief); *see also, e.g.*, 47 TTABVUE 400, 405-406 (Instacart screenshots of potato chips for \$2.89, pickles for \$3.99 and jerky for \$3.59).

¹⁵⁴ *E.g.*, 48 TTABVUE 25, 27, 76-78, 153-55, 202-04, 362-65, 431.

¹⁵⁵ 45 TTABVUE 322-24.

supplements with care,” because they are health-related, citing statements and supporting documents by PepsiCo’s predecessor-in-interest in the 2016 prosecution history.¹⁵⁶ Defendants also cite to an American Cancer Society article suggesting consultation with one’s “health care team about any supplements” being taken or considered,¹⁵⁷ and to a Consumer Reports article reporting on “serious adverse events associated with supplements.”¹⁵⁸ Defendants note that the Board in other cases has held that purchasers of dietary supplements and vitamins exercised elevated care in selecting the goods, citing *Miles Labs. Inc. v. Naturally Vitamin Supplements Inc.*, Opp. No. 62820, 1986 TTAB LEXIS 173 (TTAB 1986) and *In re PIV Ent., Inc.*, 2017 TTAB LEXIS 56 (non-precedential) TTAB 2017) as examples.¹⁵⁹ However, the *Miles Labs.* case is over 40 years old, and the “special care” of consumers on that record was undisputed by both parties. *Miles Labs.*, 1986 TTAB LEXIS 173, *7. Given the passage of time since the 2017 non-precedential *PIV Ent.* decision¹⁶⁰ and the fact-specific nature of the degree of care in purchasing particular goods, we do not find the decision persuasive in making our factual findings under this factor in this case.

¹⁵⁶ 84 TTABVUE 40 (Defendants’ Brief).

¹⁵⁷ 54 TTABVUE 93-94.

¹⁵⁸ 54 TTABVUE 96-101.

¹⁵⁹ 84 TTABVUE 41 (Defendants’ Brief).

¹⁶⁰ Defendants did not mark the *PIV Ent.* case as non-precedential in their citation as required by TBMP § 1203.02(f) (“Citation to a non-precedential case must be clearly marked as non-precedential”). Non-precedential decisions do not bind the Board, but are considered for their persuasive value. *In re Soc’y of Health and Physical Educators*, Serial No. 87107590, 2018 TTAB LEXIS 282, *10 n.7 (TTAB 2018).

We agree with Defendants that because these products are health-related, consumers likely will not buy them on impulse. However, for the nutritional supplements, “we must be sensitive to the fact that patients [or consumers] from the general public will not exercise the degree of care exhibited by medical professionals.” *Alfacell Corp. v. Anticancer Inc.*, Canc. No. 92032202, 2004 TTAB LEXIS 44, *16 (TTAB 2004). The record reflects that ordinary members of the public are purchasers of these identified goods, which are not necessarily very expensive, and Board precedent requires us to consider the least sophisticated potential customers. *Stone Lion*, 746 F.3d at 1325 (recognizing precedent requiring consideration of the “least sophisticated consumer in the class”). Based on the foregoing, as to the supplements, we find neither an elevated degree of care in purchasing, nor a basis for finding these goods subject to impulse purchases. We consider this *DuPont* factor neutral as to the nutritional supplements and nutritional supplement drink mixes. We also note that even if we considered such goods to involve a somewhat elevated degree of care in purchasing, we bear in mind that the parties’ marks are identical, so there is nothing for more discerning purchasers to rely on to distinguish the marks.

E. Actual Confusion

Under the seventh and eighth factors, we consider the parties’ respective uses “such that we could make a finding as to the ‘length of time during and conditions under which there has been concurrent use without evidence of actual confusion.’” *In re Guild Mortg. Co.*, Serial No. 86709944, 2020 TTAB LEXIS 17, *25 (TTAB 2020); *see also DuPont*, 476 F.2d at 1361 (identifying seventh and eighth *DuPont* factors as

“[t]he nature and extent of any actual confusion,” and “[t]he length of time during and conditions under which there has been concurrent use without evidence of actual confusion”).

Our primary reviewing court has stated that “[a] showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion.” *Majestic Distilling Co.*, 315 F.3d at 1317; *see also Georgia-Pacific Corp. v. Great Plains Bag Co.*, 614 F.2d 757, 762 (CCPA 1980) (“Actual confusion is entitled to great weight but only if properly proven.”). PepsiCo insists that the actual confusion evidence in this case is entitled to great weight.

The Bonthuys Declaration offers examples of alleged actual confusion:¹⁶¹

- An online article stating that Defendants’ Rockstar Skinny Gal diet pills are “made by Rockstar, a company that also makes energy drinks and pre-workout supplements,” but Defendants do not make energy drinks. Mr. Bonthuys concludes “that the article confused defendants and PepsiCo and wrongly believed that both parties’ products emanate from a single source.”¹⁶²

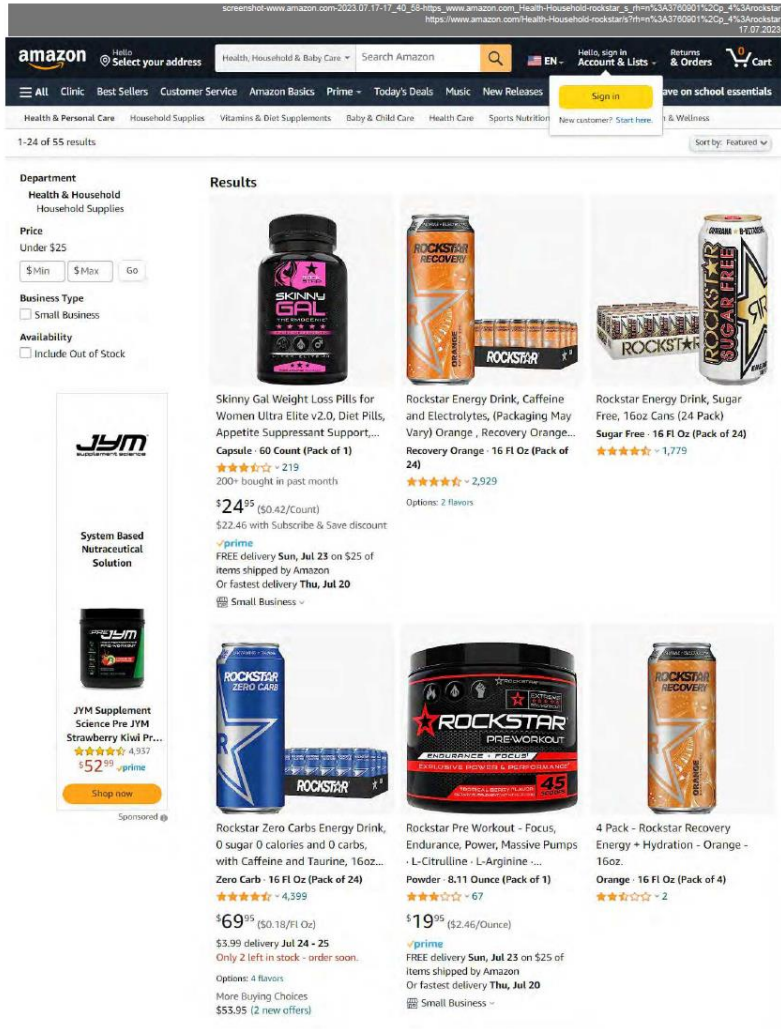
¹⁶¹ Although the Bonthuys Declaration points to an online review clarifying that Defendant’s products are not associated with PepsiCo’s energy drinks, we disagree that this constitutes actual confusion evidence, as instead the review recognizes that the goods do not emanate from the same source. 44 TTABVUE 21. *Cf. Coach/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, Canc. No. 92051006, 2014 TTAB LEXIS 95, *69-76 (TTAB 2014) (inquiries to company identity or affiliation not actual confusion evidence); *Marshall Field & Co. v. Mrs. Fields Cookies*, Opp. No. 78031, 1992 TTAB LEXIS 52, *48 (TTAB 1992) (inquiries of affiliation not actual confusion).

¹⁶² 44 TTABVUE 20, 209-10.

- “Amazon, a key e-commerce platform, mistakenly linked defendants’ product pages to PepsiCo’s ROCKSTAR store, and conflated the two sources as a single brand. In 2020, multiple pages selling [Defendants’] products included bylines directing purchasers to “Visit The Rockstar Store” which hyperlinked to PepsiCo’s Rockstar Energy Drink Amazon storefront (<https://www.amazon.com/rockstar>).”¹⁶³
- More recently in July 2023, Google search results for Defendants’ “skinny gal” products directed searchers to Amazon pages that display PepsiCo’s ROCKSTAR energy drink products alongside Defendants’ supplements sold under Defendants’ ROCKSTAR marks (see example below).¹⁶⁴

¹⁶³ 44 TTABVUE 21, 172, 179.

¹⁶⁴ 44 TTABVUE 21, 187-88, 192.



Bonthuys - Exhibit F

- On influenster.com (a website for promoting products to consumers), the page for Defendants' product was categorized as a product under PepsiCo's ROCKSTAR brand and included hyperlinks that directed customers to PepsiCo's Rockstar Energy Drink Influenster page.¹⁶⁵ The Influenster page for PepsiCo's Rockstar Energy Drink erroneously includes among the

¹⁶⁵ 44 TTABVUE 21, 204-208.

products Defendants' Rockstar Skinny Gal Weight Loss for Women (presumably supplements).¹⁶⁶

Defendants cast aspersions on these examples, for example by suggesting the article “appears to be written by a bot,” or that PepsiCo must prove that Amazon and Google hyperlinks mistakenly linking the products “were created by a human being” or “a mistaken consumer,” but do not provide support for such assertions.¹⁶⁷

As previously discussed, the Bonthuys Rebuttal Declaration also includes three examples of consumer reviews of Defendants' products wherein the reviewers contrast their prior favorable experience with PepsiCo's ROCKSTAR energy drinks with the reviewers' negative impression of Defendants' supplement and preworkout drink mixes.¹⁶⁸ Defendants maintain that “[t]he reviews certainly do not establish that a customer purchased a Rockstar supplement mistakenly believing it came from PepsiCo.”¹⁶⁹ PepsiCo contends that we can infer from the reviewers' juxtaposition of PepsiCo's and Defendants' ROCKSTAR goods the impression that the goods were from or sponsored by the same entity.

PepsiCo also points to its consumer survey for consideration under this *DuPont* factor, characterizing it as “[a] thorough, credible and rigorous expert survey providing that [Defendants'] Marks are likely to cause confusion, with a near-50%

¹⁶⁶ 48 TTABVUE 445-47.

¹⁶⁷ 84 TTABVUE 43 (Defendants' Brief).

¹⁶⁸ 81 TTABVUE 4-5 (Bonthuys Rebuttal Declaration).

¹⁶⁹ 84 TTABVEU 44 (Defendants' Brief).

confusion rate.”¹⁷⁰ PepsiCo designated Sarah Butler of National Economic Research Associates as an expert witness, and she conducted a consumer survey that generally conforms to the *Eveready*-format¹⁷¹ to support PepsiCo’s likelihood of confusion claim.¹⁷² Based on our review of the declaration and attachments, we are convinced that Ms. Butler qualifies as a competent expert in the field of market research, including that done for the express purpose of litigation involving likelihood of confusion issues. Defendants do not dispute Ms. Butler’s qualification as an expert in this case.

The 420-respondent (including the control group) survey of actual or likely purchasers of “meal replacement products, energy bars, and/or dietary and nutritional supplements” yielded a 46.2% net confusion rate, reflecting survey respondents who, when exposed to ROCKSTAR in connection with such products, believed they identified PepsiCo ROCKSTAR goods, or were associated or affiliated with PepsiCo’s ROCKSTAR brand.¹⁷³ Our precedent credits the *Eveready* survey format, and we find the survey results persuasive with respect to the goods addressed. *See, e.g., Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, Opp. No. 91194148, 2015 TTAB LEXIS 260, *44 (TTAB 2015) (“The likelihood of confusion part of the survey

¹⁷⁰ 85 TTABVUE 8 (PepsiCo’s Reply Brief).

¹⁷¹ 40 TTABVUE 8, 31 (Butler Declaration). In *Union Carbide Corp. v. Ever-Ready. Inc.*, 531 F.2d 366, 385-88 (7th Cir. 1976), the plaintiff conducted a survey to determine whether there was a likelihood of confusion between defendant’s EVER-READY lamps and plaintiff Union Carbide’s EVEREADY batteries, flashlights and bulbs. The survey asked: “Who do you think puts out the lamp shown here? [showing a picture of defendant’s EVER-READY lamp and mark],” and “What makes you think so?” *Id.* at 385-86.

¹⁷² 40 TTABVUE 3, 5 (Butler Declaration).

¹⁷³ 40 TTABVUE 6-7 (Butler Declaration).

follows the familiar ‘Eveready’ [footnote omitted] model, a widely used and well-accepted format for likelihood of confusion surveys”); *Starbucks U.S. Brands, LLC v. Ruben*, Opp. No. 91156879, 2006 TTAB LEXIS 54, * (TTAB 2006) (“Rather, given the way in which this survey format carefully follows the *Ever-Ready* likelihood of confusion survey format, we find that it is reliable and therefore of probative value on the issue of likelihood of confusion herein”). Professor McCarthy reports that “[g]enerally, figures in the range of 25% to 50% have been viewed [by courts] as solid support for a finding of likelihood of confusion.” MCCARTHY ON TRADEMARKS § 32:188 (5th ed. May 2024 update). The 46.2% figure in this case falls on the high end of that spectrum.

While Defendants, without offering their own survey or survey expert, argue that the survey has “obvious flaws,” the asserted errors generally appear to reflect Defendants’ misunderstanding of the survey or its methodology.¹⁷⁴ Defendants’ argument about an undersized survey universe are based on the underlying premise that the universe consisted of only 168 respondents, whereas the full universe, including the control group, was 420 respondents.¹⁷⁵ Also, Defendants’ contentions about the respondents’ alleged lack of association of ROCKSTAR with energy drinks or PepsiCo rely on excerpted responses about affiliation without considering other survey responses, such as those about association.¹⁷⁶ Taking the subset and question

¹⁷⁴ 84 TTABVUE 47-48 (Defendants’ Brief).

¹⁷⁵ 40 TTABVUE 6-7 (Butler Declaration).

¹⁷⁶ 84 TTABVUE 48 (Defendants’ Brief).

out of the broader context to argue a lower net confusion rate than determined by the survey expert is not convincing.

Overall, we find the survey evidence persuasive under this factor as to the “meal replacement products, energy bars, and/or dietary and nutritional supplements” that were the subject of the survey. The additional examples of actual consumer confusion are reasonably probative to corroborate the showing under this factor. Defendants contend that even if the actual confusion instances are credited, they are “infinitesimally small” in comparison to the sales overall.¹⁷⁷ While “isolated incidents of actual confusion may be disregarded as de minimis,” in “the proper factual setting, even just a few instances of actual confusion can provide very persuasive evidence of how and why confusion can occur.” J. Thomas McCarthy, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:14 (5th ed. May 2024 update) (“McCarthy”). We find the actual confusion examples in this case convincing in the context of the entire relevant record, including the survey results. Accordingly, for “meal replacement products, energy bars, and/or dietary and nutritional supplements,” the actual confusion factor weighs in favor of likely confusion.

F. Market Interface

Although Defendants argue the tenth *DuPont* factor weighs against likelihood of confusion, the record does not include relevant evidence regarding the market interface under this factor. Defendants rely on PepsiCo’s alleged inaction against

¹⁷⁷ 84 TTABVUE 44 (Defendants’ Brief).

Defendants' prior use and registration of ROCKSTAR for other goods not at issue in this proceeding, but that is not the sort of market interface contemplated by the tenth factor, which by its terms is directed to express or implied consents to use or registration, coexistence agreements, assignments, and laches and estoppel. *DuPont*, 476 F.2d at 1361. See *In re Am. Cruise Lines, Inc.*, Serial No. 87040022, 2018 TTAB LEXIS 363, *16-22 (TTAB 2018) (consent agreement); *In re Ass'n of the U.S. Army*, Serial No. 76578579, 2007 TTAB LEXIS 52, *29-31 (TTAB 2007) (implied consent potentially arising from communications between the parties); *In re Opus One Inc.*, Serial No. 75722593, 2001 TTAB LEXIS 707, *34-38 (TTAB 2001) (past business dealings between applicant and owner of the cited registration). PepsiCo responds that its decision not to oppose as to other types of goods arises from its "measured approach to only oppose marks that genuinely present a likelihood of confusion with its ROCKSTAR Marks."¹⁷⁸ We concur that inaction with regard to the other goods raised by Defendants is not relevant, and find this factor neutral.

G. Enforcement of Rights

"The extent to which applicant has a right to exclude others from use of its mark on its goods' is listed as the eleventh factor in the *du Pont* analysis." *McDonald's Corp. v. McSweet, LLC*, Opp. No. 91178758, 2014 TTAB LEXIS 351, *43-44 (TTAB 2014) (quoting *DuPont*, 476 F.2d at 1361). This factor is normally invoked by applicants, who "[i]n the few precedential cases discussing the eleventh *DuPont* factor

¹⁷⁸ 85 TTABVUE 21 (PepsiCo's Reply Brief).

. . . have failed to show sufficient use of their marks to establish a right to exclude others from use of their marks on their goods.” *DeVivo v. Ortiz*, Opp. No. 91242863, 2020 TTAB LEXIS 15, *45-46 (TTAB 2020). The Board has explained that this “factor may be useful to determine how marketplace realities and consumer perception defined by applicant’s common law use and consequent right to exclude other users affects the likelihood of confusion.” *Monster Energy Co. v. Lo*, Opp. No. 91225050, 2023 TTAB LEXIS 14, *67 (TTAB 2023) (emphasis added). The inquiry is not the same as strength or fame, but might include, for example, consideration of successful trademark enforcement activity. *Id.*

Defendants contend that this factor weighs in their favor because ROCKSTAR is inherently distinctive and has been in use with supplements since 2017, the mark is the subject of three registrations, Defendants are “the only one who has rights with nutritional supplements,” and use the mark on “more than 94 supplement products,” generating over \$5 million in revenue (although this latter figure is considerably larger than what is stated in the Keeler Declaration at 79 TTABVUE 4).¹⁷⁹ However, we do not find based on Defendants’ record any established right to exclude others for purposes of the eleventh factor. *See McSweet*, 2014 TTAB LEXIS 351, *45 (“[T]here is no evidence that Applicant, in fact, has successfully asserted its rights so as to ‘exclude’ anyone else.”). We consider the eleventh factor neutral in our analysis. *Monster Energy v. Lo*, 2023 TTAB LEXIS 14, at *68.

¹⁷⁹ 84 TTABVUE 46 (Defendants’ Brief).

H. Thirteenth *DuPont* Factor

Under the thirteenth “catchall” *DuPont* factor, PepsiCo argues that Defendants attempted to pass off its goods as PepsiCo’s because Defendants: use a star design with their mark, as does PepsiCo; use an allegedly similar color scheme and brand “themes” such as “athleticism, high performance, and achievement”; allegedly provided inconsistent information about awareness of PepsiCo’s marks at the time Defendants pursued the marks at issue in this proceeding; allegedly have “a history of copying and disregarding others’ rights and intellectual property”; allegedly engaged in “prolific, indiscriminate trademark filings”; and allegedly engaged in “deceptive commercial practices.”¹⁸⁰

We do not find the parties’ color schemes (which vary depending on the products) similar overall, and given the reference to STAR in both parties’ marks, the use of a star design with the word is unsurprising. PepsiCo’s assertions about brand themes are too vague to support its allegations of bad faith. And regardless of whether Defendants were aware of PepsiCo’s ROCKSTAR brand in advance, “an inference of ‘bad faith’ requires something more than mere knowledge of a prior similar mark.” *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, (Fed. Cir. 1987). A finding of bad faith must be supported by evidence of an intent to confuse, rather than mere knowledge of another’s mark or even an intent to copy. *See, e.g., Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 588 F.3d 97, (2d Cir. 2009) (“[T]he ‘only relevant intent is intent to confuse. There is a considerable difference between an intent to copy and

¹⁸⁰ 83 TTABVue 49-53 (PepsiCo’s Brief).

an intent to deceive.” (quoting 4 McCarthy § 23:113)). The testimony and evidence in this record about Defendants’ business model, which seems to involve selling on Amazon and other online platforms a very wide variety of ROCKSTAR-branded goods made by third-parties, and about its accompanying pursuit of trademark registrations, do not rise to the level of showing a bad faith intent to copy PepsiCo’s mark for energy drinks. We find this *DuPont* factor neutral.

I. Balancing the *DuPont* Factors

We must “weigh the *DuPont* factors used in [our] analysis and explain the results of that weighing.” *In re Charger Ventures LLC*, 64 F.4th 1375, 1383-84 (Fed. Cir. 2023). “In any given case, different *DuPont* factors may play a dominant role,” and the “weight given to each factor depends on the circumstances of each case.” *Id.* (citation omitted).

Weighing the *DuPont* factors for which there has been evidence and argument in this proceeding, we find confusion likely. PepsiCo’s ROCKSTAR mark for energy drinks is conceptually and commercially strong, and Defendants’ mark is identical to it, weighing heavily in favor of likely confusion. The parties’ respective goods are related, and they travel in some of the same trade channels, targeting some of the same ordinary consumers, who either would buy on impulse, or in the case of supplements, would exercise an ordinary degree of care in purchasing. Notably, the record includes evidence of actual confusion in the form of results of a reliable likelihood of confusion survey, buttressed by examples of actual consumer confusion. This type of showing provides a strong indication of likely confusion in the future.

Given that the relevant *DuPont* factors weigh in favor of likely confusion – some heavily so – or are otherwise neutral, Defendants’ challenged applications and registrations present a likelihood of consumer confusion. Consumers, familiar with PepsiCo’s ROCKSTAR mark likely would believe Defendants’ ROCKSTAR goods emanate from or are otherwise sponsored by the same source.

Decision: The opposition is sustained and the petitions to cancel are granted based on likelihood of confusion. We need not reach the lack of bona fide intent to use claims in the opposition. *See Venture Out Props. LLC v. Wynn Resorts Holdings, LLC*, Opp. No. 91167237, 2007 TTAB LEXIS 1, *24 (TTAB 2007) (“In view of our decision finding a likelihood of confusion, we need not reach the issue of dilution.”).