

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: April 14, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Monster Energy Company

v.

Monster Straw Company, LLC

Opposition No. 91250784

Ari Feinstein of Knobbe Martens Olson & Bear LLP,
for Monster Energy Company.

Natalie Buketov, Partner, pro se,¹
for Monster Straw Company, LLC.

Before Goodman, Pologeorgis and Allard,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

¹ Natalie Buketov, Partner of Applicant, filed an answer. 4 TTABVUE. On July 6, 2020, David D. Postolski of Gearhart Law LLC filed a notice of appearance. 11 TTABVUE. On July 2, 2023, Ms. Buketov filed a response to Opposer's motion for summary judgment, and on July 7, 2023, Ms. Buketov filed a change of address. 44 & 46 TTABVUE. On July 10, 2023, Mr. Postolski filed a motion to withdraw, which the Board granted in the order denying partial summary judgment on priority as moot. 47 & 48 TTABVUE.

Monster Straw Company, LLC (Applicant) seeks registration on the Principal Register of the mark MONSTER STRAW (in standard characters, STRAW disclaimed), identifying “drinking straws” in International Class 21.²


Monster Energy Company (Opposer) opposes registration on the ground of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), pleading eighteen Principal Register registrations³ for MONSTER ENERGY, MONSTER ENERGY formative, and MONSTER formative marks in connection with various goods including beverages, beverageware, nutritional supplements in liquid form, and restaurant and bar services in International Classes 5, 21, 32, and 43. 1 TTABVue 13-21, paragraphs 7-24. Opposer also pleaded common law rights in “Monster marks” for “beverages and nutritional supplements, on apparel, beverageware, merchandise, and on product samplings” and alleges a family of Monster marks. 1 TTABVue 12-13, paragraphs 2, 3, 5, 6.

Applicant filed an answer, later filing an amended and second amended answer with amended defenses and a counterclaim, seeking to cancel two pleaded

² Application Serial No. 88043168 was filed on July 18, 2018 based on use in commerce alleging a date of first use of August 2001 and a date of first use in commerce of July 1, 2005 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

³ Registration Nos. 5664586, 4111964, 4129288, 4058407, 3959457, 3057061, 3044315, 4376796, 4451535, 4234456, 4036681, 4036680, 3134842, 3044314, 4534414, 4532292, 3852118, 5114854. Registration no. 4234456 cancelled during the present proceeding. Monster indicates in its brief that it “withdraws its reliance on U.S. Trademark Registration No. 4,234,456 for the UBERMONSTER mark, which was cancelled after Monster filed this Opposition.” Opposer’s brief 61 TTABVue 12 note 2.



registrations: MONSTER ENERGY and  (Reg. No. 5114854 for restaurant and bar services and Reg. No. 5664586 for beverageware; insulated beverage containers for domestic use; drinking bottles for sports; water bottles sold empty) based on likelihood of confusion and Applicant's common law priority rights, which the Board allowed.⁴ 4, 21 and 26 TTABVUE. Applicant also sought leave to amend its first use and first use in commerce dates, which the Board deferred until final decision. 21 and 48 TTABVUE.

Opposer filed an answer to the counterclaim, denying the salient allegations and asserting affirmative defenses.⁵ 30 TTABVUE.

Opposer filed a brief in this case. 61 TTABVUE. Opposer submitted testimony and other evidence during its testimony period. 51-56 TTABVUE. Applicant did not submit any testimony or other evidence in connection with the opposition or counterclaim and did not file a brief in the case.

⁴ The Board struck the failure to state a claim defense and the defenses of laches, equitable estoppel, and unclean hands, allowing only leave to amend for the unclean hands defense. 25 TTABVUE. Applicant's second amended answer and counterclaim included the stricken failure to state a claim, laches and equitable estoppel defenses, and an amended unclean hands defense. 26 TTABVUE. Opposer filed a motion to strike the previously stricken failure to state a claim and equitable estoppel defenses and the realleged unclean hands defense in the second amended answer, which the Board granted as conceded. 29 and 32 TTABVUE. Applicant's answer also included amplified denials which we construe as such.

⁵ Opposer asserted the defenses of laches, waiver and equitable estoppel. Opposer also asserted the defense of failure to state a claim; however, the Board had already found likelihood of confusion sufficiently pleaded, in granting leave to amend. 25 TTABVUE.

On January 15, 2025, the Board issued an order to show cause regarding Applicant's failure, as Counterclaim-Petitioner, to file a brief on the counterclaim against Opposer's pleaded Reg. Nos. 5114854 and 5664586.⁶ When no response was received, the Board entered judgment under Trademark Rule 2.128(a)(3), 37 C.F.R. § 2.128(a)(3), against Applicant as Counterclaim-Petitioner, dismissing the counterclaim against Opposer's Reg. Nos. 5114854 and 5664586 with prejudice. 64 & 65 TTABVUE.

As plaintiff in the opposition, Opposer bears the burden of proving its entitlement to a statutory cause of action and its Section 2(d) claim by a preponderance of the evidence. *See B&B Hardware, Inc. v. Hargis Ind., Inc.*, 575 U.S. 138, 144 (2015) ("The party opposing registration bears the burden of proof, see § 2.116(b), and if that burden cannot be met, the opposed mark must be registered, see 15 U.S.C. § 1063(b)"); *Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 1403 (CCPA. 1974) (opposer must establish that there is a likelihood of confusion by a preponderance of the evidence).

Applicant's failure to submit evidence and file a brief in connection with the opposition is not a concession of the case. *Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, 2022 TTAB LEXIS 383, at *3 (TTAB 2022) (citation omitted).

⁶ Opposer also sought dismissal with prejudice based on the claims being waived. 63 TTABVUE.

I. Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the involved application and the involved registrations in the counterclaim, although the file histories of the registrations are not relevant since the counterclaim has been dismissed with prejudice.

Opposer submitted a notice of reliance at 51 TTABVUE on printed publications, discovery responses, and discovery deposition testimony (excerpt) of Natalie Buketov, Applicant's partner (Buketov Rule 30(b)(6) of the Fed. Rules of Civ. Pro. discovery deposition ("30(b)(6)").⁷ Opposer also submitted the declaration testimony of Rodney Sacks, Chairman and Co-Chief Executive Officer of Monster Beverage Corporation and its subsidiary Monster Energy Company (Sacks declaration), 52-56 TTABVUE (confidential filings at 55 and 56 TTABVUE).

II. Applicant's Motion for Leave to Amend

Applicant sought to amend its first use and first use in commerce dates of the involved application to December 2000 and July 26, 2001. Applicant's motion was signed under 28 U.S.C. 1746 and supported by a copy of a purchase contract for straws dated July 26, 2001 between Applicant and UTC International Inc., a United States company.

An applicant is entitled to prove an earlier date of use than the date alleged in its application, but its proof must be clear and convincing and must not be characterized

⁷An interrogatory response identifies Ms. Buketov as a founder, owner, and CEO of Applicant (see interrogatory no. 1, exhibit 2, 51 TTABVUE) but Ms. Buketov has signed documents submitted to the Board with the title "Partner." We refer to her as "Partner" in this opinion.

by contradiction, inconsistencies or indefiniteness. See *Hydro-Dynamics, Inc. v. George Putnam & Co., Inc.*, 811 F.2d 1470, 1473 (Fed. Cir. 1987); *Threshold.TV, Inc. v. Metronome Enters.*, 2010 TTAB LEXIS 314, at *11-12 (TTAB 2010).

The reason for this evidentiary burden on an applicant is because “a change of position [to earlier dates of use] from one ‘considered to have been made against interest at the time of filing the application,’ (internal citation omitted), requires enhanced substantiation.” *Hydro-Dynamics*, 811 F.2d at 1473.

Because there is no evidence in the record directed to the date of first use of December 2000, Applicant has not established this earlier date by clear and convincing evidence. As to the proposed amended first use in commerce date of July 26, 2001, the submitted contract alone does not provide sufficient information of use in commerce on the July 26, 2001 date.⁸ Because Applicant lacks clear and convincing evidence to amend its first use and first use in commerce dates, the motion is denied.

III. Entitlement to a Statutory Cause of Action

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

To establish entitlement to a statutory cause of action under Trademark Act Section 13, 15 U.S.C. § 1063, a plaintiff must demonstrate “an interest falling within the zone of interests protected by the statute and ... proximate causation.”

⁸ A shipment of goods from the manufacturer to Applicant is a shipment of goods in preparation for offering the goods for sale and would not constitute use in commerce. *Avakoff v. S. Pac. Co.*, 765 F.2d 1097, 1098 (Fed. Cir. 1985).

Corcamore, 978 F.3d 1303 (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-134 (2014)); *see also Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 1070 (Fed. Cir. 2022). Stated another way, a plaintiff is entitled to bring a statutory cause of action by demonstrating a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1374-75 (Fed. Cir. 2020); *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 1275 (Fed. Cir. 2014).

Opposer attached to its notice of opposition Trademark Electronic Search System (TESS) copies of its pleaded registrations for MONSTER ENERGY and MONSTER ENERGY formatives and other MONSTER formative marks (together with assignment abstract information). Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1). These registrations are current as they reflect the date of September 9, 2019, the day before the September 10, 2019 filing date of the opposition, making them of record. *Id.*

The registrations demonstrate that Opposer is the owner of its pleaded registrations for MONSTER ENERGY, MONSTER ENERGY formative, and other MONSTER formative marks for, among other things, various beverages, nutritional supplements and beverageware. These registrations are sufficient to establish Opposer's entitlement. *New Era Cap Co. v. Pro Era, LLC*, 2020 TTAB LEXIS 199, at *16-17 (TTAB 2020) (opposer's registrations made of record demonstrated its entitlement to bring a Section 2(d) claim).

IV. Section 2(d) Claim

We turn now to the substantive claim before us under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). Section 2(d) of the Trademark Act prohibits registration of marks “likely to cause confusion, or to cause mistake, or to deceive.”

A. Family of Marks

As mentioned above, Opposer alleges that it owns a family of MONSTER marks. 1 TTABVUE 2-3, paragraphs 2, 3, 5, 6.

To support an assertion of a family of marks, “Opposer must prove the existence of [a MONSTER] family of marks prior to any date Applicant can rely upon for purposes of priority.” *New Era Cap Co.*, 2020 TTAB LEXIS 199, at *21. However, Mr. Sacks’ declaration testimony is limited, ambiguous, and conclusory and does not clearly establish when Opposer began promoting multiple marks with the MONSTER family feature together, nor does he provide sufficient information or evidence of use and promotion of the MONSTER family feature from which it could be shown that the public recognizes a MONSTER family of marks.⁹ Sacks declaration paragraphs 227-231, 52 TTABVUE 123-124 (and referenced exhibits). Opposer has failed to prove

⁹ Most of the evidence relates to MONSTER ENERGY marks. Although there are a few instances of other MONSTER formative marks shown together as embedded in the brief, the circumstances surrounding the marketing is unclear. Most of the evidence referenced in exhibit 13 of the Sacks’ declaration is under seal and are point of sale (POS) catalogs and e-catalogs which appear to be directed to retailers and distributors. Other evidence includes separate listings for purchase of Opposer’s MONSTER formative branded goods offered by third-parties Amazon and Nascar; this does not establish Opposer’s promotion of MONSTER as a family feature. The mark MONSTER alone is not strictly speaking a member of Opposer’s claimed MONSTER family of marks because it lacks additional terms. See *McDonald’s Corp. v. McSweet, LLC*, 2014 TTAB LEXIS 351, at *16 (TTAB 2014) (finding the “Mc” mark not part of McDonald’s family of “Mc-formative” marks).

prior use of a MONSTER family of marks. *New Era Cap Co.*, 2020 TTAB LEXIS 199, at *25 (ambiguous testimony failed to establish a family of marks).

Therefore, the likelihood of confusion analysis will be based solely upon one or more separately pleaded registrations. *Citigroup Inc. v. Cap. City Bank Grp, Inc.*, 2010 TTAB LEXIS 40 at *37-38 (TTAB 2010) (where opposer did not establish use as a family prior to Applicant's date of first use, the Board analyzed likelihood of confusion based solely on the individual registrations).

B. Priority

As indicated, Opposer made of record its seventeen active pleaded registrations,¹⁰ which were attached to the notice of opposition. Priority is not at issue with respect to the pleaded registrations and the goods identified by them that were not subject to a counterclaim. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1402 (CCPA 1974). Applicant asserted a counterclaim against pleaded Reg. Nos. 5114854 and 5664586 that was dismissed with prejudice. Thus, priority is not an issue in this case with respect to these registrations and the goods and services identified by them either. *See e.g., Lacteos De Honduras S.A. v. Industrias Sula, S. De R.L. De C.V.*, 2020 TTAB LEXIS 13, at *22-23 (TTAB 2020).

Opposer's witness Mr. Sacks also testified about two MONSTER marks for "nonalcoholic beverages, namely, soft drinks, energy drinks, sports drinks, and fruit juice drinks" (Reg. No. 6451182) and for "energy drinks; fruit drinks; soft drinks;

¹⁰ See note 3.

sports drinks” (Reg. No. 6760278). Sacks declaration paragraph 14, 52 TTABVUE 8; exhibit 5, 52 TTABVUE 265-266.

Applicant did not object to Opposer’s testimony about these unpleaded MONSTER registrations and was fairly apprised that Opposer was offering evidence as to these unpleaded registrations. Sacks declaration paragraph 14, and exhibit 5, 52 TTABVUE 8, 265-266. We find that Opposer’s reliance on these two registrations was tried by implied consent, and Opposer has established priority based on these MONSTER registrations as well. *Time Warner Entm’t Co. L.P. v. Jones*, 2002 TTAB LEXIS 462, at *2 n.2 (TTAB 2002) (unpleaded registrations tried by implied consent where applicant raised no objection to opposer’s reliance on them).

Because we find priority based on Opposer’s pleaded registrations, or those two registrations tried by implied consent, we need not separately consider Opposer’s common law rights in other MONSTER or MONSTER formative marks. *See Keystone Consol. Indus. v. Franklin Inv. Corp.*, 2024 TTAB LEXIS 290, at *26 (TTAB 2024).

C. Likelihood of Confusion

Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019); *In re Country Oven, Inc.*, 2019 TTAB LEXIS 381, at *2 (TTAB 2019).

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods or services. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (*quoting Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). These factors, and others, are discussed below.

We focus our analysis on Opposer’s standard character mark MONSTER, Reg. No. 6760278, for “energy drinks; fruit drinks; soft drinks; sports drinks” which has the most points in common with Applicant’s mark. *Sock It to Me v. Fan*, 2020 TTAB LEXIS 201, at *20-21 (TTAB 2020) (confining likelihood of confusion analysis to most similar pleaded mark). If we find there is a likelihood of confusion between the mark in this registration and Applicant’s mark, there is no need for us to consider the likelihood of confusion with Opposer’s other pleaded registrations and marks. If no confusion is likely with this mark and Applicant’s mark, we would not find confusion likely with Opposer’s other pleaded marks (or the other registered mark that was tried by implied consent). *Id.* at *21.

1. Similarity or dissimilarity of the goods

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

When analyzing the similarity of the goods, “it is not necessary that the products of the parties be similar or even competitive to support a finding of likelihood of

confusion.” *7-Eleven, Inc. v. Wechsler*, 2007 TTAB LEXIS 58, at *287 (TTAB 2007). Instead, likelihood of confusion can be found “if the respective products 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. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012).

Applicant’s goods are identified as “drinking straws.” Opposer’s goods for its MONSTER mark (Reg. No. 6760278) are identified as “energy drinks; fruit drinks; soft drinks; sports drinks.”

Opposer’s witness Mr. Sacks testified that MONSTER drinks are sold at 25,000 bars and restaurants across the United States and “are often delivered to guests in a can with a glass with a straw, or as a mixer for a drink that also includes a straw.” Sacks declaration paragraph 18, 52 TTABVUE 10. Mr. Sacks also testified that “[i]t is also not uncommon for MONSTER drinks to be consumed through a straw even if they are not purchased from a bar or restaurant.” *Id.* Mr. Sacks testified about the licensing of a “flavored ice” MONSTER (“Slurpee”) product sold by 7-Eleven in 2008 and 2009 that was offered with straws. Sacks declaration paragraph 35, 52 TTABVUE 22-23.

To support this testimony, Mr. Sacks provided from Opposer’s business records, as exhibit 11, photographs showing “how Monster’s beverages are served and consumed, including through straws.” Sacks declaration, paragraph 18, 52 TTABVUE 10. Blue arrows have been added for highlighting purposes.



Sacks declaration, exhibit 11, 51 TTABVUE 316. In addition, Opposer provided from its business records images of the 7-Eleven Slurpee licensed MONSTER product for which straws were provided (blue arrows added for highlighting purposes).



Sacks declaration, exhibit 16, 53 TTABVUE 26, 30.

We also have testimony from Applicant's witness that one idea for expansion of her product line suggested by Amazon was to bundle a cup, lid and the Monster Straw. Petitioner's notice of reliance, Natalie Buketov 30(b)(6) discovery deposition (excerpt), 51 TTABVUE 52.

Where evidence shows that the goods at issue have complementary uses, and thus are often used together or otherwise purchased by the same purchasers for the same or related purposes, such goods have generally been found to be sufficiently related such that confusion would be likely if they are marketed under the same or similar marks. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567 (Fed. Cir. 1984); *In re Cook Med. Techs. LLC*, 2012 TTAB LEXIS 496, at *10 ((TTAB 2012) ("[i]f goods are complementary in nature, or used together, this relatedness can support a finding of likelihood of confusion"); *In re Hester Indus.*, 1986 TTAB LEXIS 61, at *4-

5 (TTAB 1986) (pre-cooked boneless chicken parts and bread to make sandwiches are used together, are complementary, and related); *In re Vienna Sausage Mfg. Co.*, 1986 TTAB LEXIS 85, at *3 (TTAB 1986) (sausage and cheese are frequently used together as sandwich ingredients, or as cold cuts, or in hors d'oeuvres and are related); *Polo Fashions Inc. v. La Loren, Inc.*, 1984 TTAB LEXIS 152, at *10 (TTAB 1984) (applicant's bath sponges found complementary in nature and related to personal products for the bath such as soap and bath oil).

The evidence establishes that Opposer's beverages and Applicant's straws are often used together when consuming beverages, are complementary goods, and thus related.

The second *DuPont* factor weighs in favor of likelihood of confusion.

2. Trade channels, and the classes of purchasers

Under the third *DuPont* factor, we consider the "similarity or dissimilarity of established, likely-to-continue trade channels." *DuPont*, 476 F.2d at 1361. We also consider the classes of consumers for the parties' goods, which is the general public, those who drink beverages with straws.¹¹

There is no restriction in Applicant's and Opposer's identifications as to the channels of trade. Therefore, the goods are deemed to be sold in all channels of trade

¹¹ Ms. Buketov testified that its consumers are smoothie drinkers, smoothie lovers, ages 15 to 35, or 18 to 34 and "actual users" are home consumers, retail and restaurants. Opposer's notice of reliance, Buketov 30(b)(6) discovery deposition, 51 TTABVUE 61. Ms. Buketov also indicated that its consumers range from small children to adults. Opposer's notice of reliance, interrogatory response no. 25, 51 TTABVUE 19. Mr. Sacks testimony indicates that Opposer's consumers are those that purchase beverages, clothing apparel and accessories. Sacks declaration, paragraph 49, 52 TTABVUE 33.

appropriate for such goods and to all classes of consumers for goods of this type. *Hard Rock Cafe Int'l (USA), Inc. v. Elsea*, 2000 TTAB LEXIS 577, at *24 (TTAB 2000).

Applicant indicates that its goods have been sold or will be sold at, (or offered) among other places, at convenience stores, restaurant/self serve, fast, fast casual, quick serve and full-service restaurants, and retail, particularly Walmart. Opposer's notice of reliance, interrogatory response no. 20, 51 TTABVUE 15. Mr. Sacks indicates that its goods are offered at, among other places, convenience stores, restaurants, coffee shops and retailers, including Walmart. Sacks declaration paragraph 15, 52 TTABVUE 8-9.

We find the parties' channels of trade and classes of consumers overlap.

The third *DuPont* factor weighs in favor of likelihood of confusion.

3. Conditions of sale

The fourth *DuPont* factor concerns "[t]he conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing." *DuPont*, 476 F.2d at 1361. Purchaser sophistication or degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1376 (Fed. Cir. 2005). We must make our determination based on the least sophisticated consumer. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 1325 (Fed. Cir. 2014).

Opposer's witness Mr. Sacks testified that "Beverages, clothing, apparel, and accessories bearing Monster's MONSTER Marks are relatively inexpensive. A 24-

pack (16 oz) of Monster’s energy drinks typically retails for approximately \$34.” Sacks declaration, paragraph 49, 52 TTABVUE 33-34. Mr. Sacks also states that “consumers do not usually spend a lot of time on their purchase of clothing, beverageware, and accessories.” *Id.*

In its interrogatory response Applicant states that “Applicant’s consumers are average consumers, from small children to adults starting with below average to a higher degree level of sophistication or degree of care.” Opposer’s notice of reliance, interrogatory response no. 25, 51 TTABVUE 19. Applicant’s retail prices for a six pack of straws was \$1.99, a 20-count pack sold at Walmart was \$3.95, and a 35 to 50 pack was \$6.75, although prices since have risen. Opposer’s notice of reliance, Buketov 30(b)(6) discovery deposition, 51 TTABVUE 63-64.

Neither Applicant nor Opposer’s identifications are limited to any price point, which means the identified goods may include those at lower cost. *In re FabFitFun, Inc.*, 2018 TTAB LEXIS 297, at *7-8 (TTAB 2018). Based on the testimony, the nature of the goods—Opposer’s beverages and Applicant’s straws—are that they are lower cost consumer goods.

While purchasers of such goods would be likely to exercise a lesser degree of care in purchasing such goods and are subject to more casual purchase, *Specialty Brands, Inc. v. Coffee Bean Distribs.*, 748 F.2d 669, 672 (Fed. Cir. 1984), we have no particular testimony relating to purchasing conditions.

The *DuPont* factor regarding the conditions of purchase is neutral.

4. Strength

We consider the fifth and sixth *DuPont* factors in order to evaluate the scope of protection to which Opposer is entitled. *DuPont*, 476 F.2d at 1361. *See Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355,1362 (Fed. Cir. 2023) (“Two of the *DuPont* factors (the fifth and sixth) consider strength.”).

We consider both the inherent strength, based on the nature of the mark itself, and, if there is evidence in the record of marketplace recognition of the mark, its commercial strength. *See Spireon*, 71 F.4th at 1362; *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength ... and its marketplace strength”).

The fifth *DuPont* factor enables Opposer to prove that its pleaded mark is entitled to an expanded scope of protection by adducing evidence of “[t]he fame of the prior mark (sales, advertising, length of use);” the sixth *DuPont* factor allows Applicant to contract that scope of protection by adducing evidence of “[t]he number and nature of similar marks in use on similar goods.”¹² *DuPont*, 476 F.2d at 1361.

a. Conceptual Strength

“Conceptual strength is a measure of a mark’s distinctiveness, and distinctiveness is ‘often classified in categories of generally increasing distinctiveness[:] ... (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful.’” *Id.* (internal citation omitted). *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).

¹² There is no evidence of use of MONSTER-formative marks in the marketplace in connection with beverages, so the sixth *DuPont* factor is neutral in our analysis of the likelihood of confusion as to marketplace weakness.

With respect to its conceptual strength, Opposer’s MONSTER mark is registered on the Principal Register without a claim of acquired distinctiveness and is treated as inherently distinctive. *See New Era Cap Co.*, 2020 TTAB LEXIS 199, at *29 (“Opposer’s mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act.”).

The term MONSTER is defined as “an animal of strange or terrifying shape” and “enormous or impressive especially in size, extent, or numbers.” MERRIAM-WEBSTER DICTIONARY (merriam-webster.com accessed April 8, 2025). *See Made in Nature, LLC v. Pharmavite LLC*, 2022 TTAB LEXIS 228, at *32 (TTAB 2022) (taking judicial notice of dictionary definitions in connection with conceptual strength).¹³ We find that MONSTER is arbitrary for beverages as it is a “known word used in an unexpected or uncommon way.” *See Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1340 (Fed. Cir. 2004) (defining an arbitrary mark as a “known word used in an unexpected or uncommon way” and observing that such marks are typically strong).

We find MONSTER is conceptually strong for energy drinks; fruit drinks; soft drinks; sports drinks.

¹³ The Board may take judicial notice of online dictionaries that exist in printed format or have regular fixed editions. *In re White Jasmine LLC*, 2013 TTAB LEXIS 9, at *20 n.23 (TTAB 2013) (citations omitted).

b. Commercial Strength

“Fame for purposes of likelihood of confusion is a matter of degree that ‘varies along a spectrum from very strong to very weak.’” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d at 1367 (citations omitted). We may measure commercial strength (or fame) indirectly, by volume of sales and advertising expenditures and factors such as length of use of the mark, widespread critical assessments, notice by independent sources of the goods or services identified by the mark, and general reputation of the goods or services. *Weider Publ’ns, LLC v. D & D Beauty Care Co.*, 2014 TTAB LEXIS 2, at *18-19 (TTAB 2014).

Opposer’s witness testified that it sells its “MONSTER branded” beverage line in over 412,000 retail stores in all 50 states in the United States and sells them at more than 25,000 bars and restaurants across the United States.¹⁴ Sacks declaration, paragraphs 15, 18, 52 TTABVUE 8-10. Opposer’s “MONSTER line” of drinks are by “unit volume and dollar value among the top two best-selling energy drinks in the United States” and Opposer sells more than 3 billion cans per year. *Id.* at 11. paragraphs 20, 21. Between 2011 to 2022, Opposer’s year end gross sales in the United States of its core MONSTER ENERGY drink line of beverages rose from \$1.43

¹⁴ Opposer witness identifies “Monster’s brands” to include “its famous MONSTER and MONSTER ENERGY brands used in connection with the MONSTER and MONSTER ENERGY line of beverages.” Sacks declaration paragraph 5, 52 TTABVUE 4. Opposer’s brief identifies the following marks as “Monster marks” and relies on these marks in support of fame: MONSTER, MONSTER ENERGY, M MONSTER ENERGY, M MONSTER ENERGY (word and design mark), MONSTER REHAB, LOCA MOCA JAVA MONSTER, JAVA MONSTER, MUSCLE MONSTER, MONSTER ENERGY ULTRA BLUE, MONSTER ENERGY ULTRA RED and LO-CARB MONSTER ENERGY and referencing the notice of opposition, 1 TTABVUE 12, paragraph 2, and the Sacks declaration, paragraph 6, 52 TTABVUE 4-5.

billion to \$3.89 billion. *Id.* at 11-12, paragraph 22. Opposer has spent \$7 billion marketing and promoting its MONSTER brand in the United States from 2002 to 2022. *Id.* at 12-13, paragraph 25. Most of Opposer's advertising budget is spent on athlete endorsements, sponsoring athletic competitions, musicians, music festivals, other events; it receives "tremendous exposure" at sporting events, on television, and through press covering these events. *Id.* at 13, 53, 70, 72, 77, 81, 83, 84, 88, 91, 92, paragraphs 27, 86, 120, 123, 129, 138, 141, 142, 146, 150, 156, 157. Opposer also employs various social media platforms including Instagram, Twitter, Tik Tok YouTube and Facebook to reach consumers, has websites, and licenses its MONSTER marks on a wide range of other products, such as, for example, beverageware, bottle openers, clothing, hats, sports bags, umbrellas, and keychains. *Id.* at 20, 21, 32, 33, 114, 115, 116, paragraphs 31 and 32, 48, 196, 198, 199, 201, 202.

Opposer has not provided separate advertising and sales figures for the various MONSTER branded marks (identified in paragraph 6 of the Sacks declaration and page 9 of Opposer's brief) as used in connection with the various beverages in the beverage line but has discussed them together in his testimony.

Based on the evidence of record, we find that of the various marks identified as part of the MONSTER brand for beverages ("MONSTER Marks"), the mark MONSTER ENERGY mark has great commercial strength to the level of fame for energy drinks.¹⁵ As to the mark MONSTER by itself, because most of the public use

¹⁵ Most of the documentary evidence referenced by Mr. Sacks in his testimony is in connection with the MONSTER ENERGY mark and not to the other identified "Monster marks."

of the word MONSTER is in combination with ENERGY and other uses are with the M claw logo or other wording, and all of the testimony relating to the sales and advertising of these various marks is grouped together, we cannot find on this record that the single word MONSTER is famous for energy drinks or other beverages.

We find that Opposer's MONSTER mark (by itself, without other wording) is entitled to the normal scope of protection for an arbitrary mark.

5. Similarity or dissimilarity of the marks

Under the first *DuPont* factor, we consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imps.*, 396 F.3d at 1371 (quoting *DuPont*, 476 F.2d at 1361). Similarity in any one of these elements may be sufficient to find the marks confusingly similar. *In re Davia*, 2014 TTAB LEXIS 214, at *4 (TTAB 2014) (citations omitted).

The test, under the first *DuPont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d at 1368.

The similarity or dissimilarity of the marks is determined based on the marks in their entireties; the analysis cannot be predicated on dissecting the marks into their various components. *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). On the other hand, different features may be analyzed to determine whether the marks

are similar. *Id.* There is nothing improper in giving more or less weight to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Id.* The focus is on the recollection of the average purchaser, who normally retains a general, rather than specific, impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 2014 TTAB LEXIS 166, at *17 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 1975 TTAB LEXIS 236, at *6 (TTAB 1975).

The dominant portion of Applicant's mark is the lead element MONSTER as the disclaimed wording STRAW is descriptive, if not generic, of drinking straws and is subordinate in nature. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 947 (Fed. Cir. 2000) ("descriptive component of a mark may be given little weight in reaching a conclusion on likelihood of confusion") (quoting *In re Nat'l Data Corp.*, 753 F.2d at 1058); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407 (Fed. Cir. 1997) (dominant portion of THE DELTA CAFÉ and design mark is DELTA as the generic term CAFÉ has been disclaimed).

MONSTER is the only word in Opposer's mark and the first word in Applicant's mark. MONSTER, as the initial word in Applicant's mark, is most likely to be impressed on consumers and remembered. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018) ("The identity of the marks' initial two words is particularly significant because consumers typically notice those words first."); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 1988 TTAB LEXIS 60 at *8 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered").

While there is no rule that marks are automatically considered similar where one mark encompasses the entirety of another, the fact that Opposer's MONSTER mark is subsumed by Applicant's mark MONSTER STRAW increases the similarity between them. *See, e.g., In re Mighty Leaf Tea*, 601 F.3d 1342, 1347-48 (Fed. Cir. 2010) (applicant's mark ML is similar to registrant's mark ML MARK LEES); *DowntownDC Bus. Improvement Dist. v. Clarke*, 2024 TTAB LEXIS 412, at *67-68 (TTAB 2024) (DOWNTOWNDC DISTRICT OF FASHION similar to DISTRICT OF FASHION); *Hunter Indus., Inc. v. Toro Co.*, 2014 TTAB LEXIS 105, at *33 (TTAB 2014) (PRECISION mark confusingly similar to PRECISION DISTRIBUTION CONTROL mark) (citations omitted).

MONSTER in Applicant's mark is identical in appearance, sound, meaning and commercial impression to Opposer's MONSTER mark. Applicant has conceded that Opposer's marks are similar to Applicant's mark. Buketov 30(b)(6) discovery deposition, 51 TTABVUE 66. When we consider the marks in their entireties, we do not ignore the presence of the additional descriptive (if not generic) word STRAW in Applicant's mark which is of less significance in the mind of consumers. But we find that this difference is not sufficient to overcome the overall similarities of commercial impression resulting from the shared term MONSTER, particularly in view of the fallible memories of consumers, who retain general impressions of trademarks. *See In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014) (marks "must be considered . . . in light of the fallibility of memory" and "not on the basis of side-by-side

comparison”) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 685 (CCPA 1977)).

For the reasons discussed above, we find that in their entirety, the parties’ marks are highly similar in sound, appearance, connotation and commercial impression.

The first *DuPont* factor strongly weighs in favor of likelihood of confusion.

6. Variety of Goods

The ninth *DuPont* factor considers “[t]he variety of goods on which a mark is or is not used (house mark, ‘family’ mark, product mark).” *DuPont*, 476 F.2d at 1361.

We have already found that Opposer did not establish a family of marks, *supra*. However, this factor also considers the variety of goods on which a mark is used.

“If a party in the position of plaintiff uses its mark on a wide variety of goods, then purchasers are more likely to view a defendant’s related good under a similar mark as an extension of the plaintiff’s line.” *DeVivo v. Ortiz*, 2020 TTAB LEXIS 15, at *44 (TTAB 2020).

The evidence shows that Opposer uses its MONSTER formative marks on beverages and licenses its marks for use on a wide array of collateral goods such as clothing, bags, beverageware, diecast cars, keychains, and decals, and promotes its goods through the sponsorship of athletes and athletic competitions, also offering restaurant and bar services at these sponsored events. Based on the evidence, we find the ninth *DuPont* factor favors a finding of likelihood of confusion insofar as it relates

to the variety of goods upon which Opposer uses its marks, but not with respect to Opposer's attempt to show the existence of a family of marks.

The ninth *DuPont* factor weighs in favor of likelihood of confusion.

7. Other *DuPont* factors

Opposer argues that actual confusion and Applicant's intent in adopting the mark are neutral factors. 61 TTABVUE 48-49.

We agree and find on this record all other *DuPont* factors neutral.

8. Conclusion as to Likelihood of Confusion

We find that the marks are similar, the goods are related, the parties' trade channels and classes of consumers overlap, the variety of goods on which the mark is used all weigh in favor of confusion. Opposer's MONSTER mark is conceptually strong and MONSTER ENERGY is, in the context of our likelihood of confusion analysis, very commercially strong for energy drinks. The conditions of sale and remaining *DuPont* factors are neutral.

We find a likelihood of confusion with Applicant's MONSTER STRAW and Opposer's MONSTER mark (Reg. No. 6760278).

Decision:

The notice of opposition is sustained on the Section 2(d) claim.