

This Opinion is Not a  
Precedent of the TTAB

Hearing: September 16, 2022

Mailed: January 19, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Honest Tea, Inc.*  
*v.*  
*La Brisa Ice Cream Company*  
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Opposition No. 91252873  
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Heather J. Kliebenstein and Lindsay M.R. Jones of Merchant & Gould, P.C.  
for Honest Tea, Inc.

Rexford Brabson of T-Rex Law, P.C.  
for La Brisa Ice Cream Company.

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Before Wellington, Lynch and Heasley, Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Applicant La Brisa Ice Cream Company seeks registration of HONEST POP (with a disclaimer of POP), in standard characters, for “frozen confections, namely, frozen fruit confections and frozen plant-based confections, all excluding frozen yogurt” in International Class 30.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88140317, filed October 2, 2018 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on alleged first use anywhere on January 19, 2018 and first use in commerce on March 5, 2018.

Opposer opposes the registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles Opposer’s registered and previously-used marks, it is likely to cause confusion.<sup>2</sup> In its notice of opposition, Opposer Honest Tea, Inc. alleges prior use and registration of several marks containing the term HONEST for a range of food and beverage goods.<sup>3</sup> In total, Opposer pleads ownership of fourteen registered marks, including:<sup>4</sup>

<b>Mark</b>	<b>Reg. No.</b>	<b>Goods</b>
HONEST (in standard characters)	4076733	Class 30: Tea and tea-based beverages; herbal teas Class 32: Nonalcoholic beverages containing fruit juices
HONEST BEVERAGES (in standard characters)	3696281	Class 30: Tea-based beverages Class 32: Non-alcoholic, organic beverages containing fruit juices
HONEST KIDS (in standard characters)	3436920	Class 32: non-alcoholic, organic beverages containing fruit juices

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<sup>2</sup> Opposer also pleaded that its marks are “famous marks within the meaning of Section 43(c) of the Federal Trademark Act of 1946, and the use by Applicant of Applicant’s Alleged Mark for Applicant’s Goods is likely to cause dilution of the distinctive quality of Opposer’s HONEST, HONEST TEA and HONEST KIDS marks under Section 43(c).” 1 TTABVUE 16-17 (N. of Opp. ¶ 16). However, Opposer did not pursue a dilution claim at trial and acknowledged in its reply trial brief that it “is not arguing dilution.” 45 TTABVUE 22. We therefore consider any dilution claim to be waived.

Citations to the record refer to TTABVUE, the Board’s online docketing system. Specifically, the number preceding “TTABVUE” corresponds to the docket entry number(s), and any number(s) following “TTABVUE” refer to the page number(s) of the docket entry where the cited materials appear.

<sup>3</sup> 1 TTABVUE (N. of Opp.).

<sup>4</sup> 1 TTABVUE 11-15 (N. of Opp. ¶¶ 3-5). Copies of the pleaded registrations were properly introduced into the record. 21 TTABVUE (Opp. NOR Exhib. A).

<b>Mark</b>	<b>Reg. No.</b>	<b>Goods</b>
HONEST SNACKS (in standard characters)	5868617	Class 29: Fruit-based snack food; vegetable-based snack food; snack mix consisting primarily of processed nuts, seeds, dried fruit
<b>Honest</b> tea	5360238	Class 30: Tea-based beverages
<b>Honest</b>	5956698	Class 30: Coffee based beverages Class 32: Non-alcoholic beverages flavored with coffees

Opposer refers to its marks as the “HONEST Marks” and specifically relies upon prior “common law rights” in these marks for goods that it characterizes as “highly similar and/or closely related” to Applicant’s goods.<sup>5</sup>

The case is fully briefed.<sup>6</sup> An oral hearing was held on September 16, 2022. We sustain the opposition.

### **I. Record**

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant’s involved application.

In addition, Opposer introduced:

- Notice of Reliance (“Opp. NOR”) and accompanying Exhibits A-N [21-29 TTABVUE, including materials designated “Confidential”];
- Declaration of Alexis Green (“Green Decl.”) and accompanying Exhibits 1-14

<sup>5</sup> *Id.* at 15-16 (N. of Opp. ¶¶ 7-8, 12).

<sup>6</sup> The parties designated portions of their briefs as “Confidential Attorneys Eyes Only (Trade Secret Commercially Sensitive)” under the Board’s Standard Protective Order. Opposer’s redacted main brief appears at 34 TTABVUE and its redacted rebuttal brief appears at 39 TTABVUE. Applicant’s redacted brief appears at 36 TTABVUE.

[30-31 TTABVUE, including a copy designated “Confidential”];

- Opposer’s Rebuttal Notice of Reliance (“Opp. Reb. NOR”) and accompanying Exhibits A-B [36 TTABVUE];
- Opposer’s Declaration of Audrey Legault (“Legault Decl.”) and accompanying Exhibit A [36 TTABVUE];
- Opposer’s Declaration of Sabrina Tandon (“Tandon Decl.”) and accompanying Exhibits AZ [36 TTABVUE]; and
- Opposer’s Declaration of Porscha Imperial (“Imperial Decl.”) [36 TTABVUE].

Applicant’s introduced:

- Notice of Reliance (“App. Not. of Rel.”) and accompanying Exhibits A-K [32 TTABVUE]; and
- Declaration of Leonel Flores (“Flores Decl.”) and accompanying Exhibits A-B [34 TTABVUE].

## **II. Opposer’s Entitlement to a Statutory Cause of Action**

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at \*3 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (2021) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A party in the position of plaintiff may oppose registration of a mark when doing so is within the zone of interests protected by the statute and it has a reasonable belief in damage that would be proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \* 6-7 (Fed. Cir. 2020), *cert. denied*, 141 S.Ct. 2671 (2021) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which

satisfies the zone-of-interests requirement, and a reasonable belief in damage by the registration of a mark, which demonstrates damage proximately caused by registration of the mark).

Here, Opposer's pleaded registrations for marks containing the term HONEST, which have been properly introduced, establish that it is entitled to oppose registration of Applicant's HONEST POP mark on the ground of likelihood of confusion. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (registration establishes "standing"); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (testimony that opposer uses its mark "is sufficient to support opposer's allegations of a reasonable belief that it would be damaged ..." where opposer alleged likelihood of confusion).

### **III. Priority**

#### **A. Opposer's Registrations**

Because Applicant has not counterclaimed to cancel any of Opposer's pleaded registrations, priority is not at issue with respect to these registered marks vis-à-vis Applicant's mark and goods. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

#### **B. Opposer's Common Law Rights in the Mark "Freezable Juice Slushies"**

**Honest** for

In addition to its registrations, Opposer pleaded common law rights "to the HONEST mark," including its sale "since 2017" of "slushy products both online and

in stores that are enjoyed frozen.”<sup>7</sup> Applicant contests these rights, arguing that Opposer “has not proven that its alleged use of its marks for ‘slushy goods’ has been used since 2017 and has not been abandoned.”<sup>8</sup>

As the alleged prior user and plaintiff in this proceeding, Opposer bears the burden of proving its claim of acquisition of proprietary rights in its pleaded mark prior to Applicant’s rights. *Hydro-Dynamics, Inc. v. George Putnam & Co., Inc.*, 811 F.2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987); *see also Embarcadero Techs., Inc. v. RStudio, Inc.*, 105 USPQ2d 1825, 1834 (TTAB 2013). (“[O]pposer must prove by a preponderance of the evidence that its common law rights were acquired before any date upon which applicant may rely.”). “As a general matter, priority in a Trademark Act § 2(d) case goes to the party which made first use of its mark on the relevant goods [or services].” *Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 USPQ2d 1134, 1139 (TTAB 2013).

Applicant, for priority purposes, is entitled to rely upon on its constructive use date of October 2, 2018, the filing date of the involved application. *See* Trademark Act Section 7(c); 15 U.S.C. § 1057(c); *Larami Corp. v. Talk to Me Programs, Inc.*, 36 USPQ2d 1840, 1844 (TTAB 1995); *Zirco Corp. v. Am. Tel. & Tel. Co.*, 21 USPQ2d 1542, 1544 (TTAB 1991). *See Syngenta Crop Prot.*, 90 USPQ2d at 1119 (“applicant may rely without further proof upon the filing date of its application as a ‘constructive use’ date for purposes of priority.”). Although Applicant refers to allegations of dates

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<sup>7</sup> 39 TTABVUE 31.

<sup>8</sup> 42 TTABUVE 10.

of first use anywhere and in commerce it made in its application, Applicant cannot rely upon these allegations for priority purposes without evidence supporting those allegations. Trademark Rule 2.122(b)(2); *see, e.g., Life Zone Inc. v. Middleman Grp., Inc.*, 87 USPQ2d 1953, 1960 (TTAB 2008) (alleged date of use in application not evidence); *Baseball Am., Inc. v. Powerplay Sports, Ltd.*, 71 USPQ2d 1844, 1847 n.10 (TTAB 2004) (dates of use and specimens not evidence); *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464, 1467 (TTAB 1993) (without proof of use, application filing date, not dates of use alleged in the application, is the earliest use date on which the applicant may rely). Here, Applicant's principal, Leonel Flores, testified and corroborated Applicant's alleged first use date in commerce for its HONEST POP mark on March 5, 2018.<sup>9</sup>

To support its claim of prior use of the mark HONEST, Opposer submitted the testimony of its Alexis Green, Opposer's Senior Brand Manager, who averred:<sup>10</sup>

**Honest began selling HONEST KIDS brand slushy products in 2017.** These products are enjoyed frozen as a substitute for sugary confections. Examples of these "slushy" products are depicted below:

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<sup>9</sup> 25 TTABVUE 264 (Flores Dep. 56:5-15).

<sup>10</sup> 30 TTABVUE 7 (Green Decl. ¶ 17, illustration of products is attached as Green Exhib. 4).



We take judicial notice that a “slushy” is defined as “a drink made of flavored ice crystals.”<sup>11</sup>

Ms. Green also testified to Opposer’s “2016 brand study document titled ‘Honest Tea Brand in a Box.’”<sup>12</sup> Although the 2016 brand study document has been designated “Confidential—Attorney’s Eyes Only,” we note—without divulging any truly confidential information—that it includes information regarding “Slushy graphics” under the subheading of “2017 Key Priorities & Initiatives,” and lists “kids slushy” directly under the subheading “Product Portfolio.”<sup>13</sup> An additional exhibit, also designated as “confidential” by Opposer, described by Ms. Green as a “study” regarding Opposer’s freezable juice slushies products and “dated February 2018,”

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<sup>11</sup> Definition of term “Slushy,” taken from MERRIAM-WEBSTER.COM DICTIONARY, Merriam-Webster, <https://www.merriam-webster.com/dictionary/slushy>. Accessed 20 Dec. 2022. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

<sup>12</sup> 30 TTABVUE at 4 (Green Decl. ¶ 10).

<sup>13</sup> 31 TTABVUE 68, 88.



further substantiates Opposer's offering of freezable juice slushies in 2017.<sup>14</sup> Again, without divulging truly confidential information, we note that this early 2018 study discusses "The Slushy Opportunity" and relies upon "2017 key learnings."<sup>15</sup>

Although the aforementioned documents are not direct evidence of sales involving Opposer's use of the mark HONEST or HONEST KIDS on freezable juice slushies, they help corroborate Ms. Green's statement regarding use of the mark in 2017, or at least prior to Applicant's first use of its mark in March of 2018. *See Exec. Coach Builders, Inc. v. SPV Coach Co., Inc.*, 123 USPQ2d 1175, 1184 (TTAB 2017) (TTAB 2017) ("Oral testimony is strengthened by corroborative documentary evidence"). Testimony, even of a single witness and if "sufficiently probative," may be sufficient to prove priority. *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1108-09 (TTAB 2007). There is nothing in the record or any reason to give us cause to question the reliability or accuracy of Ms. Green's testimony and the accompanying documentary evidence.

Applicant argues that Ms. Green's testimony regarding Opposer's use of its mark on juice slushies in 2017 "constitutes hearsay," without elaborating further or formally objecting to her testimony.<sup>16</sup> Applicant did not elect to cross-examine Ms. Green. In any event, and to the extent that Applicant believes that Ms. Green's

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<sup>14</sup> 31 TTABVUE 7 (Green Decl. ("confidential" version) ¶ 17, describing Green Exhib. 7).

<sup>15</sup> *Id.* at 167. We note this study also provides a "Value Chain Review" (*id.* at 179) with a review of sales figures for "slushy pouch" products; however, we are unable to determine the timing for such sales.

<sup>16</sup> 42 TTABVUE 10.

testimony is not based on personal knowledge, she testified that her responsibilities as Opposer's Senior Brand Manager include "overseeing the marketing, promotion, and sale of the company's HONEST brand products in the United States."<sup>17</sup> She further averred that, although she began working for Opposer in 2020, she "solely worked with the HONEST line of products since that time" and is "very familiar with the business' HONEST marks and products, including the history and development of the various products offered under the HONEST marks and those intended to be offered in the future, how they are advertised and marketed, the channels of trade through which they travel, and the customers who purchase them, among other details."<sup>18</sup>

Based on Ms. Green's responsibilities within Opposer's organization, including her being "very familiar" with Opposer's historical use of its HONEST marks, and this testimony having not been challenged through cross-examination or with evidence that rebuts or casts doubt on her credibility, we credit her testimony. *See Nat'l Pork Bd. and Nat'l Pork Producers Council v. Supreme Lobster and Seafood Co.*, 96 USPQ2d 1479, 1483 n.6 (TTAB 2010) (finding employee was sufficiently competent and trustworthy to testify on the issues before tenure despite not having first-hand knowledge of matters because employee learned the history by reviewing underlying documents and speaking to others with knowledge, and other party did not present evidence that testimony was untruthful or unreliable) (citing *Crash Dummy Movie*,

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<sup>17</sup> 30 TTABVUE 2 (Green Decl. ¶ 1).

<sup>18</sup> *Id.*

*LLC v. Mattel, Inc.*, 601 F.3d 1387, 94 USPQ2d 1315, 1317 (Fed. Cir. 2010)); *see also*, *City Nat'l Bank v. OPGI Mgmt. GP Inc. / Gestion OPGI Inc.*, 106 USPQ2d 1668, 1673 (TTAB 2013) (Despite not finding such circumstances present, Board acknowledges that “testimony by a person [whose] job responsibilities require him to be familiar with the activities of the company that occurred prior to his employment may be sufficient to lay a foundation for his subsequent testimony.”)

Applicant also attacks Opposer’s prior use of its HONEST mark on juice slushies as occurring “seasonally.”<sup>19</sup> However, as Opposer points out, the meaning of “use in commerce,” as defined in the statute, varies depending on the market and may include seasonal goods.<sup>20</sup> It is common knowledge that slushy products are enjoyed primarily in warmer summer weather as a refreshing treat. Accordingly, even if Opposer’s sales of freezable juice slushies products were seasonal, that would not detract from rights it acquired from its prior use of HONEST.

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<sup>19</sup> 42 TTABVUE 10.

<sup>20</sup> 45 TTABVUE 12-13. Section 45 of the Act defines “use in commerce” as “bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark,” and provides that a mark “shall be deemed to be in use in commerce ... on goods when ... it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto ...” 15 U.S.C. § 1127. Opposer cites, *inter alia*, a House Judiciary Committee Report, which helps explain what may properly constitute use in commerce:

While use made merely to reserve a right in a mark will not meet the standards, the [House Judiciary] Committee recognizes that the “ordinary course of trade” varies from industry to industry. Thus, for example, it might be in the ordinary course of trade for an industry that sells expensive or **seasonal products to make infrequent sales**. ...

House Judiciary Committee Report on H.R. 5372, H.R. No. 100-1028, p. 15 (Oct. 3, 1988). (Emphasis added).

In sum, Opposer has demonstrated by a preponderance of the evidence that it was using its pleaded mark HONEST for freezable juice slushies as early as 2017, before Applicant's constructive use date of October 2, 2018 and before Applicant's first use date of March 5, 2018. More specifically, and as to the mark itself, we find Opposer's prior use includes the term HONEST, stylized with the leaf design at the end of the letter "T," as follows:<sup>21</sup>

**Honest**

Although the significantly smaller stylized wording KIDS SLUSHY appears directly below on the packaging (as depicted above), the term HONEST (stylized with the leaf design) is more prominent and constitutes a separable, standalone mark.

#### **IV. Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the

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<sup>21</sup> Although this is the same mark that is the subject of Opposer's pleaded Registration No. 5956698, that registration does not cover "slushy goods."

cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

Opposer bears the burden of proving a likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf*, 55 USPQ2d at 1848. We consider the likelihood of confusion factors about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

We focus our analysis on Opposer’s previously-used, common law **Honest** mark for freezable juice slushy products versus Applicant’s HONEST POP mark. If we find confusion likely between these marks, we need not consider the likelihood of confusion with Opposer’s other pleaded marks. On the other hand, if we find no likelihood of confusion between Opposer’s **Honest** mark and Applicant’s mark, we would not find confusion likely between Applicant’s mark and Opposer’s other pleaded marks. *In re Max Capital Grp.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

#### **A. Alleged Strength and Weakness of Opposer’s Mark**

Opposer argues that its HONEST-formative marks, including the **Honest** mark, are “strong and entitled to a broad scope of protection.”<sup>22</sup> Specifically, Opposer contends that the HONEST mark is “conceptually strong,” as well as “commercially strong, if not famous, in its category.”<sup>23</sup> As to its commercial strength, Opposer relies

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<sup>22</sup> 39 TTABVUE 33.

<sup>23</sup> *Id.* at 34-35.

on its use of the HONEST mark since 1998, and “the advertisement, promotion, sales, distribution, and unpaid attention” for its HONEST-branded beverage and food products.<sup>24</sup> Opposer also states that it has “enhanced the strength of its mark through a successful trademark enforcement program.”<sup>25</sup>

Applicant, on the other hand, argues that Opposer’s HONEST mark is both commercially and conceptually weak. In support, Applicant points to eighty-three third-party registrations for marks containing the word “honest” and covering food or beverage goods.<sup>26</sup> Applicant argues that, in view of these registrations, “[i]t is readily apparent ... that the word ‘honest’ is commonly-used and is therefore capable of only minimal source-identifying value.”<sup>27</sup> Applicant further posits that “[c]learly use of the word ‘honest’ is desired to show that the source’s goods are ‘clean’ and ‘pure’ – honest,” while pointing out that Opposer has acknowledged that the term “honest” may be understood as “free of fraud and deception” and that its defined meanings, include “good and truthful” and “not hiding the truth about someone or something” and “being

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<sup>24</sup> *Id.* at 34-39.

<sup>25</sup> *Id.* at

<sup>26</sup> 42 TTABVUE 11-24. Applicant introduced copies of the registrations under notice of reliance. 32 TTABVUE 7-181. Applicant also attempts to rely on five applications for marks containing the term “honest.” However, these applications are not probative in terms of weakness because they “are not evidence of anything except that they were filed.” *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 109 USPQ2d 1949, 1956 n.9 (TTAB 2014) *vacated and remanded on other grounds, Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827 (Fed. Cir. 2015).

<sup>27</sup> 42 TTABVUE 20.

just what is indicated” and “genuine or unadulterated” and “not false or misleading; genuine.”<sup>28</sup>

In determining the strength or weakness of a mark, we consider both its conceptual strength based on the nature of the mark itself and its commercial recognition in the marketplace. *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596 at \*10 (TTAB 2020); *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength . . . and its marketplace strength . . .”). “[T]he strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak.” *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003). *See also Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017).

In terms of whether Opposer’s mark is commercially strong or weak, the fifth *DuPont* factor enables Opposer to expand the scope of protection afforded its mark by adducing evidence of “[t]he fame of the prior mark (sales, advertising, length of use),” while the sixth *DuPont* factor allows Applicant to contract that scope of protection by adducing evidence of third-party use of similar marks on similar goods. *See Made in Nature v. Pharmavite*, 2022 USPQ2d 557, \*17 (TTAB 2022) (citing *DuPont*, 177 USPQ at 567).

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<sup>28</sup> *Id.* at 23, referring to Opposer’s statement in its brief (at 39 TTABVUE 34) and copies of definitions it submitted under notice of reliance (at 32 TTABVUE 305, 310, 316, and 334).

Commercial Strength or Weakness

In this case, there is insufficient evidence for us to conclude that Opposer's **Honest** mark, as used on juice slushies in particular, is either particularly commercially strong or weak. On the one side, Applicant relies exclusively on the third-party registrations it introduced to support its contention that the word "honest" is "commonly-used"; however, as it has been long held and often stated, third-party registrations are not evidence that the registered marks are actually in use or that consumers are aware of such marks. *See, e.g., Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office); *Productos Lacteos Tocumbo S.A. de C.V. v. Paleteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 (TTAB 2011). *See also In re Hub Distrib., Inc.*, 218 USPQ 284, 285 (TTAB 1983)). Thus, they are not probative of commercial strength. In any event, and as explained more fully below, many of these registrations are for dissimilar marks or unrelated goods and services.

Regarding Opposer's evidence of a strong commercial presence and success for its HONEST-formative marks, nearly all supporting materials have been designated as "confidential—for attorney's eyes only." Nevertheless, in general, we point out that nearly all, if not all, of the marketplace evidence submitted by Opposer involves beverages and food products other than juice slushies. Indeed, Opposer admittedly only began using its HONEST mark in connection with juice slushies in 2017. Thus, while Opposer's HONEST-formative marks may have enjoyed commercial success



and marketplace recognition in connection with other food and beverage items, there is insufficient evidence pertaining to Opposer's HONEST mark on juice slushies.

Conceptual Weakness in the Term HONEST

Based on the record and the plain meaning of the word “honest,” we find Opposer's mark, **Honest**, has some inherent weakness in connection with juice slushies. As Applicant argues, several relevant defined meanings for the word “honest” have been provided, including: “free from fraud or deception”<sup>29</sup> or “genuine or unadulterated: *honest commodities*”<sup>30</sup> or “not false or misleading ... without pretensions or artificial traits.”<sup>31</sup>

Opposer implicitly acknowledges that the aforementioned meanings of the word “honest” may suggest a certain quality of wholesomeness or healthful nature in its food and beverage products to consumers. Opposer argues in its brief that it “educates consumers that its products are for customers that prioritize health and wellness, seeking cleaner products with a healthy taste that reflect [Opposer's] mission to offer transparent products that are crafted with integrity.”<sup>32</sup> Indeed, Opposer's advertisements for its juice and other food products play on these meanings

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<sup>29</sup> 32 TTABVUE 305.

<sup>30</sup> *Id.* at 316.

<sup>31</sup> *Id.* at 322.

<sup>32</sup> 39 TTABVUE 34.

with advertising that touts organic ingredients and slogans such as “Make Your Lunch Honestly Delicious” or “Delicious, Organic, Honest.”<sup>33</sup>

In addition, although the third-party registrations submitted by Applicant are not evidence of use of those registered marks, they may be used in the manner of a dictionary to show that a mark or a portion of a mark is suggestive of goods. *See, e.g., Institut Nat. des Appellations D’Origine v. Vintners Int’l Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) (third-party registrations show the sense in which a word is used in ordinary parlance and that a particular term has descriptive significance as applied to certain goods or services); *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987) (“[T]hird party registrations are of use only if they tend to demonstrate that a mark or a portion thereof is suggestive or descriptive of certain goods and hence is entitled to a narrow scope of protection. Used in this limited manner, ‘third party registrations are similar to dictionaries showing how language is generally used.’”) (internal citation omitted.).

However, we hasten to add that, despite their number, the probative value of these third-party registrations for purposes of assessing the inherent strength of Opposer’s mark is diminished because they are not for the same or closely-related goods as Opposer’s juice slushies. *See Nat’l Cable Television Ass’n, Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991) (Discounting third-party use and registration evidence as “not only unpersuasive but essentially meaningless,”

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<sup>33</sup> 22 TTABVUE 9-12 (advertisement for juice pouch), and at 17-10 (advertisement for tea beverages).

where “[n]one of the third party marks and uses of ACE made of record are nearly as closely related to the activities of the parties as the virtually identical uses of the parties are to each other.”); *Key Chemicals, Inc. v. Kelite Chems. Corp.*, 464 F.2d 1040, 175 USPQ 99, 101 (CCPA 1972) (“Nor is our conclusion altered by the presence in the record of about 40 third-party registrations which embody the word “KEY”. The great majority of those registered marks are for goods unrelated to those in issue, and there is no evidence that they are in continued use. We, therefore, can give them but little weight in the circumstances present here”). At best, the third-party registrations demonstrate that the term HONEST generally suggests a natural, wholesome quality of ingredients in food or beverage goods.

In sum, we find Opposer’s mark, **Honest**, has some conceptual weakness to the extent that that the term “honest” may generally be understood as suggestive of a positive quality for Opposer’s goods. However, we do not find the mark to be commercially weak.

### **B. Similarity of the Marks**

We turn now to the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is

sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

Here, Applicant’s standard-character mark, HONEST POP, and Opposer’s previously-used mark, **Honest**, share the same dominant element—the word HONEST. The fact that the first word in Applicant’s mark is the same as the only literal term in Opposer’s mark results in the marks being verbalized and heard by consumers in a very similar manner. In terms of appearance, because Applicant’s seeks registration of its mark in standard characters, it is not limited to any particular “font, style, size, or color....” Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a). Thus, if registered, Applicant’s protection would extend to any stylized font or color, including the same or similar style previously used by Opposer. *In re Viterra, Inc.*, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012); *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1742-43 (TTAB 2016). “[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display.” *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) *quoted in In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017).

Although the shared term, HONEST, has some conceptual weakness, it is still the element of each mark that consumers will focus on for source-identification purposes. As the first word in Applicant’s mark, it is more likely to be noticed and remembered by consumers, so as to play a dominant role in the mark. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding “the identity of the marks’ two initial words is particularly significant because consumers typically

notice those words first”); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word).

Applicant’s addition of the highly descriptive and disclaimed term POP plays a significantly less meaningful role in consumers’ minds for purposes of distinguishing the marks. *See Detroit Athletic*, 128 USPQ2d 1050 (citing *In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); *Cunningham v. Laser Golf Corp.*, 55 USPQ2d 1846 (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat’l Data Corp.*, 224 USPQ 752); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”). Indeed, Applicant’s principal, Mr. Leonel Flores, refers to Applicant’s own goods generically as “pops.”<sup>34</sup> Thus, a consumer will perceive the term POP in the mark as merely informative of the good being sold, and not as indicating the maker or commercial source.

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<sup>34</sup> See, e.g., 29 TTABVUE 1510, 1524 (Exhib. I, Flores Dep. at 34:15-18), Flores testifies that Applicant’s business is generally “to provide and manufacture pops.” Flores also testified, *id.* at 48:7-8, when clarifying the type of frozen confections made by Applicant, that “[i]t’s just pops, what we do.”

Similarly, the leaf design incorporated into the cross-bar of the “t” in Opposer’s mark has little importance in terms of distinguishing the marks. It is not prominent, may go unnoticed by consumers, and would not be verbalized when consumers refer to Opposer’s goods in conversation. Rather the “verbal portion of the mark [HONEST] is the one most likely to indicate the origin of the goods to which it is affixed.” *Viterra*, 101 USPQ2d at 1908 (quoting *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)); *see also In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (“In the case of marks, such as Applicant’s, consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods.”).

The marks also share very similar connotations and commercial impressions based on the common term HONEST. Allowing for some suggestive connotation in this term in connection with food products, the marks convey the same meaning, namely, that Applicant’s and Opposer’s food items have a wholesome or natural ingredient quality.

In sum, because the marks HONEST POP and **Honest** are overall very similar in appearance, sound, meaning and commercial impression, this factor weighs strongly in favor of finding confusion likely.

**C. Relatedness of the Parties' Goods; Their Trade Channels and Classes of Consumers**

We now turn to the *DuPont* factor involving the “similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *DuPont*, 177 USPQ at 567; *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “[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., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (internal citations omitted). Concurrent with our relatedness of the parties’ goods determination, we also assess the *DuPont* factor involving “the similarity or dissimilarity of established, likely-to-continue trade channels,” *DuPont*, 177 USPQ at 567, and the classes of consumers to which the services are marketed. *Coach Servs.*, 101 USPQ2d at 1723 (considering together “the similarity or dissimilarity of the trade channels in which the parties’ goods are sold and the purchasers to whom the parties’ goods are marketed”).

Opposer argues that its fruit juice slushies are “nearly identical” to Applicant’s “frozen fruit confections” because both types of goods are “to be eaten frozen” and are “fruit based and made from fruit juice.”<sup>35</sup> Opposer further argues that the parties’

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<sup>35</sup> 39 TTABVUE 43.

respective trade channels overlap because we must assume that Applicant's frozen fruit-based confections are offered through all of normal trade channels for such goods and "[t]hese usual channels include small- and large-scale grocers, gas stations and convenience stores, cooperatives and natural foods stores, entertainment events, schools and higher education institutions, and online retailers – precisely those channels through which Honest's HONEST products are offered."<sup>36</sup>

Applicant, on the other hand, argues that its frozen fruit confections are not related to Opposer's goods, but in doing so only really addresses Opposer's beverage and snack items, without specifically arguing whether or not Opposer's fruit slushies are related. Applicant further does not address whether its frozen fruit confections move in the same trade channels as Opposer's fruit juice slushies.

Here, the record establishes that the parties' goods are very closely related and are offered in the same trade channels. Specifically, Applicant's goods are identified in the application, are "frozen fruit confections," sold "in the form of frozen fruit bars."<sup>37</sup> According to Applicant's principal, these fruit bars "could be [refreshing]" because "[o]n a hot day, it's something frozen."<sup>38</sup> The following is an example of Applicant's goods, sold individually and in a box of "4 pops" touted as "naturally refreshing" with "60 cal[ories]":

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<sup>36</sup> *Id.* at 51.

<sup>37</sup> 34 TTABVUE 15 (Flores Dec. ¶ 7).

<sup>38</sup> 29 TTABVUE (Exhib. I, Flores Dep. at 34:15-





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<sup>39</sup> 26 TTABVUE 53.

Opposer’s freezable juice slushies are sold in pouches and advertised in packaging of “6 pouches,” each having “30 calories” and with instructions to “Freeze at Home” or “Freeze Me!”:



According to its brand manager, Alexis Green, Opposer’s freezable juice slushies are “frequently purchased by consumers for the same general purposes as frozen confectionary goods, namely, for purchases of refreshment and a hydrating benefit.”<sup>41</sup>

In terms of the trade channels, the record also shows that both parties’ goods may be purchased some of the same types of retail establishments. In particular, Applicant’s goods are sold in “meat markets, gas stations, [and] small convenience

<sup>40</sup> 23 TTABVUE 102-103.

<sup>41</sup> 30 TTABVUE 9 (Green Dec. ¶ 22).

stores,” and may be an “impulse” purchase item found in “standalone freezers” at the front of the stores.<sup>42</sup> Applicant readily admits that its goods are placed near the “cash register of the store, because they’re considered impulse sales.”<sup>43</sup> Applicant’s goods are also currently being sold in schools in the Houston region.<sup>44</sup>

Opposer’s goods are sold through various types and sizes of retail establishments:<sup>45</sup>

[Opposer’s] HONEST brand goods are distributed by Honest and other third-party intermediaries and offered for sale to end-user consumers through online channels along a wide variety of retail trade channels, including, for example, small- and large-scale grocers such as Walmart, Albertsons, and H-E-B, gas stations and convenience stores, cooperatives and natural foods stores, entertainment events, such as sporting events and concerts, and at schools and higher education institutions.

Thus, the evidence shows that the parties’ goods are found in some of the same trade channels, including gas stations, convenience stores and schools. Indeed, Opposer presented testimony with photographs showing convenience stores offering frozen confections for sale in physical proximity to goods like those offered by Opposer.<sup>46</sup> Opposer’s goods, like Applicant’s, may also be found for sale in “small refrigerators located at the checkout counters.”<sup>47</sup>

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<sup>42</sup> 25 TTABVUE 244-245 (Flores Dep. 36:17-37:22).

<sup>43</sup> *Id.* at 268 (Flores Dep. 60:13-22).

<sup>44</sup> *Id.* at 245 (Flores Dep. 37:17-25).

<sup>45</sup> 30 TTABVUE 14 (Green Dec. ¶ 42).

<sup>46</sup> 36 TTABVUE 287-303 (Imperial Dec.).

<sup>47</sup> *Id.* at 96 (Legault Dec.).

In addition, as Opposer points out, Applicant's goods are not limited to any particular trade channels and we must assume therefore that its goods will travel through all of the normal channels of trade for frozen fruit confections and sold to all of the usual customers for these goods. *See Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1357 (Fed. Cir. 2000) ("When the registration does not contain limitations describing a particular channel of trade or class of customer, the goods or services are assumed to travel in all normal channels of trade."); *In re Embiid*, 2021 USPQ2d 577, at \*31 (TTAB 2021) (citations omitted). In this regard, Opposer presented witness testimony establishing that goods, such as Applicant's frozen fruit confections, may be found in "physical proximity" with Opposer's HONEST branded products, within "large grocery stores" as well as drug stores like CVS or Walgreens.<sup>48</sup>

In sum, it has been shown that the parties' goods are very closely related and may be offered for sale in the same types of retail establishments, as well as in schools. In addition, the record establishes that the parties' goods may be displayed in physical proximity to one another within the same store, including near the checkout counter. Accordingly, the factors involving the relatedness of the parties' goods, their trade channels, and classes of consumers all weigh in favor of finding confusion likely.

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<sup>48</sup> 36 TTABVUE 94-97 (Legault Dec., with accompanying exhibits).

#### **D. Purchasing Conditions—Impulse versus Sophisticated**

The fourth *DuPont* factor involves consideration of “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because the purchasers of these products are held to a lesser standard of purchasing care.

Applicant concedes that its frozen fruit confections are placed for sale near the checkout counters “because they’re considered impulse sales.”<sup>49</sup> Applicant’s Honest Pop frozen fruit confections sell for approximately \$ .99 per item and \$ 3.79 to \$ 4.29 for package of four.<sup>50</sup> Similarly, Opposer’s HONEST-branded goods may be found in stores “on end cap displays [at the end of an aisle] and at small refrigerators located at the checkout counters.”<sup>51</sup> Opposer also contends that its fruit juice slushies are relatively inexpensive and that its goods may be priced as low as \$ 1.59.<sup>52</sup>

These marketplace conditions, for both parties’ goods, are extremely conducive to consumers making their purchasing selections with a lesser degree of care and consideration than they would exercise with more expensive, less conveniently

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<sup>49</sup> 25 TTABVUE 268 (Flores Dep. 60:16-17).

<sup>50</sup> *Id.* at 264-265 (Flores Dep. 56:20-57:3).

<sup>51</sup> 36 TTABVUE 96 (Legault Dec. ¶ 9).

<sup>52</sup> 39 TTABVUE 54. Opposer cites to the Green Declaration (30 TTABVUE) in support of its estimated pricing; however, no such figures are provided in the declaration. However, based on its sales and pricing figures for its freezable fruit juice slushies being sold in multipacks of 6- or 18-pouch packages (31 TTABVUE 175, designated “confidential”), the suggested retail price of approximately \$ 1.50 per pouch is reasonable.

displayed goods. Indeed, because of their placement near the cashier, these are the type of goods that consumers may not plan to purchase but would do so impulsively while waiting in line to purchase other items or before leaving the store.

Accordingly, we find that this *DuPont* factor weighs in favor of a likelihood of confusion.

### **E. No Evidence of Actual Confusion**

The seventh and eighth *DuPont* factors involve, respectively, “[t]he nature and extent of any actual confusion” and “[t]he length of time during and the conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567.

Applicant argues that these factors weigh against finding confusion likely because “more than four (4) years as of the date of filing [its trial brief]” since it began using its mark concurrently with Opposer’s use of its Honest marks and without either party aware of any instances of actual confusion.<sup>53</sup> Opposer, on the other hand, contends that “there has been no real opportunity for confusion, making this factor neutral, at best.”<sup>54</sup> Opposer also points out that the geographic scope and total

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<sup>53</sup> 42 TTABVUE 35. Applicant cites to Opposer’s response to a request for admission wherein it admits that “it is not presently aware of any instances of actual confusion between Applicant’s use of Applicant’s Mark and Opposer’s use of Opposer’s Marks.” 32 TTABVUE 233.

<sup>54</sup> 45 TTABVUE 27.

amount of Applicant's sales of HONEST POP goods has been extremely limited in this time.<sup>55</sup>

Although there is no dispute regarding the absence of any known instances of actual confusion evidence, we agree with Opposer that the record reflects that Applicant's use of the HONEST POP mark has been limited geographically and its sales have not been substantial. On this record, we cannot determine whether there has been any meaningful opportunity for actual consumer confusion to occur and, thus, the absence of any known instances does not help show that confusion will not be likely. *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). Accordingly, we agree that the seventh and eighth *DuPont* factors are neutral.

## V. Conclusion

Regardless of some conceptual weakness in the shared literal term "honest," because the marks are similar, the goods are closely related, are offered in some of the same channels of trade, and are purchased with a lower degree of care, we find that Applicant's mark HONEST POP for frozen confections is likely to cause confusion with Opposer's previously-used **Honest** mark for freezable fruit juice slushy goods.

**Decision:** The opposition based on likelihood of confusion is sustained.

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<sup>55</sup> Opposer specifically asserts that "Applicant ignores its own deposition testimony admitting it has sold approximately \$5,000 of HONEST POP branded products since 2018, and only sold in the Texas and Louisiana area." *Id.* In support, Opposer cites to the record [at "Opp Not. of Rel. [21 TTABVUE 385]"]; however, this cited part of the record does not provide information regarding Applicant's sales or any other information to corroborate Opposer's statement regarding Applicant's sales.