THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing: September 7, 2022 Mailed: November 14, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Dutch Bros., LLC
v.
Denco Horeca Beheer B.V.

Opposition No. 91253828
Opposition No. 91264452
(Consolidated)

Sheila Fox Morrison, Steven E. Klein and Amanda Linn
of Davis Wright Tremaine LLP, for Dutch Bros., LLC.

Patrick C. Asplin, Andrew S. Baugher, and Ashley Hart of Flora Pettit,
for Denco Horeca Beheer B.V.

Before Zervas, Lykos, and Allard,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:

Applicant, Denco Horeca Beheer B.V., seeks registration on the Principal Register of two composite marks. The first mark, shown below,

("Class 32 Mark") is for "energy drinks containing caffeine; energy drinks not for medical purposes" in International Class 32 (Applicant's "Class 32 Application").[1]

Applicant's second application seeks registration of the below mark

("Class 33 Mark") for "alcoholic beverages, except beers, namely, vodka, dutch gin, gin and whisky," in International Class 33 (Applicant's "Class 33 Application").[2]

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[1] Application Serial No. 79268177 was filed on July 18, 2019, as a request for extension of protection of International Registration No. 1489002 under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141(a). The mark is described as follows: "The mark consists of the term 'DUTCH4LIFE' above a windmill with the term 'D4L' at the center of the blades of the mill. Below the windmill is the term 'D4L' and below that is the term 'DUTCH ENERGY DRINK'." Color is not claimed as a feature of the mark. Applicant disclaims the exclusive right to use the wording "DUTCH ENERGY DRINK".

[2] Application Serial No. 79269818 was filed on August 14, 2019, as a request for extension of protection of International Registration No. 1493052 under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141(a). The mark is described as follows: "The mark consists of the wording 'ANNO 2018', 'D4L' and 'DUTCHFOR LIFE', and the design of a windmill with the wording 'D4L' also appearing in the center of the blades." Color is not claimed as a feature of the mark. The English translation of "ANNO" in the mark is "YEAR". Applicant disclaims the exclusive right to use the wording "ANNO 2018".

Opposer, Dutch Bros., LLC, opposed registration of each of Applicant's marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). In each Notice of Opposition, Opposer claimed ownership of various registered marks, including:

- DUTCH BROS for, among other things, "coffee and coffee-based beverages," in International Class 30, and "energy drinks," in International Class 32;[3]
- DUTCH BROS. COFFEE for "coffee and coffee-based beverages," in International Class 30;[4]
- DUTCH COFFEE for "coffee based beverages," in International Class 30;[5]
- DUTCH CLASSICS for, inter alia, "coffee based beverages," in International Class 30;[6]

[3] Registration No. 4595257, issued on September 2, 2014. Sections 8 and 15 combined declaration acknowledged. The registration also identifies goods and services in International Classes 16, 21, 22, 25, and 43, which are not relevant here. The mark was registered on the Principal Register after a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), was made.

[4] Registration No. 2902919, issued on November 16, 2004; renewed. The term "COFFEE" has been disclaimed. The registration also covers services in Class 43 that are not relevant here. The mark is registered in typed drawing form. A mark depicted in a typed drawing is the legal equivalent of a standard character mark. *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1236 n.5 (TTAB 2015).

[5] Registration No. 4520066, issued on April 29, 2014. Sections 8 and 15 combined declaration acknowledged. The wording "COFFEE" has been disclaimed. The registration contains a distinctiveness limitation statement as to the element "DUTCH".

[6] Registration No. 4554256, issued on June 24, 2014. Sections 8 and 15 declarations acknowledged. The wording "CLASSICS" has been disclaimed. The mark was registered on the Principal Register after a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), was made.

- for, inter alia, "coffee and coffee-based beverages," in International Class 30;[7] and

- for, inter alia, "coffee and coffee-based beverages," in International Class 30.[8]

In each Notice of Opposition, Opposer alleges that Applicant's mark so resembles Opposer's individual DUTCH-formative marks, its individual marks comprising and incorporating a windmill design and/or silhouette, its DUTCH family of marks, and its windmill design family of marks, all for coffee, coffee-based beverages and/or energy drinks, so as to be likely to cause confusion, to cause mistake, or to deceive within the meaning of Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).[9]

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[7] Registration No. 5090191, issued on November 29, 2016. The mark is described as follows: "The mark consists of a stylized drawing of a windmill with four sails in silhouette." Color is not claimed as a feature of the mark. The registration also identifies goods and services in International Classes 16, 18, 21, 25, and 43 that are not relevant here.

[8] Registration No. 5077699, issued on November 8, 2016. The registration also identifies services in International Class 43, which are not relevant here. The mark is described as follows: "The color(s) blue and white is/are claimed as a feature of the mark. The mark consists of a stylized drawing of a blue and white windmill with four arms. The arms are blue and the attached sails are white patterned with blue checkerboards. The roof of the windmill is triangular shaped divided into three smaller triangle sections; the left section is blue, and the middle and the right sections are in white outlined by thin blue lines. The tower is also divided into three sections with the left section in blue, and the middle and the right sections in white outlined by thin blue lines. In the center bottom of the middle tower section is a blue rectangle representing an entrance and in the center of the right tower section is a small blue rectangle representing a window."

[9] Notice of Opposition, paras. 3-25 (1 TTABVUE 12-20) in Opposition No. 91253828 (the "'828 proceeding"); Notice of Opposition, paras. 3-27 (1 TTABVUE 9-17) in Opposition No. 91264452 (the "'452 proceeding").

In each of its Answers, Applicant admitted that Opposer is the owner of the various pleaded registered marks, but denied the remaining salient allegations.[10] Applicant did not assert any affirmative defenses or allege any counterclaims.

By Order dated November 18, 2020, the opposition proceedings were consolidated.[11] The parties have fully briefed[12] the matter and appeared for oral argument.

Opposer, as plaintiff in this proceeding, bears the burden of establishing its statutory entitlement to bring a cause of action and its Section 2(d) claims by a preponderance of the evidence. *See Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1107 (TTAB 2007). As discussed more fully below, we find that Opposer has met its burden of proof and therefore sustain the oppositions.

I. Evidentiary Objections

Both parties make a number of evidentiary objections, which we address in turn.

Citations to the record and briefs reference TTABVUE, the Board's online docket system. Before the TTABVUE designation is the docket entry number; after this designation are the page references or paragraph numbers, as applicable. Portions of the record have been designated confidential.

[10] Answer (6 TTABVUE) in the '828 proceeding; Answer (4 TTABVUE) in the '452 proceeding.

[11] 11 TTABVUE in the '828 proceeding; 7 TTABVUE in the '452 proceeding. The '828 proceeding is designated as the "parent" case, and all TTABVUE citations are to that opposition proceeding unless otherwise indicated.

[12] Opposer's main brief was submitted in both confidential and nonconfidential versions: the publicly available version is at 28 TTABVUE and the confidential version is at 27 TTABVUE.

A. Applicant's Objections

Applicant objects to Opposer's proffered evidence of "third-party references, social media rankings of 'Engagement Labs,' the purported value of UGC [user generated content] and how consumers perceive UGC, and the purported interplay between coffee and alcoholic beverages … [on the grounds it is] inadmissible hearsay, speculation, and opinion, and lacks sufficient personal knowledge and foundation."[13] Specifically, Applicant objects to the admission and consideration of portions of Exhibit 107 to the testimony of Opposer's Chief Operating Officer, Brian Maxwell, which consists of screen shots of certain social media posts (19 TTABVUE 89, 96, 99), and to select portions of the testimony of Opposer's Chief Marketing Officer, John Graham, and select exhibits thereto, such as social media posts and articles printed from the Internet, or portions thereof (21 TTABVUE 5-9, 12-13, 35, 49-51, 56, 111-289, 343-360).

Opposer argues that Applicant only points generally to seven pages of testimony and 200 pages of exhibits from the Graham Declaration, and three pages of exhibits from the Maxwell Declaration, without indicating what objection is being asserted against what testimony or exhibit.[14] Given that Applicant neither identifies the objections with specificity nor argues the validity thereof, its objections should be overruled.[15] We agree. Applicant's blanket and broad objections are not sufficient for

[13] Applicant's brief, pp. 13-14 (31 TTABVUE 19-20).

[14] Opposer's reply brief, p. APP-1 (33 TTABVUE 26).

[15] *Id*.

consideration. Recent precedent makes it clear that it is not enough to mention a possible objection in a cursory manner, leaving the Board to sort through the evidence and the arguments to make a determination. *See Vans, Inc. v. Branded, LLC,* 2022 TTAB LEXIS 294, *12 n.20 (TTAB 2022) (citing *Illyrian Import, Inc. v. ADOL Sh.p.k.*, 2022 TTAB LEXIS 91, at *11-12 (TTAB 2022) ("It is not enough that Applicant merely refers in a cursory manner to Opposer's claimed failure to comply with discovery requests and then leaves it to the Board to figure out which of the witness's documents should have been produced in response to specific document requests.") (citing *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076, 378 U.S. App. D.C. 317 (D.C. Cir. 2007) ("It is not enough to merely mention a possible argument in the most skeletal way, leaving the court to do counsel's work."). Accordingly, we overrule the objections and allow the evidence.

B. Opposer's Objections

Opposer objects[16] to evidence offered in Applicant's brief on the case, which evidence Opposer contends was not timely or properly submitted during Applicant's trial period.[17] Specifically, Opposer argues that Applicant cites in its brief several third-party applications and registrations,[18] but did not previously make the applications or registrations of record, such as under a notice of reliance. Thus,

[16] Opposer's reply brief, p. APP-1 (33 TTABVUE 26).

[17] The text in Applicant's brief to which Opposer objects appears in Applicant's brief on pages 3-4 (31 TTABVUE 9-10).

[18] It is not clear from Applicant's brief whether the marks are the subject of pending applications or registrations as some marks are described as "registered" but only serial numbers are provided.

Opposer requests that the following assertions in Applicant's brief be disregarded and/or stricken:

1. "'Windmill Vitamins' sells energy supplements under a registered mark for WINDMILL NATURAL VITAMINS (Serial No. 86740182) …."[19]

2. "MILLSTONE is a registered mark for whiskey (Serial No. 86639347), alcoholic beverages (Serial No. 86536812), and coffee (Serial No. 73596046)."[20]

3. "DUTCH COURAGE is a registered mark for dry gin (Serial No. 79120347)."[21]

4. "OLD DUTCH is a registered mark for beer (Serial No. 87055407)."[22]

5. "WINDMILL POINTE BREWING COMPANY is a registered mark for beer (Serial No. 86078101) and also a design mark containing 'windmill-type vanes' (Serial No. 860992500)."[23]

6. "The application for the mark PIET'S DUTCH TREATS was apparently withdrawn following a settlement reached with Opposer in this case. The mark continues to have an outward facing consumer presence, *see, e.g.*, https://www.facebook.corn/Pietstreats/ (last accessed April 13, 2022)."[24]

Applicant does not in its brief cite to the record to support its arguments as to the aforementioned applications or registrations.

It is well-settled that a party that wishes to make a third-party registration of record may do so by filing, during its testimony period, for example, a TESS printout from the Office's electronic database, together with a notice of reliance thereon specifying the registration and indicating generally its relevance and associating the

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[19] Applicant's brief, p. 3 (31 TTABVUE 9).

[20] *Id*. (emphasis in original).

[21] *Id*.

[22] *Id*.

[23] *Id*. at pp. 3-4 (31 TTABVUE 9-10).

[24] *Id*. at p. 3 n.1 (31 TTABVUE 9).

registration with one or more issues in the case. 37 C.F.R. § 2.122(e); 37 C.F.R. § 2.122(g). *See e.g., W. R. Grace & Co. v. Herbert J. Meyer Indus., Inc.*, 190 USPQ 308, 309 n.5 (TTAB 1976) (reference to third-party registrations in answer, without filing copies with a notice of reliance, was insufficient to make them of record). That was not done here. Consequently, the registrations referred to by Applicant in Nos. 1-5 above are not of record and are therefore not properly cited by Applicant in its brief.

It is true that the record contains a TESS printout for a "live" application to register PIET'S DUTCH TREATS and Design (Ser. No. 88575591), which is presumably the application referenced in No. 6 above,[25] but Opposer made of record the TSDR printout showing this same application has been abandoned after an inter partes, following withdrawal of the application.[26] However, the record does not contain any evidence to support Applicant's conclusion that the application's withdrawal "follow[s] settlement" and that it "continues to have an outward facing consumer presence".

Accordingly, we find that Applicant's assertions amount to mere attorney argument, and argument without factual support is rarely, if ever, found to be persuasive. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) ("Attorney argument is no substitute for evidence."). *See also In re U.S. Tsubaki*, 109 USPQ2d 2002, 2006 (TTAB 2014) (finding that there was no proof to

[25] Applicant's First Notice of Reliance (22 TTABVUE 170).

[26] Exhibit 183 to Opposer's Seventh Notice of Reliance (24 TTABVUE 15-18).

support the statements in the record by counsel). Consequently, we sustain Opposer's objections and strike the references in Applicant's brief as set out in Nos. 1-6 above.

II. Record

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

In addition, Opposer submitted the following testimony and notice of reliance evidence:

- Testimony Declaration of Brian Maxwell, Opposer's Chief Operating Officer, and exhibits thereto ("Maxwell Decl.");[27]
- Testimony Declaration of John Graham, Opposer's Chief Marketing Officer, and exhibits thereto ("Graham Decl.");[28]
- Opposer's First Notice of Reliance consisting of certain dictionary definitions;[29]
- Opposer's Second Notice of Reliance consisting of select answers by Applicant to Opposer's written discovery requests;[30]
- Opposer's Third Notice of Reliance on certain Trademark Document Retrieval System (TSDR) records for various third-party registrations;[31]

[27] The Declaration of Brian Maxwell was submitted in both redacted and unredacted versions: the publicly available version is at 19 TTABVUE and the confidential version is at 18 TTABVUE.

[28] The Declaration of John Graham was submitted in both redacted and unredacted versions: the publicly available version is at 21 TTABVUE and the confidential version is at 20 TTABVUE. Substitute copies of Exhibit Nos. 139, 142, and 144 to the Declaration of Graham were made of record by the Board's Order, dated April 14, 2022 (32 TTABVUE), upon Opposer's motion (29 TTABVUE), which was unopposed.

[29] 12 TTABVUE.

[30] 13 TTABVUE.

[31] 14 TTABVUE.

- Opposer's Fourth Notice of Reliance consisting of select TSDR records for select Opposer registrations;[32]

- Opposer's Fifth Notice of Reliance consisting of various website and social media screen captures;[33]

- Opposer's Sixth Notice of Reliance consisting of press articles and publications featuring Opposer;[34]

- Opposer's Seventh Notice of Reliance consisting of Internet evidence concerning certain Internet country code top-level domains, and TSDR records for the application to register the mark PIET'S DUTCH TREATS and Design (Serial No. 88575591), showing the application status as abandoned;[35] and

- Rebuttal Testimony Declaration of Gary E. Lazar, paralegal for counsel for Opposer, and exhibits thereto ("Lazar Decl.").[36]

Additionally, Applicant submitted evidence under its First Notice of Reliance consisting of:

- Applicant's application files for its involved marks DUTCH4LIFE D4L DUTCH ENERGY DRINK (Ser. No. 79268177) and ANNO 2018 D4L DUTCH4LIFE (Ser. No. 79269181);[37]

- Select responses by Opposer to Applicant's written discovery requests and select documents produced by Opposer during discovery;[38]

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[32] 17 TTABVUE.

[33] 15 TTABVUE.

[34] 16 TTABVUE.

[35] 24 TTABVUE.

[36] 23 TTABVUE.

[37] 22 TTABVUE 2. Although Applicant specifies that it is making both of its application files of record, printouts of the files are not included with the Notice of Reliance. As the files of the involved applications are automatically of record by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), it is not necessary to make the application files of record or even to list the involved applications in the Notice of Reliance.

[38] 22 TTABVUE 6-59. Responses to a request for production of documents introduced through a notice of reliance are admissible solely for purposes of showing that a party has stated that there are no responsive documents; however, the Trademark Rules expressly provide that a party may not introduce into the record documents received in response to request for

- Testimony Declaration of Dennis Drieenhuizen, Applicant's CEO, and accompanying exhibits ("Drieenhuizen Decl.");[39] and
- Testimony Declaration of Kelli C. Hynd, paralegal for counsel for Applicant, and accompanying exhibits ("Hynd Decl.").[40]

III. Background

A. Opposer's Business and Marks

Opposer was founded by brothers Dane and Travis Boersma in 1992 when they first started selling coffee and espresso drinks from a single pushcart in the small town of Grants Pass, Oregon.[41]

Opposer's operations have expanded beyond the original pushcart and at the time of the parties' briefing, Opposer operated 480 DUTCH BROS locations across eleven states offering coffee, coffee-based beverages, and energy drinks.[42] At the time of trial, Opposer was the largest privately held drive-through coffee company in the United

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production of documents by a notice of reliance alone. *See* Trademark Rule 2.120(k)(3)(ii), 37 C.F.R. § 2.120(k)(3)(ii); *see also City Nat'l Bank v. OPGI Mgmt. GP Inc./Gestion OPGI Inc.*, 106 USPQ2d 1668, 1674 n.10 (TTAB 2013) (responses to document production requests are admissible solely for purposes of showing that a party has stated that there are no responsive documents). Accordingly, because Opposer's responses to Applicant's document requests (22 TTABVUE 32-41) do not state Opposer has no responsive documents to any of the requests, but rather state objections and/or indicate its willingness to produce non-privileged responsive documents or representative samples thereof, we do not consider these responses and do not consider the document production of record at 22 TTABVUE 42-59.

[39] 22 TTABVUE 60-105. It is not proper to submit testimony evidence under a notice of reliance, although it is harmless error to do so. *Syngenta Crop Protection,* 90 USPQ2d 1112, 1115 (TTAB 2009).

[40] 22 TTABVUE 106-175. It is harmless error to submit testimony evidence under a notice of reliance. *Syngenta Crop Protection,* 90 USPQ2d at 1115.

[41] Maxwell Decl., para. 4 (19 TTABVUE 3).

[42] *Id*. at para. 8 (19 TTABVUE 4).

States.[43] Opposer offers coffee, coffee-based beverages, energy drinks and café services under a range of trademarks that include Opposer's core DUTCH BROS and DUTCH BROS COFFEE word marks and its "classic" and "modern" windmill design marks.[44]

B. Applicant's Business and Marks

Applicant is a limited liability company formed in the Netherlands.[45] Its CEO, Dennis Drieenhuizen, is a native of the Netherlands.[46] Mr. Drieenhuizen admittedly designed the Class 32 and 33 Marks to spark a strong national recognition with the Netherlands.[47] Applicant also acknowledges that its alcoholic beverages offered under the Class 33 Mark (which are currently only offered outside the United States) are distilled in the Netherlands and in a region known in particular for its historic windmills.[48]

As for its applications, as mentioned earlier in this opinion, both the Class 32 and Class 33 Applications are based solely on Section 66(a) of the Trademark Act, without any allegations of use in the United States. In answers to Opposer's discovery

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[43] *Id*. at para. 3 (19 TTABVUE 3). Opposer acknowledges in its brief that, after the close of Opposer's trial period, Opposer's ultimate parent, Dutch Bros, Inc., made an initial public offering of shares and, therefore, ownership of Opposer is no longer considered privately held. Opposer's brief, p. 1 n.1 (28 TTABVUE 8).

[44] *Id*.

[45] Answer, para. 1 in the '828 proceeding (6 TTABVUE 2); Answer, para. 1 in the '452 proceeding (4 TTABVUE 2).

[46] Drieenhuizen Decl., paras. 1, 3 (22 TTABVUE 60).

[47] *Id*. at para. 10 (22 TTABVUE 62).

[48] *Id*. at paras. 11, 15 (22 TTABVUE 62-63, 64).

requests, Applicant admits that it has not used either of its marks in connection with the goods identified therein, i.e., energy drinks or alcoholic beverages, in the United States.[49]

IV. Entitlement to a Statutory Cause of Action[50]

Entitlement to a statutory cause of action is a threshold issue that must be proven by the plaintiff in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (2021). To establish entitlement to a statutory cause of action under Section 13 of the Trademark Act, 15 U.S.C. § 1063, a plaintiff must demonstrate: (1) an interest falling within the zone of interests protected by the statute (i.e., has a "real interest" in the outcome of the proceeding); and (2) damage proximately caused by registration (i.e., a reasonable basis for believing that it would suffer damage if the mark is registered). *See Meenaxi Enter., Inc. v. Coca-Cola Co.*, 2022 USPQ2d 602, at *2 (Fed. Cir. 2022) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129, 132 (2014)); *Corcamore*, 2020 USPQ2d 11277, at *4. *See also Empresa Cubana Del Tabaco v. Gen.*

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[49] Applicant's Responses to Opposer's First Set of Requests for Admissions, Nos. 1-3, 18-20 (13 TTABVUE 21-22); Applicant's Response to Opposer's First Set of Interrogatories, Nos. 2, 11-14, 22, 24, 26, 27 (13 TTABVUE 42-49); Applicant's Responses to Opposer's Second Set of Requests for Admissions, Nos. 45-48, 51-52 (13 TTABVUE 73-74).

[50] Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of "standing." We now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable.

Cigar Co., 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *see also Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999) (defining a "real interest" as a "direct and personal stake" in the outcome of the proceeding).

Opposer properly made of record its numerous pleaded registrations of its various DUTCH-formative marks and its windmill design marks. These registrations give Opposer a real interest in this proceeding and a reasonable belief of damage proximately caused from registration of Applicant's marks. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (pleaded registrations "suffice to establish … direct commercial interest"; a belief in likely damage can be shown by establishing a direct commercial interest); *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *6 (TTAB 2020) (pleaded registrations establish statutory entitlement to bring opposition).[51]

V. Priority

Because Applicant has not counterclaimed to cancel Opposer's pleaded registrations, priority is not at issue as to the marks and goods and services identified in each of Opposer's pleaded registrations. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). Further, in its brief, Applicant

[51] In its Answers, Applicant conceded Opposer's ownership of the pleaded registrations. Answer, paras. 6-18 in the '828 proceeding (6 TTABVUE 2-4); Answer, paras. 7-20 in the '452 proceeding (4 TTABVUE 2-4). In its brief, Applicant does not dispute Opposer's entitlement to a statutory cause of action, apparently conceding the issue. *See In re Morinaga Nyugyo K. K.*, 120 USPQ2d 1738, 1740 (TTAB 2016).

"expressly concedes that Opposer has priority with respect to the goods and services identified in Opposer's registrations."[52]

VI. Likelihood of Confusion Claim

Our determination of the issue of likelihood of confusion is based on an analysis of all probative facts in evidence that are relevant to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See Cai*, 127 USPQ2d at 1800 (*DuPont* "articulated thirteen factors to consider when determining likelihood of confusion"). "'Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered,'" *Cai,* 127 USPQ2d at 1800 (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)), but all factors "'must be considered' when [they] are of record." *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019) (quoting *In re Dixie Rests, Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) (internal quotation omitted)).

In every likelihood of confusion analysis, two key factors are the similarity or dissimilarity of the marks and the goods or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."). The parties address these two key factors and others as well, and we address each in turn.

[52] Applicant's brief, p. 15 (31 TTABVUE 21).

A. Opposer's Alleged Families of Marks

We begin the likelihood of confusion analysis by determining whether Opposer's pleaded families of marks have been proven under the ninth *DuPont* factor because that will inform our later comparison of the marks and goods. *See, e.g., New Era*, 2020 USPQ2d 10596, at *6-7.

Specifically, Opposer alleges ownership of two families of marks: (1) a DUTCH-formative family of marks with DUTCH as the family feature based on Opposer's use of the term "DUTCH" in "advertising and sales,"[53] and (2) a windmill-design family of marks, which use a "windmill design and/or silhouette" as the family feature, similarly based upon Opposer's use of the design in "advertising and sales."[54] In each case, Opposer asserts that the common characteristic of the family was used "prior to any date upon which Applicant can rely."[55]

Turning first to the purported DUTCH family of marks, Opposer asserts that it is comprised of the following marks, each with DUTCH as the family feature: DUTCH BROS (Reg. No. 4595257); DUTCH BROS. COFFEE (Reg. No. 2902919);[56] DUTCH

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[53] Notice of Opposition, para. 21 (1 TTABVUE 18-19) in the parent proceeding; Notice of Opposition, para. 23 (1 TTABVUE 16) in the '452 proceeding.

[54] Notice of Opposition, para. 23 (1 TTABVUE 19) in the parent proceeding; Notice of Opposition, para. 25 (1 TTABVUE 16-17) in the '452 proceeding.

[55] Notice of Opposition, paras. 21, 23 (1 TTABVUE 18-19) in the parent proceeding; Notice of Opposition, paras. 23, 25 (1 TTABVUE 16-17) in the '452 proceeding.

[56] Opposer asserts that has used its DUTCH BROS and DUTCH BROS COFFEE word marks both with and without a period after "BROS". Maxwell Decl., para. 3 n.1 (19 TTABVUE 3); Graham Decl., para. 6 n.1 (21 TTABVUE 4). Opposer contends that the meaning and commercial impression of the marks has always been the same and they are used and referred to interchangeably. Opposer's brief, p. 6 n.4 (28 TTABVUE 13). Applicant does not dispute this, apparently conceding the issue. We find that the use (or not) of a period after BROS does not change the commercial impression of the mark. See e.g., *In re Promo Ink*, 78

CLASSICS (Reg. No. 4554256); DUTCH COFFEE (Reg. No. 4520066); DUTCH FREEZE (Reg. No. 4517044); and DUTCH MOCHA and DUTCH LATTE, neither of which is the subject of an application or registration.[57] All the foregoing marks are used in connection with at least coffee-based beverages.[58]

Applicant, on the other hand, argues that (1) Opposer's evidence does not support a finding of two families of marks characterized by DUTCH and a windmill design;[59] (2) a family of marks cannot, in any event, be acquired in the DUTCH element because it is merely descriptive of persons from the Netherlands;[60] (3) a family of marks cannot be acquired in a windmill design because windmills are closely associated with the Netherlands;[61] (4) third-party marks incorporating a DUTCH element and windmill design are commonly used with similar goods;[62] (5) in any event confusion is not likely as Applicant's marks are dissimilar in terms of sight, sound,

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USPQ2d 1301, 1305 (TTAB 2006) (finding the mark PARTY AT A DISCOUNT! to be merely descriptive, specifically noting that "[t]his punctuation mark does not significantly change the commercial impression of the mark. It would simply emphasize the descriptive nature of the mark to prospective purchasers . . .").

[57] Opposer's brief, pp. 6, 10 (28 TTABVUE 13, 17); Opposer's reply brief, p. 9 (33 TTABVUE 15).

[58] Opposer's brief, pp. 6, 10 (28 TTABVUE 13, 17); Opposer's reply brief, p. 9 (33 TTABVUE 15).

[59] Applicant's brief, pp. 2-4, 27-29 (31 TTABVUE 8-10, 33-35).

[60] *Id*. at pp. 2-4 (31 TTABVUE 8-10).

[61] *Id*. at pp. 2-4 (31 TTABVUE 8-10).

[62] *Id*. at p. 26 (31 TTABVUE 32).

meaning and make a different commercial impression when compared to Opposer's asserted marks;[63] and (6) the parties' goods are also dissimilar.[64]

Proof of a family of marks could be relevant in a likelihood of confusion dispute in at least one of two ways. First, it could affect the analysis of the similarity of goods. *DuPont*, 177 USPQ at 567 ("(9) The variety of goods on which a mark is or is not used (house mark, 'family' mark, product mark)".). That is, "[w]here a senior user employs a family of marks on a range of products, a junior user with a mark that has the family characteristic is less able to argue that the difference in the goods has significant weight, because consumers are accustomed to seeing the 'family' on a range of goods." *New Era*, 2020 USPQ2d 10596, *18. Second, in a case like the present where one of the families comprises a common prefix, a junior user may find it harder to argue that the difference in the "non-family" part of its mark weighs against confusion, because consumers are accustomed to seeing the family component together with another element coming from one source (i.e., the senior user). *Id.* The burden of proving a family of marks falls with Opposer, the party asserting the existence of the family. *See TPI Holdings Inc. v. Trailertrader.com LLC*, 126 USPQ2d 1409, 1419 (TTAB 2018).

The family of marks doctrine has been explained by our primary reviewing court as follows:

> A family of marks is a group of marks having a recognizable common characteristic, wherein the marks are composed and used in such a way that the public associates not only the individual marks, but the common

[63] *Id.* at pp. 20-24 (31 TTABVUE 26-30).

[64] *Id.* at pp. 17-19 (31 TTABVUE 23-25).

> characteristic of the family, with the trademark owner. Simply using a series of similar marks does not of itself establish the existence of a family. There must be a recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods.... Recognition of the family is achieved when the pattern of usage of the common element is sufficient to be indicative of the origin of the family. It is thus necessary to consider the use, advertisement, and distinctiveness of the marks, including assessment of the contribution of the common feature to the recognition of the marks as of common origin.

J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889, 1891-92 (Fed. Cir. 1991).

As the Board explained in *New Era*, in order to prove ownership of a family of marks, a party must establish:

> [F]irst, that prior to the entry into the field of the opponent's mark, the marks containing the claimed "family" feature or at least a substantial number of them, were used and promoted together by the proponent in such a manner as to create public recognition coupled with an association of common origin predicated on the "family" feature; and second, that the "family" feature is distinctive (i.e. not descriptive or highly suggestive or so commonly used in the trade that it cannot function as the distinguishing feature of any party's mark).

New Era, 2020 USPQ2d 10596, at * 21 (likelihood of confusion claim sustained as to identified goods notwithstanding that plaintiff did not demonstrate family of marks) (quoting *Marion Labs. Inc. v. Biochemical/Diagnostics Inc.*, 6 USPQ2d 1215, 1218-19 (TTAB 1988)). Notwithstanding, Opposer's proof of priority through its pleaded registrations properly made of record, an opposer relying on a family of marks is relying on common law rights in the alleged family. *New Era,* 2020 USPQ2d 10596, at * 6.

To support its position that Opposer owns a DUTCH family of marks, Opposer first points to its multiple registrations for DUTCH-formative marks, such as

DUTCH BROS, DUTCH BROS COFFEE, DUTCH CLASSICS, DUTCH COFFEE, DUTCH FREEZE and two common law marks DUTCH MOCHA and DUTCH LATTE, all for use with coffee-based beverages.[65] However, the case law is clear that multiple registrations for related marks is not sufficient in and of itself to establish a family of marks. *See e.g., J & J Snack,* 18 USPQ2d at 1891 ("Simply using a series of similar marks does not of itself establish the existence of a family. There must be a recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods.")*; Eveready Battery Co., Inc. v. Green Planet, Inc.,* 91 USPQ2d 1511 (TTAB 2009) ("The fact that opposer has used and registered several marks including SCHICK is not in itself sufficient to establish the existence of a family of marks."); *In re LC Trademarks, Inc.,* 121 USPQ2d 1197, 1204 (TTAB 2016) (Evidence of many registrations "alone do not demonstrate the extent to which customers have been exposed to the marks ....").

Additionally Opposer argues that the DUTCH family of marks has been used together on Opposer's beverage menus, point of sale displays and in advertising.[66] Opposer also argues that the term DUTCH is used in phrases as a core part of its branding, which phrases emphasize and reinforce the DUTCH element. For example, before its DUTCH BROS BLUE REBEL energy drink was introduced in 2012,

[65] Opposer's brief, p. 10 (28 TTABVUE 17).

[66] *Id*. (28 TTABVUE 17).

Opposer's beverage menus included third party-branded energy drinks under the heading "Not Coffee, But Still Dutch."[67]

In further support of this argument, Opposer's Chief Operating Officer, Brian Maxwell, testified to Opposer's use of DUTCH-formative marks on menu boards since Opposer's inception in 1992. Mr. Maxwell testified about a menu board shown in a photograph accompanying a 2007 article in *The Oregonian* about the opening of the 101st DUTCH BROS location in Redding, Oregon. The photo (reproduced below) shows a menu board positioned next to the order window.[68] Under the mark DUTCH CLASSICS, the menu board lists five other DUTCH-formative marks that are grouped together:[69]

[67] *Id.*

[68] Maxwell Decl., para. 18 and Exhibit 84 thereto (19 TTABVUE 6-7, 27).

[69] *Id.*

Mr. Maxwell also testified about a "similar" menu board "from that period."[70] This menu board arguably displays a family of marks with DUTCH as the family feature, and it promotes Opposer's non-coffee based beverages, including RED BULL energy drinks and the DUTCH²0 mark under the heading "Not Coffee, But Still Dutch" (shown below):[71]

[72]

[70] Maxwell Decl., para. 18 and Exhibit 85 (19 TTABVUE 6-7, 28).

[71] *Id*.

[72] Exhibit 85 to Maxwell Decl. (19 TTABVUE 28).

However, Mr. Maxwell does not offer any other details about the two menu boards discussed above, such as the number of locations that displayed these boards, the length of time they were in use, and if they are still in use.

Mr. Maxwell also testified about Opposer's use of other menu boards displayed more recently, i.e., in the last ten years,[73] which arguably form the basis of a DUTCH family of marks, albeit in a lesser fashion than the menu boards shown above, which were in use in 2007. For example, as shown below, DUTCH CLASSICS appears at the top of the menu. Under the section titled, "Private Reserve," the drinks DUTCH COFFEE, DUTCH COCOA and DUTCH TEA are displayed together, which visually suggest a family of marks. Below these drinks, and separate and apart from them, in the section titled "Wind Chills," across from "Real Fruit Smoothies," DUTCH FREEZE is displayed. However, unlike the previously discussed menu boards, the newer menu board shows fewer DUTCH-formative marks grouped together, and similarly shows other DUTCH-formative marks spaced apart from them and scattered about, which undercuts Opposer's arguments about the existence of a family of marks.

[73] Maxwell Decl., para. 27 and Exhibit 101 (19 TTABVUE 10, 53-57).

[74]

Here again, Mr. Maxwell does not offer any details as to the length of time that the above menu board has been in use, the number of locations that display this board, and if it is still in use.

However, additional evidence of record belies Opposer's arguments as to the existence of a family of marks, as the images of the menu boards show at best sporadic

[74] Exhibit 101 to Maxwell Declaration (19 TTABVUE 53).

and scattered use of the DUTCH element.[75] Mr. Maxwell testified about five other menu boards "at various DUTCH BROS retail locations in the last ten years,"[76] three of which are reproduced below:

[77]

[75] Exhibit 101 to Maxwell Decl. (19 TTABVUE 54).

[76] Maxwell Decl., para. 27 (19 TTABVUE 10).

[77] Exhibit 101 to Maxwell Decl. (19 TTABVUE 54).

[78]

[78] Exhibit 101 to Maxwell Decl. (19 TTABVUE 55).

[79]

These three menu boards undermine Opposer's arguments that it has established a family of marks with DUTCH as the family feature. The DUTCH-formative marks are not are not advertised or promoted together, but rather appear spaced apart from each other and intermingled with other marks and/or names of drinks. This type of

[79] Exhibit 101 to the Maxwell Decl. (19 TTABVUE 57).

promotion does not suffice to create an awareness or recognition by consumers that Opposer possesses a family of marks characterized by the DUTCH family feature.

In sum, the evidence of record is insufficient to establish a family of marks featuring the DUTCH element. Although the record reveals some conjoint use of various DUTCH-formative marks, the evidence falls short of showing that a family of marks has been consistently promoted together in such a manner to cause consumers to recognize the common feature. Consequently, we find on this record that Opposer has not established a family of marks having DUTCH as the family feature exists.

Opposer argues that its consumers recognize and use the DUTCH term in social media, which Opposer argues is evidence that purchasers recognize DUTCH as the family feature. For example, Opposer cites to evidence of customers referring to themselves as part of the "Dutch Bros family," spreading "Dutch Luv," and asking, "You want to go DUTCH?"[80] However, this record does not show that Opposer established a family of marks; therefore, on this record, we cannot find that customers recognize a family of marks. Consumers are likely using the DUTCH term because it is part of Opposer's core brand, not because it has been established as the family feature.

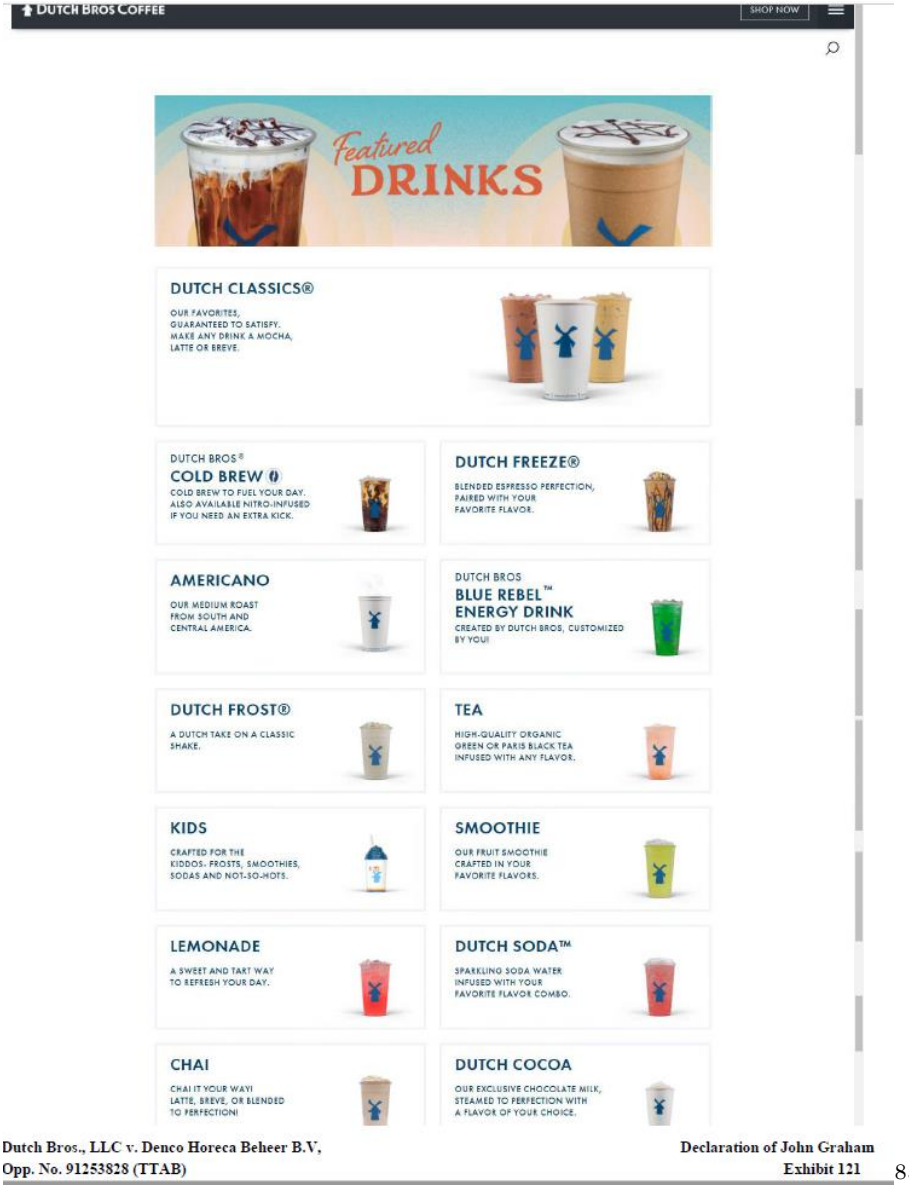
Opposer's claim of a windmill family of marks fares no better. Opposer alleges this family of marks shares the common characteristic of "the use of a windmill design and/or silhouette".[81] In its brief, Opposer argues it has a "family of variations

[80] Graham Decl., para. 19 (21 TTABVUE 8-9).

[81] Notice of Opposition, para. 23 (1 TTABVUE 19).

, . ."[82] Here again, the record is devoid of any evidence upon which we may find a family of marks having a windmill as the family feature. While some menu boards and packaging for the goods, such as cups, may display a windmill mark, Opposer's windmill marks are not displayed together in a way that consumers would understand that they form a family of marks. Opposer's cups, for example, each bear the **same** windmill design mark, rather than displaying different windmills in the proposed family. The following image is some of the better evidence showing multiple uses of a windmill mark, but, as shown, it is the **same** windmill mark displayed repeatedly:

[82] Opposer's main brief, p. 1 (28 TTABVUE 8).



[83]

The above menu does not establish a family of windmill marks, but rather shows the one single windmill design repeatedly displayed in connection with a variety of drinks.

[83] Exhibit 121 to the Graham Decl. (21 TTABVUE 18).

In sum, we find that the evidence of record does not support a finding of a family of marks having either DUTCH as the family feature or a windmill design as the family feature. Thus, the ninth *DuPont* factor is neutral.

B. Opposer's Potential Conjoint Use Claim

The conjoint use analysis "involves a twist on the comparison of marks factor in the likelihood of confusion analysis." *Schering-Plough HealthCare Prod. Inc. v. Huang*, 84 USPQ2d 1323, 1326 (TTAB 2007). It arises when an applicant's mark includes two or more elements, each of which is found in a mark of opposer's, albeit two marks that are entirely different from one another. *Id.* Two of opposer's marks may be considered together in analyzing likelihood of confusion with applicant's mark, if it is established that opposer's marks have been and are being used together on a single product or in marketing, and that the marks are used in such a manner and to such an extent in connection with the product that they have come to be associated together in the minds of the purchasing public as indications of origin for that product. *Id.* at 1327. If opposer's marks fail to meet the prerequisites for a conjoint use analysis, each of the marks must be otherwise individually examined in a likelihood of confusion analysis against applicant's mark. *Id.* at 1326.

Opposer indirectly refers to a claim under a conjoint use theory when it refers to the "combination" of a DUTCH element and a windmill element as part of its branding. For example, Opposer argues in its brief that "[it] has built the core of its branding on its longstanding and consistent use of a DUTCH BROS Word Mark **in combination with** its Windmill mark (when displayed together, the 'Dutch BROS

Brand') ...."[84] Opposer also argues that it has, for example, "long used the **combination** of its Windmill Mark with a DUTCH BROS Word Mark in connection with energy drinks[ ]"[85] and that this combination has appeared on, for example, Opposer's 12 ounce cans of energy drinks as DUTCH BROS.[86] Opposer also argues that it has long maintained its "DUTCH BROS Branded accounts and pages on all the major social media platforms"[87] and that Opposer "prominently [features] its DUTCH BROS Brand in combination with multiple iterations of the Windmill Mark and DUTCH Family of Marks."[88]

In its brief, Applicant argues that "Opposer does not specify **which** of its many marks is likely to be infringed, but instead conflates all of its marks in an attempt to create a 'super-mark' with confusingly similar elements ...."[89] Applicant also argues that "[Opposer] appears to be arguing that all of [Opposer's] marks, collectively, will be confused with either or both of Applicant's marks under a 'family of marks theory [ ]'" and that "Opposer has crafted a 'family of marks' theory in an attempt to construct a 'franken-mark' that **could** be confused with Applicant's [m]arks."[90] Applicant also argues that "[t]he record also does not establish that the public

[84] Opposer's brief, p. 7 (28 TTABVUE 14) (emphasis added).

[85] *Id*. at p. 8 (28 TTABVUE 15) (emphasis added).

[86] *Id*. at p. 9 (28 TTABVUE 16).

[87] *Id*. at p. 14 (28 TTABVUE 21).

[88] *Id*. at p. 15 (28 TTABVUE 22).

[89] Applicant's brief, pp. 14, 27 (31 TTABVUE 20, 33) (emphasis in original).

[90] *Id*. at p. 27 (31 TTABVUE 33) (emphasis in original).

associates 'Dutch" or a windmill exclusively with Opposer's goods and services. Therefore, the Board should reject Opposer's attempt to fuse its marks together to craft a stronger argument than is supported by the record."[91]

In its reply brief, Opposer clarifies its position:

> Dutch Bros has specifically identified two mark families: a DUTCH-formative family of marks with DUTCH as the family feature and a Windmill Design family of marks with Dutch Bros' Windmill as the family feature, and **has demonstrated how for each respective family, the marks in that family have been used together on menus, point of sale displays, advertising and promotional materials "in such a manner as to create public recognition coupled with an association of common origin predicated on the 'family' feature."** ***New Era Cap Co. v. Pro Era, LLC*****, --- USPQ2d ---, 2020 WL 2853282, at *7-8 (TTAB 2020).**[92]

By the foregoing passage, Opposer clarifies that its position is limited to one based on the combined use of the features of its two alleged families of marks. As Opposer did not establish the existence of its two families of marks, this argument necessarily fails. As Opposer did not argue that the combination of the DUTCH element and windmill element was grounded on any other theory, those arguments are deemed waived. *See Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 (TTAB 2013) (petitioner's pleaded descriptiveness and geographical descriptiveness claims deemed waived because they were not argued in main brief), *aff'd*, 565 Fed. App'x 900 (Fed. Cir. 2014) (*mem.*). Further, Opposer's citation to the *New Era* case, which involves a family of marks issue, not a conjoint use issue,

[91] *Id.* at p. 28 (31 TTABVUE 34).

[92] Opposer's reply brief, p. 9 (33 TTABVUE 15) (emphasis added).

reinforces our decision that Opposer intended to limit its arguments to a family of marks theory.

For the sake of completeness, however, we review Opposer's filings to determine whether Opposer alleged a conjoint use theory or if it was tried by consent, so that we may in turn determine if the record supports Opposer's position, which it argued at the hearing, that the conjoint use theory is properly before us.

1. Was the Conjoint Use Theory Pled by Opposer?

Any claim of conjoint use "must be pleaded clearly enough to provide fair notice of the claim to the defendant." *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1350 (TTAB 2017). Opposer did not explicitly plead a claim of "conjoint" use, so we review precedent and Opposer's notices of opposition to determine whether fair notice was given.

In *Bell's Brewery*, this Board's most recent precedent on the issue of conjoint use, opposer asserted two marks: BOTTLING INNOVATION SINCE 1985 and INSPIRED BREWING. *Id.* at 1342. The opposer argued that the applicant's mark INSPIRED BREWING was likely to cause confusion with the opposer's marks under a conjoint use analysis as the applicant's proposed mark INNOVATION BREWING combined elements of both of the opposer's conjoined trademarks INSPIRED BREWING and BOTTLING INNOVATION SINCE 1985. *Id.* at 1348.

The opposer's only argument that its two marks were used together and that confusion was likely under a conjoint use analysis appeared in one sentence in opposer's brief: "Applicant's proposed mark INNOVATION BREWING combines elements of both of [Opposer's] conjoined trademarks INSPIRED BREWING and

BOTTLING INNOVATION SINCE 1985." *Id.* (quotation omitted). The applicant objected, arguing that the opposer did not plead a claim of conjoint use and asked the board to strike the opposer's argument from its brief. *Id.* The opposer countered that it need not plead conjoint use or, in the alternative, that the applicant waived any objection to the claim because the applicant failed to object to the introduction of evidence on the issue of conjoint use in the opposer's testimony. *Id.*

After reviewing the pleadings, the *Bell's Brewery* panel found that the opposer in its notice of opposition first addressed its INSPIRED BREWING mark, then alleged priority and a likelihood of confusion with it, then separately discussed its BOTTLING INNOVATION SINCE 1985 mark, and subsequently alleged priority and a likelihood of confusion with it. *Id.* In the final paragraph, the opposer alleged that the applicant's involved application for its mark INNOVATION BREWING would "violate [opposer's] rights in its 'INSPIRED BREWING trademarks,' a term that is not defined in the notice." *Id.* The *Bell's Brewery* board wrote that "[n]owhere in the notice did Opposer allege that Applicant's mark would create a likelihood of confusion with Opposer's conjoint use of INSPIRED BREWING and BOTTLING INNOVATION SINCE 1985." *Id.* Consequently, the *Bell's Brewery* board found that the opposer did not plead a claim of conjoint use, but rather a likelihood of confusion with each of its two marks individually. *Id.* at 1348.

In arriving at its decision, the *Bell's Brewery* panel contrasted the leading cases in which a claim of conjoint use was found to be properly before the board. *Id.* For

example, in *Schering-Plough*, the Board refused registration of applicant's mark DR. AIR based on opposer's pleading alleging in part that:

> Since prior to the filing date of [the subject application], Opposer has **used and displayed its trademarks DR. SCHOLL'S and AIR-PILLO together** on packages and in advertising so that the purchasing public **associates the DR. SCHOLL'S and AIR-PILLO trademarks and recognizes that they jointly distinguish the products** on which they are used and identify Opposer as the source of the products.
>
> Applicant's DR. AIR mark, **which draws on two elements of Opposer's associated trademarks DR. SCHOLL'S and AIR-PILLO**, is likely to cause confusion or mistake among ordinary purchasers of the goods identified in the application concerning the origin, sponsorship, or association of Applicant's goods or the possibility that Applicant's goods are manufactured and marketed pursuant to authorization from Opposer.

Id. (emphasis added). As a result of the opposer's pleading quoted above, the Board found that the opposer's claim of conjoint use was proper. *Id.*

Continuing, the *Bell's Brewery* panel reviewed the pleadings in two other cases where a conjoint use claim was found to be properly before the Board. In the first, *Sperry Rand Corp. v. Remvac Sys. Corp.*, 172 USPQ 415 (TTAB 1971), refusing registration of REMVAC, the opposer's pleadings were found sufficient where "Opposer … pleaded prior use of REMINGTON and UNIVAC together upon and in connection with the promotion of data processing and transmission equipment and related goods of its manufacture." *Bell's Brewery*, 125 USPQ2d at 1348-49.

Second, in *Simoniz Co. v. Hysan Prods. Co.*, 142 USPQ 377, 377 (TTAB 1964), the opposer's pleading, alleging that the goods of the parties are closely related and that "applicant's PERMA LOK is confusingly similar to opposer's trademarks PERMACRYLIC and LOCK AND KEY because it is a combined portion of each of

opposer's marks[ ]" was found to be sufficient notice. *Bell's Brewery*, 125 USPQ2d at 1349.

We now turn to the notices of opposition in the present case to determine if a conjoint use claim is properly before us.

In its Notice of Opposition in the '828 proceeding, Opposer identifies each of its DUTCH-formative marks separately[93] and identifies each of its windmill design marks separately.[94] Opposer defines its many DUTCH-formative marks collectively as its "DUTCH BROS. Word Marks,"[95] and it defines its various windmill design marks collectively as its "DUTCH BROS. Design Marks."[96] Opposer then defines the term "DUTCH BROS. Marks" as a combination of its DUTCH BROS. Word Marks and its DUTCH BROS. Design Marks and then makes the following allegations:

> 5. [A]s a result of Opposer's longstanding use and promotion of the DUTCH BROS. Word Marks and the DUTCH BROS. Design Marks (collectively, the "**DUTCH BROS. Marks**") for Opposer's Goods, and related goods and services, the public has come to recognize goods and services bearing the foregoing marks as goods and services coming from a single source, namely, Opposer.[97]
>
> ....
>
> 19. Opposer has invested significant time, energy, and resources in the advertising, promotion, and distribution of Opposer's Goods under Opposer's **DUTCH BROS. Marks**. The success of Opposer's marketing and promotional efforts have not gone unnoticed, and Opposer benefits from the

[93] Notice of Opposition, paras. 6-13 (1 TTABVUE 13-15).

[94] *Id*. at paras. 14-18 (1 TTABVUE 15-17).

[95] *Id*. at para. 3 (1 TTABVUE 12).

[96] *Id*. at para. 4 (1 TTABVUE 12).

[97] *Id*. at para. 5 (1 TTABVUE 13) (emphasis added).

> publicity garnered from unsolicited media coverage of its goods and services.[98]
>
> 20. Applicant's Mark so resembles Opposer's **DUTCH BROS. Marks** and trade name that when used in association with Applicant's Goods, such use is likely to cause consumer confusion, or cause mistake, or deceive within the meaning of Section 2(d) of the Lanham Act ….[99]
> ….
>
> 25. Opposer will be damaged by the registration sought by Applicant for Applicant's Goods in International Class 32 insofar as Applicant will obtain statutory rights in Applicant's Mark in violation and derogation of Opposer's prior and superior rights in **Opposer's DUTCH BROS. Marks**, "DUTCH" family of marks, windmill design family of marks and trade name. Applicant is not entitled to the registration for Applicant's Goods in International Class 32 by virtue of Opposer's prior and continuous use of the DUTCH BROS. Marks, "DUTCH" family of marks, windmill design family of marks and trade name for Opposer's Goods.[100]

Nearly identical claims and assertions were made by Opposer in its Notice of Opposition in the '452 proceeding.

As an initial matter, we find the term "conjoint use" is not expressly used by Opposer in either of its Notices of Opposition or in its briefing. Additionally, we find that the above allegations do not suffice to put Applicant on notice of a conjoint use claim. It is true that the "DUTCH BROS. Mark" is defined as a combination of various of Opposer's mark; however, the allegations are too vague to put Applicant on notice of a conjoint use theory, and the structure and nature of the allegations are such that they could easily be interpreted as supporting Opposer's claim of likelihood of confusion as to its individually pleaded marks.

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[98] *Id*. at para. 19 (1 TTABVUE 17) (emphasis added).

[99] *Id*. at para. 20 (1 TTABVUE 18) (emphasis added).

[100] *Id*. at para. 25 (1 TTABVUE 20) (emphasis added).

2. Was the Conjoint Use Claim Tried by Implied Consent?

Fed. R. Civ. P. 15(b)(2), made applicable to Board proceedings by Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a), provides in part that when issues not raised by the pleadings are tried by express or implied consent of the parties, an amendment of the pleadings may be made to cause them to conform to the evidence. "Implied consent to the trial of an unpleaded issue can be found only where the non-offering party (1) raised no objection to the introduction of evidence on the issue, and (2) was fairly apprised that the evidence was being offered in support of the issue." TRADEMARK TRAIL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 507.03(b) (2022). *See also Morgan Creek Prods. Inc. v. Foria Int'l Inc.*, 91 USPQ2d 1134, 1138 (TTAB 2009); *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1720-1721 (TTAB 2008); *Boise Cascade Corp. v. Cascade Coach Co.*, 168 USPQ 795, 797 (TTAB 1970) ("Generally speaking, there is an implied consent to contest an issue if there is no objection to the introduction of evidence on the unpleaded issue, as long as the adverse party was fairly informed that the evidence went to the unpleaded issue."). "The question of whether an issue was tried by consent is basically one of fairness. The non-moving party must be aware that the issue is being tried, and therefore there should be no doubt on this matter." *Morgan Creek*, 91 USPQ2d at 1139. *See also* TBMP § 507.03(b).

Opposer's witness, Mr. Maxwell, testified, for example, that that Opposer built the core of its branding on DUTCH BROS and DUTCH BROS COFFEE word marks "in combination with" its windmill marks, and that "this combination" has been consistently used on building exteriors and signage, on menu boards and cups used and displayed at each location, and on Opposer's website and social media

accounts.[101] However, other testimony by Mr. Maxwell is inconsistent with a conjoint use claim, such as his testimony that Opposer sells its coffee drinks and energy drinks "under a range of trademarks" that include its DUTCH BROS and DUTCH BROS COFFEE word marks and its classic and modern windmill design marks.[102] Similarly, Mr. Graham's testimony is somewhat vague as to the exact combination of marks, as he testifies, for example, that Opposer's branding has been the "longstanding and consistent use of the DUTCH BROS [and DUTCH BROS COFFEE word marks] and in combination with **one or more** Windmill Marks [i.e., the "classic" windmill or "modern windmill" design mark]…."[103]

Similarly, Opposer responded to Applicant's interrogatories by stating that "Opposer **often uses** its DUTCH BROS. and DUTCH BROS. COFFEE word marks together with **one or more of its windmill design marks**, while Applicant's mark features the prominent use of a confusingly similar windmill design and the term DUTCH."[104]

The cited testimony and discovery responses are some evidence of a possible claim of conjoint use of a DUTCH-formative mark and a windmill design mark together, but this evidence is also relevant to Opposer's pleaded claim that confusion is likely as to each of its marks individually. Without more, Opposer evidence of a mark that

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[101] Maxwell Decl., para. 25 (19 TTABVUE 8-9).

[102] *Id*. at para. 3 (19 TTABVUE 3).

[103] Graham Decl., paras. 6, 7 (21 TTABVUE 4).

[104] Opposer's Response to Applicant's First Set of Interrogatories, Nos. 14, 17, 21 (22 TTABVUE 22, 25, 29) (emphasis added).

is a combination of the term DUTCH and one or more of its windmill design marks is too vague to support a conjoint use claim.

Thus, Opposer's evidence is insufficient to put Applicant on notice that Opposer was proffering it in support of a conjoint use claim. *Bell's Brewery*, 125 USPQ2d at 1349. *See, e.g., Micro Motion Inc. v. Danfoss A/S*, 49 USPQ2d 1628, 1629 (TTAB 1998) (applicant did not object to testimony but was not fairly apprised that evidence, which also related to existing claim, was being offered in support of unpleaded claim); *see also* TBMP § 507.03(b) ("Fairness dictates whether an issue has been tried by consent – there must be an absence of doubt that the [opposing] party is aware that the issue is being tried.").

3. In the Alternative, Did Opposer Prove the Extent of its Conjoint Use?

Even were we to find that any claim of conjoint use was tried by implied consent, we find that Opposer has not established through record evidence that use of its pleaded marks together has been effective to qualify them for conjoint analysis. The *Bell's Brewery* decision set out the two prerequisites for this showing as follows:

> In order that opposer's marks may be considered together, two elements must be satisfied before traditional likelihood of confusion analysis can proceed. First, it must be established that the marks have been and are being used together on a single product or in marketing. Further, it must be established that opposer's marks are used in such a fashion that it would be proper to combine them for purposes of comparison, that is, that they have been used and/or advertised conjointly in such a manner and to such an extent in connection with a single product that they have come to be associated together, in the mind of the purchasing public, as indications of origin for opposer's product.

Bell's Brewery, 125 USPQ2d at 1349 (citations omitted).

Opposer has not established the first element because it has not established that two of its marks are being used together. As Opposer alleges, it prominently uses various combinations of its marks:[105]

[106]

[107]

[108]

Additionally, Opposer has not established that its marks are used in such a fashion that it would be proper to combine them for purposes of comparison. Even considering the evidence where both marks are displayed, there is no reason to assume that purchasers would see them as anything other than two distinct marks, *see, e.g., Simoniz Co.*, 142 USPQ at 378 (declining to assume that a customer would automatically combine parts of two marks appearing together on a product label), or, in connection with the cup shown immediately above, if the windmill would function as an indicator of source or instead constitute decoration, given that it is relatively large in size and shown in a field of tulips. *Cf.*, *Sperry Rand,* 172 USPQ at 416 (Opposer has consistently displayed conjointly its marks and trade names REMINGTON, REMINGTON RAND and UNIVAC); *Schering-Plough*, 84 USPQ2d at

[105] Opposer's reply brief, p. 9 (33 TTABVUE 15).

[106] Exhibit 130 to the Graham Decl. (21 TTABVUE 65).

[107] *Id*. (21 TTABVUE 60).

[108] Opposer's Fourth Notice of Reliance, Exhibit 30 (17 TTABVUE 342-43).

1327 (testimony of record that Opposer never used its pleaded mark AIR-PILLO without its house mark DR. SCHOLL'S).

In sum, we find that Opposer has failed to plead or, in the alternative, to prove a conjoint use claim. Thus, we resume our likelihood of confusion analysis, assessing the similarity of Applicant's marks to Opposer's pleaded marks individually. We focus the likelihood of confusion analysis on Opposer's mark that can be considered closest to Applicant's mark and goods, namely, DUTCH BROS for, among other things, "coffee and coffee-based beverages," in International Class 30, and "energy drinks," in International Class 32.[109] *See, e.g.*, *In re Max Cap. Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010). If we find a likelihood of confusion as to that mark and those goods, we need not find it as to Opposer's other registered marks; conversely, if we do not find a likelihood of confusion, then we would not find it as to Opposer's other registered marks for the goods identified therein.

C. Likelihood of Confusion Analysis Focusing on Opposer's DUTCH BROS mark

We continue the likelihood of confusion analysis focusing on Opposer's registration for its DUTCH BROS mark.

1. The Relatedness of the Parties' Goods and their Channels of Trade (the Second and Third Factors)

The second *DuPont* factor "considers '[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,'" while the third

[109] Registration No. 4595257, issued September 2, 2014; Sections 8 and 15 combined declaration acknowledged.

DuPont factor considers "the similarity or dissimilarity of established, likely-to-continue trade channels." *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). Our analysis under these factors is based on the identifications of goods in Applicant's involved applications and Opposer's DUTCH BROS registration. *Detroit Athletic*, 128 USPQ2d at 1051; *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs., Inc.*, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.").

a. The Goods in Applicant's Class 32 Application Are Legally Identical to Opposer's Goods in Class 32 and the Channels of Trade and Class of Purchasers Are Presumed to Be the Same

Opposer's registration for its DUTCH BROS mark in standard character form identifies the following relevant goods: "coffee and coffee-based beverages" in Class 30, and "energy drinks" in Class 32.

Applicant's Class 32 Application identifies "energy drinks containing caffeine; energy drinks not for medical purposes". We find that "energy drinks" identified in the Opposer's registration is sufficiently broad to encompass "energy drinks containing caffeine" and "energy drinks not for medical purposes." Because the goods identified in Applicant's Class 32 Application are encompassed by the goods identified

in Opposer's registration, the parties' goods are legally identical. *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1412-15 (TTAB 2018) (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) ("Applicant's broadly worded identification of 'furniture' necessarily encompasses Registrant's narrowly identified 'residential and commercial furniture.'").

Because the identifications of goods in Applicant's Class 32 Application and Opposer's registration are legally identical and unrestricted as to trade channels, we must also presume that both Applicant's and Opposer's legally identical goods travel in the same channels of trade to the same class of purchasers. *Cai*, 127 USPQ2d at 1801; *In re Viterra Inc.,* 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014). These *DuPont* factors weigh in favor of finding a likelihood of confusion.

b. Applicant's Goods in its Class 33 Application are Related to Opposer's Goods in Class 30

It is well settled that it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of a likelihood of confusion analysis. That is, the issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012). The goods need only be sufficiently related that

consumers would be likely to assume, upon encountering the goods marketed under the marks at issue, that the goods originate from, are sponsored or authorized by, or are otherwise connected to the same source. *See, e.g.*, *Black & Decker Corp. v. Emerson Electric Co.*, 84 USPQ2d 1482, 1492 (TTAB 2007).

Turning to Applicant's Class 33 Application, it identifies the following goods: "alcoholic beverages, except beers, namely, vodka, dutch gin, gin and whisky." Opposer argues that coffee is related to the alcoholic beverages identified in Applicant's Class 33 Application, and to support its contention Opposer made of record the following evidence: 1) evidence of active, use-based third-party registrations of the same mark identifying both coffee and/or coffee-based beverages in Class 30 and distilled spirits in Class 33; 2) marketplace evidence showing that third parties offer coffee and alcoholic beverages, such as distilled spirits, under the same brand; 3) active, use-based third-party registrations for marks in connection with coffee-based or flavored liqueurs, alcoholic coffee-based beverages, and/or distilled spirits in Class 33; and 4) marketplace evidence showing that a number of third-parties sell coffee-flavored distilled spirits made in collaboration with, or made with coffee sourced from, a particular coffee brand.[110] We review this evidence in order.

First, Opposer made of record six third-party use-based registrations of the same mark identifying both coffee in Class 30 and distilled spirits in Class 33:

[110] Applicant's brief, p. 21, 29 (28 TTABVUE 36).

No.	Mark	Registrant	Reg. No.	Relevant Class 30 Goods	Relevant Class 33 Goods
1	THE CAJUN BUDDHA[111]	The Cajun Buddha	5023210	Coffee	Distilled spirits; liqueurs; liquor; wine
2	UBC[112]	Underground Brewing Company, LLC	5381909	Coffee	Distilled spirits; mead; wine; hard cider
3	GURKHATISE[113]	Gurkhatise Limited	5418550	Coffee	Alcoholic mixed beverages except beers
4	BLACK MOMMA[114]	Vanessa Braxton	6108002	Coffee	Alcoholic coffee-based beverages
5	BEAK & SKIFF[115]	Beak & Skiff Apple Farms, Inc.	6145893	Cold brew coffee	Distilled spirits; hard cider; apple wine
6	CENTRE RING[116]	Blind Renaissance Inc.	5246927	Roasted coffee beans	Distilled spirits; wine

Use-based, third-party registrations, although not evidence that the marks shown therein are in use or that the public is familiar with them, nonetheless are probative to the extent that they serve to suggest that the goods listed therein are of a kind that

[111] Exhibit 19 to Opposer's Third Notice of Reliance (14 TTABVUE 167-69).

[112] *Id*. (14 TTABVUE 173-75).

[113] *Id*. (14 TTABVUE 176-78).

[114] *Id*. (14 TTABVUE 179-81).

[115] *Id*. (14 TTABVUE 182-85).

[116] *Id*. (14 TTABVUE 170-72). Applicant does not argue that "roasted coffee beans" should not be compared for purposes of likelihood of confusion. Therefore, any arguments along these lines are deemed waived. *See Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313, 1314 n.4 (TTAB 2005) (where opposer presented no arguments in its brief regarding the claim of dilution, opposer is deemed to have waived the claim).

may emanate from a single source under a single mark. *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013) (finding that third-party registrations covering both wine and water were probative of the relatedness of those beverages). *See also In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *5 (TTAB 2020); *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1356 (TTAB 2015) (although five third-party registrations were "limited in number," "they nonetheless have probative value to the extent they serve to suggest that the identified goods are of a kind which are produced or marketed by a single source under a single mark."). Thus, the above-cited third party registrations are probative of the issue of relatedness.

We turn next to Opposer's use evidence, which shows that coffee, such as that identified in the involved registration, and alcoholic beverages, such as those identified by Applicant, are offered under the same mark, including BLACK MOMMA coffee K-cups, coffee beans and vodka.[117] Opposer also offers evidence of a number of coffee-flavored distilled spirits offered for sale in the United States, including by producers who advertise that the product is in collaboration with, or made with coffee, such as Fox Trail Distillery's OAK AND BEAN cold brew coffee liqueur;[118] ST. GEORGE Nola coffee liqueur;[119] MR. BLACK cold brew coffee liqueur;[120] New Deal Distillery's NEW DEAL coffee liqueur made with locally-sourced Marigold coffee;[121]

[117] Graham Decl., para. 33, and Exhibits 156-57 (21 TTABVUE 12, 343-46).

[118] *Id*. at para. 34 and Exhibit 161 (21 TTABVUE 12-13, 350-51).

[119] *Id*. at para. 34 and Exhibit 162 (21 TTABVUE 12-13, 352).

[120] *Id*. at para. 34 and Exhibit 163 (21 TTABVUE 12-13, 353-55).

[121] *Id*. at para. 34 and Exhibit 158 (21 TTABVUE 12-13, 347).

New Deal Distillery's DRIFTWOOD espresso cocktail, made in collaboration with Marigold coffee;[122] and Mississippi River Distilling's IOWA COFFEE COMPANY liqueur, sourced with coffee from Iowa Coffee Company.[123] Opposer's evidence of use of both coffee and alcoholic beverages offered by the same company under the same mark is probative of their relatedness, *In re Davey Prods. Pty Ltd.,* 92 USPQ2d 1198, 1203 (TTAB 2009), as is Opposer's evidence of coffee-flavored distilled spirits.

Lastly, Opposer made of record 32 active third-party use-based registrations for marks registered in connection with coffee-based or flavored liqueurs, alcoholic coffee-based beverages and/or distilled sprints in Class 33,[124] of which the following are representative:

No.	Mark	Registrant	Reg. No.	Relevant Class 33 Goods
1	EXPRESSO	Luxco, Inc.	690655	coffee liqueur
2	KAHLUA	The Absolut Company Aktiebolag	752237	coffee liqueur
3	COPA DE ORO	Heaven Hill Distilleries, Inc.	1694734	coffee liqueur
4	CAFFE LOLITA	Luxco, Inc.	1707106	coffee liqueur
5	CAFÉ AZTEC	Pernod Ricard USA, LLC	1781660	coffee liqueur
6	PATRÓN XO CAFE	Bacardi Martini Patron International GmbH	1950491	coffee liqueur with tequila

[122] *Id*. at para. 34 and Exhibits 159-60 (21 TTABVUE 1213, 348-49).

[123] *Id*. at para. 34 and Exhibits 164-65 (21 TTABVUE 12-13, 356-60).

[124] Opposer's Third Notice of Reliance pp. 7-9 and Exhibit 20 thereto (14 TTABVUE 8-10, 186-306).

In sum, Opposer's third-party use evidence is highly probative of the relatedness of the goods when considered together with its third-party registration evidence discussed above. *See, e.g., C.H. Hanson Co.*, 116 USPQ2d at 1355-56 (six websites showing sale of the subject goods, coupled with five third-party registrations of marks for them, "support the conclusion that the goods are related"); *Davey Prods.*, 92 USPQ2d at 1203 (two websites showing sale of the subject goods, coupled with 21 third-party registrations of marks for them, supported finding of relatedness). We find that Applicant's goods, namely, "alcoholic beverages, except beers, namely, vodka, dutch gin, gin and whisky" are related to Opposer's goods, namely, "coffee and coffee-based beverages."

Applicant does not dispute Opposer's evidence, but rather argues that alcoholic beverages are not sufficiently related to coffee because the only characteristic that they share is that "they are each a beverage."[125] Applicant argues that alcoholic beverages are distinct and dissimilar from coffee because alcoholic beverages are subject to extensive state regulation and are unavailable to persons under 21, distribution is restricted, and consumers are aware of whether they are choosing an alcoholic or nonalcoholic beverage.[126]

Applicant's argument is not persuasive. The fact that alcohol is regulated and only available to persons 21 or older has no bearing on the issue of relatedness. Relatedness for our purposes of conducting a likelihood of confusion analysis only

[125] Applicant's brief, p. 19 (31 TTABVUE 25).

[126] *Id.*

requires that Opposer provide evidence that each parties' goods are of the type that could emanate from a single source or are complementary in nature, for example. This evidence typically includes advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer under the same mark, and/or copies of prior use-based registrations of the same mark covering both applicant's and opposer's goods. *See, e.g., Ox Paperboard,* 2020 USPQ2d 10878, at *5 (citing *In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014); *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *4-5 (TTAB 2019). The fact that some goods carry age restrictions does not change the analysis or outcome. We therefore find that this *DuPont* factor weighs in favor of finding a likelihood of confusion.

i. Channels of Trade for Class 33 Goods

Under the third *DuPont* factor, we consider evidence pertaining to the similarity or dissimilarity of the trade channels in which the goods identified in the involved application and registration, respectively, are marketed. *Detroit Athletic Co.*, 128 USPQ2d at 1052 (quoting *DuPont*, 177 USPQ at 567).

Because neither Applicant's nor Opposer's identification of goods includes any restrictions or limitations as to trade channels, we assume that the respective goods are or would be marketed in all normal trade channels for such goods. *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1357 (Fed. Cir. 2000).

The third-party websites demonstrating that the goods identified in both Applicant's Class 33 Application and Opposer's registration are related (e.g., BLACK MOMMA coffee website, Fox Trail Distillery's OAK AND BEAN website) also support

a finding that such goods move in the same channels of trade, such as distilleries, and that they are sold to the same classes of consumers, namely, adult members of the general public. *See In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012); *Stone Lion*, 110 USPQ2d at 1161.

Based on this evidence, we find that the channels of trade for the alcoholic beverages identified in Applicant's Class 33 Application and coffee identified in Registrant's registration overlap and that this overlap in trade channels supports a finding, under the third *DuPont* factor, that a likelihood of confusion exists.

Applicant does not dispute Opposer's evidence but rather argues that it cannot be presumed that distinct products - coffee and alcohol - share common channels of trade,[127] because alcohol is tightly regulated and controlled.[128] Applicant also argues that the record shows that Opposer sells its coffee through its own retail stores, while Applicant will sell its goods through third-party markets.[129]

We find Applicant's unpersuasive. Applicant has not discredited Opposer's evidence, and while it may be true that alcohol is regulated, this does not negate Opposer's evidence showing that the coffee and alcoholic beverages have overlapping channels of trade. Further, Applicant's argument based on "real world" evidence about channels of trade has no impact on our decision, as we must reach our decision on the basis of the identifications of goods in the involved application and registration.

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[127] Applicant's brief, p. 24 (31 TTABVUE 30).

[128] *Id.*

[129] *Id.*

See Stone Lion, 110 USPQ2d at 1162 ("It was proper, however, for the Board to focus on the application and registrations rather than on real-world conditions ....").

ii. Conditions of Purchase

The fourth *DuPont* factor is the "conditions under which and buyers to whom sales are made, i.e. 'impulse' v. 'careful, sophisticated purchasing.'" *DuPont*, 177 USPQ at 567.

Although Applicant has admitted that it has not yet sold its goods in its Class 33 Application in the United States,[130] Applicant expects to sell its distilled spirits, such as vodka, gin, whiskey, for $26-35.[131]

Applicant argues that "[t]he price of Opposer's coffee and energy drinks is low," while the price of Applicant's alcoholic beverages is "high."[132] Continuing, Applicant argues that "[i]t is highly unlikely that a consumer will be confused when purchasing an alcoholic beverage from Applicant. The state regulations governing alcohol sales restrict where alcohol can be distributed and consumers possess awareness of whether they are choosing an alcoholic beverage."[133] Applicant argues without supporting evidence that its alcoholic beverages are not the subject to impulse

[130] Applicant's Answer to Opposer's Interrogatory No. 20 (13 TTABVUE 98).

[131] Applicant's Answer to Opposer's Interrogatory No. 2 (13 TTABVUE 93). Applicant does not specify the units.

[132] Applicant's brief, p. 25 (31 TTABVUE 31).

[133] *Id*.

purchases by members of the general public, but instead are made under strict age regulations and at high price points.[134]

Opposer counters that Applicant's arguments are unpersuasive as the evidence of record shows that the relevant goods are all inexpensive and that Applicant's arguments are immaterial given that the parties' identifications are unrestricted as to class of purchasers.[135]

We can infer from the identifications of goods that each parties' goods may be purchased by members of the general public and that Applicant's goods are limited to consumers over the age of 21, but our determination under this *DuPont* factor must be based on the degree of care exercised by the least sophisticated purchasers of the goods. *Stone Lion*, 110 USPQ2d at 1163. We find that the parties' goods are both relatively inexpensive products that may be purchased on impulse rather than selected with careful consideration and sophistication. 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. Consequently, we find that this *DuPont* factor weighs in favor of a likelihood of confusion.

2. The Strength or Weakness of the Opposer's DUTCH BROS Mark

We now consider the strength of Opposer's mark, *DuPont*, 177 USPQ at 567, as that may affect the scope of protection to which Opposer's mark is entitled. In

[134] *Id*. at pp. 25-26 (31 TTABVUE 31-32).

[135] Opposer's brief, pp. 35-36 (28 TTABVUE 42-43).

determining the strength of a mark, we consider both its inherent strength, based on the nature of the mark itself, and its commercial strength, based on marketplace recognition of the mark. *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, *21 (TTAB 2022); *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength).

a. The Inherent Strength of Opposer's DUTCH BROS Mark

The record includes a dictionary definition of the term "Dutch,"[136] which Applicant acknowledges describes persons from the Netherlands.[137] To the extent that Applicant argues that Opposer's **founders** are of Dutch heritage and that Opposer flies a Dutch flag over its stores,[138] this is not evidence that the term DUTCH is descriptive of Opposer's **goods**. While the term DUTCH may be descriptive of Opposer's **founders**, this argument alone is not persuasive as to the asserted descriptive nature of Opposer's goods offered under its mark.

Applicant also argues that there are "numerous registered marks in Class 33" that contain the word "Dutch," citing to the Hynd Declaration.[139] Third-party registrations alone may be relevant, in the manner of dictionary definitions, "to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak."

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[136] Exhibit 1 to Opposer's First Notice of Reliance (12 TTABVUE 5).

[137] Applicant's brief, pp. 2-3 (31 TTABVUE 8-9).

[138] *Id*. at p. 3 (31 TTABVUE 9).

[139] *Id*. (citing to Hynd Decl., para. 7 (22 TTABVUE 108-09)).

Juice Generation, Inc. v. GS Enters. LLC, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (internal quotation marks omitted). *See also Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015).

However, Ms. Hynd's testimony consists solely of the statement that she "searched the USPTO site for Class 33 goods containing the term DUTCH and found that it is very popular to use that term on goods."[140] Ms. Hynd's testimony includes only a mere listing of the "hits" but does not include supporting documentary evidence such as the TESS printouts.[141] Opposer argues that Ms. Hynd's testimony is both hearsay and incompetent to show the existence of any third-party registrations.[142]

We agree with Opposer that Ms. Hynd's mere listing of DUTCH-formative marks does not make these third-party marks of record. *See e.g., In re Compania de Licores Internacionales S.A.*, 102 USPQ2d 1841, 1843 (TTAB 2012) (merely listing of registrations is insufficient to properly make them of record). Accordingly, we give this testimony and listing no further consideration, and find this argument unpersuasive.

As noted above, Opposer registered its DUTCH BROS mark under the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). For procedural purposes, a claim of distinctiveness under Section 2(f), whether made in the application as-filed

[140] Hynd Decl., para. 7 (22 TTABVUE 108).

[141] *Id.*

[142] Opposer's reply brief, pp. 6-7 (33 TTABVUE 12-13).

or in a subsequent amendment, may be construed as conceding that the matter to which it pertains is not inherently distinctive and, thus, not registrable on the Principal Register absent proof of acquired distinctiveness. *See Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) ("Where an applicant seeks registration on the basis of Section 2(f), the mark's descriptiveness is a nonissue; an applicant's reliance on Section 2(f) during prosecution presumes that the mark is descriptive.").

Accordingly, we find that Opposer's mark is not inherently distinctive. It was registered pursuant to a claim of acquired distinctiveness under Section 2(f), an admission that the mark is not inherently distinctive. *See Cold War Museum*, 92 USPQ2d at 1629; *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988) ("Where, as here, an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the statute accepts a lack of inherent distinctiveness as an established fact."). Thus, we find that Opposer's mark is not a conceptually strong mark. This is not fatal, however, as even a weak mark is entitled to protection against confusion. *See e.g.*, *King Candy*, 182 USPQ at 109.

b. Commercial Strength

Commercial strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006). In the context of a likelihood of confusion analysis, the commercial strength of a mark is not a binary factor. Rather, it "varies along a spectrum from very strong to very weak." *Joseph Phelps Vineyards, LLC v. Fairmont*

Holdings, LLC, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)).

Opposer argues that its mark is commercially strong and points to evidence in the record of its long use, strong sales and advertising, unsolicited media recognition, and surveys showing strong association of the mark with the Opposer.[143] Specifically, Opposer argues that its DUTCH BROS mark is one of its core brands[144] and it has used its DUTCH BROS mark continuously with coffee since its founding in 1992[145] and energy drinks since 2012.[146] Since its first use in 1992, Opposer's mark has acquired substantial commercial strength, evidenced by Opposer's expansion and extremely strong retail sales. As of August 2, 2021, Opposer has opened over 480 locations across eleven states under the DUTCH BROS mark, making it the largest privately held, drive-through coffee company in the country at the time of trial.[147] The DUTCH BROS mark (both with and without the term COFFEE) has been displayed, for example, on the exteriors of storefronts and on signage for decades.[148]

Opposer made of record its annual gross revenues for retail coffee and energy drinks for the years 2018 and 2019 under its DUTCH BROS mark. These amounts

[143] Opposer's brief, p. 25 (28 TTABVUE 32).

[144] Maxwell Decl., para. 3 (19 TTABVUE 3).

[145] Graham Decl., paras. 5, 7 (21 TTABVUE 4).

[146] Maxwell Decl., para. 19-21 (19 TTABVUE 7-8).

[147] Graham Decl., para. 5 (21 TTABVUE 4); Maxwell Decl., paras. 3, 8 (19 TTABVUE 3, 4).

[148] Maxwell Decl., para. 37 and Exhibit 117 (19 TTABVUE 14, 131-160).

are designated confidential. Suffice to say, they are substantial and support Opposer's claim that its mark is commercially strong.[149]

Additionally, Mr. Graham testified that for more than 25 years, Opposer has made substantial annual investments in sales and marketing activities directed at promoting the DUTCH BROS mark and the goods and services offered thereunder. In the years 2018 and 2019 alone, Opposer's annual advertising expenditures, albeit for all products and services in the United States, were substantial.[150]

Opposer advertises and promotes its mark and the coffee and energy drinks offered under it on its social media platforms,[151] which are popular with its followers. For example, Opposer's Facebook page has more than 820,000 followers and more than 230,000 check-ins[152] and Opposer's Instagram page, which has been active since 2012, has more than 530,000 followers.[153] *Cf. Chanel, Inc. v. Makarczyk*, 110 USPQ2d 2013, 2020 (TTAB 2014) (evidence of dilution fame included Opposer's social media presence on Facebook, YouTube, Twitter, Google+, Vimeo and LinkedIn).

Mr. Graham also testified that in 2015, the social media benchmarking company Engagement Labs released rankings of the top ten coffee chains on social media and that it ranked "Dutch Bros as second on Instagram (behind only Starbucks), third on

[149] Maxwell Decl., para. 41 (19 TTABVUE 15-16).

[150] Graham Decl., para. 25 (21 TTABVUE 10).

[151] Graham Decl., para. 10 (21 TTABVUE 5-6).

[152] *Id*. and Exhibit 124 thereto (21 TTABVUE 5-6, 34-37).

[153] Graham Decl., para. 10 and Exhibit 125 (21 TTABVUE 5-6, 37-39).

Twitter (behind Starbucks and Dunkin' Donuts) and sixth on Facebook."[154] Additionally, according to Mr. Graham, Engagement Labs noted that on Instagram, Opposer "held the highest Engagement and Responsiveness subscores, along with the highest active user base" and "similar to Starbucks and Dunkin' Donuts."[155]

Opposer's advertisement and promotion of its DUTCH BROS mark includes its sponsorship of the professional soccer teams Portland Timbers and Portland Thorns. Since 2016, Opposer has sponsored both teams, and in March 2019, Opposer became the official training jersey partners of the Timbers, with exclusive logo rights on all Timbers training apparel.[156] Both teams have highly engaged and loyal fan bases. Indeed, based on data leading up to the lockdown due to the Covid-19 pandemic, the Timbers sold out every home game since joining Major League Soccer in 2011, and the Thorns consistently posted the highest average attendance of any team in the National Women's Soccer League (20,098 fans per game on average in 2019).[157]

As a result of Opposer's sponsorship, the DUTCH BROS mark is visible on the teams' jerseys, on physical and televised scoreboards, and on cross-promotional activities and advertisements.[158] As a result, the DUTCH BROS mark is highly

[154] Graham Decl., para. 12 (21 TTABVUE 6).

[155] Graham Decl., para. 12 and Exhibit 129 thereto (21 TTABVUE 6, 49-54).

[156] Graham Decl., paras. 20-23 (21 TTABVUE 9-10).

[157] Graham Decl., para. 20 (21 TTABVUE 9).

[158] Graham Decl., paras. 20-22 and Exhibits 140-45 (21 TTABVUE 9, 312-328).

visible to both in-person attendees and viewers of the televised broadcasts; images are sometimes posted to social media.[159] Below are a few examples:

[160]

[159] *Id.*

[160] Exhibit 144 to the Graham Decl. (21 TTABVUE 325).

[161]

Over the years, Opposer has received extensive media coverage, including being featured in *Forbes* magazine and on the network TV series *Undercover Boss*, where the DUTCH BROS word mark is usually displayed prominently in accompanying photos.[162]

While Applicant argues Opposer's evidence of commercial strength of the term "DutchforLife" (which is not at issue here) is largely speculative, Applicant does not dispute or attempt to discredit any of the evidence set out above.[163] Similarly, there is no evidence in the record that any witness was cross-examined.

In sum, we find that Opposer has established that its pleaded registered DUTCH BROS mark used in connection with coffee and energy drinks falls on the higher end

[161] Exhibit 145 to the Graham Decl. (21 TTABVUE 328).

[162] Exhibits 117-120 to the Maxwell Decl. (19 TTABVUE 131-176).

[163] Applicant's brief, p. 17 (31 TTABVUE 23).

of the commercial strength spectrum from very strong to very weak. As a result, this factor weighs in favor of likelihood of confusion.

3. The Number and Nature of Similar Marks in Use on Similar Goods

"'Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.'" *In re FabFitFun*, 127 USPQ2d 1670, 1674 (TTAB 2018) (quoting *Palm Bay*, 73 USPQ2d at 1693).

Applicant argues that the word "Dutch" and a depiction of a windmill is used on a variety of beverage products, including "Old Dutch," "By the Dutch," "Millstone," "Dutch Courage," and "Windmill Brewing," citing to the Declaration of Mr. Drieenhuizen and exhibits thereto.[164] However, Exhibit 6 relied upon in part for support for Applicant's argument appears to be an email from Mr. Drieenhuizen to himself with snippets of images of bottles of alcohol bearing DUTCH-formative marks and/or windmill design images; most of the writing on the labels is not in English.[165]

Opposer seeks to discredit Applicant's evidence by arguing that the photographs of the bottles in Mr. Drieenhuizen's email to himself are "unauthenticated photos captioned as '**Dutch** drink bottles with the name Dutch & or mill as logo' that purport to show 'Dutch' and/or a windmill image on bottle of alcoholic beverages, many with labels entirely in Dutch."[166] Opposer concludes that as the photos are identified as "**Dutch**" drink bottles and there is no showing that any of the depicted goods/labels

[164] Applicant's brief, p. 3 (31 TTABVUE 9).

[165] Applicant's Notice of Reliance (22 TTABVUE 99-105).

[166] Opposer's reply brief, pp. 5-6 (33 TTABVUE 11-12).

are in use **in the US** (or anywhere else), these purported examples are not probative of use in the U.S.[167]

We agree with Opposer and give the DUTCH-formative marks in the photographs no consideration. There is no indication either in Mr. Drieenhuizen's testimony or on the face of the accompanying exhibit that the goods shown are offered for sale in the United States. Indeed, there is no context for the photographs at all, and it is not possible to discern if the marks are in use and, if so where. Indeed, one of the labels is not in English, further suggesting that this mark is not in use in the United States.[168] Without more information, we do not find this evidence persuasive.

Applicant also asserts that there are "eight third-party marks for food and beverage products" that contain the word "Dutch" and a windmill,[169] citing to Exhibit O of the Hynd Declaration, which contains TESS records of these marks.[170] However, none of these marks are for DUTCH-formative marks registered under Section 1(a) for use with coffee. Consequently, this evidence is not relevant to the issue at hand. *See e.g., Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693-94 (Fed. Cir. 2018) (mere fact that registrations were for food and beverage products insufficient to show that they were for "similar" goods).

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[167] *Id.* at p. 6 (33 TTABVUE 12).

[168] Exhibit 6 to Drieenhuizen Decl. (22 TTABVUE 101).

[169] Applicant's brief, p. 3 (31 TTABVUE 9).

[170] Hynd Decl., para. 8 and Exhibit O (22 TTABVUE 109, 168-75).

Applicant also cites to printouts from three websites that show use of DUTCH-formative marks with alcoholic beverages.[171] First, PALE DUTCH BOY is used for pale ale (Exhibit C);[172] OLD DUTCH distillers offers OLD DUTCH gin and vodka but the site is not written in English (Exhibit D);[173] and DUTCH is used with "genquila", albeit from a website bearing the ".nl" top-level domain name and located in the Netherlands (Exhibit E).[174] Opposer argues that with regard to Exhibits D and E, there is no evidence that the goods on the sites for the Netherlands' distillers are available in the U.S. and should be disregarded.[175]

There is no testimony from Ms. Hynd addressing the issue of whether the products shown on this site are available for sale in the United States. Even assuming that they are, these three DUTCH-formative marks are not sufficient to establish that Opposer's mark is weak, as this evidence "reflects a more modest amount of evidence than that found convincing in *Jack Wolfskin* and *Juice Generation,* wherein 'a considerable number of third parties' use [of] similar marks was shown.'" *FabFitFun,* 127 USPQ2d at 1674 (quoting *Juice Generation*, 115 USPQ2d at 1674). As a result, we find that Applicant has not established that Opposer's mark is weak. Thus, based on the record before us, this *DuPont* factor regarding the number and nature of similar marks in use on similar goods is neutral.

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[171] Hynd Decl., para. 4 and Exhibits C-E (22 TTABVUE 106-07, 118-28).

[172] Exhibit C (22 TTABVUE 118-22).

[173] Exhibit D (22 TTABVUE 123-24).

[174] Exhibit E (22 TTABVUE 126-28).

[175] Opposer's reply brief, p. 6 (33 TTABVUE 12).

4. Similarity of the Marks (the First Factor)

We next consider the *DuPont* factor regarding the similarity of the marks, keeping in mind that where, as here, the goods are both legally identical (Applicant's Class 32 Mark) and related (its Class 33 Mark), the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the parties' goods. *Coach Servs.*, 101 USPQ2d at 1721; *see also Bridgestone Americas Tire Operations, LLC v. Fed. Corp.,* 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012) (where the goods are identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines); *Shen Mfg. Co. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004) ("Because the goods are related, 'the degree of similarity necessary to support a conclusion of likely confusion declines.'") (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992)).

We compare the marks in their entireties for similarities as to "appearance, sound, connotation and commercial impression." *Palm Bay,* 73 USPQ2d at 1691 (citing *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*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. (2019) (quotations omitted).

"'The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.'" *In re i.am.symbolic, llc*, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) (quoting *Coach Servs.*, 101 USPQ2d at 1721). The focus is on the recollection of

the average purchaser, who normally "retains a general rather than a specific impression of marks." *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018).

Opposer's mark is the standard character mark DUTCH BROS. Because the term DUTCH is the first term in Opposer's mark, it is the dominant term in the mark. *Stawski v. Lawson*, 129 USPQ2d 1036, 1052 (TTAB 2018) ("The common term PROSPER, appearing first in [the] marks, is their dominant feature.").

Applicant's marks are, on the other hand, the following composite marks:

Applicant's Class 32 Mark

Applicant's Class 33 Mark

Opposer argues that Applicant's use of DUTCH4LIFE is confusingly similar to its DUTCH BROS mark in terms of sight, sound and meaning, because both marks begin with the identical term DUTCH.[176] Pointing to evidence that the phrase "4LIFE" (or "for life") is an expression of lifelong duration,[177] Opposer argues that the "4LIFE" element merely emphasizes the term DUTCH and does not serve to distinguish

[176] Opposer's brief, p. 31 (28 TTABVUE 38).

[177] Opposer's Notice of Reliance, Exhibits 5 and 6 (12 TTABVUE 26-41).

Applicant's marks from Opposer's.[178] Further, Opposer argues that DUTCH4LIFE is identical to the consumer-initiated hashtag #dutch4life that consumers have spontaneously associated with Opposer since at least as early as 2012.[179]

Additionally, Opposer argues that with regard to Applicant's Class 32 Mark, the term DUTCH is repeated in the phrase DUTCH ENERGY DRINK, which reinforces the term DUTCH in the DUTCH4LIFE portion.[180]

With regard to Applicant's Class 33 Mark, Opposer argues that the terms ANNO 2018 simply mean "in the year 2018", which is a descriptive element that Applicant has disclaimed, is not source indicating, and could be perceived as indicating the date that Opposer launched a Class 33 line of goods.[181]

In contrast, Applicant argues that its Class 33 Mark begins with the terms ANNO 2018 and that this is the dominant element as it is what the consumer will notice first;[182] that even though it may have voluntarily disclaimed the terms ANNO 2018, these terms are still part of its mark and must be considered when evaluating whether the mark is similar to Opposer's mark;[183] that its marks have different connotations and make different commercial impressions than Opposer's mark;[184] that both of its marks "render a strong national recognition with the Netherlands,"

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[178] Opposer's brief, pp. 31-32 (28 TTABVUE 38-39).

[179] *Id*. at p. 32 (28 TTABVUE 39).

[180] Opposer's brief, p. 33 (28 TTABVUE 40).

[181] *Id*. at pp. 33-34 (28 TTABVUE 40-41).

[182] Applicant's brief, pp. 21-22 (31 TTABVUE 27-28).

[183] *Id*. (31 TTABVUE 27-28).

[184] *Id*. at p. 22 (31 TTABVUE 28).

and that windmills, also shown in Applicant's marks, are plentiful there;[185] and that its DUTCH4LIFE element signifies Dutch heritage and identity, not Opposer.[186]

We find that the literal DUTCH4LIFE element is the dominant element in each of Applicant's marks. In Applicant's Class 32 Mark, this is the element that appears first. We agree with Opposer that the D4L element is an initialism that reinforces the DUTCH4LIFE element and thus reinforces the notion that DUTCH4LIFE is the dominant element.

Both of Applicant's marks include a large windmill design element; however, we conclude that the literal DUTCH4LIFE element is the dominant portion of each mark and is entitled to greater weight. This is because it is the literal element that purchasers will use to refer to or request the goods. *See, e.g.*, *Viterra*, 101 USPQ2d at 1911; *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1247 (TTAB 2010); *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

Turning to Applicant's Class 33 Mark, the terms ANNO 2018, which mean "in the year 2018," are merely descriptive and Applicant was required to disclaim this phrase in its entirety. Disclaimed matter is often given little weight, *Code Consultants,* 60 USPQ2d at 1702, and the D4L element is entitled to less weight because it reinforces the DUTCH4LIFE element.[187]

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[185] *Id.*

[186] *Id.*

[187] Opposer made of record some evidence that consumers use the hashtags #DUTCH4LIFE and #D4L on Instagram and Twitter in reference to Opposer. Graham Decl., paras. 116, 117 and Exhibits 134-38 (21 TTABVUE 8, 188-309). We cannot find on this record that these hashtags point uniquely and unmistakably to Opposer. For example, we cannot determine that the following posts relate to Opposer: the image of dancers (top left at 21 TTABVUE

Overall, we find that the parties' marks are similar. As the dominant element of Opposer's mark is the term DUTCH and the dominant element of Applicant's marks is DUTCH4LIFE, we find that the parties' marks are similar in sight and sound to the extent that they both share the DUTCH element. Although Applicant's mark includes the "4LIFE" component, this component reinforces the element DUTCH. Because the Applicant's marks are used with legally identical and related goods, there is no reason to conclude that the term DUTCH would have a different meaning or connotation and, indeed, neither party offers any evidence along this line. Accordingly, this factor weighs in favor of a likelihood of confusion.

5. Nature and Extent of Actual Confusion and Related Conditions for Confusion (Seventh and Eighth Factors)

Under the seventh and eighth *DuPont* factors, we consider the nature and extent of any actual confusion in light of the length of time and conditions under which there has been contemporaneous use of the parties' subject marks. *DuPont*, 177 USPQ at 567. These factors are interrelated.

Applicant admitted in its discovery responses that it has not yet used either of its marks in commerce in the United States.[188]

Opposer argues that because Applicant has not yet used its marks in commerce in the United States, there has not been a sufficient opportunity for confusion to

236), the bowl of cherries (bottom center at 21 TTABVUE 236), and flowers (top row, far left, at 21 TTABVUE 237).

[188] Applicant's Responses to Opposer's First Set of Requests for Admissions, Nos. 1-3, 18-20 (13 TTABVUE 21-22); Applicant's Response to Opposer's First Set of Interrogatories, Nos. 2, 11-14, 22, 24, 26, 27 (13 TTABVUE 42-49); Applicant's Responses to Opposer's Second Set of Requests for Admissions, Nos. 45-48, 51-52 (13 TTABVUE 73-74).

occur.[189] In contrast, Applicant argues that there is no evidence of actual confusion in the record despite Opposer's own "voluminous evidence" that the public is aware of both parties.[190] Although the parties advance different arguments, both agree that this factor is neutral.[191]

"The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Applicant of its mark[s] for a significant period of time in the same markets as those served by Opposer under its mark." *New Era*, 2020 USPQ2d 10596, at *49; *see also Guild Mtg.,* 2020 USPQ2d at *6 ("The eighth *du Pont* factor… — '[t]he length of time during and conditions under which there has been concurrent use without evidence of actual confusion,' see *du Pont*, 177 USPQ at 567 — requires us to look at actual market conditions, to the extent there is evidence of such conditions of record."). Therefore, we agree with Opposer that because the evidence of record shows that Applicant's marks have not yet been used in commerce in the United States, we find that there has not been a significant opportunity for actual confusion to have occurred. Accordingly, the seventh and eighth *DuPont* factors are neutral.

D. Balancing the Factors

Opposer's DUTCH BROS mark is conceptually weak but is commercially strong. Overall, Applicant's marks are similar to Opposer's DUTCH BROS mark. The goods

[189] Opposer's brief, p. 36 (28 TTABVUE 43).

[190] Applicant's brief, pp. 17, 29 (31 TTABVUE 23, 35).

[191] Opposer's brief, p. 36 (28 TTABVUE 43); Applicant's brief, p. 17 (31 TTABVUE 23).

in Applicant's Class 32 Application are legally identical to Opposer's goods, and therefore we presume that the goods travel in the same channels of trade to the same class of purchasers. Additionally, the goods in Applicant's Class 33 Application are related to Opposer's goods and have overlapping channels of trade and classes of purchasers. This weighs heavily in favor of a finding of likelihood of confusion, and also reduces the degree of similarity between the marks necessary to find a likelihood of confusion. Applicant has not used its marks in commerce in the United States, so the lack of evidence of actual confusion is neutral. Weighing these factors, we find that both of Applicant's marks are likely to be confused with Opposer's mark.

VII. Decision

The oppositions to registration of the marks in Application Serial Nos. 79268177 and 79269818 under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), are sustained and registration to Applicant is refused.