

**This Opinion is Not a
Precedent of the TTAB**

Mailed: January 30, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Monster Energy Company
v.
Country Innovation & Supply LLC
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Opposition No. 91270179
—

Steven J. Nataupsky, Lauren Keller Katzenellenbogen, Baraa Kahf, Jacob R. Rosenbaum and Clayton R. Henson of Knobbe, Martens, Olson & Bear, LLP, for Monster Energy Company.

Rexford Brabson, Alexandra Berkowitz and Jorge Franco of T-Rex Law, P.C., for Country Innovation & Supply LLC.

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Before Greenbaum, Lebow and O'Connor,
Administrative Trademark Judges.


Opinion by O'Connor, Administrative Trademark Judge:

I. Background

Country Innovation & Supply LLC (“Applicant”) seeks registration on the Principal Register of three marks for goods in International Classes 25 and 28:

1. BEAST HACK (standard characters) (three single-class applications) for “hats; tops as clothing” in Class 25;¹ “baseball and softball training aid, namely, a unit comprised primarily of a stand and ball for use in swing training,” in Class 28;² and “hand grips for baseball bats, softball bats and golf clubs; grip tapes for baseball bats, softball bats and golf clubs; golf training aid, namely, a unit comprised primarily of a stand and ball for use in swing training,” also in Class 28;³
2. BEAST HACK SWING TRAINER (SWING TRAINER disclaimed) and



design, displayed as  , for “baseball and softball training aid, namely, a unit comprised primarily of a stand and ball for use in swing training,” in Class 28;⁴ and


¹ Application Serial No. 90248790 was filed on October 12, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use of the mark anywhere and in commerce since at least as early as October 6, 2020.

² Application Serial No. 90178891 was filed on September 14, 2020 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

³ Application Serial No. 90248825 was filed on October 12, 2020 under Section 1(a) of the Trademark Act, based upon Applicant’s claim of first use of the mark anywhere and in commerce since at least as early as October 6, 2020 for the identified hand grips and grip tapes, and under Section 1(b) of the Trademark Act, based upon Applicant’s allegation of a bona fide intention to use the mark in commerce, for the identified golf training aid.

⁴ Application Serial No. 90178859 was filed on September 14, 2020 under Section 1(b) of the Trademark Act, based upon Applicant’s allegation of a bona fide intention to use the mark in commerce, and includes the following description of the mark: “The mark consists of the stylized wording ‘BEAST HACK SWING TRAINER’. The wording ‘BEAST HACK’ is outlined and superimposed on a polygon in the shape of a stylized home plate. There are two polygons within the outer polygon. The innermost polygon is incomplete and is filled with the design



3. BEAST HACK and design, displayed as  , for “hats; tops as clothing,” in Class 25.⁵

Monster Energy Company (“Opposer”) opposes registration of Applicant’s marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), asserting priority and a likelihood of confusion with Opposer’s previously used and registered BEAST-inclusive marks shown below:⁶

of an animal eye and a small portion of the animal’s face immediately surrounding the eye. Behind this stylized home plate design are two stylized crossed baseball bats. The word ‘SWING TRAINER’ appears beneath the bats. The entire design with the exception of the wording ‘SWING TRAINER’ is outlined.” Color is not claimed as a feature of the mark.

⁵ Application Serial No. 90248724 was filed on October 12, 2020 under Section 1(a) of the Trademark Act, based upon Applicant’s claim of first use of the mark anywhere and in commerce since at least as early as October 6, 2020, and includes the following description of the mark: “The mark consists of the stylized wording ‘BEAST HACK’. The wording ‘BEAST HACK’ is outlined and superimposed on a polygon in the shape of a stylized home plate. There are two polygons within the outer polygon. The innermost polygon is incomplete and is filled with the design of an animal eye and a small portion of the animal’s face immediately surrounding the eye. Behind this stylized home plate design are two stylized crossed baseball bats. The entire design is outlined.” Color is not claimed as a feature of the mark.

⁶ All of the pleaded registrations issued on the Principal Register. Opposer also pleaded, but no longer relies on, Reg. No. 4953200 for the mark UNLEASH THE CAFFEINE FREE BEAST!, which has been cancelled for failure to file the requisite maintenance documents. 43 TTABVUE 12 n.1. Five other pleaded registrations have since been cancelled for the same reason: Reg. Nos. 4482659 (issued Feb. 11, 2014), 4482660 (issued Feb. 11, 2014), 4542107 (issued June 3, 2014) and 4546402 (issued June 10, 2014) for PUMP UP THE BEAST! and Reg. No. 5402465 (issued Feb. 13, 2018) for HYDRATE THE BEAST! We do not consider any of Opposer’s cancelled registrations in this decision.

Citations in this opinion to the briefs and other materials in the voluminous record refer to TTABVUE, the Board’s public online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, Opp. No. 91216455, 2020 TTAB LEXIS 199, at *4 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Opposer’s redacted main brief appears at 43 TTABVUE and its redacted rebuttal brief at 50 TTABVUE. Applicant’s brief appears at 46 TTABVUE. The parties designated portions of their briefs and/or other materials in the record as confidential under the Board’s Standard

- UNLEASH THE BEAST! (four registrations) for:
 - “fruit juice drinks, soft drinks, carbonated soft drinks and soft drinks enhanced with vitamins, minerals, nutrients, amino acids and/or herbs,” in Class 32;
 - “clothing, namely, tops, shirts, t-shirts, hooded sweatshirts, sweat shirts,” in Class 25;
 - “nutritional supplements in liquid form” in Class 5, “furniture; chairs; gaming chair” in Class 20, and “bar services; café services; mobile restaurant services; restaurant services; mobile café services for providing food and drink,” in Class 43; and
 - “promoting goods and services in the sports, motorsports, electronic sports, and music industries through the distribution of printed, audio and visual promotional material; promoting sports, electronic sports and music events, performances and competitions for others” in Class 35, and “entertainment services in the nature of sporting events and competitions, electronic sporting events and competitions, and music performances and events,” in Class 41;⁷
- UNLEASH THE NITRO BEAST! for:
 - “non-alcoholic beverages, namely, carbonated soft drinks; carbonated drinks enhanced with vitamins, minerals, nutrients, proteins, amino acids and/or herbs; carbonated energy or sports drinks,” in Class 32;⁸

Protective Order and filed the unredacted versions under seal. Except as otherwise indicated, all TTABVUE citations in this opinion are to the redacted publicly accessible versions. Consistent with our need “to discuss the evidence of record, unless there is an overriding need for confidentiality, so that the parties and a reviewing court will know the basis of [our] decision,” *Noble House Home Furnishings, LLC v. Floorco Enters., LLC*, Canc. No. 92057394, 2016 TTAB LEXIS 100, at *11 n.21 (TTAB 2016), we have discussed all evidence designated as confidential in general terms to the extent possible.

This opinion is issued as part of an internal pilot program on broadening acceptable forms of legal citation in Board cases. It cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). The opinion uses LEXIS citations for Board decisions. Serial or proceeding numbers are provided where available to assist finding cited Board opinions in USPTO and other databases.

⁷ Respectively, Reg. Nos. 2769364 (issued Sept. 30, 2003; renewed); 4975822 (issued June 14, 2016; maintained); 5820901 (issued July 30, 2019); and 5927420 (issued Dec. 3, 2019).

⁸ Reg No. 4394044 (issued Aug. 27, 2013, renewed).

- UNLEASH THE ULTRA BEAST! for:
 - “non-alcoholic beverages, namely, carbonated soft drinks; carbonated drinks enhanced with vitamins, minerals, nutrients, proteins, amino acids and/or herbs; carbonated energy drinks and sports drinks,” in Class 32;⁹
- UNLEASH THE SALTY BEAST! for:
 - “non-alcoholic beverages, namely, energy drinks, soft drinks, sports drinks, and fruit juice drinks,” in Class 32;¹⁰ and
- REHAB THE BEAST! and REHAB THE BEAST!
WWW.MONSTERENERGY.COM, both for:
 - “ready to drink tea, iced tea and tea based beverages; ready to drink flavored tea, iced tea and tea based beverages,” in Class 30 and “non-alcoholic beverages, namely, energy drinks, sports drinks and fruit juice drinks; all the foregoing enhanced with vitamins, minerals, nutrients, proteins, amino acids and/or herbs,” in Class 32;¹¹

In its answer, Applicant denied the salient allegations of the notice of opposition.¹²

The case is fully briefed.¹³ For the reasons discussed below, we dismiss the opposition.

⁹ Reg. No. 4371544 (issued July 23, 2013, renewed).

¹⁰ Reg. No. 5783086 (issued June 18, 2019).

¹¹ Respectively, Reg. Nos. 4336329 (issued May 14, 2013; renewed) and 4292502 (issued Feb. 19, 2013; renewed). We refer to the marks reflected in Opposer’s nine active pleaded registrations collectively as Opposer’s “Beast marks.”

¹² Applicant also asserted two purported affirmative defenses, including that (i) there is no likelihood of confusion and (ii) Applicant acted without knowledge or willful intent. 4 TTABVUE 5-6. These allegations merely amplify Applicant’s denials to the notice of opposition and are not true affirmative defenses, and we do not address them as such. *E.g.*, *The Mars Generation, Inc. v. Carson*, Opp. No. 91224726, 2021 TTAB LEXIS 386, at *4 (TTAB 2021) (defenses that are mere amplifications of denials, such as failure to state a claim, are not true affirmative defenses).

¹³ Both parties have relied on other regional circuit and federal district court cases, some involving the issue of infringement, which presents certain differences from the issue of likelihood of confusion as it concerns registrability. We are not bound by these authorities,

II. Record and Evidentiary Issues

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Applicant's involved application files. The record also includes the following materials submitted by the parties during their testimony periods.

A. Opposer's submissions:

- First notice of reliance on Opposer's pleaded registrations (Exhibits 1-14);¹⁴ Applicant's initial disclosures and written responses to Opposer's discovery requests (Exhibits 15-18);¹⁵ and Opposer's 2002-2021 10-K reports printed from the United States Securities and Exchange Commission's website (Exhibits 19-38),¹⁶ 15-19 TTABVUE;

and we apply the law set forth by our primary reviewing court, the Court of Appeals for the Federal Circuit and its predecessor.

¹⁴ Opposer's notice of opposition includes copies of its pleaded registrations, as well as printouts from the USPTO's Trademark Electronic Search System and Assignment database showing their current status and title, which made them of record in this proceeding. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 704.03(b)(1)(A) (2024). It was therefore unnecessary and duplicative for Opposer to reintroduce them during its testimony period.

¹⁵ Written responses to requests for production of documents introduced through a notice of reliance are admissible only to show that a party has stated there are no responsive documents, as Applicant did in certain of its responses. 15 TTABVUE 139-62. *McGowen Precision Barrels, LLC v. Proof Research, Inc.*, Canc. No. 92067618, 2021 TTAB LEXIS 167, at *8 n.6 (TTAB 2021). Neither party discusses non-production of documents in its brief.

Applicant's responses to Opposer's requests for admission include denials. We consider only Applicant's admissions, as denials to requests for admission are not admissible. *Life Zone Inc. v. Middleman Grp., Inc.*, Opp. No. 91160999, 2008 TTAB LEXIS 37, at *10 n.10 (TTAB 2008) (denials of requests for admission not admissible; the denial of a request for admission establishes neither the truth nor falsity of the assertion, but leaves it for proof at trial).

¹⁶ Opposer submitted nearly 2400 pages of 10-K reports that it asserts are "relevant generally to the strength and fame of Opposer's BEAST Marks, the similarity of Opposer's and Applicant's goods and services, the similarity of the trade channels for Opposer's and Applicant's goods and services, and the variety of goods and services with which Opposer's BEAST Marks are used." 15 TTABVUE 6-12. Opposer introduced 400 pages of excerpts of

- Second notice of reliance on printed publications, including magazine articles (Exhibits 39-51), 20 TTABVUE;
- Third notice of reliance on various Internet printouts, including printouts from social media websites (Exhibits 52-75), 21 TTABVUE;
- Fourth notice of reliance on portions of the discovery deposition testimony of Applicant's founder, Keaton Smith ("Smith Dep. Tr."), as Applicant's designated Fed. R. Civ. P. 30(b)(6) witness and in his individual capacity with certain exhibits, 22 TTABVUE (public, Exhibits 79-82), 23 TTABVUE (confidential, Exhibits 76-78);¹⁷ and
- Testimony declaration of Rodney Sacks ("Sacks Decl."), Chairman and Co-Chief Executive Officer of Monster Beverage Corporation and its subsidiaries including Opposer, with Exhibits 1-38, 24-27 TTABVUE (public); 28-29 TTABVUE (confidential testimony and Exhibits 8 and 10).

these 10-K reports via testimony declaration. 25 TTABVUE 2-406. Apart from being cumulative, Opposer does not refer to any of that evidence in its briefs. It thus serves no purpose other than to clutter the record.

¹⁷ Opposer filed this deposition transcript entirely under seal, which was improper because most of it pertains to testimony that is not confidential, as testified to by the witness during the deposition without claiming confidentiality. *See Edwards Lifesciences Corp. v. VigiLanz Corp.*, Opp. No. 91154210, 2010 TTAB LEXIS 84, at *7 (TTAB 2010) (Board proceedings are designed to be public, and the improper designation of materials as confidential thwarts this objective). In this opinion, we treat as confidential only evidence that is clearly confidential or commercially sensitive. *Id.* *See also* Trademark Rule 2.116(g), 37 C.F.R. § 2.116(g) ("The Board may treat as not confidential that material which cannot reasonably be considered confidential, notwithstanding a designation as such by a party.").

B. Applicant's submissions:

- Notice of reliance on third-party registrations and applications for marks incorporating the term "BEAST"; and printouts of third-party websites showing use of certain such marks (Exhibits A-C), 30 TTABVUE;
- Notice of reliance on dictionary definitions and articles showing meaning of the word "beast"; dictionary definitions showing meaning of the word "hack"; Opposer's written responses to Applicant's discovery requests; and certain documents produced by Opposer in response to Applicant's document requests (Exhibits D-I), 31 and 33 TTABVUE (confidential portions of Exhibit I); 32 and 36 TTABVUE (public);¹⁸
- Declaration of Keaton Smith ("Smith Decl.") with Exhibits A-E (which appear to be duplicative of Exhibits A-E to Applicant's notice of reliance, 34 and 35 TTABVUE.

C. Evidentiary Objections

Applicant's brief includes an Appendix entitled "Evidentiary Objections," responding to certain of Opposer's arguments that Applicant construes as attacks on

¹⁸ As none of Opposer's responses to Applicant's document requests state that there are no responsive documents, 36 TTABVUE 123-50, we do not consider the responses. *See McGowen Precision Barrels*, 2021 TTAB LEXIS 167, at *8 n.6. Also, Opposer's responses to Applicant's requests for admission include denials, which as noted, are not admissible.

"Generally, a party that has obtained documents through a response to a request for production of documents may not make the documents of record by notice of reliance alone." *Boston Athletic Ass'n v. Velocity, LLC*, Opp. No. 91202562, 2015 TTAB LEXIS 459, at *5 (TTAB 2015) (citing Trademark Rule 2.120(j)(3)(ii), renumbered by amendment to Trademark Rule 2.120(k)(3)(ii), 37 C.F.R. § 2.120(k)(3)(ii)). Documents that are not printed publications, Internet materials, or official records are not admissible under notice of reliance. *See* Trademark Rule 2.122(e), 37 C.F.R. § 2.122(e).

the admissibility and relevance of evidence.¹⁹ The only such argument we consider an objection is Opposer's contention that Mr. Smith's testimony about third-party websites is inadmissible because he lacked personal knowledge regarding them.²⁰

Opposer had already moved to strike this evidence before final briefing. In an order dated September 20, 2023, the Board denied the motion, finding that Opposer had waived its objection to these paragraphs of Mr. Smith's Declaration by not raising it during Mr. Smith's cross-examination deposition.²¹ We decline to revisit the denied motion and entertain what essentially is a belated request for reconsideration. *Cf.* Trademark Rule 2.127(b), 37 C.F.R. § 2.127(b) ("Any request for reconsideration or modification of an order or decision issued on a motion must be filed within one month from the date thereof."). Moreover, Applicant has properly submitted the same evidence in its notice of reliance, 30 TTABVUE, which we may consider for what is shown on the face of the documents.

Applicant also faults Opposer with providing incomplete information from an October 2020 list compiled by Nielsen and Hookit that placed Monster fourth among

¹⁹ 46 TTABVUE 52.

²⁰ 43 TTABVUE 51-52 ("Applicant also submitted evidence of websites which he alleged offered or sold products and services related to 'Beast'-inclusive marks. (34 TTABVUE 24-32, Smith Decl. ¶¶ 19(a)-(kk).) However, during [his] cross-examination deposition, Applicant admitted that he had not, in fact, visited these websites and did not actually have any knowledge as to whether the goods and services listed in his declaration can be purchased from the websites. (38 TTABVUE 7, 28, 32 - 34.) Thus, Applicant lacked personal knowledge regarding the statements he made in his declaration regarding these websites, and they are inadmissible under Fed. R. Evid. 602.").

²¹ 42 TTABVUE 8-9. The Board also denied Opposer's motion to strike Applicant's evidence of third party registrations, applications and website printouts on grounds of, inter alia, lack of probative value and hearsay. *Id.* at 9-11.

the “Top 50 Most Marketed Brands in Sports.”²² Opposer’s main Brief discussed this placement and the revenue generated by the Top 50 brands, citing the Sacks Declaration, which discussed the list but did not attach a copy.²³ Applicant was unable to access a copy of the October 2020 Nielsen and Hookit list, but did locate the 2021 list, and attached it to its brief, asking that we consider it for the sake of completeness under Fed. R. Evid. 106.²⁴ Applicant also states that “[t]his reference guide is available for downloading and print, making it judicially noticeable.”²⁵

We decline to consider or take judicial notice of the October 2021 Nielsen and Hookit list, which was not included in a notice of reliance or testimony declaration but only attached to Applicant’s trial brief. “The Board will not consider evidence and other evidentiary materials attached to the briefs unless they were properly made of record during the time assigned for taking testimony.” *Hole in 1 Drinks, Inc. v. Lajtay*, Canc. No. 92065860, 2020 TTAB LEXIS 9, at *5 (TTAB 2020) (citations omitted); *see also* TBMP § 704.05(b). In addition, Applicant does not indicate any particular fact or facts in the October 2021 Nielsen and Hookit list of which it seeks judicial notice, thus failing to provide “the necessary information” for us to take judicial notice. Fed. R. Evid. 201(c)(2); TBMP § 704.12(a); *see* TBMP § 1208.04. When considering Mr.

²² 46 TTABVUE 54 (referencing Opposer’s Main Brief, 43 TTABVUE 24).

²³ 43 TTABVUE 24 (citing 24 TTABVUE 19, Sacks Decl. ¶ 40). Applicant did not object to Mr. Sacks’ testimony about the October 2020 Nielsen and Hookit list, such as on grounds of hearsay or lack of foundation. 46 TTABVUE 42-44, 54.

²⁴ Fed. R. Evid. 106 provides that “[i]f a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part—or any other statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.”

²⁵ 46 TTABVUE 54.

Sacks' testimony about Nielsen and Hookit's October 2020 list, however, we bear in mind the lack of context by virtue of Opposer's failure to include a copy of that list.

The parties' remaining arguments²⁶ concerning the relevance or weight to be accorded the evidence either were already resolved in the Board's order denying Opposer's motion to strike or are fully within the Board's ken to weigh the evidence, including any inherent limitations, obviating the need to strike the challenged testimony and exhibits. *Poly-America, L.P. v. Ill. Tool Works Inc.*, Canc. No. 92056833, 2017 TTAB LEXIS 392, at *4 (TTAB 2017), *aff'd*, No. 3:18-cv-00443-C (N.D. Tex. Oct. 29, 2019). We accord the testimony and other materials whatever probative value they merit, keeping in mind the parties' objections, and comment on any limitations elsewhere in this opinion as appropriate.

III. Statutory Entitlement to Oppose

Applicant does not dispute Opposer's entitlement to bring a statutory cause of action. Nonetheless, entitlement must be established by the plaintiff in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020). To do so, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute and (ii) a reasonable belief in damage proximately caused by registration of the mark. *Id.* at 1303, 1306 (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-33 (2014)).

Opposer's entitlement to oppose registration of Applicant's marks is established by Opposer's nine pleaded, valid and subsisting registrations, which Opposer has

²⁶ *E.g.*, 46 TTABVUE 52-55; 50 TTABVUE 31-34.

entered into the record as exhibits to the notice of opposition.²⁷ *See, e.g., Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, Opp. No. 91263919, 2022 TTAB LEXIS 383, at *20 (TTAB 2022).

IV. Priority

A. Opposer's Active Pleaded Registrations

Because nine of Opposer's pleaded registrations are live and of record and Applicant has not filed a counterclaim to cancel them, priority is not at issue as to the marks and goods/services covered by the registrations. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1402 (CCPA 1974). In addition, Applicant does not dispute Opposer's priority.

B. Opposer's Claimed Common Law Rights and Family of BEAST Marks

In its notice of opposition, Opposer included general allegations about prior common law rights, including in a "family" of BEAST marks.²⁸ In his testimony declaration, Opposer's CEO, Mr. Sacks, also made several references to a purported family of marks, testifying that:

[S]ince 2002, Monster has also used its UNLEASH THE BEAST![®] mark in connection with beverages, apparel, accessories, and numerous other products and services. Monster's family of BEAST-inclusive marks has since grown to include, for example, the following: UNLEASH THE BEAST![®], HYDRATE THE BEAST![®], UNLEASH THE NITRO BEAST![®], UNLEASH THE ULTRA BEAST![®], PUMP UP THE BEAST![®], REHAB THE

²⁷ 1 TTABVUE 29-203, Exhibits 1-4, 9-12 and 14. As noted above, six of Opposer's pleaded registrations have been cancelled during the course of this proceeding for failure to file declarations of use under Trademark Act Section 8.

²⁸ 1 TTABVUE 12-13, 18, ¶¶ 2, 4 and 8.

BEAST!®, REHAB THE BEAST!
WWW.MONSTERENERGY.COM®, and UNLEASH THE
SALTY BEAST!® (collectively, the “BEAST Marks”).²⁹

He further testified that “[t]he BEAST Marks often appear on products in the same coolers, and accompanied by point-of sale materials bearing one or more of the BEAST Marks, such that consumers frequently see several of the BEAST Marks displayed together and have come to recognize Monster’s family of BEAST Marks.”³⁰

Opposer’s claim of a family of marks presents a preliminary issue that we must resolve before assessing likelihood of confusion, as an opposer relying on a family of marks is relying on common law rights in the alleged family. *New Era Cap*, 2020 TTAB LEXIS 199, at *19-20. “Neither the mere intention to create a family of marks, nor ownership of multiple registrations containing the family term, is sufficient in and of itself to establish that a party owns a family of marks;” instead, Opposer must prove the existence of a family of marks prior to any date Applicant can rely on for priority. *Id.* at *20-21 (citations omitted); *see also J & J Snack Foods Corp. v. McDonald’s Corp.*, 932 F.2d 1460, 1462-63 (Fed. Cir. 1991).

Opposer’s briefs do not mention a family of marks, thereby waiving this claim.³¹ *See, e.g., Bell’s Brewery, Inc. v. Innovation Brewing*, Opp. No. 91215896, 2017 TTAB LEXIS 452, at *20-21 (TTAB 2017) (opposer’s failure in its main brief to argue likelihood of confusion as to second mark cited in notice of opposition led to waiver of

²⁹ 24 TTABVUE 3-4 ¶ 4.

³⁰ 24 TTABVUE 8 ¶ 11.

³¹ *See, e.g., 43 TTABVUE 28* (stating only that “Opposer owns extensive common law rights in its BEAST Marks resulting from [] its use and promotion of the BEAST Marks as set forth above.”); 50 TTABVUE.

claim as to that mark) (citing *Swatch AG (Swatch SA) (Swatch Ltd.) v. M. Z. Berger & Co.*, Opp. No. 91187092, 2013 TTAB LEXIS 515, at *2 n.3 (TTAB 2013), *aff'd*, 787 F.3d 1368 (Fed. Cir. 2015)). Thus, Opposer's claim of "likelihood of confusion must be based on each of Opposer's pleaded marks separately." *New Era Cap*, 2020 TTAB LEXIS 199, at *27.

V. Likelihood of Confusion

"The Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion [or] mistake, or to deceive." *In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023) (cleaned up). The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as "*DuPont* factors"). "Whether a likelihood of confusion exists between an applicant's mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors." *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1319 (Fed. Cir. 2018). We consider all *DuPont* factors for which there is argument and evidence of record. *Bureau Nat'l Interprofessionnel DU Cognac v. Cologne*, 110 F.4th 1356, 1369 (Fed. Cir. 2024). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Charger Ventures*, 64 F.4th at 1381 ("In any given case, different

DuPont factors may play a dominant role and some factors may not be relevant to the analysis.”).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 1199 (CCPA 1973). However, in any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164 (Fed. Cir. 2022).

Opposer must prove its Section 2(d) claim as to each class in each opposed application by a preponderance of the evidence. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 951 (Fed. Cir. 2000); *see Spireon, Inc. v. Flex LTD.*, 71 F.4th 1355, 1365 (Fed. Cir. 2023) (“It is well established that, in opposition proceedings, the burden of proof rests on the opposer.”).

In arguing likelihood of confusion, Opposer does not rely on common law rights of a broader scope than its pleaded registrations,³² and thus we do not separately

³² Opposer states in its brief, and Mr. Sacks testified, that Opposer uses (or licenses for use) its BEAST marks on “sporting equipment,” which is not recited in any of its pleaded registrations. 43 TTABVUE 13-14, 46 (citing 24 TTABVUE 10-11, Sacks Decl. ¶ 23; 24 TTABVUE 118-28, Sacks Decl. Ex. 6). But the only such goods for which Opposer presented evidence are snowboards, in the form of a single photo, with no evidence of the extent of use or sales of such items. *Id.* Opposer does not argue that Applicant’s identified Class 28 goods are related to snowboards or base its claim on any common law rights it may have in connection with snowboards. 43 TTABVUE 46 (relying on use of its marks on products including sporting equipment and snowboards to show use “on a variety of products,” commonly considered under the ninth *DuPont* factor).

analyze its asserted common law rights. While we consider all of Opposer's active pleaded registrations, we focus on Opposer's registered standard character mark UNLEASH THE BEAST! for the identified goods and services in Classes 5, 20, 25, 32, 35, 41 and 43, as this mark is arguably closer to Applicant's marks, and the identified goods and services are either identical or arguably closer to Applicant's identified goods, than those of Opposer's other pleaded registrations. If we do not find a likelihood of confusion with respect to this mark and these goods and services, then we would not find a likelihood of confusion with Opposer's other pleaded marks. *See In re Max Cap. Grp. Ltd.*, Ser. No. 77186166, 2010 TTAB LEXIS 1, at *5 (TTAB 2010).

A. Second, Third and Fourth *DuPont* Factors

Under these factors, we consider “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use,” “[t]he similarity or dissimilarity of established, likely-to-continue trade channels,” and “[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 476 F.2d at 1361. In doing so, we compare the goods and services as they are identified in the parties' respective applications and pleaded registrations. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990).

1. Applicant's Class 25 Goods

a. Goods and Services

Applicant has applied to register its standard character mark BEAST HACK (Ser. No. 90248790) and BEAST HACK and design (Ser. No. 90248724) for use in

connection with “hats; tops as clothing” in Class 25. While worded slightly differently, “tops as clothing” are identical to the “clothing, namely, tops” identified in Opposer’s Reg. No. 4975822 for UNLEASH THE BEAST!. Thus, Applicant’s arguments notwithstanding,³³ we need not further consider the relatedness of the Class 25 goods because confusion may be likely if identity is established for any item within the identification of goods in a particular class of the application. *E.g.*, *Bertini v. Apple Inc.*, 63 F.4th 1373, 1379-80 (Fed. Cir. 2023) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 648 F.2d 1335, 1336 (CCPA 1981)).

b. Trade Channels

Because Applicant’s “tops as clothing” and Opposer’s “clothing, namely, tops” are identical, with no restrictions or limitations as to channels of trade or classes of customers, we presume the channels of trade and classes of purchasers for these goods are also identical. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1372 (Fed. Cir. 2018) (absent restrictions, the identified goods, if identical, “are presumed to travel in the same channels of trade to the same class of purchasers”) (citing *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012)).

c. Purchasing Conditions

Opposer argues that Applicant’s apparel, hand grips and grip tapes are inexpensive and likely to be impulse purchases, with its shirts, hats, hoodies and

³³ 46 TTABVUE 33-35 (lodging several arguments including that the apparel goods are collateral to the parties’ core goods and falling within the same “general field” is not sufficient). Unlike the brassieres and sportswear at issue in *In re Sears, Roebuck & Co.*, Ser. No. 73502919, 1987 TTAB LEXIS 84, at *3-4 (TTAB 1987), cited by Applicant, here the goods identifications use identical wording, and are for identical items, just in a different order.

jerseys ranging in price from \$30 to \$50, and Opposer's t-shirts priced between \$20-25.³⁴ There is no evidence of the price of Applicant's hand grips and grip tapes. Nonetheless, Applicant does not disagree that its apparel, hand grips and grip tapes are relatively inexpensive and may be purchased on impulse.³⁵

2. Applicant's Class 28 Goods

a. Goods and Services

In Class 28, Applicant has applied to register BEAST HACK (Ser. No. 90178891) and BEAST HACK SWING TRAINER & design (Ser. No. 90178859) for use in connection with "baseball and softball training aid, namely, a unit comprised primarily of a stand and ball for use in swing training" and BEAST HACK (Ser. No. 90248825) for use in connection with "hand grips for baseball bats, softball bats and golf clubs;" "grip tapes for baseball bats, softball bats and golf clubs;" and "golf training aid, namely, a unit comprised primarily of a stand and ball for use in swing training."

There is no overlap between Applicant's identified goods and any of the goods or services identified in Opposer's UNLEASH THE BEAST! registrations. Yet, as noted by Opposer, "[i]t is well established that the goods and/or services of the parties need not be similar or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion."³⁶ *See Weider Publ'ns, LLC v. D & D*

³⁴ 43 TTABVUE 46-47.

³⁵ 46 TTABVUE 44 (arguing only that Opposer "improperly focuses on Applicant's collateral goods" and that its swing trainers are expensive).

³⁶ 43 TTABVUE 44.

Beauty Care Co., LLC, Opp. No. 91199352, 2014 TTAB LEXIS 2, at *28 (TTAB 2014).

“Instead, likelihood of confusion can be found if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.”

Coach Servs., Inc. v. Triumph Learning LLC, 668 F.3d 1356, 1369 (Fed. Cir. 2012) (citation omitted).

Opposer argues that Applicant’s Class 28 goods are “closely related to Opposer’s sports-related services and Opposer’s extensive marketing through sponsorship of athletes, teams, and sports events.”³⁷ Opposer points specifically to its sponsorship and promotion of professional fighting, bodybuilding, powerlifting, baseball, basketball, hockey and motorsports, among others, and sponsorship of famous athletes like Tiger Woods, Rob Gronkowski, Conor McGregor and Rampage Jackson, as well as its recognition as the fourth “Most Marketed Brand in Sports” in 2020.³⁸

Opposer states that it “advertises and promotes its products bearing the BEAST Marks at sporting events, including baseball games,” including through its distribution of “beverages and apparel at famous sports venues in major cities.”³⁹ This argument implicates each of Opposer’s four registrations for UNLEASH THE BEAST!, which again are for use in connection with

³⁷ 43 TTABVUE 45. Opposer’s evidence indicates that it has generally eschewed traditional marketing through mass media advertising on television in favor of sponsorships of athletes and sporting and other events, often in extreme sports. *E.g.*, 26 TTABVUE 79, Sacks Decl. Ex. 25 (Monster mission and company overview on Facebook).

³⁸ 43 TTABVUE 45, citing 24 TTABVUE 18-21, Sacks Decl. ¶¶ 39, 40-43, 45-47 and Sacks Decl. Ex. 10 (confidential) at p. 115.

³⁹ *Id.*

“promoting goods and services in the sports, motorsports, electronic sports, and music industries through the distribution of printed, audio and visual promotional material; promoting sports, electronic sports and music events, performances and competitions for others” and “entertainment services in the nature of sporting events and competitions, electronic sporting events and competitions, and music performances and events,” in Classes 35 and 41 (Reg. 5927420),

“fruit juice drinks, soft drinks, carbonated soft drinks and soft drinks enhanced with vitamins, minerals, nutrients, amino acids and/or herbs,” in Class 32 (Reg. 2769364),

“nutritional supplements in liquid form,” “furniture; chairs; gaming chair” and “bar services; café services; mobile restaurant services; restaurant services; mobile café services for providing food and drink,” in Classes 5, 20 and 43 (Reg. 5820901) and

“clothing, namely, tops, shirts, t-shirts, hooded sweatshirts, sweat shirts,” in Class 25 (Reg. 4975822).

From this, Opposer concludes that “consumers are likely to believe that Applicant’s products displaying the BEAST HACK Marks are sold or distributed by Opposer, or that they are a co-branded product licensed by Opposer.”⁴⁰

Opposer does not argue that its goods and services offered under the UNLEASH THE BEAST! mark and Applicant’s identified baseball, softball and golf training aids and hand grips and grip tapes for baseball bats, softball bats and golf clubs are similar in nature or of a type that are generally regarded as emanating from the same source. Nor does Opposer present any evidence that the parties’ respective goods and services are used together, are complementary or are offered by the same sellers under a single mark. *Cf. Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267

⁴⁰ 43 TTABVUE 45.

(Fed. Cir. 2002) (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”); *In re Country Oven, Inc.*, Ser. No. 87354443, 2019 TTAB LEXIS 381, at *5 (TTAB 2019) (“Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods and services are used together or used by the same purchasers; advertisements showing that the relevant goods and services are advertised together or sold by the same manufacturer or dealer; or copies of use-based registrations of the same mark for both the applicant’s services and the goods listed in the cited registration.”).⁴¹

Applicant argues that its sporting goods are facially dissimilar from Opposer’s goods and services, and the fact that both parties market in the field of sports is not enough for their goods and services to be related.⁴² We agree. Apart from sponsorship of a wide range of athletes, sporting events and venues in support of its beverage marketing, Opposer offers no reason why the goods and services would be deemed related. Opposer has presented no evidence that the nature of its goods and services offered under the UNLEASH THE BEAST! mark (including beverages, apparel, gaming chairs, promotion, sponsorship and entertainment services in the field of sports) and Applicant’s identified goods (baseball, softball, and golf swing training

⁴¹ Opposer’s reliance on *In re Majestic Distilling Co.* is inapposite, 43 TTABVUE 45, as that case involved the identical RED BULL mark for tequila and malt liquor, goods found to be similar as both are alcoholic beverages marketed in many of the same channels of trade to many of the same consumers. 315 F.3d 1311, 1316 (Fed. Cir. 2003). Neither of those facts is present here.

⁴² 46 TTABVUE 35-37 (arguing that “[t]his relationship is tangential at best and thus subject to the ‘something more’ standard” of *In re St. Helena Hosp.*, 774 F.3d 747 (Fed. Cir. 2014)).

aid and hand grips and grip tapes for baseball and softball bats and golf clubs), or the circumstances surrounding their marketing, would lead consumers to believe that they emanate from the same source. *Coach Servs.*, 668 F.3d at 1369; *see also Shen Mfg. Co., Inc. v. The Ritz Hotel Ltd.*, 393 F.3d 1238, 1244 (Fed. Cir. 2004) (for purposes of likelihood of confusion, the goods must “be related in the mind of the consuming public as to the origin of the goods”). Indeed, Opposer’s evidence reflects the breadth of goods and services that are promoted through professional sports and sponsorship of athletes, as Mr. Sacks testified that the October 2020 Nielsen and Hookit list reviewed over 7,000 brands with a marketing presence in sports.⁴³

The mere fact that both parties market their goods and services in the field of sports, including Opposer’s sponsorship of the Angels baseball stadium and golfer Tiger Woods, does not establish that the goods and services are related. *See Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1376 (Fed. Cir. 2002) (“[A] broad general market category is not a generally reliable test of relatedness of products.”); *Calypso Tech., Inc. v. Calypso Capital Mgmt., LP*, Opp. No. 91184576, 2011 TTAB LEXIS 259, at *27 (TTAB 2011) (“[I]n order to find that goods and services are related, there must be more of a connection than that a single term, in this case

⁴³ 24 TTABVUE 19, Sacks Decl. ¶ 40. As noted above, Opposer did not provide a copy of the October 2020 Nielsen and Hookit list, and we do not consider the October 2021 list attached to Applicant’s brief. Given Mr. Sacks’ role as Chairman and Co-Chief Executive Officer of Monster Beverage Corporation and its subsidiaries including Opposer, with responsibility for and involvement in “all aspects of the business,” including “marketing, promoting, and distributing the company’s products,” 24 TTABVUE 2-3, Sacks Decl. ¶¶ 1-2, we accord his testimony about Opposer’s placement on the October 2020 list and the broad revenue standings reflected therein some probative value. The probative value is limited, however, without insight into whether the list covers activity beyond the United States or the extent to which the posts reviewed relating to Opposer included the BEAST marks.

‘financial field,’ may be used to generally describe them.”); *Cooper Indus., Inc. v. Repcoparts USA, Inc.*, Opp. No. 64343, 1983 TTAB LEXIS 127, at *7 (TTAB 1983) (“[T]he mere fact that the products involved in this case (or any products with significant differences in character) are sold in the same industry does not of itself provide an adequate basis to find the required ‘relatedness.’”).⁴⁴

Opposer also argues that this *DuPont* factor weighs in its favor because “Applicant intends to expand its brand to include as many products under the BEAST HACK brand as possible.”⁴⁵ While Applicant’s CEO testified that Applicant would “like to have as many products under the Beast Hack umbrella as we can that baseball and softball players see as bringing value to better their game,”⁴⁶ that does not signal an intent to offer beverage goods or promotional or entertainment services of the type offered by Opposer. Further, “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.” *Stone Lion*, 746 F.3d at 1323 (citation omitted).

⁴⁴ Applicant argues that “when the relatedness of the goods and services is not evident, well known, or generally recognized, ‘something more’ than the mere fact that the goods and services are used together must be shown.” 46 TTABVUE 33. Given the well-established law discussed above, however, we need not decide whether this is a case where “something more” is required to show relatedness. See *In re Samsung Display Co., Ltd.*, Ser. No. 90502617, 2024 TTAB LEXIS 258, at *16 (TTAB 2024) (noting that *In re Coors Brewing Co.*, 343 F.3d 1340 (Fed. Cir. 2003) and *St. Helena Hosp.*, 774 F.3d 747, “involved the question of relatedness of goods and services, limiting the requirement for ‘something more’ to circumstances where goods are used in the rendering of services and the relatedness of the goods and services is not evident, well known, or generally recognized”).

⁴⁵ 43 TTABVUE 45.

⁴⁶ 23 TTABVUE 181-82 (confidential).

The evidence does not show that consumers are likely to consider Applicant's Class 28 goods to emanate from the same source as the goods and services identified in Opposer's UNLEASH THE BEAST! registrations.

b. Trade Channels

Because neither the applications nor Opposer's UNLEASH THE BEAST! registrations contain any limitation on trade channels or classes of consumers, we presume that the respective goods and services would move in all of the normal channels and be available to all of the usual purchasers for such goods and services. *See, e.g., Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 TTAB LEXIS 228, at *61 (TTAB 2022); *see also Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1361 (Fed. Cir. 2000) ("When the registration does not contain limitations describing a particular channel of trade or class of customer, the goods or services are assumed to travel in all normal channels of trade.").

Opposer offers no evidence or argument as to the "normal" channels of trade,⁴⁷ but the record contains some evidence of the trade channels employed by each of the parties for their respective goods and services. Opposer's witness, Mr. Sacks, testified that "beverages displaying the BEAST Marks" are sold in "gas stations, convenience stores, grocery stores, gyms, health food stores, independent stores, mass merchandisers such as Costco, Wal-Mart, and Target, and drug stores such as CVS and Walgreens."⁴⁸ Opposer's drinks bearing its BEAST marks are also sold "by on-

⁴⁷ *See* 43 TTABVUE 43-44.

⁴⁸ 24 TTABVUE 10, Sacks Decl. ¶ 21.

premise retailers such as restaurants, coffee shops, sports venues, gyms, bars, and theme parks” and online, “including on amazon.com, Walmart.com, and monsterarmy.com.”⁴⁹ Applicant sells its swing trainer aid through its website and promotes it at trade shows related to baseball and softball, to travel baseball teams, at batting cages, little league parks and through contacts in the baseball community.⁵⁰ Both parties promote their goods and services on social media.⁵¹

None of this evidence establishes a common channel of trade; the only area of overlap is Internet advertising via the parties’ own websites and social media accounts, which is not probative of an overlap in channels of trade. *See, e.g., Parfums de Coeur, Ltd. v. Lazarus*, Opp. No. 91161331, 2007 TTAB LEXIS 36, at *31-32 (TTAB 2007) (“[T]he mere fact that goods and services may both be advertised and offered through the Internet is not a sufficient basis to find that they are sold through the same channels of trade.”).

The only evidence of a potential common channel of trade is promotion at major league baseball games. Opposer sponsors the Los Angeles Angels Major League Baseball stadium, and Applicant has explored promoting its product at Atlanta

⁴⁹ *Id.*

⁵⁰ 22 TTABVUE 246-74 (website); 23 TTABVUE 63-64, 95, 130, 189 (confidential).

⁵¹ *See, e.g.,* 43 TTABVUE 43, 22 TTABVUE 324-38. Applicant has Facebook, Instagram, and Twitter sites, and has paid for advertising through Facebook and Tiktok. *E.g.,* 23 TTABVUE 90-91 (confidential). Opposer maintains a significant presence on each of those platforms. 24 TTABVUE 28-31, Sacks Decl. ¶¶ 64-70.

Braves games, enabling children to try the swing trainer, but there is no evidence that this has been implemented.⁵²

Opposer argues that Applicant intends to target “sophisticated consumers of sporting goods, including men and women seeking to improve their baseball, softball, and/or golf swings,” and “Opposer markets its products to the same specific group of people, by advertising at and sponsoring sporting events, including professional baseball games.”⁵³ Applicant’s CEO testified that the target audience for its baseball swing training goods includes people of all ages and skill levels, from children to major league players, male and female, and that Opposer primarily targets young adult males aged 18 to 34, but has expanded that demographic to include female and older consumers.⁵⁴ As noted by Opposer, consumers targeted through its sponsorship of athletic competitions, including baseball, would necessarily include Applicant’s target consumers of baseball players, parents and fans. Opposer also sponsors professional golfer Tiger Woods, placing its UNLEASH THE BEAST! mark before golf fans.⁵⁵ These facts show modest overlap in channels of trade and target consumers with respect to Applicant’s Class 28 goods.

c. Purchasing Conditions

The evidence shows that Applicant’s baseball and softball swing training aid ranges in price from \$189.63 for an on-deck unit to \$999 for the deluxe model, with

⁵² 23 TTABVUE 125-30 (confidential).

⁵³ 43 TTABVUE 43.

⁵⁴ 23 TTABVUE 185-87 (confidential), 24 TTABVUE 18, Sacks Decl. ¶ 38.

⁵⁵ 43 TTABVUE 43-44; *Id.* 19-20.

the base permanent model advertised at \$499.99.⁵⁶ Applicant's CEO testified that "[t]his is an extremely high purchase point for a piece of sporting equipment, especially as compared to a baseball glove or baseball bat."⁵⁷

Applicant argues that it largely targets two groups of purchasers: (i) athletic associations, which are sophisticated purchasers that take care in purchasing and interact personally with Applicant at trade events, and (ii) athletes or parents of athletes, who exercise a heightened degree of care due to considerations such as safety.⁵⁸ According to Applicant, both groups typically have limited budgets, and will investigate the relatively high price of Applicant's product compared to other models on the market.⁵⁹ Opposer presents no contrary evidence or argument as to the sophistication of or care taken by consumers of Applicant's swing training aids.⁶⁰ We find that consumers of Applicant's baseball and softball swing training aids in Class 28 are likely to be sophisticated and exercise a reasonable degree of care in their purchase decisions.

B. Strength of Opposer's Marks

Because it affects the scope of protection to which they are entitled, we next address the strength or weakness of Opposer's BEAST marks. "Two of the *DuPont* factors (the fifth and sixth) consider [the] strength" of a plaintiff's mark. *Spireon*, 71

⁵⁶ 22 TTABVUE 256-57, 314, 34 TTABVUE 4, Smith Decl. ¶ 9.

⁵⁷ 34 TTABVUE 4, Smith Decl. ¶ 9. The parties did not point to any evidence of the price at which Applicant intends to sell golf swing training aids.

⁵⁸ 46 TTABVUE 45-46.

⁵⁹ *Id.*

⁶⁰ 43 TTABVUE 46-47; 50 TTABVUE.

F.4th at 1362. The fifth *DuPont* factor, “[t]he fame of the prior mark (sales, advertising, length of use) is a measure of the mark’s strength in the marketplace.” *Id.* (cleaned up). This factor allows a plaintiff to expand the scope of protection its mark should be afforded based on evidence of marketplace strength.

The sixth *DuPont* factor is “[t]he number and nature of similar marks in use on similar goods [or services],” 476 F.2d at 1361, “which is a measure of the extent to which other marks weaken the asserted mark.” *Spireon*, 71 F.4th at 1362. “There are two prongs of analysis for a mark’s strength under the sixth factor: conceptual strength and commercial strength.” *Id.* (citations omitted).

“Conceptual strength is a measure of a mark’s distinctiveness,” which is “often classified in categories of generally increasing distinctiveness: (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful.” *Spireon*, 71 F.4th at 1362 (cleaned up). “Marks that are descriptive or highly suggestive are entitled to a narrower scope of protection, i.e., are less likely to generate confusion over source identification, than their more fanciful counterparts.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015).

Commercial strength is “the marketplace recognition value of the mark,” asking “whether consumers in fact associate [it] with a unique source and can be shown by, for instance, exclusive use of a mark in the marketplace, advertising and marketing, and sales.” *Spireon*, 71 F.4th at 1363 (cleaned up). The party asserting that its mark is “famous” or commercially strong for purposes of likelihood of confusion, as Opposer does here, has the burden to prove it. *Coach Servs.*, 668 F.3d at 1367.

1. Conceptual Strength

In evaluating a mark's conceptual strength, we may consider dictionary definitions. *See, e.g., Made in Nature*, 2022 TTAB LEXIS 228, at *26 nn.27, 28 (considering dictionary definitions in connection with conceptual strength). In addition "third-party registrations 'are relevant to prove that some segment of the composite marks which both contesting parties use has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.'" *Spireon*, 71 F.4th at 1363 (quoting *Juice Generation*, 794 F.3d at 1339); *see also Tao Licensing, LLC v. Bender Consulting Ltd.*, Canc. No. 92057132, 2017 TTAB LEXIS 437, at *47 (TTAB 2017) ("Use evidence may reflect commercial weakness, while third-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered for similar goods or services.").

Once again, Opposer's Beast marks are:

- UNLEASH THE BEAST!
- UNLEASH THE NITRO BEAST!
- UNLEASH THE ULTRA BEAST!
- UNLEASH THE SALTY BEAST!
- REHAB THE BEAST!
- REHAB THE BEAST! WWW.MONSTERENERGY.COM

Because Opposer's Beast marks are registered on the Principal Register without a claim of acquired distinctiveness or disclaimer, they are presumptively valid, inherently distinctive, and at most suggestive of the identified goods and services. *See* Trademark Act Section 7(b), 15 U.S.C. § 1057(b).

Opposer asserts that its marks are conceptually strong, citing a recent California district court case, *Monster Energy Co. v. BeastUp LLC*, 2022 U.S. Dist. LEXIS 207122, at *7-8 (E.D. Cal. 2022) (the “*BeastUp* case”), which Opposer states “previously found Opposer’s BEAST Marks to be either ‘arbitrary or fanciful because the marks do not describe or suggest any ingredient, quality, or characteristic’ of Opposer’s drinks.”⁶¹ We are not bound by the California district court’s finding on the strength of Opposer’s BEAST marks in an infringement case between different parties, on a different record, regarding different goods (energy drinks), nor do we find it persuasive here.

In response, Applicant argues that Opposer’s BEAST marks are descriptive or suggestive of Opposer’s products, either because they implore consumers to perform an action for a “beast,” “an analogy for the consumer’s id, or primitive self, that will be unleashed upon consumption of Opposer’s product,” or because they are slogans for Opposer’s MONSTER-branded products.⁶²

⁶¹ 43 TTABVUE 35. Opposer does not state which of its BEAST marks were part of that case, which also appears to have involved PUMP UP THE BEAST!, *Monster Energy Co.*, 2022 U.S. Dist. LEXIS 207122, at *4-5, the registrations for which have since been cancelled.

⁶² 46 TTABVUE 16. We do not find “beast” defined as “a monstrous animal” in the definition cited by Applicant, but Applicant’s evidence does define beast as a “monstrously unusual and dangerous animal” and includes “monster” among synonyms for beast. 46 TTABVUE 16 n.2 (citing 36 TTABVUE 3); 36 TTABVUE 3-4 (Wiktionary, <https://en.wiktionary.org/wiki/beast>, accessed April 20, 2023), 36 TTABVUE 13 (MERRIAM-WEBSTER dictionary, <https://www.merriam-webster.com/dictionary/beast>, accessed April 20, 2023).

We recognize the limitations of online dictionaries such as Wiktionary or Urban Dictionary that include definitions submitted by visitors to the websites. *See, e.g., In re Star Belly Stitcher, Inc.*, Ser. No. 85247730, 2013 TTAB LEXIS 451, at *8 n.3 (TTAB 2013). Opposer has had an opportunity to rebut these definitions by submitting others but did not do so, and the evidence of record as a whole corroborates the Wiktionary and Urban Dictionary entries.

The dictionary evidence of record defines “beast” as “(slang) [a]nything regarded as larger or more powerful than one of its normal size or strength” and “(slang) [s]omeone who is particularly impressive, especially athletically or physically.”⁶³ As observed in the Dictionary.com entry provided by Applicant,

[a] more recent slang sense of beast is completely positive. Calling someone a beast in this way means they are extremely strong, skilled, or dominant in some activity, such as a sport, as in Tara is a beast on the volleyball court. This sense of the word is used in the slang term beast mode, which refers to an increased (and often temporary) state of exceptionally high performance.⁶⁴

We also take judicial notice of the AMERICAN HERITAGE DICTIONARY’s definition of “beast” as “[a] very large or powerful person or thing: [e.g.,] drives a beast of a truck.”⁶⁵ Similarly, we take judicial notice of the definition of “unleash,” which means “[t]o set free from restraints: [e.g.,] unleashed his anger.”⁶⁶

⁶³ 36 TTABVUE 3-4 (<https://en.wiktionary.org/wiki/beast>). These definitions align with how some traditional dictionaries define “beast,” and reflect the evolving usages of the term. *E.g.*, 36 TTABVUE 7 (MACMILLAN DICTIONARY definition of “beast” includes humorous use “for describing something with a particular quality,” as in, “The music business is an unpredictable beast.”); 36 TTABVUE 13 (MERRIAM-WEBSTER dictionary definition of “beast” includes “something formidably difficult to control or deal with”).

⁶⁴ 36 TTABVUE 21; *see also, e.g.*, 36 TTABVUE 29 (Urban Dictionary defining beast as “a person that is extremely talented at whatever they [sic] do and always display[s] great determination, dedication, and resilience to always win or want to win”); 36 TTABVUE 33-34 (article from wellness360magazine.com discussing the meaning of the term “beast mode”; “athletes who train at high intensity ... are sometimes called ‘beasts’”).

⁶⁵ <https://www.ahdictionary.com/word/search.html?q=beast>, THE AMERICAN HERITAGE DICTIONARY, accessed Jan. 28, 2025. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, Ser. No. 85214191, 2014 TTAB LEXIS 94, at *6 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594 (Fed. Cir. 2016).

⁶⁶ <https://www.ahdictionary.com/word/search.html?q=unleash>, THE AMERICAN HERITAGE DICTIONARY, accessed Jan. 28, 2025.

These meanings are consistent with how Opposer uses its BEAST marks and the terms contained in them, as illustrated by the following ads, among other uses:⁶⁷



Rob Gronkowski He's a Beast on the football field and a Party Animal in the offseason. In other words, he's a Monster kind of guy.

Who better to partner with on our latest all pro creation.. Gronk.

We re-engineered the flavor and added our tried and true energy blend to deliver the big bad buzz only Monster can.

**Unleash
the Beast!®**



⁶⁷ 43 TTABVUE 18 (highlighting added); 21 TTABVUE 143-44; *see also* 21 TTABVUE 110 (Monster Energy Facebook post with photo of boxer states “Conor McGregor is ready to #UnleashTheBeast as he steps into the UFC Octagon”); 21 TTABVUE 127 (Monster Yamaha Tech 3 Snapchat post with photo of racing vehicle reads: “In a few weeks we will #UnleashTheBeast and get back on track for the pre season tests. Are. You. Ready?!”); 21 TTABVUE 131 (post on Opposer’s Muscle Monster Facebook account with photo of fighter states: “Train like a beast.”).

Opposer's witness testified that "sponsored athletes are also often seen with one of [Opposer's] MONSTER drinks displaying the BEAST Marks on the product container when they are on the podium after winning."⁶⁸ Opposer argues that "customers strongly associate Opposer's BEAST Marks with winning athletes who are the best in their sport."⁶⁹

We find that UNLEASH THE BEAST! is somewhat suggestive of Opposer's energy drink beverages and nutritional supplements in liquid form to the extent the mark hints, but does not directly convey, that consuming the goods will enable one to "unleash" (release) one's strength or power. *See In re Fat Boys Water Sports LLC*, Ser. No. 86490930, 2016 TTAB LEXIS 150, at *11 (TTAB 2016), quoting *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 1332-33 (Fed. Cir. 2014) ("A suggestive mark requires imagination, thought and perception to reach a conclusion as to the nature of the goods, while a merely descriptive mark forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods.").

We likewise find that Opposer's other BEAST marks are suggestive of Opposer's energy drink beverages. UNLEASH THE NITRO BEAST! is suggestive of Opposer's "carbonated drinks enhanced with vitamins, minerals, nutrients, proteins, amino acids and/or herbs; carbonated energy or sports drinks" identified in the registration

⁶⁸ 24 TTABVUE 20, Sacks Decl. ¶ 44; *see also* 24 TTABVUE 20-21, 25, Sacks Decl. ¶¶ 45, 47, 52-53 (detailing winning athletes sponsored by Opposer, including Rob Gronkowski and NASCAR driver Kurt Busch). Neither this testimony nor the referenced exhibits, however, mentions use of any specific BEAST mark in these endorsements other than UNLEASH THE BEAST! *Id.*, 25 TTABVUE 447-58.

⁶⁹ 43 TTABVUE 15.

for this mark to the extent it suggests the goods contain nitrogen and that consuming them will enable one to tap into or “unleash” one’s strength or power. “Nitro” is an abbreviation for “[n]itrogen: [e.g.,] a nitro-charged beer.”⁷⁰

UNLEASH THE ULTRA BEAST! is suggestive of Opposer’s “carbonated drinks enhanced with vitamins, minerals, nutrients, proteins, amino acids and/or herbs; carbonated energy drinks and sports drinks” identified in the registration for this mark to the extent it suggests that consuming the goods will enable one to tap into or “unleash” one’s strength or power beyond what one would normally expect. “Ultra” means “[f]ar beyond the normal or proper degree of: [e.g.,] ultraconservative.”⁷¹

UNLEASH THE SALTY BEAST! is suggestive of the “non-alcoholic beverages, namely, energy drinks, soft drinks, sports drinks, and fruit juice drinks” identified in this registration to the extent it suggests that the goods are salty or unsweet, and that consuming them will enable one to tap into or “unleash” one’s strength or power. “Salty” means “[o]f, containing, or seasoned with salt.”⁷²

And REHAB THE BEAST! is suggestive of Opposer’s “non-alcoholic beverages, namely, energy drinks, sports drinks and fruit juice drinks; all the foregoing enhanced with vitamins, minerals, nutrients, proteins, amino acids and/or herbs” identified in the registrations for this mark to the extent it suggests that consuming

⁷⁰ <https://www.ahdictionary.com/word/search.html?q=nitro>, THE AMERICAN HERITAGE DICTIONARY, accessed Jan. 28, 2025.

⁷¹ *Id.*, <https://www.ahdictionary.com/word/search.html?q=ultra>.

⁷² *Id.*, <https://www.ahdictionary.com/word/search.html?q=salty>.

them will restore or “rehab” one’s beast power. “Rehab” is an informal abbreviation for “rehabilitation.”⁷³

Opposer’s BEAST marks are also somewhat suggestive of its sports-related services, given the above meanings of “beast,” and of Opposer’s apparel goods to the extent they promote the beverages and sports-related services.

Applicant nonetheless argues that “the prevalence of the term BEAST in the clothing, sporting goods, and fitness industries” shows that the term is weak, entitling Opposer’s BEAST marks to only a narrow scope of protection.⁷⁴ In support, Applicant submitted evidence of 176 U.S. trademark registrations and applications for BEAST-formative marks, describing 37 of these as for “sporting goods,” 43 for “fitness related services” and 118 for “apparel goods,” and noted that many of the cited registrations identified goods and services in more than one relevant class.⁷⁵

Opposer seeks to minimize the import of these marks absent evidence of use.⁷⁶ Yet even without evidence of use, “[a] real evidentiary value of third party registrations per se is to show the sense in which ... a mark is used in ordinary parlance.” *Juice Generation*, 794 F.3d at 1339 (citing 2 J. Thomas McCarthy, MCCARTHY ON

⁷³ *Id.*, <https://www.ahdictionary.com/word/search.html?q=rehab>.

⁷⁴ 46 TTABVUE 17-18.

⁷⁵ 46 TTABVUE 18, 30 TTABVUE 7-957. Applicant’s evidence includes several third-party marks registered under Trademark Act Sections 44(e) or 66(a) for which no declaration of use has been filed, and three pending applications. *E.g.*, 30 TTABVUE 700-03, 730-33. Such evidence is generally deemed to lack probative value, *see, e.g., Made in Nature*, 2022 TTAB LEXIS 228, at *31. Even if the evidence were to be considered in the manner of a dictionary, it would not impact our decision on conceptual strength in view of the other evidence presented.

⁷⁶ 50 TTABVUE 14.

TRADEMARKS AND UNFAIR COMPETITION § 11:90 (4th ed. 2015)) (internal quotations omitted); *see also Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed. Cir. 2015); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 916-17 (CCPA 1976) (“[A]lthough third-party registrations are entitled to little weight on the question of likelihood of confusion where there is no evidence of actual use, they may be given some weight to show the meaning of a mark in the same way that dictionaries are used.”) (citation omitted).

Opposer offers little challenge to the content of Applicant’s third party registration evidence; although claiming that many are for “diverse goods and services not relevant to the Parties’ goods and services,” Opposer undertakes to distinguish only three of them, leaving over 160 third-party registrations unaddressed.⁷⁷ In reviewing third-party registrations to consider the conceptual strength of Opposer’s composite UNLEASH THE BEAST! and other BEAST marks, we consider registrations for the term BEAST both on its own as well as used in a composite mark. *Spireon*, 71 F.4th at 1363-64. We have reviewed, but do not separately list, all of the third party registrations, discussing herein those most pertinent to our analysis.

Applicant submitted evidence of the following third-party registrations for BEAST-formative marks that cover clothing, including shirts, t-shirts or tops:

- THE BEAST OF THE EAST
- ANGRY BEAST
- BEAST (filed under Section 44(e), affidavits of continued use filed)

⁷⁷ 43 TTABVUE 50-51. Applicant persuasively argues that these three registrations are indeed relevant, as BATTLE BEASTS covers “balls for games and sports,” BEASTDEVELOPMENTAL includes career counseling and other services for athletes, and BELLABEASTS covers dance studio services, which may be considered a competitive sport and used by athletes to cross-train. 46 TTABVUE 53.

- WHERE'S THE BEAST
- THE BEAST
- LADYBEAST
- INDIGOBEAST
- BEASTMEAT
- BEASTNOW
- RUMBEAST
- BEASTUP
- BKBEASTS
- MRBEAST
- BEASTYLE
- BARBEAST
- SHYBEAST
- BEASTCAT
- ROTOBEAST
- BEAST MODE
- SEXY BEAST
- LONG BEAST
- CHIEF BEAST
- PRETTY BEAST
- BEAST BEHAVIOR
- BREECE THE BEAST
- MEEK BEAST APPAREL
- FANTASTIC BEASTS
- BEAST RIVER FISHING and
- BEAUTIFUL BEAST DESIGNS⁷⁸

Other third-party registrations for BEAST-formative marks covering the same goods include other elements signifying strength, power or physical prowess:

- YOGA BEAST
- MAT BEAST
- BODY BEAST
- BEASTLY BUILT
- HARDCORE BEAST 365
- BEASTIN ATHLETICS
- BEAST AT PLAY SPORT
- FACT FITNESS BEAST MASTER YOUR BEHAVIOR & design⁷⁹

⁷⁸ Applicant's third-party registration evidence can be found in 30 TTABVUE 7-939, Applicant's notice of reliance, Exhibit A.

⁷⁹ *Id.*

In the fields of entertainment in the nature of sporting events and competitions and music performances and events in Class 41, the third party registrations include:

- BEAST OF THE EAST (“conducting rugby football tournaments”)
- BKBEASTS (“organizing and conducting competitions in the fields of rock climbing, exercise and physical fitness; entertainment in the nature of competitions in the fields of rock climbing, exercise and physical fitness”)
- BKBEASTMODE (“organizing and conducting competitions in the fields of rock climbing, exercise and physical fitness; entertainment in the fields of rock climbing, exercise and physical fitness”)
- SHYBEAST (“entertainment services in the nature of live musical performances”)
- BODY BEAST (“entertainment services, namely, conducting contests”)
- THE BEAST (“year-round recreational services, namely, providing sports facilities and recreational facilities and services for skiing, snowboarding, hiking, mountain biking, golf, gondola rides, horseback riding, sightseeing, tennis, swimming, concerts and social entertainment events; providing instruction in the field of skiing and snowboarding”)
- BEAT THE BEAST/CAN YOU BEAT THE BEAST? (“sporting activities, namely, organizing and conducting running and endurance events”)
- THE BEAST (“entertainment in the nature of professional wrestling matches and exhibitions”)
- CONQUERING THE BEAST (“entertainment in the nature of golf tournaments,” “entertainment, namely, live music concerts; entertainment, namely, live performances by musical bands”) and
- BEAST DEVELOPMENTAL (“organizing events in the field of amateur, scholastic, collegiate and professional sports for cultural or educational purposes”)⁸⁰

Given Opposer’s contention that Applicant’s Class 28 goods “are closely related to Opposer’s sports-related services and Opposer’s extensive marketing through sponsorship of athletes, teams, and sports events,”⁸¹ we also consider the following third-party registrations in Class 28:

- THE BEAST (“basketball equipment, namely, basketball backboards and portable basketball units containing a base, pole, backboard and goal”)
- BATTLE BEASTS (“balls for games and sports”)

⁸⁰ *Id.*

⁸¹ 43 TTABVUE 45.

- BEASTMASTER (stylized) (“fishing reels; fishing tackle”)
- ANGRY BEAST (“cricket sports equipment[], namely, cricket bats, balls, gloves, leg guards, thigh pads, chest pads, bags designed to hold cricket equipment, bat covers, arm guards, abdomen guards”)
- BEAST (“sleeved elastic spring bars for exercising”)
- GEAR BEAST (“exercise balls; exercise equipment, namely, exercise resistance bands and foam exercise rollers; jump ropes; exercise equipment in the nature of straps that are affixed to exercise equipment for performance of weight resistance exercises; weight lifting gloves”)
- FITBEAST (“bar-bells; body-building apparatus; boxing gloves; climbers’ harness; dumb-bells; knee guards for athletic use; nets for sports; punching bags; rackets; stationary exercise bicycles; stationary exercise bicycles and rollers therefor; trampolines; athletic protective pads for soccer, baseball; athletic protective elbow pads for skating; athletic protective knee pads for skateboarding; foam exercise rollers; skipping rope; sports equipment for boxing and martial arts, namely, boxing gloves, mixed martial arts gloves, punching mitts, and shin guards”)
- BEAST (“discs for playing disc golf; recreational and sporting goods, namely, flying discs”)
- GOBEAST (“manually-operated exercise equipment”)
- BEAST POWER GEAR (“golf accessory, namely, support for holding a golf club,” “manually-operated exercise equipment,” “body-building apparatus; covers for golf clubs ... gloves for golf; golf ball sleeves; handle grips for sporting equipment; head covers for golf clubs”)
- BEAST7 (“lacrosse equipment and accessories, namely, lacrosse balls; lacrosse sticks, lacrosse stick heads and structural and replacement parts thereof, lacrosse gloves ... lacrosse goals, lacrosse nets”)
- THE BAND BEAST (“exercise equipment in the nature of anchor base for resistance bands; exercise machines; exercise platforms; manually-operated exercise equipment”)
- POWER BEAST & design (“gym chalk for improving hand grip in sports activities”)
- THE NET BEAST (“rackets and balls for a court type paddle ball game”) and
- BEAUTY BEAST FITNESS (“weight lifting belts”)⁸²

Finally, as Opposer “has promoted, distributed, and sold its products displaying the BEAST marks at gyms and fitness-related events,”⁸³ we consider evidence of

⁸² See 30 TTABVUE 7-939, Ex. A.

⁸³ 43 TTABVUE 24.

third-party BEAST-formative marks registered for fitness and personal training services, including:

- BKBEASTS
- BODY BEAST/BODY BEAST & design
- HUMBLE BEAST
- JOHN THE BEAST
- BEAST CHICKZ
- MAMA BEASTS
- THE BEAST MOVEMENT & design
- BEAST GANG & design
- BASEMENT BEAST
- BEASTS TRAIN MEAN and
- SHEBEAST⁸⁴

This evidence of third-party registrations for goods and services that are the same as or similar to those identified in Opposer's pleaded registrations or otherwise similar to the parties' goods and services, which we find to be extensive, is powerful on its face. *Juice Generation*, 794 F.3d at 1337-39 and n.1 (evidence including "considerable number" of third party uses and 26 registered or unregistered marks featuring terms PEACE LOVE followed by a food item was "powerful on its face"). The registrations show that the BEAST element of Opposer's marks has "a normally understood and well-recognized descriptive or suggestive meaning" in the fields of apparel and sports. *Spireon*, 71 F. 4th at 1363 (citation omitted). It is apparent that the term "beast" "hint[s] at some attribute of the goods or services,' in this industry and is thus suggestive." *Spireon*, 71 F.4th at 1364 (quoting 2 McCarthy § 11:64 (5th ed. 2023)). Based on the foregoing, we conclude that "beast" is a weak indicator of

⁸⁴ See 30 TTABVUE 7-939, Ex. A.

source when used with the parties' identical or arguably related goods and services, with a narrow scope of protection.

2. Commercial Strength

We next consider the commercial strength of Opposer's BEAST marks. Commercial strength is "based on marketplace recognition of the marks," *Made in Nature*, 2022 TTAB LEXIS 228, at *24, and "may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident." *Omaha Steaks*, 908 F.3d at 1319 (quoting *Bose*, 293 F.3d at 1371 (internal citations omitted)). Commercial strength may also be measured by "widespread critical assessments; notice by independent sources of the products identified by the marks; and the general reputation of the products and services." *Monster Energy Co. v. Lo*, Opp. No. 91225050, 2023 TTAB LEXIS 14, at *30 (TTAB 2023) (citations omitted). Likelihood of confusion strength is not a binary factor, but varies along a spectrum from very strong to very weak. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 1325 (Fed. Cir. 2017).

Opposer argues that its BEAST marks are commercially strong, pointing to the findings of the California district court in the *BeastUp* case discussed above regarding Opposer's sales volume, marketing and exposure of its BEAST marks.⁸⁵ Again, we are not bound by the decision in *BeastUp* and do not find it persuasive under the different facts of this case.

⁸⁵ 43 TTABVUE 36-37.

In his testimony, Mr. Sacks traces the founding of the Monster Energy brand in 2002 to its current status as one of the top two energy drinks in the U.S., with a 31% market share, over \$6.3 billion in advertising expenditures from 2002-2021, and over 2.8 billion cans sold annually in the U.S. alone.⁸⁶ Eighty percent of the cans sold since 2002 have used one of Opposer's BEAST marks, such as seen below:⁸⁷



Mr. Sacks testified in general terms about Opposer's other BEAST marks, including UNLEASH THE NITRO BEAST! (used on Monster Energy Extra Strength Nitrous Technology line since 2009 and Monster Maxx line since 2018 and currently also used on Monster Energy Nitro product), UNLEASH THE ULTRA BEAST! (used on Monster Energy Ultra line since 2012), UNLEASH THE SALTY BEAST! (used

⁸⁶ 24 TTABVUE 3-5, 14-16, Sacks Decl. ¶¶ 3, 5, 9, 33, 36.

⁸⁷ 24 TTABVUE 6-7, 64-66, Sacks Decl. ¶ 11, Ex. 2.

“on certain containers of its Juice Monster® products” since 2018), and REHAB THE BEAST! (used with Monster Rehab line from 2011 to 2021).⁸⁸ He also provided photos showing UNLEASH THE NITRO BEAST!, UNLEASH THE ULTRA BEAST!, REHAB THE BEAST! and UNLEASH THE CAFFEINE FREE BEAST! used on the back of the cans, similar to the use of UNLEASH THE BEAST! seen above.⁸⁹ However, we have no information regarding Opposer’s advertising, sales and revenues for the goods sold under these marks.


Mr. Sacks’ testimony and evidence, which was not controverted, largely pertains to the marketing and sale of Opposer’s Monster Energy drinks and shows that these products have come to enjoy considerable sales and market share. Opposer’s UNLEASH THE BEAST! mark was launched at the same time as its original energy drink and the vast majority (over 80%) of Opposer’s beverages sold under its Monster Energy brand since 2002 bear one of the BEAST marks, along with the MONSTER,

⁸⁸ 24 TTABVUE 9, Sacks Decl. ¶¶ 13-18. Mr. Sacks also discussed use of PUMP UP THE BEAST! and HYDRATE THE BEAST!, but did not mention use of REHAB THE BEAST! WWW.MONSTERENERGY.COM.

Mr. Sacks further testified that Opposer (through a subsidiary), began using THE BEAST UNLEASHED with a ready-to-drink malt alcohol beverage in January 2023, 24 TTABVUE 10, Sacks Decl. ¶ 19, but this mark is not mentioned in Opposer’s notice of opposition or briefs. See 1, 43 and 50 TTABVUE.

⁸⁹ 24 TTABVUE 77-99, 113-17, Sacks Decl. Ex. 2, 5. Apart from these undated photos, there is scant evidence of Opposer’s use of any of its BEAST marks other than UNLEASH THE BEAST! *E.g.*, 25 TTABVUE 407-41, Sacks Decl. ¶ 37, Ex. 15 (point-of-sale marketing items show two uses of UNLEASH THE NITRO BEAST! among multiple uses of UNLEASH THE BEAST!); 25 TTABVUE 462-99, Sacks Decl. ¶ 63, Ex. 24 (exemplary printouts from www.monsterenergy.com from 2003-2018 show one legible use each of UNLEASH THE ULTRA BEAST! and PUMP UP THE BEAST! among multiple uses of UNLEASH THE BEAST!).



MONSTER ENERGY and/or claw design  marks. From this, we can extrapolate that a good portion of Opposer's marketing and advertising expenses, and its sales and revenues, can be attributed to energy drinks sold under Opposer's BEAST marks, including UNLEASH THE BEAST!, indicating that this mark has moderate commercial strength for beverages.⁹⁰ Conceding that such evidence can be persuasive, Applicant argues that the evidence relating to beverages does not prove the marks' commercial strength for the specific goods and services at issue in this case.⁹¹

When assessing commercial strength, a "mark's renown within a specific product market is the proper standard," *Joseph Phelps*, 857 F.3d at 1325 (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1374-75 (Fed. Cir. 2005)), and its strength "is determined from the viewpoint of consumers of like products." *Id.* at 1326. Renown of Opposer's UNLEASH THE BEAST! mark for beverages may result in some degree of recognition for its other goods and services. *Inter IKEA Sys. B.V. v. Akea, LLC*, Opp. No. 91196527, 2014 TTAB LEXIS 166, at *15-16 (TTAB 2014) ("To the extent that consumers recognize the IKEA mark in connection with furniture, housewares, home furnishings, food products and restaurant services, that is a result of the fame of the retail stores."). It does not, however, automatically equate to "fame" or strength for other goods or services. *See*,

⁹⁰ We find Opposer has not shown commercial strength for any BEAST marks other than UNLEASH THE BEAST!, even for beverages, given the lack of evidence of their renown and indications that Opposer has stopped using several of the marks.

⁹¹ 46 TTABVUE 20-21.

e.g., *Monster*, 2023 TTAB LEXIS 14, at *41 (“After consideration of the evidence regarding the relationship between energy drinks and restaurants and frozen and flavored ice products, we find that the fame of the MONSTER ENERGY drinks does not extend to restaurant services generally or to restaurants with take-out for flavored and fruit ice products.”) (citation omitted).

Thus, we consider Opposer’s evidence relating to the strength of UNLEASH THE BEAST! for other goods and services. Mr. Sacks testified that, “[i]n addition to selling beverages in connection with the BEAST Marks, since 2002 Monster uses and licenses its BEAST Marks on a wide range of other products, such as, for example, beverages, clothing (such as shirts and sweatshirts), headgear (such as hats), sporting equipment, gaming chairs, and headphones, among other products.”⁹² Opposer presented some evidence of use of UNLEASH THE BEAST! on clothing, including shirts and hats, snowboards and gaming chairs, such as seen below:⁹³

⁹² 24 TTABVUE 10-11, Sacks Decl. ¶ 23.

⁹³ *Id.*; *see also* 24 TTABVUE 118-28, Sacks Decl. Ex. 6.



Mr. Sacks further testified that “[s]ince 2002, Monster has sold and/or distributed clothing and accessories displaying the BEAST Marks through giveaways, its MONSTER ARMY program, its Monster Gear program, and its distribution of products to retailers and distributors, among other channels.”⁹⁴ According to Mr. Sacks, “[t]here is a huge demand for t-shirts, sweatshirts, hats, and other clothing, gear, and merchandise bearing the BEAST marks,”⁹⁵ and “[s]ince at least 2003, Monster’s apparel and accessories bearing its BEAST marks have been sold or distributed directly to consumers in all 50 states, and have been and continue to be

⁹⁴ 24 TTABVUE 11, Sacks Decl. ¶ 25. This includes the Monster Army program and monsterarmystore.com, “through which Monster Army athletes can purchase various items featuring the BEAST Marks, including clothing, hats, stickers, and backpacks”; it is unclear whether the general public can buy goods on this website. *Id.* 12-13, Sacks Decl. ¶¶ 27-28. Through its point of sale program, Opposer has sold and/or distributed items, “many of which prominently display the BEAST Marks, including, apparel, display headers, stickers, signs, racks, table tents, decals, gaming chairs, headsets, and display cards, among other goods.” *Id.* 13, Sacks Decl. ¶ 29. Opposer also sells or gives away “accessories, clothing, and beverage products bearing its BEAST Marks” at sporting events, music festivals, concerts and other events. *Id.*, Sacks Decl. ¶ 30; *see also id.* at 19, Sacks Decl. ¶ 42 (Monster Ambassador Team gives away beverages and merchandise bearing the BEAST marks at sporting events).

⁹⁵ 24 TTABVUE 11, Sacks Decl. ¶ 26.

sold to the public through retail stores and websites.”⁹⁶ In addition, Mr. Sacks testified that Opposer “has entered into license agreements with several clothing manufacturers, giving them a license to produce and sell clothing and other merchandise that bears the BEAST Marks,” yielding gross sales and royalties in amounts submitted confidentially, but Opposer does not state whether these figures are for the U.S., the time period they cover, or what proportion is for goods bearing UNLEASH THE BEAST! or any other BEAST mark.⁹⁷ See *New Era Cap*, 2020 TTAB LEXIS 199, at *32 (“Because Opposer failed to break down sales and expenditures for the United States alone, the probative value of this evidence to prove commercial strength or fame is diminished.”).

Opposer also provides evidence of its promotion of the BEAST marks through sponsorships and athletic events. For example, Opposer “allocates a large proportion of its marketing, advertising, and promotional budget on athlete endorsements and sponsoring athletic competitions and other events in order to reach [its] primary target market,” which has traditionally been “young adults aged 18 to 34 years old, primarily males.”⁹⁸ This includes the MONSTER ARMY program, whose applicants

⁹⁶ 24 TTABVUE 14, Sacks Decl. ¶ 31.

⁹⁷ 24 TTABVUE (28 TTABVUE confidential) 11-12, Sacks Decl. ¶ 26. There is no evidence that these licenses include any BEAST marks other than UNLEASH THE BEAST!, which is the only BEAST mark listed in the example license provided confidentially. 28 TTABVUE 41-58, Conf. Ex. 8 to Sacks Decl.

⁹⁸ 24 TTABVUE 18, Sacks Decl. ¶ 38.

include “more than 390,000 amateur athletes from throughout the world in various extreme sports.”⁹⁹

Further, Opposer sponsors “a number of venues for major sporting events, such as the Los Angeles Angels’ MLB baseball stadium (from 2008 to present), the Arizona Cardinals’ NFL football team (2010), the San Diego Chargers NFL football team (2009), Major League Lacross[e] (2008-2009), the Anaheim Ducks (since as early as 2005), [the] New Jersey Devils (present), [the] Boston Bruins (present), and [the] Montreal Canadiens NHL teams (present)”; its “MONSTER drinks, the majority of which bear one of the BEAST Marks, are sold at the arenas, venues, and sporting events sponsored by Monster.”¹⁰⁰ Although not mentioned in the Sacks’ declaration, Opposer argues in its brief that “[t]hrough Opposer’s sponsorship with the Los Angeles Angels’ baseball stadium, Opposer has prominently displayed its branding in the outfield of the Angels’ baseball stadium, and thus Opposer’s branding is seen by attendees as well as television viewers of the 80-90 home games per year.”¹⁰¹

In addition, Opposer has sponsored athletes in a wide range of sports, such as NFL player Rob Gronkowski, boxer Conor McGregor and golfer Tiger Woods, as well as athletes in bodybuilding, basketball, hockey, racing and bullfighting.¹⁰² Opposer’s use of its BEAST marks in connection with these sponsorships includes “trucks that

⁹⁹ 24 TTABVUE 12, Sacks Decl. ¶ 27.

¹⁰⁰ 24 TTABVUE 26-27, Sacks Decl. ¶ 57.

¹⁰¹ 43 TTABVUE 18, citing 24 TTABVUE 26-27, Sacks Decl. ¶ 57. *Cai*, 901 F.3d at 1371 (“Attorney argument is no substitute for evidence.”) (citation omitted).

¹⁰² 24 TTABVUE 18-23, Sacks Decl. ¶¶ 39, 45-48.

have been ‘wrapped’ with MONSTER Marks and BEAST Marks and other promotional vehicles at events where Monster offers samples of Monster products to consumers,” including “free samples of MONSTER drinks bearing the BEAST Marks and MONSTER-branded merchandise, also bearing the BEAST Marks.”¹⁰³ Opposer also uses its UNLEASH THE BEAST! mark in social media posts about the events.¹⁰⁴ Mr. Sacks testified that Opposer placed fourth on Nielsen and Hookit’s October 2020 list of the “Top 50 Most Marketed Brands in Sports,” which was compiled through “audits of all online posts from professional athletes, teams, and leagues over the course of 12 months — weighing the awareness and revenue generated by 25,000 sporting organizations for over 7,000 brands.”¹⁰⁵

Opposer has also “promoted, distributed, and sold its products displaying the BEAST Marks at gyms and fitness-related events,” such as LA Fitness and Equinox gyms;¹⁰⁶ its event sponsorship includes concerts and gaming.¹⁰⁷

Mr. Sacks recounted Opposer’s general promotion using the BEAST marks, such as sponsoring the Las Vegas monorail, which “was named after Monster’s MONSTER drink and prominently featured the UNLEASH THE BEAST!® mark on the sides of

¹⁰³ 24 TTABVUE 19, Sacks Decl. ¶ 41. Mr. Sacks testified that “Monster’s BEAST Marks are often displayed at Monster’s sponsored events,” citing a banner bearing UNLEASH THE BEAST! displayed at an unspecified event. 24 TTABVUE 20, Sacks Decl. ¶ 44, 25 TTABVUE 447-48, Ex. 18.

¹⁰⁴ *E.g.*, 24 TTABVUE 22-23, Sacks Decl. ¶ 48.

¹⁰⁵ 24 TTABVUE 19, Sacks Decl. ¶ 40. “For the 50 Most Marketed Brands alone, which included Monster, these partnerships generated over \$3 billion in sponsorship value, which accounts for 49% of the total value generated by all brands with a presence in sports.” *Id.*

¹⁰⁶ 24 TTABVUE 28, Sacks Decl. ¶ 61.

¹⁰⁷ 24 TTABVUE 13, Sacks Decl. ¶ 30; *id.* 23, Sacks Decl. ¶ 49.

the train”; according to Mr. Sacks, “television and radio reports about the train in June and July 2003 promoted MONSTER drinks, and the UNLEASH THE BEAST!® mark, to approximately 50 million people” in major cities across the country.¹⁰⁸ Promotion of Opposer’s BEAST Marks includes distribution of “millions of point-of-sale marketing items,”¹⁰⁹ use on the websites www.monsterenergy.com and www.monsterarmy.com,¹¹⁰ and prominent display on Opposer’s social media accounts, which have millions of followers. Opposer’s YouTube channel alone has received more than 522 million views worldwide with over 3 million subscribers.¹¹¹ Still further, Opposer presented evidence that Opposer and its executive team have won multiple awards in the beverage field and at least two recognitions in sports marketing, the Nielsen and Hookit list and “brand of the year in 2017 at a sports media awards ceremony by online publisher Cynopsis.”¹¹²

Lastly, Opposer argues that it has engaged in diligent policing, including filing “over 200 opposition proceedings (many of which involve the BEAST Marks) and over 25 lawsuits in federal or state court against individuals or companies using marks confusingly similar to trademarks owned by Monster,” such as the *BeastUp* case.¹¹³

¹⁰⁸ 24 TTABVUE 31-32, Sacks Decl. ¶¶ 71, 73.

¹⁰⁹ 24 TTABVUE 17, Sacks Decl. ¶ 37.

¹¹⁰ 24 TTABVUE 28, Sacks Decl. ¶ 63.

¹¹¹ 24 TTABVUE 28-31, Sacks Decl. ¶¶ 63-70.

¹¹² 24 TTABVUE 4-5, Sacks Decl. ¶¶ 5-6.

¹¹³ 43 TTABVUE 50, 24 TTABVUE 36, Sacks Decl. ¶¶ 91-93, Ex. 38, 27 TTABVUE 2-100. Although the parties address this separately, policing efforts go to the strength of the mark. *Burns Philp Food, Inc. v. Modern Prods. Inc.*, Opp. No. 77433, 1992 TTAB LEXIS 35, at *2 n.2 (TTAB 1992), *aff’d*, 1993 U.S. App. LEXIS 14877 (Fed. Cir. June 14, 1993).

Applicant argues that Opposer's apparel and other licensed products are collateral to its beverage goods, noting that they are addressed in a single paragraph in Opposer's 2021 10-K report, which states that Opposer derives 99.5% of its revenue from beverages. According to Applicant, a review of Opposer's non-beverage product catalogs shows that only five percent of Opposer's apparel and accessory products feature the BEAST-formative marks, making them a negligible portion of the remaining 0.5% of Opposer's revenue stream.¹¹⁴

Opposer's evidence has some facial flaws, as most of it is not confined to the U.S. and, apart from limited examples, does not show the extent to which its activities involve any of the BEAST marks, let alone any specific BEAST mark. *See Hard Rock Cafe Licensing Corp. v. Elsea*, Opp. No. 93436, 1998 TTAB LEXIS 124, at *13 (TTAB 1998) ("The renown of opposer's marks outside the United States or exposure of the foreign public to opposer's marks is irrelevant."). As for its apparel and other goods, even if limited to the U.S., Opposer's confidential sales and royalty figures, while appreciable, do not approach those of cases where a high degree of commercial strength was found, nor is there evidence of their context in the overall marketplace for such goods.¹¹⁵ *See, e.g., Bose*, 293 F.3d at 1371 (reviewing cases); *Made in Nature*, 2022 TTAB LEXIS 228, at *37-38, 44 (TTAB 2022) (evidence including confidential

¹¹⁴ 46 TTABVUE 35 (citing 19 TTABVUE Ex. 38 p. 78; App. Ex. I, filed under seal).

¹¹⁵ It does not appear that Opposer generates any revenue directly from its promotional and entertainment services, including in the field of sports. *See, e.g.,* 25 TTABVUE 401 (2021 10-K report states "[v]irtually all of our sales are derived from our energy drinks...."); 21 TTABVUE 71 (Opposer's Facebook account states "Most companies spend their money on ad agencies, TV commercials, radio spots, and billboards to tell you how good their products are. Instead, we support the scene, our bands, our athletes and our fans!").

annual net revenues for 2018-2020 ranging “from the mid- to high- tens of millions of dollars” led to finding of moderate commercial strength); *Fossil, Inc. v. Fossil Grp.*, Opp. No. 98191, 1998 TTAB LEXIS 388, at *20 (TTAB 1998) (unless extraordinarily large, raw sales and advertising figures alone do not establish that mark is famous).

The foregoing evidence of Opposer’s use of its BEAST marks with non-beverage goods and services either refers generally to the “BEAST Marks” or to the specific mark UNLEASH THE BEAST!. Opposer does not provide any evidence that these goods or services are provided under any BEAST mark other than UNLEASH THE BEAST!¹¹⁶

Although there is some evidence that Opposer has used UNLEASH THE BEAST! in its general marketing and promotion of sports teams, events, venues and athletes, there is a dearth of evidence showing how much of its overall expenditures, use and fan following can be attributed to this mark. For example, notably absent is any evidence that Opposer’s promotion of the Los Angeles Angels’ baseball stadium features UNLEASH THE BEAST! or any other BEAST mark, thus providing no basis to assess the exposure of these marks to baseball fans.¹¹⁷

Nor does Opposer’s enforcement evidence support a finding of strength for its non-beverage goods and services. At least three of the referenced oppositions involved

¹¹⁶ See 24 TTABVUE 10-14, Sacks Decl. ¶¶ 23-31 (detailing “Monster Apparel and Merchandising”) and related images at 24 TTABVUE 118-30, 135-43, Ex. 6-7, 11-13; see also 24 TTABVUE 18-28, Sacks Decl. ¶¶ 38-61 (detailing “Sponsorship of Athletes, Teams, and Events,” “Monster’s Stadium / Venue and Team Sponsorships” and “Monster’s Gym Sponsorships”) and related images at 25 TTABVUE 444-61, Ex. 17-23.

¹¹⁷ 24 TTABVUE 26-27, Sacks Decl. ¶ 57 (listing Angels’ stadium sponsorship among sponsored venues but not providing any photos showing use of BEAST marks there).

marks combining “beast” with “unleash” or “untamed” and several involved food or beverages. An opposition to registration of SUPER BEAST for apparel goods was sustained after the individual applicant abandoned its application,¹¹⁸ but this single instance does not persuade us that Opposer has strong rights in UNLEASH THE BEAST! or any other BEAST mark with respect to clothing.

All of this demonstrates that Opposer has used UNLEASH THE BEAST!, to an unspecified extent, in connection with goods like t-shirts, hats and snowboards, as well as marketing and promotion generally and within the sports and some other entertainment fields. Most if not all of these uses also feature one or more of Opposer’s



MONSTER, MONSTER ENERGY and claw design MONSTER marks.¹¹⁹ This evidence may support general marketplace recognition of Opposer’s brand at large, but does not show that any of Opposer’s BEAST marks—including UNLEASH THE BEAST!—have achieved significant marketplace recognition in connection with the relevant apparel and sports goods and services.

For its part, Applicant argues that Opposer’s BEAST marks are commercially weak due to third-party use of BEAST-formative marks for the same or similar goods.¹²⁰ “Evidence of third-party use of similar marks on similar goods is relevant to

¹¹⁸ 27 TTABVUE 30-39, Sacks Decl. Ex. 38.

¹¹⁹ See 24 TTABVUE 10-14, Sacks Decl. ¶¶ 23-31 (detailing “Monster Apparel and Merchandising”) and related images at 24 TTABVUE 118-30, 132-33, 135-43, Ex. 6-7, 9-13; see also 24 TTABVUE 18-28, Sacks Decl. ¶¶ 38-61 (detailing “Sponsorship of Athletes, Teams, and Events,” “Monster’s Stadium / Venue and Team Sponsorships” and “Monster’s Gym Sponsorships”) and related images at 25 TTABVUE 444-61, Ex. 17-23.

¹²⁰ 46 TTABVUE 15, 17-22.

show that a mark is relatively weak and entitled to only a narrow scope of protection.”
Palm Bay Imps., 396 F.3d 1369 at 1373.

Although fewer in number than its registration evidence, Applicant submitted evidence of use of third-party BEAST-formative marks (including some of the registered marks) with apparel, sports competitions, sports equipment and fitness goods and services, in the form of website screenshots,¹²¹ which we consider for what they show on their face, namely, the use of marks to offer and/or promote goods and services on the websites. *See* Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2); *see also Ayoub, Inc. v. ACS Ayoub Carpet Serv.*, Opp. No. 91211014, 2016 TTAB LEXIS 98, at *44-46 (TTAB 2016). These include:

Apparel

- BASEMENT BEAST (supplements, t-shirts and workout gear)
- HUMBLE BEAST (t-shirts, hats, exercise equipment)
- BEAST AT PLAY SPORT (fitness services, equipment and apparel)
- BEAST GANG (apparel)
- BEAST POWERGEAR (tank tops and weight lifting accessories such as gloves)

Sports events

- BKBEASTMODE (climbing competition)
- BRAMPTON BEAST (hockey team)

Sporting equipment

- ANGRY BEAST (cricket bats and gloves)
- BEAST 7 (lacrosse equipment)
- BEAST COAST (fishing gear)
- BEASTMASTER (fishing rods)
- BEASTMODE (gloves for football and fitness)

¹²¹ Each of the screenshots includes the URL and access date and can be found in 30 TTABVUE 958-1127, Applicant’s notice of reliance, Exhibit C.

- BEAST (golf disc)
- BEAUTY BEAST FITNESS (fitness equipment)
- GOBEAST (pull up bar)
- FITBEAST (home gym equipment)
- JIG-A-BEAST (fishing lures)
- POWER BEAST & design (hand chalk for sports; thumb and finger protectors for golf)
- THE BEAST (portable basketball hoop)
- THE NET BEAST (pickleball equipment)

Fitness

- THE BEAST MOVEMENT (fitness services)
- SHEBEAST (fitness services)
- MAMA BEASTS (fitness services)
- BEAST CHICKZ (fitness classes)
- BEASTS TRAIN MEAN (fitness services)
- BELLA BEASTS (dance studio)
- HUNGER CREATES BEASTS (sports player development)
- IRON BEAST GYM (fitness services)
- BODY BEAST (fitness services)

These examples support a finding that the word BEAST is commercially weak in the relevant fields. *See Omaha Steaks*, 908 F.3d at 1324 (“[T]he controlling inquiry is the extent of third-party marks in use on ‘similar’ goods or services.”); *Jack Wolfskin*, 797 F.3d at 1373 (“The weaker an opposer’s mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.”) (citation omitted).

3. Conclusion on Strength

In sum, we find that Opposer’s BEAST marks, including UNLEASH THE BEAST!, are inherently distinctive but somewhat suggestive, conceptually, with respect to both beverages and the other goods and services identified in Opposer’s pleaded registrations, including apparel and sports sponsorship and entertainment.

The evidence supports a finding that the word “beast” itself is conceptually weak in the apparel and sports fields. Opposer has demonstrated moderate commercial strength in its UNLEASH THE BEAST! mark by virtue of the promotion and sales of its beverages under that mark, together with Opposer’s MONSTER ENERGY,



MONSTER, and claw design marks shown on the container, but we cannot assess commercial strength of Opposer’s other BEAST marks absent evidence concerning those marks individually. Applicant’s evidence of third-party use shows that the word “beast” is in fairly common use for apparel and sports/fitness related goods and services. Based on the foregoing, we find that Opposer’s BEAST marks, including UNLEASH THE BEAST!, are entitled to a normal scope of protection, but the word “beast” itself is conceptually and commercially weak in the apparel and sports/fitness fields and thus entitled to a slightly narrower scope of protection.

C. The Nature and Extent of any Actual Confusion; Length of Concurrent Use; Extent of Potential Confusion

Opposer argues that the seventh, eighth and twelfth *DuPont* factors weigh in favor of finding a likelihood of confusion. Specifically, Opposer contends that Applicant’s minimal use of its marks means “there has been little to no opportunity for actual confusion” to occur, but Applicant’s expansion plans mean “the potential for future confusion is far greater.”¹²² Applicant responds that there is no evidence of actual confusion, and its potential expansion does not increase the potential confusion

¹²² 43 TTABVUE 47-48.

because the marks and goods are not similar and Mr. Smith's testimony only showed an intent to offer more products "that baseball and softball players see as bringing value to their game," whereas he avowed not to enter the beverage industry.¹²³

We find that the lack of actual confusion is not significant, in view of the limited duration and extent of any concurrent use. Applicant's potential for expansion among baseball and softball players does not increase the extent of potential confusion, in view of this distinct, niche market. *Cf. Toro Co. v. ToroHead Inc.*, Opp. No. 91114061, 2001 TTAB LEXIS 823, at *17 (TTAB 2001) ("Because of the sophistication of the purchasers, the highly technical nature of applicant's goods, and the limited number of potential purchasers, the extent of potential confusion is slight, and the resolution of this factor favors applicant."). Accordingly, we find the seventh, eighth and twelfth *DuPont* factors to be neutral.

D. The Variety of Goods or Services On Which Opposer's Marks are Used

The ninth *DuPont* factor considers "[t]he variety of goods on which a mark is or is not used (house mark, 'family' mark, product mark)." *DuPont*, 476 F.2d at 1361; *see also Monster*, 2023 TTAB LEXIS 14, at *54 ("If a party in the position of plaintiff uses its mark on a wide variety of goods or services, then purchasers are more likely to view a defendant's related goods or services under a similar mark as an extension of the plaintiff's line.") (citations omitted).

¹²³ 46 TTABVUE 48-49.

Opposer argues that it uses its BEAST marks on “a wide range of products, including clothing, shirts, sweat-shirts, beverages, headgear, hats, sporting equipment, gaming chairs, headphones, snowboards, and other products” which “makes it more likely that relevant consumers will be confused by applicant’s similar mark.”¹²⁴ Opposer presented some evidence that it has used UNLEASH THE BEAST! with clothing such as t-shirts and unspecified accessories (including through licenses with nearly 20 parties named confidentially), snowboards and gaming chairs, as well as the listed sports venues, teams and athletes. Yet these uses are largely to promote Opposer’s energy drinks, which generate virtually all of its sales.¹²⁵ We do not find on this record that Opposer uses its BEAST marks (including UNLEASH THE BEAST!) with a variety of goods and services. The ninth *DuPont* factor is neutral.

E. Applicant’s Right to Exclude Other Users

The parties disagree on whether Applicant has established exclusive rights in BEAST HACK under the eleventh *DuPont* factor, with Opposer arguing that Applicant’s sales are limited and Applicant arguing that it has “clearly differentiated itself in the market.”¹²⁶ “The applicant’s right to exclude is a right appurtenant to the applicant’s trademark use,” and “considers applicant’s place in the market and any resulting consumer perception as defined by the applicant’s trademark use, insofar

¹²⁴ 43 TTABVUE 46.

¹²⁵ *E.g.*, 25 TTABVUE 401. Even if supported here, this factor would be of marginal relevance for the parties’ identical apparel goods in Class 25. *Monster*, 2023 TTAB LEXIS 14, at *54 (ninth factor has less impact if the goods or services in issue are identical or closely related).

¹²⁶ 43 TTABVUE 49-50 (noting Applicant’s less than \$10,000 in total sales and less than \$8,000 spent in marketing and advertising); 50 TTABVUE 26-27; 46 TTABVUE 48.

as that use is reflected in the mark and goods described in the application.” *Monster*, 2023 TTAB LEXIS 14, at *58. If applicant has achieved “an appreciable level of consumer recognition” and “successfully asserted its [trademark] rights,” this may indicate “how marketplace realities and consumer perception defined by applicant’s common law use and consequent right to exclude other users affects the likelihood of confusion.” *Id.* at *66-67 (citations omitted). Because there is no evidence of either an appreciable level of consumer recognition or that Applicant has successfully asserted its trademark rights, we do not find that Applicant has shown a right to exclude others from use of its BEAST HACK mark, and this factor is neutral. *See, e.g., DeVivo v. Ortiz*, Opp. No. 91242863, 2020 TTAB LEXIS 15, at *46 (TTAB 2020), citing *McDonald’s Corp. v. McSweet LLC*, Opp. Nos. 91178758, 91192099, 2014 TTAB LEXIS 351, at *45 (TTAB 2014) (“Applicant’s sales figures and Applicant’s advertising and promotional expenditures are not sufficient to establish an appreciable level of consumer recognition.”).

F. Applicant’s Intent

Opposer argues that Applicant adopted its marks in bad faith, intending to create a likelihood of confusion with its BEAST marks, pointing to a trademark search that identified two UNLEASH THE BEAST! registrations owned by Opposer in classes 35 and 41 and categorized them as “Level 2 – High risk.”¹²⁷ Applicant denies these

¹²⁷ 43 TTABVUE 48-49, 22 TTABVUE 60, 65-66.

allegations and claims that it adopted its BEAST HACK marks in good faith, noting that Opposer's marks were among 1,684 total marks in the 624-page search report.¹²⁸

“A party's bad faith in adopting a mark is relevant to the thirteenth *DuPont* factor, which includes ‘any other established fact probative of the effect of use.’” *Quiktrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 1036 (Fed. Cir. 2021) (citing *DuPont*, 476 F.2d at 1361). However, an “inference of ‘bad faith’ requires something more than mere knowledge of a prior similar mark...[i]t requires an intent to confuse.” *Id.* (citations omitted).

Here, there is no evidence that Applicant adopted its BEAST HACK marks intending to cause confusion with Opposer or its BEAST marks. Applicant's founder testified that he “was aware of Opposer itself prior to the filing of our Applications, but was not aware of Opposer's marks containing the word ‘beast,’” and chose BEAST HACK for the significance of the terms to its swing trainer goods.¹²⁹ The factor of applicant's intent therefore is neutral. *See, e.g., Bd. of Regents v. S. Ill. Miners, LLC*, Opp. Nos. 91183196 and 91183698, 2014 TTAB LEXIS 92, at *45-46 (TTAB 2014) (search report identifying opposer's mark as “the sole ‘Group One’ conflicting registration” not enough to show bad faith adoption) (citing *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1564 (Fed. Cir. 1987)).

¹²⁸ 46 TTABVUE 46.

¹²⁹ 34 TTABVUE 5, 32, Smith Decl. ¶¶ 14-15, 21.

G. Similarity or Dissimilarity of the Marks

We turn now to the first *DuPont* factor, which considers “[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *DuPont*, 476 F.2d at 1361.

1. Applicant’s Standard Character Mark

We begin by comparing Opposer’s asserted UNLEASH THE BEAST! standard character mark to the closest of Applicant’s marks, BEAST HACK in standard characters.

“The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai*, 901 F.3d at 1373 (quoting *Coach Servs.*, 668 F.3d at 1368). “On the other hand, in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). The marks “must be considered ... in light of the fallibility of memory” and we focus on the recollection of the average consumer, who normally retains a general rather than a specific impression of trademarks. *St. Helena Hosp.*, 774 F.3d at 751. In comparing the marks, we are mindful that where the goods are identical, as they with the parties’ apparel goods in Class 25, Serial Nos. 90248790 and 90248724 and Reg. No. 4975822, the degree of

similarity necessary to find likelihood of confusion is less than where there is a recognizable disparity between the goods. *See, e.g., Coach Servs.*, 668 F.3d at 1369.

Opposer argues that there is a “strong similarity” between the parties’ marks because they share the word “beast.”¹³⁰ As the first word in BEAST HACK, Opposer argues, “beast” is “most likely to be impressed upon the mind of a purchaser and remembered,” and the second word, “hack,” means “to make chopping strikes or blows” and “to play inexpert golf,” meriting “less weight because it is descriptive of what Applicant’s goods are used for.”¹³¹

We agree that UNLEASH THE BEAST! and BEAST HACK are similar in that they both include the word “beast.” Yet this is where the similarities end. And we disagree that “hack” is merely descriptive here. It has not been disclaimed, and in the context of Applicant’s Class 28 goods (the only goods that it arguably describes), “hack” imparts a double entendre, referring to both a batter or golfer’s swing **and** a simple means of improving it. Indeed, MERRIAM-WEBSTER defines “hack” to include “a clever tip or technique for doing or improving something.”¹³²

Nor would consumers necessarily perceive BEAST as dominant in either mark because both UNLEASH THE BEAST! and BEAST HACK are unitary marks and do not necessarily have a dominant portion. *See Dena Corp. v. Belvedere Int’l, Inc.*, 950 F.2d 1555, 1561 (Fed. Cir. 1991) (“A unitary mark has certain observable

¹³⁰ 43 TTABVUE 37-38.

¹³¹ 43 TTABVUE 39.

¹³² 36 TTABVUE 63; *see also* 46 TTABVUE 30-31.

characteristics. Specifically, its elements are inseparable. In a unitary mark, these observable characteristics must combine to show that the mark has a distinct meaning of its own independent of the meaning of its constituent elements. In other words, a unitary mark must create a single and distinct commercial impression.”).

Visually, the marks have notable differences. UNLEASH THE BEAST! comprises three words ending in “beast” and forms a complete imperative sentence, concluding in an exclamation point. BEAST HACK comprises two words and starts with “beast,” while lacking sentence structure and punctuation. Each of the marks has a different additional word, “unleash” and “hack,” which are not visually similar.

The marks also differ in sound. “Unleash” and “beast” lend a rhyming cadence to the three-word UNLEASH THE BEAST! by virtue of their placement at the beginning and end of the mark and their shared long “e” sound, phonetic features that are absent in BEAST HACK.

We also consider the connotation of the marks. Opposer points to the term “beast” indicating a “strong, aggressive athlete” in both marks.¹³³ Even with this shared connotation of the word “beast,” the marks convey different impressions, with UNLEASH THE BEAST! directing an action such as releasing a beast-like quality and BEAST HACK indicating that “the product allows the user to learn how to take beastly swings at a ball.”¹³⁴ The marks thus convey distinct messages.

¹³³ 43 TTABVUE 40; 34 TTABVUE 5, Smith Decl. ¶ 14 (Applicant “chose the mark BEAST HACK because the word ‘beast’ is colloquially referred to as a person that is good at sports.”).

¹³⁴ 34 TTABVUE 5, Smith Decl. ¶ 14.

Nor is the shared connotation from use of “beast” dispositive, as the evidence shows that this word is employed by many trademark registrants and users to impart a similar meaning. As the Federal Circuit has reasoned,

Where marks share a common segment, ‘[t]hird party registrations are relevant to prove that [the shared] segment of the composite marks...has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.’ Evidence of composite third-party registrations is also relevant because ‘[s]uch registrations could...show that the PTO, by registering several marks with such a common segment, recognizes that portions of such composite marks other than the common segment are sufficient to distinguish the marks as a whole and to make confusion unlikely. That is, the presence of such a descriptive or suggestive weak segment in conflicting composite marks is not per se sufficient to make confusion likely.’

Spireon, 71 F.4th at 1364 (quoting 2 McCarthy § 11:90 (5th ed. 2023)). *See also Jack Wolfskin*, 797 F.3d at 1374 (quoting *Juice Generation*, 794 F.3d at 1338) (“[E]vidence of third-party use of similar marks on similar goods ‘can show that customers have been educated to distinguish between different marks on the basis of minute distinctions.’”); *In re Melville Corp.*, Ser. No. 73736814, 1991 TTAB LEXIS 18, at *6 (TTAB 1991) (internal citations omitted) (third-party registrations “may be considered to demonstrate the meaning of a word which comprises the mark, or a portion thereof, to show that there is a well-known and commonly understood meaning of that word and that the mark has been chosen to convey that meaning.... The conclusion to be drawn in such a case is that there is an inherent weakness in a mark comprised in whole or in part of the word in question and that, therefore, the

question of likelihood of confusion is colored by that weakness to the extent that only slight differences in the marks may be sufficient to distinguish one from the other.”).

Here, the differences in the marks are more than minute or slight. Indeed, Applicant’s BEAST HACK mark is closer to many of the third party BEAST-formative marks registered or in use (e.g., BEAST, THE BEAST, BEAST MODE, BEASTCAT, BEAST GANG) than it is to Opposer’s UNLEASH THE BEAST! mark.

In sum, while the shared term “beast” lends some similarities to UNLEASH THE BEAST! and BEAST HACK, we find that the marks’ sound, appearance, connotation and overall commercial impressions are more dissimilar than they are similar.

2. Applicant’s Composite Marks

The foregoing analysis applies equally to the composite marks



and



to the extent they include the

words BEAST HACK. Moreover, each of the composite marks includes additional, fairly prominent, visual elements including a home plate filled with the design of an animal eye in front of two crossed baseball bats. Although “the verbal portion of a word and design mark” is usually dominant, *Viterra*, 671 F.3d at 1366, the design elements here further distinguish the marks. The first composite mark also includes the words “SWING TRAINER,” which, despite having been disclaimed as descriptive or generic for the goods, provide a modest additional point of visual and aural distinction. *In re Binion*, Ser. Nos. 76590702 and 76590729, 2009 TTAB LEXIS 701,

at *7 (TTAB 2009) (“merely descriptive or generic words are accorded less weight in the likelihood of confusion analysis”). As for connotation, the eye design hints at the word “beast,” while the home plate and bats call to mind baseball and one meaning of “hack,” i.e., “to make chopping strikes or blows.”¹³⁵ Even if the design elements merely reinforce the words BEAST HACK, they do not bring either of the composite marks closer to Opposer’s UNLEASH THE BEAST! mark, given the weakness of the word “beast” as a source indicator and the lack of any reference to baseball in Opposer’s mark.

H. Balancing the Factors and Conclusion

With respect to Class 25, the parties’ identified goods are identical, the channels of trade and classes of consumers are presumed to be the same, and the goods are low-priced and may be purchased on impulse, with the second, third and fourth *DuPont* factors weighing in favor of finding a likelihood of confusion.

With respect to Class 28, the goods and services identified in Opposer’s UNLEASH THE BEAST! registrations are not the same as those identified in Applicant’s applications, nor do we find them to be related, with the second *DuPont* factor weighing against finding a likelihood of confusion. As for *DuPont* factors three and four, we find some overlap in the channels of trade and classes of consumers, slightly favoring finding a likelihood of confusion. Applicant does not disagree that its identified Class 28 “hand grips for baseball bats, softball bats and golf clubs; grip tapes for baseball bats, softball bats and golf clubs” sell at low prices and may be

¹³⁵ 43 TTABVUE 39.

subject to impulse purchase, which favors a likelihood of confusion for these goods. As for Applicant's "baseball and softball training aid, namely, a unit comprised primarily of a stand and ball for use in swing training," the evidence supports a finding that consumers would exercise care given the higher price and safety considerations for such goods, which weighs against a likelihood of confusion for those goods. But without any evidence of the price of Applicant's Class 28 "golf training aid, namely, a unit comprised primarily of a stand and ball for use in swing training," we find the fourth *DuPont* factor neutral for those goods.

UNLEASH THE BEAST! is inherently distinctive, but somewhat suggestive of Opposer's goods and services. The mark has achieved moderate commercial strength in connection with beverages. Applicant's evidence shows that the shared word "beast" is both conceptually and commercially weak in the fields of apparel and sports/fitness, diminishing the effect of any commercial strength of Opposer's UNLEASH THE BEAST! mark when considered in the context of Applicant's identified goods and services. The fifth and sixth *DuPont* factors weigh against finding a likelihood of confusion.

The only common element in UNLEASH THE BEAST! and BEAST HACK is the word "beast," which is insufficient to outweigh the differences in the marks' appearance, sound, connotation and commercial impression, such that the first *DuPont* factor weighs against finding a likelihood of confusion. *Cf., e.g., Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 1381-82 (Fed. Cir. 2016) ("a single *DuPont* factor may be dispositive in a likelihood of confusion analysis,

especially when that single factor is the dissimilarity of the marks”) (citation omitted).


The seventh, eighth and twelfth *DuPont* factors are neutral in our analysis. We do not find that Opposer has used its UNLEASH THE BEAST! mark on a variety of goods, such that the ninth *DuPont* factor is neutral. Likewise, we do not find that Applicant has a right to exclude others from using its marks or that Applicant adopted its marks in bad faith, with the eleventh and thirteenth *DuPont* factors neutral in our analysis.

We have carefully considered all arguments and evidence properly of record as they pertain to the relevant likelihood of confusion factors. Weighing these factors,



we hold on this record that Applicant’s BEAST HACK,  and



 marks, when used in connection with the goods identified in the respective applications, are not likely to cause confusion with Opposer’s UNLEASH THE BEAST! or other pleaded BEAST marks for the identified goods and services.

Decision: The opposition under Section 2(d) of the Trademark Act is dismissed as to each of the opposed applications.