

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: February 26, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board

—
Monster Energy Company

v.

Victor Rodriguez

—
Opposition No. 91271109

—
Ari Feinstein, Steven J. Nataupsky, and Matthew S. Bellinger of Knobbe, Martens,
Olson & Bear, LLP, for Monster Energy Company.

Oliver L. Edwards of Law Office of Oliver Edwards LLC, for Victor Rodriguez.

—
Before Heasley, Lebow, and Cohen,
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Victor Rodriguez, seeks a Principal Register registration for a composite mark that “consists of the word ‘LAIKABEAST’ above of the design of a character that has no eyes and has horns and fists at the bottom,” as shown below, for “mugs” and “plates” in International Class 21:¹

—
¹ Application Serial No. 90242794 (“the Application”) is the child application of Application Serial No. 90978500, which was filed on April 20, 2021 under Section 1(b) of the Trademark



Monster Energy Company (“Opposer”) has opposed the Application, alleging in its amended notice of opposition that (1) Applicant did not have a bona fide intent to use his mark in commerce in connection with mugs and plates when he filed the Application, and (2) Applicant’s proposed mark, when used on or in connection with mugs and plates, is likely to cause confusion with Opposer’s previously used and principally registered “BEAST-inclusive” marks shown below:²

- Registration No. 2769364 (UNLEASH THE BEAST!) 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; issued September 30, 2003; maintained;
- Registration No. 4975822 (UNLEASH THE BEAST!) for “clothing, namely, tops, shirts, t-shirts, hooded sweatshirts, sweat shirts” in Class 25; issued June 14, 2016; maintained;
- Registration No. 5820901 (UNLEASH THE BEAST!) for “nutritional supplements in liquid form” in International Class 5; “furniture; chairs; gaming chair” in International Class 20; and

Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce. Color is not claimed.

² We refer to Opposer’s marks collectively as Opposer’s “Beast marks.”

11 TTABVUE. Record citations are to TTABVUE, the Board’s publicly available docket history system. *See, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, *2 n.1 (TTAB 2020). The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry, if applicable.

“bar services; café services; mobile restaurant services for providing food and drink” in Class 43; issued July 30, 2019;

- Registration No. 5927420 (UNLEASH THE BEAST!) for “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; issued December 3, 2019;
- Registration No. 4394044 (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; issued August 27, 2013; renewal application pending;
- Registration No. 5622925 (UNLEASH THE NITRO BEAST!) for “nutritional energy supplements in liquid form; nutritional supplement beverages containing vitamins” in Class 5; issued December 4, 2018;
- Registration No. 4336329 (REHAB THE BEAST!) 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; issued May 14, 2013; renewed;
- Registration No. 5628025 (REHAB THE BEAST!) for “nutritional energy supplements in liquid form; nutritional supplement beverages containing vitamins” in Class 5; issued December 11, 2018;
- Registration No. 4371544 (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; issued July 23, 2013; renewal application pending;
- Registration No. 5633094 (UNLEASH THE ULTRA BEAST!) for “nutritional energy supplements in liquid form; nutritional

supplement beverages containing vitamins” in Class 5; issued December 18, 2018;

- Registration No. 4482659 (PUMP UP THE BEAST!) for “nutritional supplements in liquid form; vitamin fortified beverages” in Class 5; issued February 11, 2014; maintained;
- Registration No. 4482660 (PUMP UP THE BEAST!) for “dairy-based beverages; dairy-based energy shakes” in Class 29; issued February 11, 2014; maintained;
- Registration No. 4542107 (PUMP UP THE BEAST!) for “chocolate-based shakes for boosting energy; ready to drink chocolate-based beverages” in Class 30; issued June 3, 2014; maintained;
- Registration No. 4546402 (PUMP UP THE BEAST!) for “non-alcoholic beverages, namely, non-alcoholic and non-carbonated drinks enhanced with vitamins, minerals, nutrients, proteins, amino acids and/or herbs; non-carbonated energy or sports drinks” in Class 32; issued June 10, 2014; maintained;
- Registration No. 5402465 (HYDRATE THE BEAST!) for “non-alcoholic beverages, namely, energy drinks, soft drinks, sports drinks, and flavored waters; drinking water, namely, water enhanced with vitamins, nutrients, proteins, and/or amino acids” in Class 32; issued February 13, 2018; and
- Registration No. 5783086 (UNLEASH THE SALTY BEAST!) for “non-alcoholic beverages, namely, energy drinks, soft drinks, sports drinks, and fruit juice drinks” in Class 32; issued June 18, 2019.³

³ Opposer also alleges in its notice of opposition that its pleaded marks “have become famous identifiers of Opposer such that consumers have come to recognize a family of BEAST-inclusive Marks with which Opposer markets and sells its goods and services,” and that “Opposer’s BEAST-inclusive Marks have been used and advertised in such a manner so that the public associates the distinctive BEAST element of Opposer’s BEAST-inclusive Marks as an indicator of source of Opposer’s goods and services.” 11 TTABVUE 17 (¶ 7). However, Opposer does not raise the issue again its briefs, much less prove that it owns a family of BEAST-inclusive marks, i.e., proving that such marks are used and promoted together by Opposer or its licensees “in such a manner as to create public recognition coupled with an association of common origin predicated on the family feature[.]” *New Era Cap*, 2020 USPQ2d 10596, *7 (quoting *Marion Labs. Inc. v. Biochemical Diagnostics Inc.*, 6 USPQ2d 1215, 1218-19 (TTAB 1988) (internal quotations omitted)). “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.” *Id.* at *7 (citations omitted). Opposer has waived its family of marks claim; its claim of “priority and likelihood of confusion

Applicant denies the salient allegations in his answer to the amended notice of opposition.⁴ For the reasons discussed below, we dismiss the opposition.

I. The Record

The record includes the pleadings, the file of the Application by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), Opposer's pleaded registrations by operation of Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1),⁵ and the following additional evidence submitted by the parties during their respective testimony periods.

Opposer's submissions:

- notice of reliance on (i) Applicant's answers to certain of Opposer's interrogatories and requests for production of documents,⁶ and (ii) and copies of Opposer's 2002-2021 10-K reports printed from the United States Security and Exchange Commission's website;⁷

must be based on each of Opposer's pleaded marks separately." *New Era Cap*, 2020 USPQ2d 10596, at *9.

⁴ 13 TTABVUE.

⁵ Opposer's amended 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. *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 704.03(b)(1)(A). It was therefore unnecessary for Opposer to reintroduce them during its testimony period.

⁶ 14 TTABVUE 96-129 (First Notice of Reliance, Exhibits 17-20). Written responses to requests for production of documents introduced through a notice of reliance are admissible solely for the purpose of showing that a party has stated that there are no responsive documents, as Respondent did in certain of its responses. *McGowen Precision Barrels, LLC v. Proof Research, Inc.*, 2021 USPQ2d 559, at *5 n.6 (TTAB 2021).

⁷ *Id.* at 130-784 (Exhibits 18-27); 15 TTABVUE 2-542 (Exhibits 28-32); 16 TTABVUE 2-437 (Exhibits 33-36); 17 TTABVUE 2-747 (Exhibits 37-40).

- notice of reliance on printed publications, including magazine articles;⁸
- notice of reliance on Applicant's discovery deposition testimony;⁹ and
- testimony declaration of Rodney Sacks, Chairman and Co-Chief Executive Officer of Monster Beverage Corporation, Opposer's parent company.¹⁰

Applicant's submissions:

- notice of reliance on printouts from the USPTO's Trademark Status & Document

Opposer submitted 2,373 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, the similarity of the trade channels for Opposer's and Applicant's goods, and the variety of goods and services with which Opposer's BEAST Marks are used." 14 TTABVUE 7-13 (First Notice of Reliance). Opposer introduced another 484 pages of its 10-K reports, presumably duplicative, through the declaration testimony of the Chairman and Co-Chief Executive Officer of Opposer's parent company, Monster Beverage Corporation. Apart from being cumulative, Opposer does refer to any of that evidence in its briefs. It thus serves no purpose other than to clutter the record.

⁸ 18 TTABVUE 8-63 (Second Notice of Reliance, Exhibits 41-53).

⁹ 19 TTABVUE 6-130 (Third Notice of Reliance, "Appl. Disc. Dep.," public version including exhibits but not the transcript); 20 TTABVUE 6-131 (confidential version, including both transcript and exhibits). Applicant's deposition was filed entirely under seal, which was improper because most of it pertains to testimony that is not commercially sensitive or truly confidential. *See Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1402 (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. 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."); *see also Adamson Sys. Eng'r, Inc. v. Peavey Elecs. Corp.*, 2023 USPQ2d 1293, at *6 (TTAB 2023) ("Due to the improper designation of all record testimony as confidential, we resort to [Trademark Rule 2.116(g)] and discuss evidence that cannot be reasonably termed confidential and is necessary to support our decision."); *Noble House Home Furnishings, LLC v. Floorco Enters., LLC*, 118 USPQ2d 1413, 1416 n.21 (TTAB 2016) ("[W]e will treat only testimony and evidence that is truly confidential or commercially sensitive as such."). "Therefore, in rendering our decision, we will not be bound by [Applicant's] designation." *Edwards Lifesciences Corp.*, 94 USPQ2d at 1402-03.

¹⁰ 21 TTABVUE 2-142 ("Sacks Test. Decl.," public version with redactions); 22 TTABVUE 2-286 (exhibits); 23 TTABVUE 2-327 (exhibits); 24 TTABVUE 2-33 (exhibits); 25 TTABVUE 2-184 (confidential version).

Retrieval (“TSDR”) database for various third-party registrations of BEAST-formative marks;¹¹

- notice of reliance on TSDR database printouts for various pairs of third-party registrations with different owners “for mugs and plates on the one hand and energy drinks or beverages on the other”;¹²

- notice of reliance on printouts from the USPTO’s Trademark Electronic Search System (“TESS”) database for third-party registrations of “LAIKA”-formative marks;¹³ and

- testimony declaration of Applicant.¹⁴

II. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action must be established in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020), *cert. denied*, 142 U.S. 82 (2021) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26, 109 USPQ2d 2061, 2067 n.4 (2014)). A party in the position of plaintiff may oppose registration of a mark when such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and the plaintiff has a reasonable belief in damage that is proximately caused by registration of the mark. *Meenaxi Enter., Inc. v. CocaCola Co.*, 2022 USPQ2d 602, at *2 (Fed. Cir. 2022) (citing *Lexmark*, 572 U.S. at

¹¹ 27 TTABVUE (First Notice of Reliance).

¹² 28 TTABVUE (Second Notice of Reliance).

¹³ 29 TTABVUE (Third Notice of Reliance).

¹⁴ 26 TTABVUE 2-17(“Application Test. Decl.” with exhibits).

129, 132); *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020).

Opposer's entitlement to oppose registration of Applicant's mark on the ground of likelihood of confusion is established by its pleaded registrations, which are of record and support a colorable claim for likelihood of confusion. *See, e.g., Lipton Indus. Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) (reasonable belief in damage may be established by "assert[ing] a likelihood of confusion which is not wholly without merit ..."); *Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, at *13-14 (TTAB 2022) (valid and subsisting pleaded registration establishes opposer's direct commercial interest in the proceeding and its belief in damage) (citing *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000)).

Having established its entitlement to oppose registration on the ground of likelihood of confusion, Opposer may also pursue its claim of no bona fide intent. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012) (citing *Jewelers Vigilance Comm., Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987) ("Once [entitlement to a statutory cause of action] is established, the opposer is entitled to rely on any of the grounds set forth in section 2 of the Lanham Act which negate applicant's right to its subject registration.")).

III. Likelihood of confusion

"Trademark Act Section 2(d) permits opposition on the basis of ownership of 'a

mark or trade name previously used in the United States ... and not abandoned.” *Exec. Coach Builders, Inc. v. SPV Coach Co.*, 123 USPQ2d 1175, 1181 (TTAB 2017). Therefore, “priority of use” is “a necessary element of any claim under Section 2(d).” *Id.* “Because Opposer relies on its asserted [BEAST-inclusive] registrations that have been made of record, and Applicant has not challenged these registrations by way of any cancellation counterclaim(s), Opposer’s priority ... is not at issue with respect to the goods identified” therein. *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *19-20 (TTAB 2021) (citing *King Candy Co. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)).

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

Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848. We consider the likelihood of confusion factors about which there is evidence and argument. *See In re*

Guild Mortg. Co., 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

A. Comparison of the Goods/Services, Channels of Trade, and Classes of Customers

“The second *DuPont* factor ‘considers [t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,’ while the third *DuPont* factor considers ‘the similarity or dissimilarity of established, likely-to-continue trade channels.’” *In re Embiid*, 2021 USPQ2d 577, at *22 (TTAB 2021) (quoting *In re Detroit Athl. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567)).

1. The Goods/Services

“Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods [or services] are used together or used by the same purchasers; advertisements showing that the relevant goods [or services] are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant’s goods and the goods [and services] listed in” an opposer's pleaded registrations. *Embiid*, 2021 USPQ2d 577, at *22-23. In this case, however, there is no evidence of relatedness; only argument.

Applicant’s goods, once again, are “mugs” and “plates” in Class 21.

Opposer’s goods and services include variously described non-alcoholic beverages in Classes 5, 29, 30 and/or 32,¹⁵

¹⁵ See Registration Nos. 2769364 (UNLEASH THE BEAST!); 4394044 and 5622925 (UNLEASH THE NITRO BEAST!); 4336329 and 5628025 (REHAB THE BEAST!); 4371544 and 5633094 (UNLEASH THE ULTRA BEAST!); 4482659, 4482660, 4542107 and 4546402

as well as nutritional supplements,¹⁶ items of apparel,¹⁷ and services of promoting the goods and services of others in various industries, sporting events and competitions, and musical performances and events.¹⁸

Focusing only on its beverage goods, Opposer argues that the parties' goods are "highly related" because:

Applicant's Application covers mugs (a type of beverageware) and plates, which are closely related to beverageware. Opposer has asserted trademark registrations for its BEAST Marks in connection with beverages, which are highly related to beverageware. Indeed, the sole purpose of beverageware, such as mugs, is for use in consuming beverages. Opposer has also extensively used its BEAST Marks on and in connection with beverages. Consequently, consumers are likely to believe that Applicant's mugs and plates displaying the LAIKABEAST mark are sold or distributed by Opposer, or that they are a co-branded product with Opposer.¹⁹

Opposer provides no evidence to support this argument, and we find it unpersuasive. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005) ("Attorney argument is no substitute for evidence."); *Martahus v. Video Duplication Servs. Inc.*, 3 F.3d 417, 27 USPQ2d 1846,

(PUMP UP THE BEAST!); 5402465 (HYDRATE THE BEAST!); and 5783086 (UNLEASH THE SALTY BEAST!).

¹⁶ *See* Registration Nos. 5820901 (UNLEASH THE BEAST!), 5622925 (UNLEASH THE NITRO BEAST!), 5628025 (REHAB THE BEAST!), 5633094 (UNLEASH THE ULTRA BEAST) and 4482659 (PUMP UP THE BEAST!).

¹⁷ *See* Registration No. 2769364 (UNLEASH THE BEAST!); furniture goods, and bar, café and restaurant services, *see* Registration No. 5820901 (UNLEASH THE BEAST!).

¹⁸ *See* Registration No. 5927420 (UNLEASH THE BEAST!).

¹⁹ 30 TTABVUE 42 (Opposer's Brief).

1849 (Fed. Cir. 1993) (“[M]ere attorney arguments unsubstantiated by record evidence are suspect at best.”).

The question is whether consumers “would consider the goods to emanate from the same source,” *Coach Services*, 101 USPQ2d at 1723. *See also 7-Eleven, Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007). Opposer’s energy drink beverages may be drunk from any number of drink containers—including glasses, cups, mugs—from any number of sources. The mere fact that one may be used to contain the other does not make such beverages and containers commercially related, any more than steak or salmon is commercially related to the pots or pans in which it is cooked. Even where there is some tenuous relationship between goods, as where they are used together, likelihood of confusion may not be found where the consuming public would not perceive them as originating from the same source.²⁰

In other factual scenarios, we have found that goods could be related by virtue of their complementary nature, but this is not one of those situations. *See e.g., Polo Fashions, Inc. v. La Loren, Inc.*, 224 USPQ 509, 511 (finding bath sponges and personal products such as bath oil and soap to be closely related complementary goods). “Merely because goods can be used together is not a sufficient basis on which to find them to be complementary. Rather, there must be some showing that

²⁰ Applicant, for his part, provided evidence in the nature of 14 pairs of “co-existing third-party registrations” for “substantially identical marks ... used by different mark owners for mugs and plates on the one hand and energy drinks or beverages on the other” to show that the USPTO does not consider such goods related, 28 TTABVUE (Applicant’s Second Notice of Reliance). We need not analyze that evidence, or the arguments of Opposer in opposition thereto, because Opposer failed to establish a prima facie case that the respective goods/services are related.

customers would seek out both types of goods for the same purpose” *N. Face Apparel Corp. v. Sanyang Indus. Co.*, 116 USPQ2d 1217, 1232 (TTAB 2015).

The evidence in this record does not show that consumers will consider mugs or plates to emanate from the same source as non-alcoholic beverages of the type covered by Opposer’s Beast registrations (or any other goods and services identified in those registrations). The second *DuPont* factor therefore weighs against a finding of likelihood of confusion.

2. The Channels of Trade

We turn now to the channels of trade, which, like the comparison of goods, looks to what is disclosed in the Application and Opposer’s Beast registrations. See, e.g., *In re Detroit Athl. Co.*, 128 USPQ2d at 1052.

Opposer notes, citing *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1361 (Fed. Cir. 2000), that because neither the Application nor Opposer’s Beast registrations contain any limitation on trade channels, the parties’ goods “are presumed to travel through the normal channels of trade” for such products.”²¹ See also TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 1207.01(a)(iii), quoted in *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013) (“presuming, absent specific limitations from the applicant, that the ‘registration encompasses all goods or services of the type described, that they move in all normal channels of trade, and that they are available to all classes of purchasers.’”).

²¹ 30 TTABVUE 40 (Opposer’s Brief).

The record, however, is devoid of evidence showing what the “normal” channels of trade are for the parties’ goods/services in this case, much less whether they are overlapping. We know some of Opposer’s trade channels because Opposer’s witness, Mr. Sacks, testified that “beverages displaying [Opposer’s] 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.”²² And we know from Applicant’s discovery deposition that he has tentative plans to advertise his mugs and plates on Instagram and Facebook, and potentially via Google ads, “but that is not set in stone.”²³

Even if we assume that mugs and plates are carried by mass merchandisers, that does not constitute a common channel of trade. *See e.g. Morgan Creek Prods., Inc. v. Foria Int’l, Inc. Inc.*, 91 USPQ2d 1134, 1142 (TTAB 2009) (“It has long been held that the mere fact that two different items can be found in a supermarket, department store, drugstore or mass merchandiser store is not a sufficient basis for a finding that the goods are related.”); *see also Recot, Inc.v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899-1900 (Fed. Cir. 2000) (absent some evidence that the products are sold in close proximity to one another, the fact that the involved products are sold in supermarkets did not weigh in favor of confusion being likely).

This record fails to demonstrate an overlap in the parties’ channels of trade.

²² 21 TTABVUE 7 (Sacks Decl. ¶ 19).

²³ 20 TTABVUE 79-80 (Appl. Disc. Dep. pp. 73:7-74:4).

3. The Classes of Customers

Opposer argues that “Applicant and Opposer target the same consumers.”²⁴ In support, Opposer compares Applicant’s business plan, which indicates that he “intends to market his goods to people aged 13 to 40 years old,”²⁵ to its own target market: “Opposer’s primary target market consists of young adults aged 18 to 34 years old, primarily males,” although this “demographic of [Opposer’s] consumers has expanded over time and MONSTER energy drinks are increasingly being consumed by more females as well as older persons.”²⁶ From this, Opposer concludes that “Applicant’s target consumers ... necessarily include consumers targeted by Opposer.”²⁷

Are we to conclude from Opposer’s argument that overlap in the target age of each party’s customers, means *ipso facto* that the classes of customers are the same? Of course not, any more than we would conclude that the classes of consumers would be considered the same for automobiles and ice cream, merely because a common audience of people over the age of 21 are targeted by the providers of such goods.

Applicant, in fact, clarifies in his discovery deposition that as to mugs and plates, his target customers are “are gamers and anime fans of all ages.”²⁸ The fact that some portion of Applicant’s target audience – gamers and anime fans of all ages – may from

²⁴ 30 TTABVUE 41 (Opposer’s Brief).

²⁵ *Id.*; 20 TTABVUE 131 (App. Disc. Dep. p. 131, Exhibit 61).

²⁶ 21 TTABVUE 14 (Sacks Test. Decl. ¶ 35).

²⁷ 30 TTABVUE 41 (Opposer’s Brief).

²⁸ 20 TTABVUE 58 (App. Disc. Dep. p. 52:9-11).

time to time also consume energy drinks of the type listed in Opposer's Beast mark registration, is not a sufficient basis to conclude that the classes of customers are the same. This shows nothing more than that both parties offer goods to parts of the general public which, at times, may overlap. *See Coach Services, Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012); *Sports Authority Michigan Inc. v. PC Authority Inc.*, 63 USPQ2d 1782, 1794 (TTAB 2002) ("We think it a fit subject for judicial notice that purchasers of computer hardware and software also would be purchasers of, at least, footwear and apparel, and perhaps sporting goods and equipment. There is nothing in the record, however, to suggest that merely because the same consumer may purchase these items, such consumer would consider the goods as likely to emanate from the same source or have the same sponsorship."). *Cf. Harvey Hubbell Inc. v. Tokyo Seimitsu Co.*, 188 USPQ 517, 520 (TTAB 1975) ("In determining whether products are identical or similar, the inquiry should be whether they appeal to the same market, not whether they resemble each other physically or whether a word can be found to describe the goods of the parties.").

On this record, the second and third *DuPont* factors weigh strongly against a finding of likelihood of confusion.

B. Comparison of the Marks

We turn now to the first *DuPont* factor, which considers the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. Once again, Opposer's marks are UNLEASH THE BEAST!, UNLEASH THE NITRO BEAST!, UNLEASH THE ULTRA BEAST!, UNLEASH THE SALTY BEAST!, REHAB THE BEAST!,

HYDRATE THE BEAST! and PUMP UP THE BEAST!, and Applicant's mark is:



In comparing the marks, we are mindful that that “[t]he 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 v. Diamond Hong, Inc.*, 127 USPQ2d at 1801 (quoting *Coach Servs.*, 101 USPQ2d at 1721; *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). We also keep in mind that “[s]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003).

Before discussing Opposer's arguments regarding the purported similarity of the parties' marks, it is necessary to point out that Opposer, in making its arguments, apparently used the original version of Applicant's mark (as shown in the

Application),²⁹ rather than the mark as it was revised during prosecution.³⁰ As shown below, respectively, the original drawing shows the wording component of Applicant's mark as two separate terms, whereas the revised drawing displays it as one:



We must evaluate the similarity of the marks using Applicant's mark as it appeared at the time of publication.³¹

Opposer argues that the parties' marks are "highly similar" because the word "BEAST" is "the dominant portion of Opposer's BEAST Marks" and "the dominant portion and most significant component" of Applicant's LAIKABEAST composite mark.³² Continuing, and again referring to the incorrect (original) version of

²⁹ 30 TTABVUE 38-39 (Opposer's Brief); October 8, 2020 Application Drawing, TSDR 1.

³⁰ May 11, 2021 Response to Office Action, TSDR 5. There are also several additional changes to the mark, including changes to the base of the character's neck and surrounding area and horns though these differences are inconsequential to Opposer's arguments.

³¹ As Applicant points out, 32 TTABVUE 3 (Applicant's Brief), while Opposer uses the incorrect (original) version of Applicant's mark when it discusses the purported similarities between the marks, Opposer uses the correct (revised) version in the introductory section of its brief. 30 TTABVUE 9. Opposer made the same error during discovery, defining Applicant's mark in its first sets of interrogatories and requests for production of documents to Applicant by depicting the incorrect (original) drawing. This caused Applicant to point out the error in his responses thereto, *see* 14 TTABVUE 99-100 (Applicant's response to Opposer's first set of interrogatories), 119 (Applicant's responses to Opposer's first request for production of documents).

³² 30 TTABVUE 38-39 (Opposer's Brief).

Applicant's mark, Opposer argues that:

Applicant's LAIKABEAST mark displays the words "LAIKA" and "BEAST." Since the word "LAIKA" is not likely to be understood by many consumers and merely modifies the word "BEAST," which word consumers are likely to understand and recall, the word "BEAST" is the dominant portion and most significant



component of Applicant's **LAIKA BEAST** mark. The fact that the LAIKABEAST mark uses the word "BEAST" as the second component does not diminish the dominant quality of the word "BEAST." In fact, the word "BEAST" appears as the last word in Opposer's BEAST Marks, such as UNLEASH THE BEAST!®,

The parties' marks are phonetically the same. The "BEAST" portions of both parties' respective marks are phonetically the same. The word BEAST is the point of emphasis of Applicant's LAIKABEAST mark when it is spoken and a common element throughout Opposer's BEAST Marks. Thus, there are similarities in sound between the marks.

The overall commercial impression of Opposer's BEAST Marks and Applicant's LAIKABEAST mark are also similar in that both marks include the term BEAST and present the same commercial impression or meaning for that word.³³

We agree that there are certain "similarities in sound between the marks" to the extent that they both contain some form of the wording "BEAST" at the end – specifically, as the last word in Opposer's three- and four-word marks, and as the third syllable of Applicant's composite mark comprised of a unitary term and a design. But the similarities end there.

³³ *Id.* at 39-40.

Applicant's mark does not display the separate terms "LAIKA" and "BEAST," as Opposer asserts, but instead shows a single, unitary term – LAIKABEAST – which has no recognized meaning. Applicant explained in his deposition that he coined the term while playing a mobile game in the summer to fall of 2018:



Q. How did you select the LAIKABEAST mark?

A. ... So to make a long story short, I was playing a mobile game, and it's called Summoners War, and there's a character that I summoned. When you awaken him, he gets a unique name. His name is Laika. So I felt the character was cool. So I was saying -- I told my brother, you know, Laika is a beast. You know, he's cool. He's strong. And then I kept repeating the words "Laika" is a beast. Laika is a beast. Laika the beast." And then eventually I used his name, right. I wanted to incorporate it. And I said, you know what, Laika a beast, Laika a beast, Laika a beast. And then that's when it clicked. I was, like, you know, this is a unique name.³⁴

Breaking LAIKABEAST, which has no meaning, into component parts so as to emphasize the "beast" portion of the wording in Applicant's composite mark in this comparison is an improper dissection of Applicant's mark that violates the anti-dissection rule. *See China Healthways Inst., Inc. v. Wang*, 491 F.3d 1337, 83 USPQ2d 1123, 1125 (Fed. Cir. 2007), citing *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1283 (Fed. Cir. 1984) ("It is incorrect to compare marks by eliminating portions thereof and then simply comparing the residue."); *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) ("It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion."). We thus

³⁴ 20 TTABVue 71 (Applicant Disc. Dep., p. 65:3-18).

reject Opposer's contention that "LAIKA" "merely modifies the word 'BEAST,' and that consumers necessarily would find BEAST to be "the dominant portion and most significant component" of Applicant's composite mark.

Additionally, because the wording **LAIKABEAST** in Applicant's mark is so highly stylized, it is not easy to perceive (without clarification) that it represents the term LAIKABEAST. Without Applicant's explanation, we would not necessarily know that the triangle design  is supposed to be a stylized letter "L," rather than just a triangle design that precedes the wording in the mark. Nor would we know for sure that the design  signifies the letters "I" and "K," respectively, rather than a highly stylized letter "K." Depending on a particular consumer's interpretation, the wording in Applicant's mark could be perceived as LAIKABEAST, AIKABEAST, LAKABEAST, and/or AKABEAST.

Opposer points out, citing *In re Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905 (Fed. Cir. 2012), that because Applicant's mark is a composite mark containing both words and a design, "the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed," *id.* at 1908, and that may be true here as well. But, as noted above, we do not know how exactly the term **LAIKABEAST** will be pronounced. "There is no correct pronunciation of a trademark that is not a recognized word." *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651 (Fed. Cir. 2014). *See also Centraz Inds. Inc. v. Spartan Chem. Co.*, 77 USPQ2d 1698, 1701 (TTAB 2006) ("[I]t is obviously is not possible for a trademark owner to control how purchasers will vocalize its mark").

Regardless of how it will be pronounced, Applicant mark,



in its entirety, appears quite different from any of Opposer's Beast marks:

- UNLEASH THE BEAST!
- UNLEASH THE NITRO BEAST!
- UNLEASH THE ULTRA BEAST!
- UNLEASH THE SALTY BEAST!
- REHAB THE BEAST!
- HYDRATE THE BEAST! and
- PUMP UP THE BEAST!

Like Applicant's composite mark, whose wording LAIKABEAST is unitary and thus has no dominant portion, each of Opposer's Beast marks are also unitary, and each has a structure that is similar to one another, yet quite different from Applicant's mark. Each begins with a verb, or call to action – to UNLEASH!, REHAB!, HYDRATE!, or PUMP UP! some kind of beast.

In sum, while there are similarities in sound between Applicant's mark and Opposer's Beast marks to the extent they share the word "beast, we find the marks much more dissimilar to each other than they are similar. The first *DuPont* factor therefore weighs strongly against a finding of likelihood of confusion.

C. The Strength of Opposer's Marks

The fifth *DuPont* factor is “[t]he fame of the prior mark (sales, advertising, length of use).” *DuPont*, 177 USPQ at 567. The fame or strength of a mark is not a binary factor; rather, it varies along a spectrum from very strong to very weak. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015).

A very strong mark receives a wider latitude of legal protection in the likelihood of confusion analysis, *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1056 (TTAB 2017), while a very weak mark receives a narrower scope of protection. A mark in the middle of the spectrum receives an intermediate scope of protection. *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1347 (TTAB 2017) (finding that opposer's marks were entitled to ‘the normal scope of protection to which inherently distinctive marks are entitled’).

“Because of the extreme deference accorded to a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting fame to clearly prove it.” *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1437 (TTAB 2012).

In assessing the fame or strength of Opposer's marks, we consider both the inherent or conceptual strength of the marks based on the nature of their wording, and their commercial strength, based on their marketplace recognition. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010); *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, *30 (TTAB 2021).

1. Conceptual Strength

To determine the conceptual strength of Opposer's marks, we evaluate where they lie "along the generic-descriptive-suggestive-arbitrary (or fanciful) continuum...." *In re Davia*, 110 USPQ2d 1810, 1815 (TTAB 2014).

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!
- HYDRATE THE BEAST! and
- PUMP UP THE BEAST!

Because Opposer's Beast marks are registered on the Principal Register without a claim of acquired distinctiveness or disclaimer of wording, they are presumptively valid, inherently distinctive, and at most, suggestive of the identified goods. Trademark Act Section 7(b), 15 U.S.C. § 1057(b). *See also See Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) ("A mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods.").

Opposer asserts that its marks are conceptually strong,³⁵ citing to a recent California district court case, *Monster Energy Co. v. BeastUp LLC*, 2022 USPQ2d 1098 (E.D. Cal. Nov. 15, 2022),³⁶ which found Opposer's Beast marks (which in that

³⁵ 30 TTABVUE 36 (Opposer's Brief).

³⁶ 30 TTABVUE 36-37 (Opposer's Brief).

case did not include Opposer's UNLEASH THE NITRO BEAST! mark) "arbitrary or fanciful because the marks do not describe or suggest any ingredient, quality, or characteristic of [Opposer's] energy drinks." *Id.* at *7-8. Echoing that finding, Opposer asserts here that its Beast marks "do not describe any characteristic, feature or quality of Opposer's goods" and instead "act as strong identifiers."³⁷

Applicant, in response, argues that "none of [Opposer's BEAST marks] are fanciful and to the extent these marks suggest an intended result or effect to a consumer of Opposer's caffeine and energy drinks (i.e., consumers will be pumped up, hydrated, unleashed, or rehabbed), these marks are at least somewhat suggestive as to such goods."³⁸ According to Applicant, "UNLEASH THE NITRO BEAST! is certainly suggestive of Opposer's products containing nitrous-oxide."³⁹

Upon review, we agree that Opposer's Beast marks are somewhat suggestive of Opposer's energy drink beverages, which as noted above are the only goods Opposer argues are related to Applicant's mugs and plates.⁴⁰

UNLEASH THE BEAST! is suggestive of Opposer's energy drink beverages and nutritional supplements in the registrations 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. A "beast" is "[a] very large or powerful person or thing: [e.g.,] *drives a beast of*

³⁷ *Id.* at 37.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ As discussed *infra*, Opposer argues relatedness only as between Applicant's mugs and plates and Opposer's beverage goods.

*a truck.*⁴¹ The mark appears arbitrary with respect to the remaining goods and services identified in the registrations for this mark.

UNLEASH THE NITRO BEAST! is suggestive of Opposer’s energy drink beverages and nutritional supplements identified in the registrations for this mark to the extent it suggests the goods contain nitrogen⁴² and that consuming them will enable one to tap into or “unleash” one’s strength or power. “Nitro” is an abbreviation for “nitrogen: [e.g.,] *a nitro-charged beer.*”⁴³

UNLEASH THE ULTRA BEAST! is suggestive of Opposer’s energy drink beverages and nutritional supplements identified in the registrations 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.*”⁴⁴

REHAB THE BEAST! is suggestive of Opposer’s energy drink beverages and nutritional supplements identified in the registrations for this mark to the extent it suggests that consuming them will restore or “rehab” one’s beast power. “Rehab” is an informal abbreviation for “rehabilitation.”⁴⁵

⁴¹ THE AMERICAN HERITAGE DICTIONARY (ahdictionary.com), accessed January 18, 2024. 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*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re Omniome, Inc.*, 2020 USPQ2d 3222, at *2 n.17 (TTAB 2019). We take judicial notice of the definitions for nitro, ultra, rehab, and pump up.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

PUMP UP THE BEAST! is suggestive of the beverages and nutritional supplements identified in the registrations for this mark to the extent it suggests that consuming them assist in maximizing one's power, as in working out or bodybuilding. To "pump up" is a slang term that means "[t]o fill with enthusiasm, strength, or energy," and in the context of sports, it means "[t]o be actively involved in a bodybuilding program; [e.g.,] *athletes pumping up at the gym*."⁴⁶

HYDRATE THE BEAST! is suggestive of Opposer's energy drink beverages identified in this registration to the extent it suggests that consuming them will hydrate one's inner beast strength.

And UNLEASH THE SALTY BEAST! is suggestive of the beverages identified in this registration to the extent it suggests that the goods are salty or unsweet, and that consuming them enable one to tap into or "unleash" one's strength or power.

In sum, we find that Opposer's pleaded Beast marks are somewhat suggestive because they convey an impression of the identified goods but nevertheless require the exercise of some imagination and perception to reach a conclusion about the products' nature. *See In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1515 (TTAB 2016), quoting *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1652 (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.") (addition citations and internal quotations

⁴⁶ *Id.*

omitted).⁴⁷ However, “the fact that a mark may be somewhat suggestive does not mean that it is a ‘weak’ mark entitled to a limited scope of protection.” *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985).

Applicant nonetheless argues that Opposer’s Beast marks are conceptually weak because BEAST “is not a strongly distinguishing component” “in identifying goods and services generally, and ... beverages in particular.”⁴⁸ Applicant highlights, as notable, evidence he introduced of “22 use-based registrations owned by 20 distinct owners covering 12 international classes” “where BEAST is the only literal element,”⁴⁹ and, further, that there are “eleven registrations by ten different owners” for “marks containing the term BEAST for class 32 beverages.” According to Applicant, “[t]he apparent coexistence in the marketplace evidenced by these BEAST and BEAST-formative registrations, including Opposer’s asserted marks, for legally identical goods suggests that there is no likelihood of confusion arising from the common element BEAST.”

Opposer, in response, notes that 17 of the 22 Beast-only registrations relied on by Applicant are for use with goods or services in classes other than those covered by Opposer’s Beast registrations, and points out that “Applicant has not shown that the[] goods and services [in those registrations] are identical to or closely related to the

⁴⁷ We hasten to add, however, that even if we had determined that Opposer’s Beast marks were fanciful or arbitrary, rather than suggestive with respect to the relevant goods, and that Opposer’s mark was entitled to a greater scope of protection than normal, it would not have changed the outcome of this decision.

⁴⁸ 32 TTABVUE 4 (Applicant’s Brief).

⁴⁹ 32 TTABVUE 4 (Applicant’s Brief).

goods and services listed in Opposer's registrations for its BEAST marks."⁵⁰ Additionally, it argues, nine of the eleven Class 32 registrations cited by Applicant "appear to be owned by breweries and are for marks for use with 'beer,' which is not a good listed in Applicant's Application or any of Opposer's asserted registrations."⁵¹ And one of them, Registration No. 4584629 for the mark BEASTUP, was ordered cancelled in California district court case *Monster Energy Co. v. BeastUp LLC*, 2022 USPQ2d 1098 mentioned above. *Id.* at *23.

We agree that Applicant's third-party registration evidence does not suffice to show that Opposer's Beast marks have been conceptually diluted due to common registration of the term BEAST for similar goods or services by others. The issue is relatedness, not classification.⁵² See *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1694 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus "on goods shown to be similar"); *In re i.am.symbolic*, 123 USPQ2d at 1751 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration).

Of the 22 live third-party registrations for Beast-only marks highlighted by

⁵⁰ 33 TTABVUE 13-14 (Opposer's Reply Brief).

⁵¹ *Id.* at 14.

⁵² *Jean Patou Inc. v. Theon Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993) (classification is for the convenience of the Office and "wholly irrelevant to the issue of registrability under section 1052(d), which makes no reference to classification").

Applicant in his brief,⁵³ only three of them ostensibly cover goods or services related to those of Opposer or Applicant: Registration No. 2918892 “for athletic footwear”; Registration No. 3719344 for “clothing, namely, shirts, tank tops, tee shirts”; and Registration No. 4334953 for “dietary and nutritional supplements.” And the latter two registrations were recently assigned to Opposer, so there is really just one relevant BEAST-only third-party registration. Similarly, only two of the ten Beast-formative registrations for “class 32 beverages” Applicant cites are relevant: Registration No. 4772758 for the mark THUNDER BEAST for “non-alcoholic beverages,” and Registration No. 4584629 for BEASTUP. And because the latter registration was ordered cancelled, there is just one relevant BEAST-formative third party registration.

Two registrations are “a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant in both *Jack Wolfskin* and *Juice Generation*.” *In re Embiid*, 2021 USPQ2d 577, at *38. Therefore, apart from some degree of conceptual weakness of Opposer’s Beast marks, the record does not reflect additional conceptual weakness of Opposer’s marks due to widespread registration of the term Beast for similar goods.

2. Commercial Strength

We next consider the commercial strength of Opposer’s Beast marks. Commercial

⁵³ 32 TTABVUE 4 (Applicant’s Brief); 27 TTABVUE 197-99, 232-34, 384-85, 405-06, 448-49, 468-69, 646-47, 764-65, 809-10, 826-27, 905-06, 1035-39, 1078-79, 1272-73, 1399-1400, 1446-47, 1599-1600, 1701-02, 1740-42, 1843-44, 1846-47.

We note that Applicant references only small percentage of the 1882 pages of evidence he introduced comprising USPTO printouts 822 third-party registrations.

strength “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.” *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002). Other relevant factors include “length of use of the mark, market share, brand awareness, licensing activities, and variety of goods bearing the mark.” *Coach Servs.*, 101 USPQ2d at 1720.

Opposer again points to the California district court case of *Monster Energy Co. v. BeastUp LLC* as support for its argument that its Beast marks are commercially strong, but we are not privy to the record in that case and must rely on our own findings. Specifically, we look to the testimony and evidence provided by Opposer’s parent company’s Chairman and co-CEO, Rodney Sacks, who testified about Opposer’s advertising and marketing, and its sales and revenues, for the goods and services provided under Opposer’s marks.

Much of Mr. Sacks’ testimony and evidence on these subjects pertains not only to Opposer’s Beast marks, but also to Opposer’s famous Monster, Monster Energy, and



claw design – – marks. This is understandable because Opposer launched its Monster Energy Drink brand in April 2002, and each of these marks – as well as

Opposer's UNLEASH THE BEAST! mark – were, and continue to be, included on Opposer's original energy drink cans, as shown in the images below:⁵⁴



As a result, it is not too difficult to assess the relative commercial strength of Opposer's UNLEASH THE BEAST! mark.

As to marketing and advertising, Mr. Sacks testified that inter alia that:

From 2002 to 2021, [Opposer] has spent at least approximately US\$6.3 billion in advertising, marketing and promoting its MONSTER brand in the United States alone. Specifically: in 2021 [Opposer] spent over US\$685 million, from US\$617 million in 2020, from US\$600 million in 2019, from US\$603 million in 2018, from US\$537 million in 2017, from US\$467 million in 2016, from US\$410 million in 2015,⁵⁵

⁵⁴ 21 TTABVUE 3 (Sacks Test. Decl. ¶¶ 3-4, 7).


⁵⁵ *Id.* at 12-13 (¶ 33).

As to sales and revenue, Mr. Sacks testified that:

Since 2002, [Opposer] has sold more than 42 billion cans of its MONSTER line of drinks worldwide, **over approximately 80% of which (more than 33 billion cans) display one of [Opposer’s] BEAST Marks.** Currently, by unit volume and dollar value, MONSTER energy drinks are among the top two best-selling energy drinks in the United States and the second best-selling worldwide by dollar value. For the five-week period ending October 8, 2022, Monster (brand) held a 31.2% share of the measured Total Non-Alc (TNA) energy drink market by dollar value in the United States. **Currently, [Opposer] sells more than 6 billion cans per year worldwide, more than 2.8 billion of which are sold in the U.S. alone.** ... Sales of [Opposer’s] MONSTER line of drinks have increased every year since the launch in 2002. [Opposer’s] gross sales for the year ending December 31, 2021 increased to US\$6.47 billion from US\$5.37 billion in 2020, from US\$4.87 billion in 2019, from US\$4.43 billion in 2018, from US\$3.86 billion in 2017, from US\$3.49 billion in 2016, from US\$3.11 billion in 2015, ...from US\$2.83 billion in 2014, from US\$2.59 billion in 2013, from US\$2.37 billion in 2012, and from US\$1.95 billion in 2011, **the vast majority of which sales occurred in the U.S.** Additionally, in the U.S. alone, [Opposer’s] gross sales of its Monster line of beverages for the year ending December 31, 2021 increased to US\$3.52 billion from US\$3.06 billion in 2020, from US\$2.9 billion in 2019, from US\$2.85 billion in 2018, from US\$2.55 billion in 2017, from US\$2.39 billion in 2016, from US\$2.2 billion in 2015, from US\$2.01 billion in 2014, from US\$1.85 billion in 2013, from US\$1.72 billion in 2012, and from US\$1.43 billion in 2011.⁵⁶

And specifically, with regard to Opposer’s UNLEASH THE BEAST! mark, Mr.

Sacks testified that:

- “[Opposer] began using its MONSTER®, MONSTER ENERGY®,  MONSTER®, and M MONSTER ENERGY® marks in 2002 when it launched its MONSTER line of drinks”;

⁵⁶ *Id.* at 11-12 (¶ 31) (emphasis added).

- “since 2002, Monster has also used its UNLEASH THE BEAST!® mark in connection with beverages, apparel, accessories”;
- “[i]n April 2002, [Opposer] launched its MONSTER ENERGY® drink. Since that time, the can has displayed [Opposer’s] UNLEASH THE BEAST!® mark”;
- “[t]he vast majority (over 80%) of [Opposer’s] beverages sold under its MONSTER brand since 2002 bear one of the well-known BEAST Marks on the beverage containers”;
- “[Opposer’s] “flagship and best-selling original Monster Energy® drink, which Monster launched in 2002, displays the UNLEASH THE BEAST!® mark on the product container”; and that
- “[Opposer’s] Lo-Carb Monster Energy® drink, which was released in August 2003, also displays the UNLEASH THE BEAST!® mark on the product container. Monster has used the UNLEASH THE BEAST!® mark on virtually all of the cans of the original Monster Energy® and Lo-Carb Monster Energy® drinks that it has sold.”

Taking all of this testimony together, with emphasis on the fact that Opposer’s UNLEASH THE BEAST! mark was launched at the same time Opposer launched its original flagship energy drink product and the fact that the vast majority or over 80% of Opposer’s beverages sold under Opposer’s Monster Energy brand since 2002 bear one of the BEAST marks, we can extrapolate that a good portion of Opposer’s marketing and advertising expenses, and its sales and revenues, can be attributed to the energy drink beverages goods sold under the several of Opposer’s marks that

include Opposer's UNLEASH THE BEAST! mark and we can say it has moderate commercial strength.

We cannot say the same with respect to Opposer's remaining Beast marks, about which Mr. Sacks was vague. Indeed, through his testimony, when discussing any of Opposer's Beast marks apart from UNLEASH THE BEAST!, Mr. Sacks simply refers to its Beast marks, generally. For example, he testified that Opposer "has widely used the BEAST Marks in its marketing and promotional materials and efforts" and he provided some point-of-sale and promotional materials that he said "display [Opposer's] UNLEASH THE BEAST!® mark or other BEAST Marks" and have been distributed "to more than 300,000 retail stores nationwide."⁵⁷ But we do not know which other Beast marks are shown on those materials besides UNLEASH THE BEAST!. The majority of the approximately 30 examples of promotional materials Mr. Sacks provided show marks other than Opposer's Beast marks, such as Opposer's MONSTER, MONSTER ENERGY, and claw design marks.⁵⁸ With small exception, when Mr. Sacks testified and about a specific Beast mark, it was with regard to UNLEASH THE BEAST!. Otherwise, he simply referred to Opposer's Beast marks generally. We therefore have little evidence bearing on the commercial strength of the other Beast marks.

Regarding Opposer's PUMP UP THE BEAST! mark, Mr. Sacks testified that Opposer's "Muscle Monster" product line "was released in March 2013" and that

⁵⁷ *Id.* at 13 (¶ 34).

⁵⁸ 22 TTABVue 488-516 (Sack Test. Decl., Exhibit 13).

Opposer “has continuously used the PUMP UP THE BEAST® on the product containers in that line since its launched.”⁵⁹ However, we have no information about Opposer’s advertising expenditures, or sales and revenues, related to goods or services sold under this mark.

As to Opposer’s UNLEASH THE ULTRA BEAST! mark, Mr. Sacks testified that Opposer’s “Monster Energy Ultra® line was released in August 2012” and that Opposer “has continuously used the UNLEASH THE ULTRA BEAST!® mark on the product containers in that line since its launch.”⁶⁰ However, we have no information about Opposer’s advertising, sales and revenues related to goods sold under this mark.

As to Opposer’s HYDRATE THE BEAST! mark, Mr. Sacks testified that Opposer’s “Monster Hydro® line was released in 2014” and that Opposer “has used the HYDRATE THE BEAST® mark on products in that line.”⁶¹ However, we have no information about Opposer’s advertising, sales and revenues related to goods sold under this mark. And unlike as with the PUMP UP THE BEAST! and UNLEASH THE ULTRA BEAST! marks, Mr. Sacks did not mention that the HYDRATE THE BEAST! mark was “continually” used on the cans.

Regarding Opposer’s REHAB THE BEAST! mark, Mr. Sacks testified that Opposer’s “Monster Rehab® line was released in March 2011”; that the line “was

⁵⁹ *Id.* at 7 (¶ 14).

⁶⁰ *Id.* at 6 (¶ 13).

⁶¹ *Id.* at 7 (¶ 15).

rebranded in 2021 as Rehab Monster®”; and that before it was rebranded as Monster Rehab, Opposer used REHAB THE BEAST! on product containers.⁶² However, we have no information about Opposer’s advertising, sales and revenues specifically related to goods sold under this mark or whether it has been used since 2021.

As to Opposer’s UNLEASH THE SALTY BEAST! mark, Mr. Sacks testified that Opposer began using this mark “on certain containers of its Juice Monster® products in 2018,” but we do not know from the wording “certain containers” whether this is a significant number or Opposer’s sales and revenues specifically related to goods sold under this mark.⁶³

And as to Opposer’s UNLEASH THE NITRO BEAST mark, Mr. Sacks testified that Opposer’s “Monster Energy Extra Strength Nitrous Technology® line was released in July 2009”; that the product “was rebranded in 2018 as Monster Maxx®”; that Opposer “has continuously used the UNLEASH THE NITRO BEAST!® mark on the product containers in those lines since their launch”; and that Opposer “currently sells Monster Energy® Nitro™, which also displays the UNLEASH THE NITRO BEAST!® mark on the product container.” However, we have no information regarding Opposer’s advertising, sales and revenues specifically related to goods sold under this mark.

As discussed, there is little evidence regarding the frequency or extent of Opposer’s advertising and promotion of its Beast marks, or the amount of Opposer’s

⁶² *Id.* at 6 (¶ 12).

⁶³ *Id.* at 7 (¶ 16).

sales and revenues as it relates specifically to any specific Beast mark or good provided thereunder. Nor is there significant testimony or evidence bearing on the relevant consuming public's perception of the Beast marks at issue in this case. As such, there is no way to determine the extent to which consumers of energy drinks associate any particular pleaded Beast mark with Opposer. The record shows little use of the advertisement and promotion of any particular Beast mark by itself, and there is no evidence indicating that consumers focus on the Beast marks when they encounter them along with Opposer's other marks.

3. Conclusion on Strength

In sum, we find that Opposer's Beast marks are inherently distinctive but somewhat suggestive, conceptually, with respect to its beverages – the only goods provided under Opposer's pleaded Beast marks that Opposer maintains are related to Applicant's mugs and plates. Opposer has demonstrated moderate commercial strength in its UNLEASH THE BEAST! mark by virtue of the promotion and sales of Opposer's beverages under that mark, together with Opposer's other well-known marks that are on the container, i.e., Opposer's Monster Energy or claw design mark. However, we cannot accurately assess the commercial strength of Opposer's other Beast marks with any confidence due to the lack of evidence concerning those marks individually. We thus accord Opposer's Beast marks the usual scope of protection we would accord an inherently distinctive mark, with Opposer's UNLEASH THE BEAST! mark being stronger due to its moderate commercial strength.

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

“The ninth *DuPont* factor takes into account the variety of goods on which a mark is or is not used.” *DeVivo v. Ortiz*, 2020 USPQ2d 10153, *15 (TTAB 2020) (citing *DuPont*, 177 USPQ at 567). “If a party in the position of plaintiff uses its mark on a wide variety of goods, then purchasers are more likely to view a defendant’s related good under a similar mark as an extension of the plaintiff’s line. *See, e.g., In re Hitachi High-Technologies Corp.*, 109 USPQ2d 1769, 1774 (TTAB 2014) (“[C]onsumers who may be familiar with various products in the [Opposer’s] product line, when confronted with applicant’s mark, would be likely to view the goods marked therewith as additional products from [Opposer]. One of the circumstances mentioned in the ninth *du Pont* factor is the variety of goods on which a prior mark is used.”).

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, and other products,” which “makes it more likely that relevant consumers will be confused by applicant’s similar mark.”⁶⁴ Additionally, it asserts, “Opposer has engaged in numerous co-branding agreements,” and “has also licensed the use of its BEAST marks on various goods, such as clothing, sporting equipment, gaming chairs, and other products.”⁶⁵

We do not find on this record that Opposer uses its Beast marks on a variety of goods or services. There is little testimony or evidence regarding Opposer’s use of *any*

⁶⁴ 30 TTABVUE 42 (Opposer’s Brief).

⁶⁵ *Id.* at 42-43.

particular Beast mark for the sale or provision of *any particular* good or services other than beverages. As discussed above, Ms. Sacks testified about use of the Beast marks only generally, with the exception of Opposer's UNLEASH THE BEAST! mark.

The ninth *DuPont* factor is therefore neutral.

E. Purchasing Conditions

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

Applicant testified that he anticipates selling mugs and plates bearing the LAIKABEAST and Design mark for around \$12,⁶⁶ and Opposer's witness, Mr. Sacks, testified that "beverages, apparel and accessories bearing [Opposer's] BEAST Marks are relatively inexpensive."⁶⁷ Opposer's beverages "typically retail for approximately \$2-\$4 per container A t-shirt bearing the BEAST Marks can sell for about \$20-\$25."⁶⁸ Based on the foregoing, Opposer argues that the fourth *DuPont* factor weighs in favor of finding a likelihood of confusion.⁶⁹

We must focus on the least sophisticated consumer, who is more apt to make an impulsive decision. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014); *In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) ("Board precedent requires our decision to be based on the least

⁶⁶ 20 TTABVUE 50-51 (Applicant Disc. Dep. pp. 44:16-45:21).

⁶⁷ 21 TTABVUE 10-11 (Sacks Test. Decl. ¶ 30).

⁶⁸ *Id.*

⁶⁹ 30 TTABVUE 43 (Opposer's Brief).

sophisticated potential purchasers.”)). This *DuPont* factor therefore weighs in favor of a finding of likelihood of confusion, but only slightly. The parties’ marks are just too different in overall appearance, sound, connotation, and commercial impressions, and the parties’ respective goods are too different, for this factor to make much of an impact.

F. Conclusion – Confusion is Unlikely

In sum, having considered all *DuPont* factors for which there is argument or evidence, we find no likelihood of confusion between Applicant’s LAIKABEAST and



Design mark, _____, and Opposer’s marks Beast marks including: UNLEASH THE BEAST!, UNLEASH THE NITRO BEAST!, UNLEASH THE ULTRA BEAST!, UNLEASH THE SALTY BEAST!, REHAB THE BEAST!, HYDRATE THE BEAST! and PUMP UP THE BEAST! in Registration Nos. 2769364, 4975822, 5820901, 5927420, 4394044, 5622925, 4336329, 5628025, 4371544, 5633094, 4482659, 4542107, 4546402, 5402465, and 5783086.

The first, second, and third *DuPont* factors concerning the dissimilarities of the marks, the dissimilarities of the goods/services, and channels of trade clearly weigh in favor of Applicant, while the fourth *DuPont* factor regarding consumer

sophistication weighs slightly in favor of Opposer; and the ninth *DuPont* factor is neutral.

Simply put, the parties' marks are too dissimilar overall to warrant a finding of likelihood of confusion and the first *DuPont* factor, accordingly, is dispositive in this case. *Kellogg Co. v. Pack'em Enters.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) (“We know of no reason why, in a particular case, a single *du Pont* factor may not be dispositive. ... ‘each [of the thirteen factors] may from case to case play a dominant role.’”).

IV. Bona Fide Intent to Use

We turn now to Opposer's second claim: that Applicant lacked a bona fide intent to use his LAIKABEAST and Design mark in commerce in connection with mugs and plates when he filed the Application.

Trademark Act § 1(b), 15 U.S.C. § 1051(b), states that “a person who has a bona fide intention, under circumstances showing the good faith of such person, to use a trademark in commerce may request registration of its trademark” “Because a bona fide intent to use the mark in commerce is a statutory requirement of a valid intent-to-use trademark application under [Trademark Act] Section 1(b) [15 U.S.C. § 1051(b)], the lack of such intent is a basis on which an opposer may challenge an applicant's mark.” *Hole in 1 Drinks, Inc. v. Lajtay*, 2020 USPQ2d 10020, at *19 (TTAB 2020) (citing *M.Z. Berger & Co. v. Swatch AG*, 787 F.3d 1368, 114 USPQ2d 1892, 1897 (Fed. Cir. 2015)).

“Although the evidentiary bar is not high, the circumstances must indicate that

the applicant's intent to use the mark was firm and not merely intent to reserve a right in the mark." *M.Z. Berger v. Swatch*, 114 USPQ2d at 1897. The Board makes such determinations "on a case-by-case basis considering the totality of the circumstances." *Id.* at 1898. "We have long held, and the Federal Circuit affirmed, that our determination of whether an applicant has a bona fide intention to use the mark in commerce is to be a fair, objective determination based on all the circumstances." *Id.*; see also *Lane Ltd. v. Jackson Int'l Trading Co.*, 33 USPQ2d 1351, 1355 (TTAB 1994); *Commodore Elecs. Ltd. v. CBM Kabushiki Kaisha*, 26 USPQ2d 1503, 1506 (TTAB 1993).

A. Relevant Factual Background

Applicant, Victor Rodriguez, obtained an associate's degree in graphic design from Bronx Community College and a bachelor's degree in computer graphics from Lehman College.⁷⁰ He considers himself a graphic artist and designer.

In early Summer of 2020, when Applicant was 29 years old, he decided to start his own business "selling clothing with custom graphic designs and providing a service of imprinting messages on wearing apparel."⁷¹ At the same time, his mother encouraged him to also consider making custom plates and mugs as another potentially profitable business area and he agreed that was a good idea.⁷² She subsequently gave Applicant 24 blank mugs in August 2020.⁷³

⁷⁰ 26 TTABVUE 2 (App. Test. Decl. ¶¶ 3-4).

⁷¹ *Id.* at 2 (¶ 5).

⁷² *Id.*

⁷³ *Id.* (¶ 6).

Thereafter, but before September 9, 2020, Applicant decided that he would name his new business LAIKA BEAST and proceeded to create a design/logo that he would use for the new business.⁷⁴

On September 9, 2020, Applicant “placed an order with Amazon for a ‘F2C 5 in 1 Professional Digital Transfer Sublimation Swing-Away 360-degree Rotation Heat Press Machine ... 12x15 Multifunction Black 110V’ for a total of \$234.55.” The digital transfer machine he purchased was listed as capable of printing hats, mugs, plates, caps and t-shirts as shown below:⁷⁵

[Print this page for your records.](#)

Order Placed: September 9, 2020
Amazon.com order number: 112-1033315-2556238
Order Total: \$234.55

Shipped on September 10, 2020

Items Ordered	Price
1 of: F2C 5 in 1 Professional Digital Transfer Sublimation Swing-Away 360-degree Rotation Heat Press Machine Hat/Mug/Plate/Cap/T-Shirt 12x15 Multifunction Black 110V Sold by: F2C Direct (seller profile) Condition: New	\$179.99

Shipping Address:
Victor Rodriguez
94 MILL CREEK RD
BAYVILLE, NJ 08721-1339
United States

Shipping Speed:
Standard Shipping

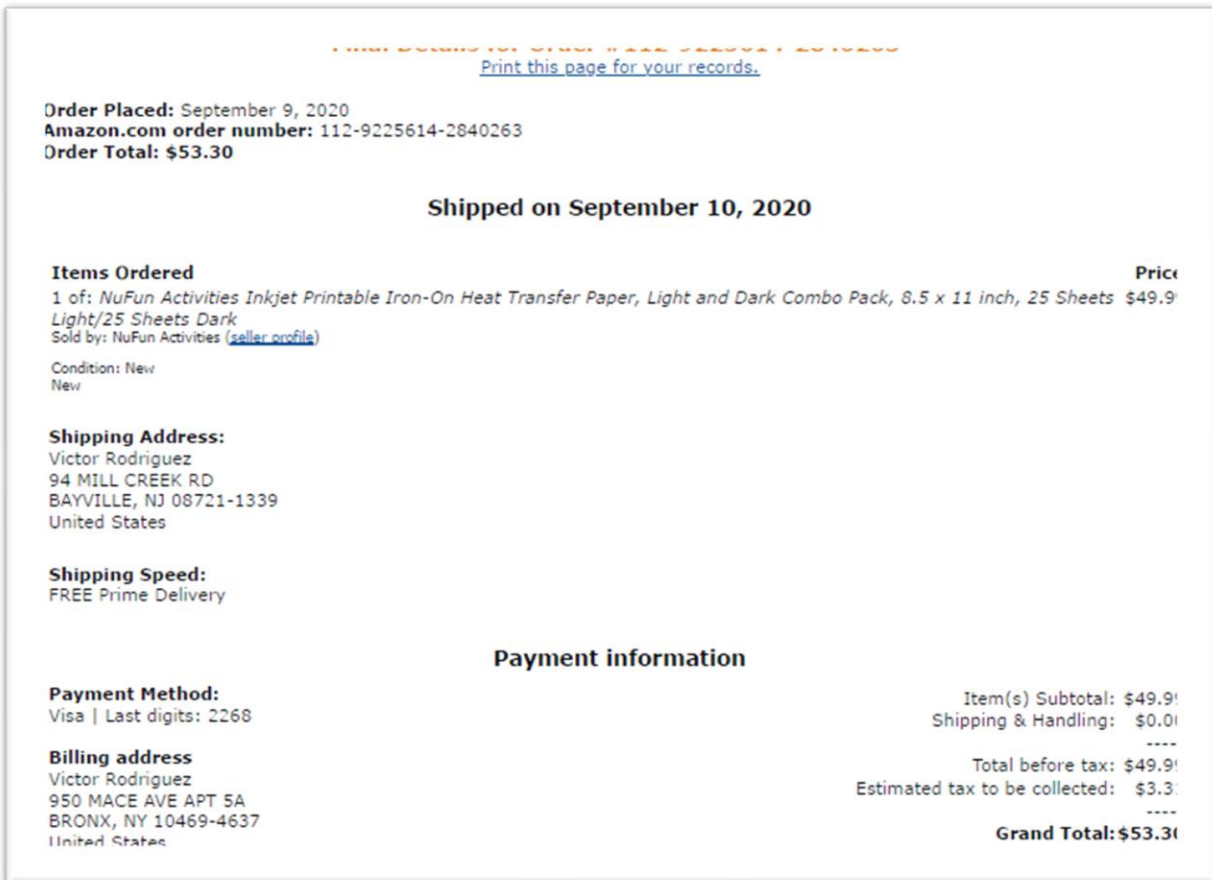
Payment information

Payment Method: Visa Last digits: 2268	Item(s) Subtotal: \$179.99
Billing address Victor Rodriguez 950 MACE AVE APT 5A BRONX, NY 10469-4637 United States	Shipping & Handling: \$39.99 ----- Total before tax: \$219.98 Estimated tax to be collected: \$14.57 ----- Grand Total: \$234.55

⁷⁴ *Id.* (¶ 7).

⁷⁵ *Id.* at 3 (¶ 8), 7 (Trial Exhibit 2).

On the same date, Applicant also ordered from Amazon “NuFun Activities Inkjet Printable Iron-On Heat Transfer Paper, Light and Dark Combo Pack, 8.5 x 11 inch, 25 Sheets Light/25 Sheets Dark’ for a total of \$53.30,” which would allow Applicant “to print and transfer custom designs and logos onto hats, mugs, plates, caps, and t-shirts,” as shown below:⁷⁶



Also on the same date, Applicant proceeded to register the domain name “laikabeast.com,” which he did through the domain registrar GoDaddy, as shown below:⁷⁷

⁷⁶ *Id.* at 3 (¶ 9), 9 (Trial Exhibit 3).

⁷⁷ *Id.* at 3 (¶ 10), 11 (Trial Exhibit 5).

WHOIS search results

Domain Name: laikabeast.com
Registry Domain ID: 2559252339_DOMAIN_COM-VRSN
Registrar WHOIS Server: whois.godaddy.com
Registrar URL: https://www.godaddy.com
Updated Date: 2022-09-12T05:46:37Z
Creation Date: 2020-09-11T15:25:24Z
Registrar Registration Expiration Date: 2024-09-11T15:25:24Z
Registrar: GoDaddy.com, LLC

Thereafter, on October 7, 2020, Applicant registered his business, LAIKA BEAST LLC, as a limited liability company in New Jersey, as shown below:⁷⁸

NEW JERSEY DEPARTMENT OF THE TREASURY
DIVISION OF REVENUE AND ENTERPRISE SERVICES


CERTIFICATE OF FORMATION
LAIKA BEAST LLC
0450551707

The above named DOMESTIC LIMITED LIABILITY COMPANY was duly filed in accordance with New Jersey State Law on 10/07/2020 and was assigned identification number 0450551707. Following are the articles that constitute its original certificate.

- 1. Name:**
LAIKA BEAST LLC
- 2. Registered Agent:**
VICTOR RODRIGUEZ
- 3. Registered Office:**
94 MILL CREEK ROAD
BAYVILLE, NEW JERSEY 08721
- 4. Business Purpose:**
SELLING SHIRTS, MOUS MASKS AND CAPS.
- 5. Effective Date of this Filing is:**
10/07/2020
- 6. Members/Managers:**
VICTOR RODRIGUEZ
94 MILL CREEK ROAD
BAYVILLE, NEW JERSEY 08721
- 7. Main Business Address:**
94 MILL CREEK ROAD
BAYVILLE, NEW JERSEY 08721

Signatures:
PETER J. MARCIANO, JR.
AUTHORIZED REPRESENTATIVE

IN TESTIMONY WHEREOF, I have
heretunto set my hand and
affixed my Official Seal
7th day of October, 2020



Elizabeth Maher Muscia
Elizabeth Maher Muscia

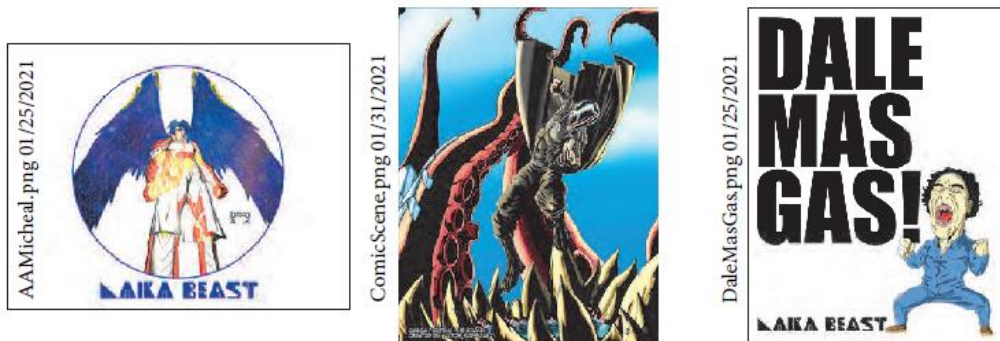
⁷⁸ *Id.* at 3 (¶ 11), 13 (Trial Exhibit 6).

On the same day, Applicant applied for and received a Certificate of Authority for his company from the State of New Jersey Division of Taxation to collect New Jersey sales and use tax, as shown below:⁷⁹



The next day, on October 8, 2020, Applicant filed the Application.

During the approximately ten months that that followed, but prior to Opposer's filing of its notice of opposition to the Application, Applicant created 34 designs for use in his LAIKA BEAST business. A sampling of the designs along with the dates on which they were created as shown below:⁸⁰



⁷⁹ *Id.* at 3 (¶ 12), 14 (Trial Exhibit 7).

⁸⁰ *Id.* at * (¶ *), 15 (Trial Exhibit 8).



Additionally, during the discovery period, Applicant provided Opposer with a business plan (“IdeasForBusiness”) that was updated a couple of times. The business plan sets out proposed prices for the goods he plans to sell under his mark, which include the t-shirts, aprons, long sleeve shirts, hoodies, at hats that remain in Applicant’s parent application (Serial No. 90978500), as well as the mugs and plates at issue in this opposed child Application; lists some of the supplies Applicant will need, including polymailer packaging, plastic bags, more t-shirts, puff transfer vinyl

paper, and to “get shippers”; provides the anticipated demographic and target market of customers; and lists other steps Applicant will need to take, such as “look[ing] for Website builders”⁸¹

B. Opposer’s Arguments

Opposer begins by listing several “key factual issues” that are not contested, including that there have not yet been sales of goods or services under Applicant’s mark; that Applicant has not yet used his mark in commerce; and that “Applicant has not spent money on marketing or advertising” his mark,⁸² none of which is unusual for an application that is based on an intent-to-use. Opposer, nevertheless, takes issue with the fact that two years after the Application was filed, Applicant “still has no plans regarding the promotion and advertising of his LAIKABEAST mark”; Applicant has not yet activated his website at laikabeast.com; and Applicant “still has no firm plans regarding marketing his LAIKABEAST mark on social media.”⁸³

That fact that Applicant, whose application is based on an intent-to-use, has not yet used his mark is not altogether surprising, particularly since the application was opposed by Opposer, a multimillion-dollar company. We find it entirely reasonable that an intent-to-use applicant such as Applicant might proceed cautiously before launching his business.

In addition, we disagree that Applicant has no plans to promote his mark. During

⁸¹ 20 TTABVUE 131 (App. Disc. Dep., Exhibit 7).

⁸² 30 TTABVUE 31 (Opposer’s Brief).

⁸³ *Id.*

his deposition, Applicant clearly testified that he plans to advertise his mugs and plates on Instagram, while at the same time acknowledging that such plans were not set in stone and that he was also considering using Facebook, Google Ads, and/or YouTube in the future.⁸⁴ In addition, his business plan indicates that his “Store channels” will be Amazon.com and his website located at laikabeast.com⁸⁵

Opposer also argues that Applicant has no firm plans with respect to the pricing for his goods. “Even approximately two years after Applicant filed his Application ... [Applicant] testified that he has no firm plans regarding the pricing for mugs and plates that might be sold under his LAIKABEAST mark. Though he came up with tentative pricing for mugs and plates, he still has not decided what the prices will be because they are “subject to change.”⁸⁶ We are not persuaded by this argument. Applicant clearly listed a proposed range of prices for each of the various goods he intends to provide under his mark, including the mugs and plates at issue in the Application. We see no reason such prices cannot be subject to change.

Opposer takes issue with Applicant’s “business plan,” which, as mentioned above, was updated a couple of times, but is essentially a single page or so of notes to himself for setting up his business.⁸⁷ Opposer contends that each of the plans (which Opposer refers as the Original Plan, First Updated Plan, and Second Updated Plan) were created after the Application was filed and “[t]hus ... are of limited evidence of any

⁸⁴ 20 TTABVUE 79 (App. Disc. Dep. 73:7-74:17).

⁸⁵ *Id.* at 131 (Exhibit 7).

⁸⁶ 30 TTABVUE 31-32 (Opposer’s Brief).

⁸⁷ *Id.* at 32-33.

purported intent-to-use by Applicant at the time he filed his Application; and that the original business plan was created “more than three (3) months after filing the Application,” which contained little information and Applicant “only made updates to it a few months after Opposer filed its Notice of Opposition.”⁸⁸

Applicant, in response, argues that Opposer “repeatedly and erroneously contends that Applicant’s business plan documents were *created* as of their stated *modification* dates.” But “[t]he actual creation dates of Applicant’s business plan documents are not in evidence.”⁸⁹ To the extent the actual creation dates of Applicant’s business plan documents are not in evidence, it is because neither party made it of record. Of course, it remains Opposer’s burden to prove its case by a preponderance of the evidence.

Opposer correctly notes, quoting *Kate Spade LLC v. Wolv, Inc.*, Opposition No. 91241442, 2022 TTAB LEXIS 189 (TTAB 2022) (non-precedential), that “generally, the strongest documentary proof will have been created prior to, or at the latest on, the filing date of the intent-to-use application.”⁹⁰ *Id.* at 69 (emphasis added). But documents created after the application filing date may still be relevant to show an applicant’s bona fide intent at the time of filing. For example, documents created seven months after the application filing date have been found relevant to, but not dispositive of, an applicant’s intent at the time of filing. *Société des Produits Nestlé S.A. v. Cândido Viñuales Taboada*, 2020 USPQ2d 10893, at *12-13 (TTAB 2020),

⁸⁸ *Id.*

⁸⁹ 32 TTABVUE 11 (Applicant’s Brief).

⁹⁰ 30 TTABVUE 32 (Opposer’s Brief).

citing *Swatch AG (Swatch SA) (Swatch Ltd.) v. M.Z. Berger & Co.*, 108 USPQ2d 1463, 1474 (TTAB 2013) (nonetheless, the Board ultimately found the applicant's bona fide intent lacking). And correspondence occurring nine to eleven months after the filing date also has been found sufficiently contemporaneous to corroborate other evidence regarding an applicant's bona fide intent as of the application filing date. *Nestlé*, 2020 USPQ2d 10893, at*13 (citing *Lane Ltd. v. Jackson Int'l Trading Co.*, 33 USPQ2d 1351, 1356 (TTAB 1994)).

In any event, as noted, the Board evaluates an applicant's bona fide intent on a "on a case-by-case basis considering the totality of the circumstances." *M.Z. Berger v. Swatch*, 114 USPQ2d at 1898. What we have here is an applicant who, prior to taking the above-described steps and filing the Application, had "no experience, education, or training in creating or running a business, nor in business planning or market research."⁹¹ Applicant nevertheless purchased equipment and supplies, incorporated his company, obtained a Certificate of Authority from the State of New Jersey to collect taxes for his business sales, filed an application, continued to make artwork for his planned business, and has a basic plan for his new business.

Opposer cites a couple of non-precedential Board cases to point out that the Board has previously found that a lack of "any established business or relevant experience in an industry" may suggest a lack of bona fide intent, but that is not necessarily true in all cases. How else does one start certain small businesses? This is not rocket science. We are talking about the sale of mugs and plates imprinted with designs that

⁹¹ 26 TTABVUE 4 (App. Test. Decl. ¶ 13).

Applicant plans to advertise on Instagram and/or Facebook, and there is no dispute that Applicant has purchased equipment to produce the goods, including a professional heat press machine that is capable of printing images on mugs and plates, as well as some other supplies, and has taken other steps geared to creating a small business on the Internet. Evidence that a party has the capacity to market or manufacture a product can rebut a lack of bona fide intent to use claim. *Wet Seal, Inc. v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1643 (TTAB 2007).

C. Conclusion Regarding Applicant's Bona Fide Intent

In conclusion, we find that Applicant's evidence and testimony as a whole, including his deposition testimony, has been credible and straightforward, and that Opposer has failed to demonstrate that Applicant lacked the requisite bona fide intent to use his LAIKABEAST and Design mark in commerce in connection with mugs and plates.

Decision: The opposition is dismissed.