

This Opinion Is Not a
Precedent of the TTAB

Mailed: December 7, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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W. Clay Mackey
v.
Lawson's Finest Liquids, LLC
—————

Opposition No. 91220846
—————

Leslie C. Vander Griend and Samantha K. Pitsch of Stokes Lawrence, P.S.
for W. Clay Mackey.

Daniel Christopherson of Lehrman Beverage Law, PLLC
for Lawson's Finest Liquids, LLC.
—————

Before Cataldo, Bergsman and English, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Lawson's Finest Liquids, LLC (Applicant) seeks registration on the Principal Register of the mark CHINOOKER'D IPA, in standard character form, for "beer," in International Class 32.¹ Applicant disclaims the exclusive right to use the term "IPA."

¹ Serial No. 86299655 filed June 4, 2014, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming September 2008 as its dates of first use of its mark anywhere and first use of its mark in commerce.

W. Clay Mackey (Opposer) opposes the registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles Opposer's registered mark CHINOOK, in typed drawing form, for "table wine and sparkling wine," in International 33,² and "beer," in International Class 32,³ as to be likely to cause confusion. Opposer also alleges common law use of the mark CHINOOK in connection with beer since as early as July 21, 1992. Finally, Opposer alleges that Applicant's mark CHINOOKER'D IPA is likely to dilute by tarnishment Opposer's CHINOOK mark under Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c).⁴

Applicant, in its Answer, denies the salient allegations in the Notice of Opposition. Applicant also pleads purported affirmative defenses that are not affirmative defenses but amplifications of its defense against Opposer's claim of likelihood of confusion. Finally, Applicant filed a counterclaim to cancel Opposer's pleaded Registration No. 1790596 for the mark CHINOOK for beer on the grounds that

² Registration No. 1353183 registered August 6, 1985; renewed.

³ Registration No. 1790596 registered August 31, 1993; cancelled under Section 18 of the Trademark Act, 15 U.S.C. § 1068. The Board granted Applicant's counterclaim to cancel Registration No. 1790596 on the ground of abandonment. 69 TTABVUE 10. See the discussion below.

⁴ Opposer did not pursue the dilution claim at trial or in his brief. Therefore, we hold that Opposer waived his dilution claim and we give it no further consideration. See *UMG Recordings Inc. v. O'Rourke*, 92 USPQ2d 1042, 1045 (TTAB 2009) ("In its main brief ... opposer lists the only question presented as whether there exists a likelihood of confusion, and we therefore consider opposer to have waived its dilution claim."); *Corporacion Habanos S.A. v. Guantanamera Cigars Co.*, 86 USPQ2d 1473, 1474 n.2 (TTAB 2008); *Krause v. Krause Publ'ns Inc.*, 76 USPQ2d 1904, 1906 n.2 (TTAB 2005).

CHINOOK is merely descriptive of beer, it is generic for beer, Opposer never used CHINOOK in connection with beer, and fraud.

After extensive motion practice regarding the counterclaims, Opposer denied the salient allegations in the counterclaim.

As noted above, the Board granted Applicant's motion for summary judgment on the ground that Opposer abandoned the CHINOOK mark for beer.⁵ Specifically, the Board found that "Applicant has established a *prima facie* case the Opposer discontinued use of the mark CHINOOK for beer for at least three consecutive years from the September 3, 1992 filing date of the use-based application underlying the '596 Registration (the Nonuse period)."⁶ Opposer failed to rebut the presumption. Thus, the Board held that Opposer abandoned the mark and granted the counterclaim to cancel Registration No. 1790596 for the mark CHINOOK for beer.⁷ The Board noted, however, that Opposer's contention that he used the CHINOOK mark for beer from 1999 to 2006 and again from 2013 to the present is not pertinent to the counterclaim but may be relevant in proving Opposer's allegations of prior common law rights.⁸

⁵ 69 TTABVUE 9.

⁶ 69 TTABVUE 8.

⁷ 69 TTABVUE 9-10.

⁸ 69 TTABVUE 9-10 (Note 15).

I. Preliminary Issues

A. Objections

The parties filed numerous objections to testimony and evidence introduced into the record. Because an opposition proceeding is akin to a bench trial, the Board is capable of assessing the proper evidentiary weight to be accorded the testimony and evidence, taking into account the imperfections surrounding the admissibility of such testimony and evidence. This precludes the need to strike the testimony and evidence. Given the circumstances, we choose not to make specific rulings on each objection. As necessary and appropriate, we will point out any limitations applied to the evidence or otherwise note that we may not rely on the testimony or evidence in the manner sought. While we have considered all the evidence and arguments of the parties, we do not rely on evidence not discussed herein.

B. Applicant's rebuttal notice of reliance

The Board, in its August 1, 2019 order, granted Applicant's motion for summary judgment on its counterclaim of abandonment and ordered Registration No. 1790596 for the mark CHINOOK for beer to be cancelled in due course.⁹ This order removed the counterclaim from the proceeding. The new trial order should not have included

⁹ 69 TTABVUE 10. The Director cancelled Registration No. 1790596 on August 31, 2019. 70 TTABVUE. The cancellation of Registration No. 1790596 was premature because this proceeding is still pending. "[I]n a case in which there is a counterclaim, if the Board grants summary judgment only as to the counterclaim, the case is not ripe for appeal until there has been a final decision with respect to the original claim." Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 901.02(a) (2020). *See also Procter & Gamble Co. v. Sentry Chemical Co.*, 22 USPQ2d 1589, 1594 n.4 (TTAB 1992) (decision granting opposer's motion for summary judgment on counterclaim and denying opposer's motion for partial summary judgment in the opposition was not appealable).

time for a counterclaim, but it did.¹⁰ The Board scheduled Applicant's 15-day rebuttal testimony as the plaintiff in the counterclaim to close May 6, 2020.¹¹ This was an error by the Board. Neither party notified the Board about the mistake in the revised trial order.

On April 15, 2020, Applicant introduced a rebuttal notice of reliance purportedly to rebut Opposer's evidence that Applicant and Opposer offer their products in the same channels of trade.¹² Because Applicant's 15-day rebuttal testimony period closed May 6, 2020, Applicant's rebuttal testimony period opened April 22, 2020. Applicant filed its rebuttal evidence seven days before the opening of its time to introduce rebuttal evidence.

Opposer, in its brief, objected to Applicant's rebuttal evidence on the ground that it "was filed outside of Applicant's rebuttal period and therefore should be stricken from the record."¹³ In response, Applicant pointed out that its time for rebuttal closed May 6, 2020.¹⁴ Applicant did not realize that Opposer based his objection on the fact that Applicant filed its rebuttal evidence before the opening of Applicant's assigned time to introduce rebuttal evidence. Opposer asserted, in its reply brief, "Applicant does not dispute that it submitted its rebuttal evidence outside of its 15-day trial

¹⁰ 69 TTABVUE 10-11.

¹¹ 69 TTABVUE 11.

¹² 82 TTABVUE 3.

¹³ Opposer's Brief, p. 34 (83 TTABVUE 35).

¹⁴ Applicant's Brief, p. 15 (85 TTABVUE 16).

period.”¹⁵ Again, neither party pointed out that because the Board had granted Applicant’s motion for summary judgment cancelling Registration No. 1790596, the Board removed the counterclaim to cancel from the proceeding and the Board erred in its August 1, 2019 trial order by including a counterclaim.

In summary,

- The Board issued an erroneous trial order allowing Applicant time for rebuttal;
 - Applicant introduced its improper rebuttal evidence outside of its improperly assigned time for rebuttal by filing it early;
 - Opposer objects to the early filing of the improper rebuttal evidence on the ground that it was filed outside of Applicant’s improperly assigned time for rebuttal;
- and
- Neither party realizes that there is no counterclaim pending that permits Applicant to introduce rebuttal evidence.

Under these circumstances, we fail to see how Opposer suffers any prejudice by admitting into evidence Applicant’s rebuttal evidence. In reaching this decision, we acknowledge that the Board created the circumstances leading up to this procedural mess by issuing an erroneous trial order. The equitable resolution of this issue is to admit Applicant’s rebuttal evidence for whatever probative value it may have subject to Opposer’s other objections.

Opposer’s objection to Applicant’s rebuttal evidence on the ground of timeliness is overruled.

¹⁵ Opposer’s Reply Brief, p. 20 (86 TTABVUE 21).

II. The Record

The record includes the pleadings, and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's application for the CHINOOKER'D IPA mark. In addition, the parties introduced the evidence listed below:

A. Opposer's testimony and evidence.

1. Testimony declaration of W. Clay Mackey (November 25, 2019), Opposer and co-owner of the Chinook Winery;¹⁶
2. Notice of reliance on websites purportedly advertising the sale of beer, wine, and other alcoholic beverages under the same mark;¹⁷
3. Notice of reliance on Opposer's website;¹⁸
4. Notice of reliance on third-party websites purporting to advertise the sale of Opposer's CHINOOK wine;¹⁹
5. Notice of reliance on copies of Opposer's pleaded registrations printed from the USPTO Trademark Status and Document Retrieval (TSDR) database showing the current status of and title to the registrations, as well as copies of the entire prosecution history files;²⁰
6. Notice of reliance on copies of third-party registrations for beer and wine;²¹

¹⁶ 71 TTABVUE.

¹⁷ 72 TTABVUE 13-127.

¹⁸ 72 TTABVUE 128-139.

¹⁹ 72 TTABVUE 140-147.

²⁰ 72 TTABVUE 148-247.

²¹ 72 TTABVUE 248-542.

7. Rebuttal testimony declaration of Opposer (March 20, 2020);²²
8. Rebuttal testimony declaration of Jeff Cox, the Wine, Beer & Spirits Merchandiser for Puget Consumers Co-op, a high-end grocery store chain;²³
9. Rebuttal testimony declaration of Kay Simon, Opposer's wife and a wine maker;²⁴ and
10. Rebuttal notice of reliance on the Total Wine website (totalwine.com).²⁵

B. Applicant's testimony and evidence.

1. Testimony declaration of Patrick Rue, founder and Chief Executive Officer of The Bruery LLC, a craft brewery in Placentia, California, proffered as an expert witness on the meaning of the term "Chinook" in the beer and alcohol industry;²⁶
2. Testimony declaration of Jennifer Swiatek, Manager and owner of the Beverage Warehouse of Vermont;²⁷
3. Testimony declaration of Sean Lawson, Applicant's founder and Chief Executive Officer;²⁸

²² 80 TTABVUE 2-5.

²³ 80 TTABVUE 6-7.

²⁴ 80 TTABVUE 8-12.

²⁵ 81 TTABVUE.

²⁶ 73 TTABVUE. The declaration is entitled "Report of Expert Witness Patrick Rue."

²⁷ 74 TTABVUE.

²⁸ 76 TTABVUE. The Board posted the portions of the Lawson declaration designated confidential at 75 TTABVUE.

4. Notice of reliance on “third-party Certificates of Label Approval (COLA) issued by the United States Alcohol and Tobacco and Trade Bureau (TTB)” purportedly to demonstrate third-party use of CHINOOK in connection with labeling beer and other alcoholic beverages;²⁹
5. Notice of reliance on “third-party COLAs issued by the TTB ... relevant to demonstrate the nature and quantity of third-party use of the term ‘CHINOOK’ as a generic/descriptive term on beer, wine, and distilled spirits products”;³⁰
6. Notice of reliance on two printouts from the untapped.com website purportedly to show the third party breweries using of CHINOOK or similar a term;³¹
7. Notice of reliance on printed Internet articles to demonstrate the use of hop-related terms and puns with beer;³²
8. Notice of reliance on printed Internet articles to demonstrate the term CHINOOK is a type of hops;³³

²⁹ 77 TTABVUE 3 and 47-280.

³⁰ 77 TTABVUE 4 and 281-376.

³¹ 77 TTABVUE 377-454.

³² 77 TTABVUE 455-486.

³³ 77 TTABVUE 487-534.

9. Notice of reliance on copies of third-party registrations for the same or similar marks for beer and wine owned by different entities;³⁴
10. Notice of reliance primarily on specimens from some of the third-party registration files purportedly to show use of the third-party marks for beer and wine owned by different entities;³⁵
11. Notice of reliance on an Internet article to show that craft beer consumers are sophisticated buyers;³⁶
12. Notice of reliance on printed Internet articles purportedly distinguishing wine and beer;³⁷ and
13. Rebuttal notice of reliance on Internet materials purportedly identifying where consumers may purchase the parties' products.³⁸

III. Entitlement to a Statutory Cause of Action

Even though Applicant does not contest it, Opposer's entitlement to a statutory cause of action, formerly referred to as "standing," is a threshold issue in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277 (Fed. Cir. 2020); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 (Fed. Cir. 2020); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). To establish

³⁴ 78 TTABVUE 3-228.

³⁵ 78 TTABVUE 230-571.

³⁶ 78 TTABVUE 614-641 and 645-665.

³⁷ 78 TTABVUE 642-644.

³⁸ 82 TTABVUE.

entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute and (ii) proximate causation. *Corcamore*, 2020 USPQ2d 11277 at *4.³⁹ See also *Empresa Cubana*, 111 USPQ2d at 1062; *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (TTAB 1982).

Because Opposer has properly introduced into evidence Registration No. 1353183 for the mark CHINOOK for table wine and sparkling wine, Opposer has established his entitlement to a statutory cause of action.⁴⁰ *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1032 (TTAB 2016) (standing established based on pleaded registration made of record).

IV. Priority

A. Opposer's pleaded registration.

Because Opposer's Registration No. 1353183 for the mark CHINOOK for table wine and sparkling wine is properly of record, Section 2(d) priority is not an issue as to the mark (CHINOOK) and goods (table wine and sparkling wine) covered by the pleaded registration. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d. 1400, 182 USPQ 108, 110 (CCPA 1974).

³⁹ Our decisions have previously analyzed the requirements of §§ 1063 and 1064 under the rubric of "standing." We now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting "standing" under §§ 1063 and 1064 remain equally applicable.

⁴⁰ 77 TTABVUE 148.

B. Opposer's common law rights.

With respect to Opposer's use of CHINOOK to identify beer, because Opposer's Registration No. 1790596 for the mark CHINOOK for beer has been cancelled, Opposer must rely on his common law use of the mark.

As explained in *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 44-45 (CCPA 1981), a plaintiff must have proprietary rights in its pleaded mark. "Where an opposer asserts likelihood of confusion because of its prior use of what appears to be a merely descriptive term, as in *Otto Roth*, the opposer must show that such term has come to identify the opposer as the source of goods or services." *Jewelers Vigilance Comm., Inc. v. Ullenberg Corp.*, 853 F.2d 888, 7 USPQ2d 1628, 1632 (Fed. Cir. 1988). As stated in *Otto Roth*,

[Y]et it is equally clear that if an opposer's alleged means of trade designation is not distinctive--does not identify source--then there is no basis upon which to compare such a thing with the applicant's mark to determine whether confusion as to source is likely.

Otto Roth, 209 USPQ at 44.

"[A] person's acquisition of source-indicating significance in a particular name or term gives that person proprietary rights in the sense that 'the law [will] prevent others from using it or something so similar as to be likely to cause public confusion as to source.'" *Jewelers Vigilance*, 7 USPQ2d at 1632 (quoting *Otto Roth*, 209 USPQ at 44). Without such proprietary rights, Opposer cannot prove likelihood of confusion.

The substance of the holding of *Otto Roth* is that likelihood of confusion cannot be established unless the prior use on which the opposition is based is, in fact, a mark indicating source in another.

Jewelers Vigilance, 7 USPQ2d at 1632.

“Under the rule of *Otto Roth*, a party opposing registration of a trademark due to a likelihood of confusion with his own unregistered term cannot prevail unless he shows that his term is distinctive of his goods, whether inherently or through the acquisition of secondary meaning or through ‘whatever other type of use may have developed a trade identity.’” *Towers v. Advent Software, Inc.*, 913 F.2d 942, 16 USPQ2d 1039, 1041 (Fed. Cir. 1990) (quoting *Otto Roth*, 209 USPQ at 43).

In granting Applicant’s motion for summary judgment on the ground of abandonment, the Board found Applicant had established a prima facie case that Opposer discontinued use of the mark CHINOOK for beer for at least three consecutive years from the September 3, 1992 filing date of his use-based application for CHINOOK for beer that Opposer failed to rebut.⁴¹ Accordingly, we look to the record to determine whether and when Opposer used CHINOOK for beer subsequent to September 3, 1995 and the extent to which Opposer used CHINOOK for beer.

Opposer testified that in 1998 or 1999, he began negotiations with Redhook Ale Brewery and ultimately entered into a trademark license agreement for Redhook to produce beer under the CHINOOK mark. Despite Opposer’s testimony that he approved the branding proposed by Redhook, routinely sampled and approved the CHINOOK beer Redhook made, and received royalties, he “understand(s)” – not knows – Redhook ceased production in of CHINOOK beer in 2006. Opposer discussed licensing with other breweries and, ultimately in 2013, entered a license agreement

⁴¹ 69 TTABVUE 8-9.

with Northwest Brewing to produce and sell CHINOOK beer. Northwest Brewing has produced and sold CHINOOK beer for the last several years.⁴²

In addition, Opposer “understand(s) that beer had been sold under the CHINOOK mark in the following channels of trade: retail stores including big box stores, liquor stores and grocery stores; restaurants; and on the internet.”⁴³ We note that the Total Wine & More webpages for CHINOOK wine and CHINOOKER’D IPA include links to “similar selections” and “customers who viewed [Chinook Chardonay or CHINOOKER’D] also viewed” with links CHINOOK wine and CHINOOKER’D IPA, but no links to CHINOOK beer.⁴⁴ Apparently, Total Wine & More does not sell CHINOOK beer.

That is the extent of the testimony and evidence regarding Opposer’s use of CHINOOK beer.

To show that Opposer does not have any proprietary rights in the term CHINOOK as applied to beer, Applicant introduced the evidenced discussed below:

The United States Department of Agriculture (ars.usda.gov) identifies Chinook as a hop varietal.⁴⁵

Patrick Rue testified on behalf of Applicant as an expert witness. Mr. Rue is the founder and Chief Executive Officer of The Bruery LLC, a craft brewery in Placentia,

⁴² Mackey Decl. ¶14 (71 TTABVUE 4-5).

⁴³ Mackey Decl. ¶15 (71 TTABVUE 5).

⁴⁴ 81 TTABVUE 5-9.

⁴⁵ 77 TTABVUE 503.

California.⁴⁶ He completed “the Cicerone certification program in stylistic and quality issues relating to beer, including recognizing the flavors and ingredients that are present in the recognized styles of beer.”⁴⁷ Mr. Rue testified that “Chinook” refers to a variety of hops used in beer.⁴⁸ He supported his testimony with the exhibits listed below:

- An excerpt from the Northern Brewer Homebrew Supply website advertising the sale of Chinook Hop Pellets.⁴⁹ The advertisement states, “Chinook Pellet Hops provide a spicy, piney flavor with high alpha, used for bittering and late additions in American Ales.”

- An article entitled “How to Grow & Brew Chinook Hops” posted on <learn.kegerator.com> (September 2, 2016).⁵⁰ According to the article, “[t]he Chinook hop variety is well-known among the American craft brewing world.”⁵¹ “Chinook [h]as remained one of the top five hops since the American Brewer’s Association started releasing Hop Usage Reports back in 2007. The 2015 report has Chinook as

⁴⁶ Rue Decl. ¶1 (73 TTABVUE 2).

⁴⁷ *Id.* at ¶5 (73 TTABVUE 2).

⁴⁸ *Id.* at ¶9 (73 TTABVUE 3).

⁴⁹ 73 TTABVUE 8. The webpage did not include the URL or date that Rue accessed the webpage. *See* Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2). Nevertheless, we consider the document because it helps us to evaluate the opinion and Opposer suffers no apparent prejudice because of it. *See* Fed. R. Evid. 703 (if the facts or data on which the expert relies “would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.”). In addition, Opposer did not object to the exhibits and Patrick Rue authenticated it in paragraph 7 of his declaration.

⁵⁰ 73 TTABVUE 10-20.

⁵¹ 73 TTABVUE 10.

“the 3rd most popular hop variety”⁵² and “Chinook is a commercial variety with no restrictions making it easy for the home gardener to buy and grow.”⁵³

- Beer Advocate website Hop Guide listing Chinook.⁵⁴ According to the Beer Advocate Hop Guide, “Chinook is a bittering variety with aroma characteristics released in May 1995. It was bred by crossing a Petham Golding with the USDA 63012 male.”⁵⁵

- A blog about hops posted at A Perfect Pint website (aperfectpint.net) identifying Chinook as an American hops.⁵⁶

- An excerpt from an online publication “How To Brew,” Chapter 5 – Hops, Section 5.3 Hop Types identifying Chinook as a bittering hop variety with “Heavy spicy aroma; Strong versatile bittering hop, cloying in large quantities.”⁵⁷ Sierra Nevada Celebration Ale and Sierra Nevada Stout use chinook hops.⁵⁸

- “List of hop varieties,” Wikipedia.org lists Chinook as an American hop that is “slightly spicy and very piney.”⁵⁹

⁵² 73 TTABVUE 12.

⁵³ *Id.*

⁵⁴ 73 TTABVUE 21-23. The webpage did not include the URL or date that Rue accessed it.

⁵⁵ *Id.*

⁵⁶ 73 TTABVUE 27.

⁵⁷ 73 TTABVUE 30-31. The webpage did not include the URL or date that Rue accessed it.

⁵⁸ *Id.*

⁵⁹ 73 TTABVUE 43.

- Hopslist.com (July 2016) identifies Chinook as a beer hops “trending in the brewing space by revealing which varieties brewers are searching for the most.”⁶⁰

- Andrew Kaczmarek, “Top Hops: Cascade Ranks #1 Among Craft Brewers’ Favorite Varieties,” posted on CraftBeer.com (February 8, 2013) provides the following list of “Notable Chinook Beers”: Chinook Single Hop Imperial IPA (Flying Dog Brewery), All Chinook Pale Ale (Coast Brewing), and High Tide Fresh Hop IPA (Port Brewing).⁶¹

Applicant introduced through a notice of reliance “Your Guide To The Most Popular Beer Hops In The USA,” CraftBeerClub.com (March 23, 2018) listing Chinook hops.⁶²

Chinook

Another Washington-grown hop, Chinook is very flavor-packed and complex in comparison to the others on this list. Its pine-heavy and light spiciness give way to some hints of citrusy grapefruit. The Chinook hop is another popular one with mellow bitterness which allows for a smooth, easy-drinking beer.⁶³

Andy Sparhawk, “Cascade Reigns: Top Hops 2007 vs. 2015,” CraftBeer.com (December 1, 2015) reports that Chinook is the third most used hop in beer making. “In 2011, Cascade, Centennial and Chinook accounted for more than half of small brewers’ usage; today they have been cut back to below 40 percent.”⁶⁴

⁶⁰ 73 TTABVUE 65.

⁶¹ 73 TTABVUE 71.

⁶² 77 TTABVUE 494.

⁶³ *Id.*

⁶⁴ 77 TTABVUE 498.

Jennifer Swiatek, the Manager and owner of the Beverage Warehouse of Vermont, an alcoholic beverage retailer in Winooski, Vermont, testified that she sells many beers brewed with chinook hops and that many craft beer brands include the hop name as part of their brand name.⁶⁵ Patrick Rue also testified, “[b]reweries often name such beers by referring only to the variety of hops used in producing the beer.”⁶⁶ Applicant introduced a notice of reliance on the Untappd website (untappd.com) listing beers incorporating the term “Chinook” in their name.⁶⁷ The following beers are representative:

- Chinook IPA (Maku Brewing)⁶⁸
- Bourbon Barrel Aged Chinook IPA (Bold City Brewery)⁶⁹
- Simcoe/Chinook IPA (Avery Brewing Co.)⁷⁰
- Honey Chinook IPA (Sycamore Brewing)⁷¹
- Wet Hop’d Chinook IPA (Light the Lamp Brewery).⁷²

A generic term “is the common descriptive name of a class of goods or services.” *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1045 (Fed. Cir. 2018) (quoting *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987,

⁶⁵ Swiatek Decl. ¶¶7-8 (74 TTABVUE 3).

⁶⁶ Rue Decl. ¶9 (73 TTABVUE 3).

⁶⁷ 77 TTABVUE 378-454.

⁶⁸ 77 TTABVUE 383.

⁶⁹ 77 TTABVUE 385.

⁷⁰ 77 TTABVUE 386.

⁷¹ 77 TTABVUE 387.

⁷² 77 TTABVUE 388.

228 USPQ 528, 530 (Fed. Cir. 1986)). “In an opposition or cancellation proceeding, the opposer or petitioner bears the burden of proving genericness by a preponderance of the evidence.” *Royal Crown*, 127 USPQ2d at 1046 (quoting *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015)). “The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term ... to refer to the genus of goods or services in question.” *Royal Crown*, 127 USPQ2d at 1046 (quoting *Marvin Ginn*, 228 USPQ at 530); *Princeton Vanguard*, 114 USPQ2d at 1830.

The Federal Circuit has set forth a two-step inquiry to determine whether a mark is generic: First, what is the genus (category or class) of goods at issue? Second, does the relevant public understand the term primarily to refer to that genus of goods? *Marvin Ginn*, 228 USPQ at 530. The perception of the relevant public is the chief consideration in determining whether a term is generic. *See Princeton Vanguard*, 114 USPQ2d at 1833. We may obtain evidence of the public’s understanding of a term from “any competent source, such as consumer surveys, dictionaries, newspapers and other publications.” *Id.* at 1830 (quoting *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985)).

“[A] term can be generic for a genus of goods ... if the relevant public ... understands the term to refer to a key aspect of that genus.” *Royal Crown*, 127 USPQ2d at 1046 (quoting *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1637 (Fed. Cir. 2016)). In *Cordua Rests.*, the court explained, “a term is generic if the relevant public understands the term to refer to *part of the claimed genus of*

goods or services, even if the public does not understand the term to refer to the broad genus as a whole.” *Id.* at 1638.

The genus of the goods at issue is beer. The relevant public is brewers (commercial, craft, and home brewers), beer distributors, and beer drinkers. The above-noted testimony and evidence shows that hops are ingredients of beer. The testimony and evidence provides clear evidence that the relevant purchaser perceives Chinook as indicating a type of beer by referring to a key aspect of that product. *See Royal Crown*, 127 USPQ2d at 1047 (holding that ZERO when used in combination with a designated beverage name to refer to a sub-group or type of beverage that carries specific characteristics is enough to render ZERO generic); *In re Cordua Rests., Inc.*, 118 USPQ2d at 1637 (holding that certain words referring to key aspects of a genus of services were generic for those services). As such, Chinook is generic when used in connection with beer because the relevant public perceives the beer as brewed with Chinook hops.

Opposer argues to the contrary, “CHINOOK is an arbitrary term as applied to both beer and wine. There have been hops known as ‘Chinook Hops,’ but they were not used in CHINOOK branded beer.”⁷³ Whether a term is generic or descriptive is determined in relation to the goods at issue. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re Calphalon Corp.*, 122 USPQ2d 1153, 1162 (TTAB 2017). “The question is not whether someone presented with only the mark could guess what the goods or services are.

⁷³ Mackey Decl. ¶11 (71 TTABVUE 4).

Rather, the question is whether someone who knows what the goods and services are will understand the mark to convey information about them.” *DuoProSS*, 103 USPQ2d at 1757 (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)). Someone familiar with beer, particularly craft beer, perceives CHINOOK as a beer made from chinook hops.⁷⁴ That CHINOOK may have another meaning in another context is not controlling. *In re Franklin County Historical Soc’y*, 104 USPQ2d 1085, 1087 (TTAB 2012); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

Because CHINOOK when used in connection with beer is generic, Opposer does not have any proprietary rights in that word.⁷⁵ Accordingly, Opposer may not pursue a likelihood of confusion claim against the registration of Applicant’s mark CHINOOKER’D IPA for beer based on nonexistent common law rights in CHINOOK for beer. The sole issue before us is whether Applicant’s mark CHINOOKER’D IPA

⁷⁴ Opposer’s use of CHINOOK for beer other than beer made from chinook hops may be deceptive. Deceptive marks are marks that falsely describe a material content of a product. *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1394 (holding the term WHITE in the proposed mark WHITE JASMINE deceptive for tea that did not include white tea, where the evidence established that consumers perceive that white tea has desirable health benefits); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047 (TTAB 2002) (holding SUPER SILK deceptive for clothing, namely dress shirts and sport shirts made of silk-like fabric); *In re Organik Tech., Inc.*, 41 USPQ2d 1690 (TTAB 1997) (holding ORGANIK deceptive for clothing and textiles made from cotton that is neither from an organically grown plant nor free of chemical processing or treatment); *In re Shapely, Inc.*, 231 USPQ 72 (TTAB 1986) (holding SILKEASE deceptive as applied to clothing not made of silk); *In re Intex Plastics Corp.*, 215 USPQ 1045 (TTAB 1982) (holding TEXHYDE deceptive for synthetic fabric).

⁷⁵ Even if CHINOOK when used in connection with beer were only merely descriptive, Opposer failed to show that its use of CHINOOK for beer has acquired distinctiveness and, therefore, Opposer still does not have a proprietary interest in that term in connection with beer.

for beer is likely to cause confusion with Opposer's registered mark CHINOOK for table wine and sparkling wine.

V. Likelihood of Confusion

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567). “Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)). See also *M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

“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, 177 USPQ 386, 387 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the

similarities between the marks and the similarities between the goods or services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *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.”). *See also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. The strength of Opposer’s mark CHINOOK for table wine and sparkling wine, including the number and nature of similar marks in use on similar goods.

Opposer contends that CHINOOK is a strong mark when used in connection with table wine and sparkling wine because it “is arbitrary as applied to wine and was chosen to suggest to consumers the connection with positive features of the Pacific Northwest United States,”⁷⁶ Opposer has used it for more than 30 years,⁷⁷ and

⁷⁶ Mackey Decl. ¶4 (71 TTABVUE 3) (“The winery is named after the Chinook wind that blows through the Pacific Northwest, rather than the Chinook salmon that is also common to the region.”); Mackey Decl. ¶1 (80 TTABVUE 2-3).

⁷⁷ Mackey Decl. ¶5 (71 TTABVUE 3) (“I have continuously used the CHINOOK mark in association with wine from 1984 through the present time.”).

In his brief, Opposer noted that Registration No. 1353183 became incontestable in November 1990. Opposer’s Brief, p. 33 (83 TTABVUE 34). The status of Opposer’s registration is not relevant to our analysis of the strength of Opposer’s mark. The fact that Opposer’s federally registered trademark has achieved incontestable status means that it is conclusively considered to be valid, but it does not dictate that the mark is “strong” for purposes of

Opposer has generated over \$7.5 million dollars in revenue selling CHINOOK wine since 1997.⁷⁸

The fifth *DuPont* factor enables Opposer to expand the scope of protection afforded its pleaded mark by adducing evidence of “[t]he fame of the prior mark (sales, advertising, length of use);” the sixth *DuPont* factor allows Applicant to contract that scope of protection by adducing evidence of “[t]he number and nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567.

Under the fifth factor, likelihood of confusion fame is not “an all-or-nothing measure.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (Fed. Cir. 2017). It “varies along a spectrum from very strong to very weak.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)). To determine a mark’s place on that spectrum, we consider its inherent strength, based on the nature of the mark itself, and its commercial strength, based on its marketplace recognition. See *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength.”); *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017); *Top Tobacco, L.P.*

determining likelihood of confusion. See *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031, 1036 (TTAB 2010).

⁷⁸ Mackey Decl. ¶17 (71 TTABVUE 5) (“Since 1997, Chinook Wines has generated in excess of \$7.5 million for CHINOOK branded wines.”).

v. North Atlantic Operating Co., Inc., 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) (market strength is the extent to which the relevant public recognizes a mark as denoting a single source); 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. December 2020 update) (“The first enquiry is for conceptual strength and focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another’s use.”). Commercial strength may be measured indirectly, by volume of sales and advertising expenditures and factors such as length of use of the mark, widespread critical assessments, notice by independent sources of the goods or services identified by the mark, and general reputation of the goods or services. *Weider Publ’ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1354 (TTAB 2014).

1. Inherent strength of CHINOOK for wine.

The RANDOM HOUSE UNABRIDGED DICTIONARY (2020) defines “Chinook,” inter alia, as “a member of a formerly numerous North American Indian people originally inhabiting the northern shore of the mouth of the Columbia River and the adjacent territory,” “a warm dry wind that blows at intervals down the eastern slopes of the

Rocky Mountains,” and “chinook salmon.”⁷⁹ See also “Chinook Winds,” Wikipedia.org.⁸⁰

Applicant introduced one third-party Certificate of Label Approval issued by the U.S. Alcohol and Tobacco and Trade Bureau consisting in part of the word “Chinook” for wine.⁸¹

In view of the foregoing, we find that CHINOOK for wine is an arbitrary mark and, therefore, it is inherently strong.

2. Commercial strength of CHINOOK for wine.

The only evidence Opposer introduced regarding the commercial strength of his mark CHINOOK for wine is that Opposer has sold \$7.5 million worth of CHINOOK wine since 1997.⁸² Inasmuch as Opposer testified regarding revenue on November 22, 2019, he has sold \$7.5 million of CHINOOK wine over 23 years or an average of

⁷⁹ Dictionary.com accessed December 1, 2020. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *Cordua Rests*. 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

⁸⁰ 80 TTABVUE 5.

⁸¹ 77 TTABVUE 48. While Applicant introduced numerous Certificates of Label Approval for beers and spirits, they are of limited probative value because we are analyzing the strength of Opposer’s mark when used in connection with wine. *Cf. Omaha Steaks Int’l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686 (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, LLC*, 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); *TAO Licensing, LLC v. Bender Consulting Ltd.*, 125 U.S.P.Q.2d 1043, 1058 (T.T.A.B. 2017) (third party registrations in unrelated fields “have no bearing on the strength of the term in the context relevant to this case.”).

⁸² Mackey Decl. ¶17 (71 TTABVUE 5) (“Since 1997, Chinook Wines has generated in excess of \$7.5 million for CHINOOK branded wines.”).

\$326,087 per year. Opposer testified that CHINOOK brand wines range from \$14-\$28 per 750 ml bottle and Total Wines & More was selling CHINOOK wine for \$20 per bottle.⁸³ Using \$21 per bottle as the median price, Opposer has sold on average 15,530 bottles per year (326,087 divided by 21). We have no testimony to put the sale of 15,530 bottles of wine a year in context. Because there is no testimony to put these figures in context, Opposer failed to meet its burden of proving the commercial strength of its mark. The testimony and evidence regarding the commercial strength of Opposer's CHINOOK mark for wine is neutral.

In sum, while Opposer's CHINOOK mark for wine is inherently strong, there is insufficient probative evidence regarding its commercial strength.

B. The nature and extent of any actual confusion and the length of time during and conditions under which there has been continuous use without evidence of actual confusion.

Applicant has been selling its CHINOOKER'D IPA to "beer retailers" since 2008.⁸⁴ It is unaware of any reported instances of confusion with Opposer's CHINOOK wine.⁸⁵ Opposer, having testified that he is "unaware of any beers sold in the United States using the name 'Chinook,' other than by entities licensed by myself to produce beer under the mark," is also unaware of any reported instances of confusion.⁸⁶ In fact, although both Opposer and his wife testified that they recall witnessing consumers being confused that as to whether beer and wine originated from the same

⁸³ Mackey Decl. ¶¶2-3 (80 TTABVUE 3).

⁸⁴ Lawson Decl. ¶8 (76 TTABVUE 4).

⁸⁵ *Id.* at ¶14 (76 TTABVUE 5).

⁸⁶ Mackey Decl. ¶16 (71 TTABVUE 5).

company,⁸⁷ they did not testify as to being aware of any consumers confusing the source of CHINOOK wine and CHINOOKER'D IPA beer.

The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Applicant of its mark for a significant period in the same markets as those served by Opposer under his mark. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff'd*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must be a reasonable opportunity for confusion to occur. *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred); *Red Carpet Corp. v. Johnstown Am. Enters. Inc.*, 7 USPQ2d 1404, 1406-1407 (TTAB 1988); *Central Soya Co., Inc. v. North Am. Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981) (“[T]he absence of actual confusion over a reasonable period of time might well suggest that the likelihood of confusion is only a remote possibility with little probability of occurring.”). Assessing the lack of any reported instances of actual confusion requires us to look at actual market conditions. *In re Guild Mtg. Co.*, 2020 USPQ2d 10279, *6 (TTAB 2020).

⁸⁷ Simon Decl. ¶7 (80 TTABVUE 10); Mackey Decl. ¶5 (80 TTABVUE 4).

Opposer has been using the mark CHINOOK to identify wines since 1984.⁸⁸ Opposer sells wine in his tasting room in Prosser, Washington and in retail stores including big box stores, liquor stores, grocery stores, restaurants and through alcohol distributors.⁸⁹ Total Wine & More located in Vancouver, Washington advertises the sale of Opposer's CHINOOK wine.⁹⁰ It also lists Applicant's CHINOOKER'D IPA.⁹¹ However, the website indicates that CHINOOKER'D IPA is not available online and it is not eligible to be shipped to Washington.⁹²

Applicant has continuously sold CHINOOKER'D IPA beer since 2008.⁹³ Applicant introduced invoices demonstrating sales to only companies in Vermont.⁹⁴ In what appears to be an advertising flyer, Applicant states, "Our beer is only available in Central Vermont, in and around the Mad River Valley."⁹⁵ In addition, Applicant states that it owns "a modest production facility" and it is "one of America's smallest commercial breweries."⁹⁶ An article in BeerAdvocate.com (January 13, 2013) reports that Applicant "distributes his beers to a handful of local bars, bottle shops and

⁸⁸ Mackey Decl. ¶5 (71 TTABVUE 3).

⁸⁹ Mackey Decl. ¶¶6-7 (71 TTABVUE 3).

⁹⁰ 81 TTABVUE 5.

⁹¹ 81 TTABVUE 7.

⁹² 81 TTABVUE 7 and 9.

⁹³ Lawson Decl. ¶7 (76 TTABVUE 3).

⁹⁴ Lawson Decl. Exhibit 4 (75 TTABVUE 15-131) (Confidential).

⁹⁵ Lawson Decl. Exhibit 6 (76 TTABVUE 30).

⁹⁶ *Id.*

farmers markets. He doesn't do tours or sell bottles out of his brewhouse [sic], which sits on the side of a Vermont mountain."⁹⁷

Despite the fact that the parties have simultaneously used their marks since 2008, the same consumers are unlikely to encounter both products because of their small sales, especially Applicant's de minimis sales, remote trading areas, and lack of advertising. Therefore, we find that there has not been a reasonable opportunity for confusion to occur. These *DuPont* factors are neutral.

C. The similarity or dissimilarity and nature of the goods.

The description of goods in Opposer's pleaded registration is table wine and sparkling wine and the description of goods in Applicant's application is beer. Unlike the *DuPont* factors relating to actual confusion, we analyze the similarity or dissimilarity and nature of the goods based, as dictated by precedent from the Federal Circuit, on the descriptions of goods set forth in the application and pleaded registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014). As such, we may not consider the particular nature of the products, actual channels of trade or classes of consumers. *Id.* This is because we are analyzing the right to register, not the right to use.

To show that wine and beer are related products, Opposer introduced 54 use-based, third-party registrations registered for both beer and wine.⁹⁸ Third-party

⁹⁷ Lawson Decl. Exhibit 7 (76 TTABVUE 45).

⁹⁸ 72 TTABVUE 248-540. Opposer also included 26 copies of third party registrations that are not probative because the description of goods for beer, wine or both were canceled or expired, or the registrations were not based on use in commerce. Registration No. 3247029 for the mark PECHANGA is illustrative of Opposer's lack of attention to detail in this regard. 72 TTABVUE 417. The registration for PECHANGA did not include beer. Opposer

registrations based on use in commerce that individually cover a number of different goods may have probative value to the extent that they serve to suggest that the listed goods are a type that may emanate from the same source. *In re Country Oven, Inc.*, 2019 USPQ2d 443903, *8 (TTAB 2019); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd mem.* 864 F.2d 149 (Fed. Cir. 1988). The registrations listed below are representative:

- Registration No. 4646106 for the mark MARGARITAS WITH A MISSION;⁹⁹
- Registration No. 5551925 for the mark CHEERS BEACHES;¹⁰⁰
- Registration No. 1736692 for the mark EDGEFIELD;¹⁰¹
- Registration No. 2350261 for the mark BINNY'S BEVERAGE DEPOT;¹⁰² and
- Registration No. 3456841 for the mark DEFENDERS OF FREEDOM.¹⁰³

Opposer also introduced excerpts from eight third-party websites advertising the sale of beer and wine under the same mark.¹⁰⁴ We list below representative examples of the third-party evidence:

introduced the registration because the description of goods included beer mugs. In addition, the USPTO cancelled the description of goods for wine because registrant did not file a Section 8 declaration of use. In other words, Opposer did not review the registrations he introduced into evidence to insure their relevancy.

⁹⁹ 72 TTABVUE 250. Registered November 25, 2014; Sections 8 and 15 Declarations received.

¹⁰⁰ 72 TTABVUE 254. Registered August 28, 2018.

¹⁰¹ 72 TTABVUE 292. Registered December 1, 1992; second renewal.

¹⁰² 72 TTABVUE 299. Registered May 16, 2000; renewed.

¹⁰³ 72 TTABVUE 359. Registered July 1, 2008; renewed.

¹⁰⁴ 72 TTABVUE 13-127. There are a number of websites where we could not discern how the beer and wine were labelled (72 TTABVUE 21-39), whether one entity or multiple entities were the source of the beer and wine (72 TTABVUE 57-66), or did not include both beer and

- Charleville Vineyard & Microbrewery (facebook.com) advertising CHARLEVILLE beer and wine;¹⁰⁵
- KIRKLAND beer (doingbeerjustice.blogspot.com and beeradvocate.com)¹⁰⁶ and KIRKLAND wine (costcowineblog.com);¹⁰⁷
- The Mint 400 website (themint400.com) advertising MINT 400 wine and MINT 400 beer;¹⁰⁸
- Spring Gate Vineyard (facebook.com) advertising SPRING GATE BREWERY beer and SPRING GATE VINEYARD wine;¹⁰⁹
- Motor City Brewing Works website (motorcitybeer.com) advertising MOTOR CITY BREWING WORKS beer and MOTOR CITY BREWING WORKS wine;¹¹⁰ and
- KIGEN beer (totalwine.com)¹¹¹ and KIGEN wine (morewines.com).¹¹²

Opposer testified that he is aware of other companies selling beer and wine under the same name.

12. I am also aware that other companies have produced and sold both wine and beer under the same name, examples are Wagner Vineyards of Lodi, New York, and Firestone Vineyards previously of Los Olivos, California.

wine (72 TTABVUE 91-97). For example, Crown Country website (crowncountry.com) advertises CROWN VALLEY WINE but does not display a wine label (72 TTABVUE 116-117). Thus, we can determine whether that entity uses the same mark on wine and beer.

¹⁰⁵ 72 TTABVUE 14-18.

¹⁰⁶ 72 TTABVUE 40-46.

¹⁰⁷ 72 TTABVUE 47-49.

¹⁰⁸ 72 TTABVUE 50-54.

¹⁰⁹ 72 TTABVUE 67-70.

¹¹⁰ 72 TTABVUE 72-74.

¹¹¹ 72 TTABVUE 76-78.

¹¹² 72 TTABVUE 80-84.

Today companies across the country produce and sell wine, beer and distilled products under the same name. Examples include St. Clair Brown Winery & Brewery of Napa, California, Schram Vineyards Winery & Brewery of Waconia, Minnesota, Crown Valley Brewery & Distillery and Winery of Genevieve, Missouri, and Wilridge Vineyard, Winery & Distillery of Yakima, Washington.¹¹³

In opposition to Opposer's testimony and evidence, Sean Lawson, Applicant's Chief Executive Officer testified that since he began selling beer in 2008, he "has never witnessed any consumer being confused as to the source of beer being related to any wine product."¹¹⁴ Likewise, Jennifer Swiatek, the Manager and owner of Beverage Warehouse of Vermont, testified, "[m]ost of the breweries that produce the beer we sell do not produce or sell wine products, and most of the wineries that produce the wine we sell do not produce or sell beer products."¹¹⁵ She also testified that in her 34 years in the alcoholic beverage industry that she has "no recollection of witnessing a consumer being confused that a wine product originated from or was related to a brewery, or whether a beer product originated from or was related to a winery."¹¹⁶

To counter Opposer's third-party registration evidence, Applicant introduced 220 sets of third-party registrations for similar or identical marks owned by different

¹¹³ Mackey Decl. ¶12 (71 TTABVUE 4). Opposer did not introduce any supporting documentation. The problem we had with the documentation relating to Crown Valley Brewery & Distillery and Winery of Genevieve, Missouri is noted in a previous footnote.

¹¹⁴ Lawson Decl. ¶14 (76 TTABVUE 4).

¹¹⁵ Swiatek Decl. ¶12 (74 TTABVUE 4).

¹¹⁶ *Id.* at ¶13 (74 TTABVUE 4).

entities where one entity has registered its mark for beer and the other entity has registered its mark for wine.¹¹⁷ The following sets of registrations are representative:

- Registration No. 0600470 for the mark STERLING for beer and ale¹¹⁸ and Registration No. 3252353 for the mark STERLING for wines;¹¹⁹

- Registration No. 0691791 for the mark BUCKEYE SPARKLING DRY for beer¹²⁰ and Registration No. 3488525 for the mark BUCKEYE BLUSH for table wines;¹²¹

- Registration No. 1270164 for the mark REGAL BRAU¹²² and Registration No. 5936343 for the mark REGAL TEJ HONEY WINE for wine;¹²³

- Registration No. 1387709 for the mark DRAGON STOUT for beer¹²⁴ and Registration No. 4854761 for the mark DRAGON MEADERY for honey wine and mead;¹²⁵ and

- Registration No. 1486399 for the mark INDIA GOLD LABEL for beer¹²⁶ and Registration No. 3399401 for the mark GOLD LABEL for wine.¹²⁷

¹¹⁷ 78 TTABVUE 3-228.

¹¹⁸ 78 TTABVUE 3.

¹¹⁹ 78 TTABVUE 18.

¹²⁰ 78 TTABVUE 4.

¹²¹ 78 TTABVUE 16.

¹²² 78 TTABVUE 5.

¹²³ 78 TTABVUE 24.

¹²⁴ 78 TTABVUE 6.

¹²⁵ 78 TTABVUE 22

¹²⁶ 78 TTABVUE 7.

¹²⁷ 78 TTABVUE 17.

We find the third-party registration and use evidence sufficient to support finding that beer and wine are related products. *See Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1826-27 (TTAB 2015) (wine related to beer); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1265 (TTAB 2011) (beer related to wine); *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (beer related to wine); *Kranz Brewing Corp. v. Kelly Importing Co. Inc.*, 96 USPQ 219, 220 (Exm'r in Ch. 1952 (beer and wine related). “[E]xtensive evidence of third-party use and registrations is ‘powerful on its face,’ even where the specific extent and impact of the usage has not been established.” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (citing *Juice Generation v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)).

As we indicated above, Opposer’s third-party registrations suggest that beer and wine are related because the same party registered a common mark for those products. Similarly, Applicant submitted sets of third-party registrations to suggest the opposite, i.e., that different parties registered the same or similar marks for beer or wine. *See In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009) (“On the other hand, applicant has submitted copies of 13 sets of registrations for the same or similar marks for different types of trailers owned by different entities arguing, in essence, that the third-party registrations serve to suggest that the listed goods are of a type which may emanate from different sources.”); *Helene Curtis Indus. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989) (“In connection with its related goods

arguments, plaintiff has made of record numerous third-party registrations and exhibits to show that it is common in the trade for the same mark to appear both on personal care products and wearing apparel emanating from the same source. Defendant, on the other hand, has introduced registrations and exhibits to show registration and use of the same or similar marks on these same types of products, but emanating from different sources.”).

However, Applicant’s third-party registrations have less probative value than Opposer’s third-party registrations because there is no requirement that for goods to be related that all or even a majority of the sources of one product must also be sources of the other products. Therefore, evidence showing only that the source of one product may not be the source of other products does not aid Applicant in its attempt to rebut Opposer’s evidence. *In re G.B.I. Tile and Stone, Inc.*, 92 USPQ2d 1366, 1370 (TTAB 2009) (sets of third-party registrations for the same or similar marks for one of the goods at issue does not rebut third-party registrations for both goods). *See also Kysela Pere et Fils Ltd.*, 98 USPQ2d at 1265 (same).

Applicant contends, in essence, that the third-party registration evidence is unreliable because the USPTO has become aware that some applicants have submitted phony digitally created, altered, or mockup specimens citing United States Patent & Trademark Office, Examination Guide 3-19, *Examination of Specimens for Use in Commerce: Digitally Created or Altered and Mockup Specimens* (2019),

available at www.uspto.gov/sites/default/files/documents/Exam%20Guide%2003-19.pdf.¹²⁸

Applicant submits that a company attempting to substantiate use in connection with two specialized goods (i.e., both beer and wine) is even more likely to rely upon questionable evidence of use as to such goods.¹²⁹

It is worth noting that, prior to 2019, the USPTO habitually did not require a showing of use for each good listed in a class, instead approving the registration of a mark in a class where use was shown as to any good in a class.¹³⁰

We are aware of the problem the USPTO encounters with phony specimens. The USPTO has addressed the phony specimen issue as noted by the examination guide. Nevertheless, the registrations remain prima facie evidence of the validity of the registered marks and of the registration of the marks. Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b). In addition, the registrations are not evidence that the marks are in use; they serve to suggest that the goods listed in description of goods are of a type that may emanate from a single source. If Applicant wishes to rebut the inference that we draw from the registrations, it should present evidence that the third-party registrants are not using the mark for the one or more of the goods at issue rather than denigrate the validity of trademark registrations and the trademark examination process.

¹²⁸ Applicant's Brief, p. 31 (85 TTABVUE 32).

¹²⁹ *Id.*

¹³⁰ *Id.* at p. 32 (85 TTABVUE 33).

Based on the record, we find that beer and wine are related products.

D. Established, likely-to-continue channels of trade and classes of consumers.

As noted above, Opposer's description of goods is table wine and sparkling wine and Applicant's description of goods is beer. Neither description of goods is restricted or limited in any way. Because there are no limitations as to channels of trade or classes of purchasers in the descriptions of goods, we presume that Opposer's wine and Applicant's beer are offered in all channels of trade normal for those goods, and that they are available to all classes of purchasers for those goods. *See In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)); *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *Paula Payne Prods. Co. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

Opposer sells his wine in "retail stores including big box stores, liquor stores and grocery stores; restaurants; through alcohol distributors; and in our tasting room."¹³¹ Opposer's "target demographic is middle class consumers who shop at retail stores like Total Wines & More, who prefer quality wines and beers rather than the cheapest options for alcohol consumption."¹³²

¹³¹ Mackey Decl. ¶7 (71 TTABVUE 3).

¹³² Mackey Decl. ¶ 3 (80 TTABVUE 3).

Jeff Cox, Wine, Beer & Spirits Merchandiser for Puget Consumers Co-Op, a 14-store, high-end grocery in the Puget Sound region, testified that its suppliers distribute both beer and wine.¹³³

Jennifer Swiatek, the Manager and owner of Beverage Warehouse of Vermont testified that her store “stocks as many as 1,200 different beer brands, about 4,000 wine brands, and about 2,500 distilled spirits brands.”¹³⁴

Finally, Opposer’s third-party use evidence shows companies selling both beer and wine.¹³⁵ For example,

- The Charleville Vineyard & Microbrewery Facebook page shows that company advertising or promoting its Charleville beer and wine;¹³⁶

- McMenamins website (mcmenamins.com) advertises the sale of McMenamins growlers, tap beer from Edgefield Brewery, and Edgefield Wines;¹³⁷ and

- The Round Barn website (roundbarn.com) advertises the sale of wine and beer.¹³⁸

We find that beer and wine are offered in some of the same channels of trade to some of the same classes of consumers.

¹³³ Cox Decl. ¶2 (80 TTABVUE 6-7).

¹³⁴ Swiatek Decl. ¶5 (74 TTABVUE 3).

¹³⁵ 72 TTABVUE.

¹³⁶ 72 TTAVUE 13-18.

¹³⁷ 72 TTABVUE 21-39.

¹³⁸ 72 TTABVUE 104-108.

E. Conditions under which and customers to whom sales are made.

As noted above, Opposer's description of goods is table wine and sparkling wine and Applicant's description of goods is beer. Neither description of goods is restricted or limited in any way. We must consider the goods as they are described in the application and registration. *Stone Lion Capital Partners*, 110 USPQ2d at 1161; *Octocom Sys, Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."); *Paula Payne Prods.*, 177 USPQ at 77 ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods").

We also do not read limitations into the identification of goods. *In re i.am.symbolic*, 123 USPQ2d at 1748; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"); *In re Thor Tech Inc.*, 90 USPQ2d at 1638 ("We have no authority to read any restrictions or limitations into the registrant's description of goods."). Therefore, we must presume that Opposer's table wine and sparkling include all types of table wine and sparkling wine and that Applicant's beer includes all types of

beer regardless of any extrinsic evidence regarding the nature of the wine or the beer. See *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413-14 (TTAB 2018) (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”).

Because the respective identifications are table wine and sparkling wine and beer without any limit regarding a particular price point, channels of trade, or classes of consumers, we must treat the goods as including inexpensive as well as more costly wine and beers, and therefore presume that purchasers for the wine and beer include ordinary consumers who may buy inexpensive wine and beer on impulse. See *Stone Lion Capital Partners*, 110 USPQ2d at 1163-64 (recognizing Board precedent requiring consideration of the “least sophisticated consumer in the class”). See also *In re Sailerbrau Franz Sailer*, 23 USPQ2d at 1720 (finding that not all purchasers of wine may be discriminating because while some may have preferred brands, “there are just as likely to be purchasers who delight in trying new taste treats.”); *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

We find that the conditions under which and customers to whom sales are made is a neutral *DuPont* factor.

F. The similarity or dissimilarity of the marks.

We now turn to the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. Sept. 13, 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing the marks, we are mindful 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*, 127 USPQ2d at 1801 (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)).

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012). As discussed above, because the goods are wine

and beer without any restrictions or limitations, the average customer is an ordinary consumer.

Opposer's mark is CHINOOK and Applicant's mark is CHINOOKER'D IPA. Because Applicant's mark incorporates Opposer's mark, the marks are similar in appearance and sound. However, the marks have different meanings and engender different commercial impressions.

Opposer's CHINOOK mark suggests the Pacific Northwest. As discussed above, "Chinook" is a "a member of a formerly numerous North American Indian people originally inhabiting the northern shore of the mouth of the Columbia River and the adjacent territory," "a warm dry wind that blows at intervals down the eastern slopes of the Rocky Mountains," or a "chinook salmon." Opposer testified, "[t]he winery is named after the Chinook wind that blows through the Pacific Northwest, rather than the Chinook salmon that is also common in the region."¹³⁹

Applicant's mark CHINOOKER'D IPA, on the other hand, engenders the commercial impression of getting snookered (i.e., drunk) on a beer made from Chinook hops.¹⁴⁰ As discussed above, Chinook is a generic term for a beer made from Chinook hops. Thus, when used in connection with beer, Chinook means a type of hops and engenders a different commercial impression than Chinook used in connection with wine. *See Coach Servs., Inc. v. Triumph Learning LLC*, 96 USPQ2d 1600, 1609 (TTAB 2010), *aff'd*, 668 F.3d 1356, 101 USPQ2d 1713 (Fed. Cir. 2012) (COACH applied to

¹³⁹ Mackey Decl. ¶4 (71 TTABVUE 3). *See also* Mackey Decl. ¶1 (80 TTABVUE 2-3).

¹⁴⁰ The Random House Unabridged Dictionary (2020) (accessed December 2, 2020) defines "snookered" as "drunk; intoxicated."

fashion accessories engender the commercial impression of traveling bag and COACH applied to educational materials and services engenders the commercial impression of a tutor); *In re Sears, Roebuck and Co.*, 2 USPQ2d 1312 (TTAB 1987) (CROSS-OVER for brassieres creates a different commercial impression from CROSSOVER for ladies' sportswear); *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984) (PLAYERS for shoes engenders a different commercial impression from PLAYERS for underwear); *In re Sydel Lingerie Co., Inc.*, 197 USPQ 629, 630 (TTAB 1977) (BOTTOMS UP as applied to men's clothing engenders a different commercial impression than BOTTOMS UP for ladies' and children's underwear).

The difference in the meaning and commercial impression of the marks CHINOOK and CHINOOKER'D IPA outweigh the similarities in appearance and sound. Therefore, we find that Applicant's mark CHINOOKER'D IPA is not similar to Opposer's mark CHINOOK.

G. Conclusion

The relevant *DuPont* factors weighing in favor of finding likelihood of confusion are the inherent strength of Opposer's mark CHINOOK for wine, the similarity of the goods, and the similarity of the channels of trade and classes of consumers. The relevant *DuPont* factor weight against finding likelihood of confusion is the dissimilarity of the marks. Each of the evidentiary factors set out in *DuPont*, may, from case to case, play a dominant role. *See Kellogg Co. v. Pack'em Enters., Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single *DuPont* factor may not be dispositive."). In this case, the

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dissimilarity of the marks is sufficiently pronounced that purchaser confusion is unlikely, particularly because CHINOOK when used in connection with beer is generic.

We find that Applicant's mark CHINOOKER'D IPA for beer is not likely to cause confusion with Opposer's registration for CHINOOK for table wine and sparkling wine.

Decision: The opposition is dismissed.