

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

Hearing: February 23, 2021

Mailed: May 3, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Monster Energy Company*

*v.*

*Maple Leaf Sports & Entertainment Ltd.  
and NBA Properties, Inc.*

—  
Opposition Nos. 91222422 (Parent)  
91222445, 91226092 and 91228458  
—

Hans L. Mayer, Steven J. Nataupsky, Lynda Zadra-Symes  
and Matthew S. Bellinger of Knobbe, Martens, Olson & Bear, LLP  
for Monster Energy Company.

Eleanor M. Lackman and Marissa B. Lewis  
of Mitchell Silberberg & Knupp LLP  
for Maple Leaf Sports & Entertainment Ltd. and NBA Properties, Inc.

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Before Wellington, Adlin and Hudis,  
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Applicant, Maple Leaf Sports & Entertainment Ltd. (“Maple Leaf”), seeks registration on the Principal Register of the mark  for goods and services in International Classes 9, 16, 18, 25, 28 and 41, and the mark  for goods and services in International Classes 9, 14, 16, 18, 20, 21, 24, 25, 28, 35, 38 and 41.

Applicant, NBA Properties, Inc. (“NBA”), seeks registration on the Principal Register of the mark  for goods and services in Classes International Classes 25 and 41, and the mark  for services in International Class 41. All of these applications were filed based upon the respective Applicants’ allegations of a bona fide intention to use each mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). Maple Leaf’s applications were filed on December 15, 2014; NBA’s applications were filed on May 26, 2015.<sup>1</sup> Where appropriate throughout this decision, we refer to Maple Leaf and the NBA collectively as “Applicants.”

In its Notices of Opposition, Opposer, Monster Energy Company (“Monster”), opposes registration of Applicants’ marks under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that each of Applicants’ marks, as applied to the goods or services identified in the applications, so resembles Opposer’s registered and common law marks: ,  and , registered and used in connection with goods and services in International Classes 5, 9, 14, 16, 18, 25, 32 and 35,<sup>2</sup> as to be likely to cause confusion, mistake, or to deceive. Monster also opposes registration of Applicants’ marks under Trademark Act Section 43(c), 15 U.S.C. § 1125(c), on the ground that each of Applicants’ marks is likely to dilute Opposer’s marks. Applicants denied the salient allegations of the Notices of Opposition in each of their Answers.

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<sup>1</sup> Complete recitations of Applicants’ marks, application serial numbers, filing dates, filing bases and identifications of goods/services may be found in **Appendix 1**.

<sup>2</sup> Complete recitations of Opposer’s marks, registration numbers, issue dates and identifications of goods/services may be found in **Appendix 2**.

Applicants' Answers also asserted the so-called "prior registration" or "*Morehouse*" defense<sup>3</sup> to Opposer's claims, which was dismissed on summary judgment.<sup>4</sup>

In Opposition Nos. 91222422 and 91222445, Maple Leaf counterclaims to cancel Monster's pleaded registrations on grounds of false suggestion of a connection pursuant to Trademark Act Section 2(a), 15 U.S.C. § 1052(a); priority and likelihood of confusion pursuant to Trademark Act Section 2(d), 15 U.S.C. § 1052(d); and likelihood of dilution pursuant to Trademark Act Section 43(c), 15 U.S.C. § 1125(c) – all based on Maple Leaf's claim of prior rights in the putatively famous  mark registered in connection with goods and services in International Classes 16, 25, 28 and 41.<sup>5</sup> Maple Leaf did not pursue its false suggestion or dilution counterclaims pursuant to Trademark Act Sections 2(a) and 43(c). They are therefore waived. *Knight Textile Corp. v. Jones Inv. Co.*, 75 USPQ2d 1313, 1314 n.4 (TTAB 2005).

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<sup>3</sup> *Morehouse Mfg. Corp. v. J. Strickland & Co.*, 407 F.2d 881, 160 USPQ 725, 717 (CCPA 1969).

<sup>4</sup> Board Order of June 18, 2019 in Opposition No. 91222422 at 54 TTABVUE 2. References to the pleadings, the evidence of record and the parties' briefs refer to the Board's TTABVUE docket system. Coming before the designation TTABVUE is the docket entry number; and coming after this designation are the page and paragraph references, if applicable. Unless otherwise stated, all references to the Board's TTABVUE docket system denote the docket entries from Opposition No. 91222422.

<sup>5</sup> Complete recitations of Maple Leaf's marks, registration numbers, issue dates and identifications of goods/services pleaded in its counterclaims, as well as Monster's marks, registration numbers, issue dates and identifications of goods/services subject to the counterclaims for cancellation may be found in **Appendix 3**.

Monster denied the salient allegations of Maple Leaf's counterclaims in each of its Answers in Opposition Nos. 91222422 and 91222445. Monster's Answers also asserted the defenses of failure to state a claim, laches, estoppel, acquiescence, waiver, lack of priority and the absence of a likelihood of confusion. "Failure to state a claim is not a true affirmative defense because it relates to an assertion of the insufficiency of the pleading of [Maple Leaf's counterclaims] ... rather than a statement of a defense to ... properly pleaded [counter]claim[s]." *John W. Carson Found. v. Toilets.com, Inc.*, 94 USPQ2d 1942, 1949 (TTAB 2010). Since Monster did not pursue this "defense" by way of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), we do not consider it further.

Monster also did not pursue its asserted defenses of laches, estoppel, acquiescence and waiver. Accordingly, we deem them all waived. See *Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1422-23 n.7 (TTAB 2014); *Alcatraz Media v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 n.6 (TTAB 2013), *aff'd mem.*, 565 F. App'x 900 (Fed. Cir. 2014). Monster's defense that Maple Leaf does not have trademark priority and there is no likelihood of confusion merely amplifies Monster's denials to Maple Leaf's counterclaims. *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1236 n.11 (TTAB 2015).

Monster's oppositions and Maple Leaf's counterclaims have been consolidated pursuant various prior Board Orders.<sup>6</sup> "Despite being consolidated, each proceeding

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<sup>6</sup> Board Order of October 1, 2015 in Opposition No. 91222445 (6 TTABVUE); Board Order of June 29, 2016 in Opposition 91226092 (7 TTABVUE); and Board Order of September 22, 2016 in Opposition No. 91228458 (8 TTABVUE).

retains its separate character. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleadings; a copy of th[is] decision shall be placed in each proceeding file.” *Dating DNA, LLC v. Imagini Holdings, Ltd.*, 94 USPQ2d 1889, 1893 (TTAB 2010).

Monster, as plaintiff in these oppositions, bears the burden of proving, by a preponderance of the evidence, its asserted and pursued grounds of: (i) priority and likelihood of confusion; and (ii) dilution; Maple Leaf, as plaintiff on its counterclaims for cancellation, likewise bears the burden of proving, by a preponderance of the evidence, its asserted and pursued ground of priority and likelihood of confusion. *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1267 (TTAB 2003). Having considered the evidentiary record, the parties’ arguments and applicable authorities, as we explain below, we find that none of the parties has carried this burden. We therefore dismiss Monster’s Oppositions and deny Maple Leaf’s Counterclaims.

## **I. The Evidentiary Record**

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the files of Maple Leaf's and NBA's involved applications, as well as the files of Monster's registrations subject to the counterclaims. In addition, the parties introduced the following evidence:

### **A. Monster's Evidence**

- Opposer's First Notice of Reliance ("Opp 1<sup>st</sup> NOR"), with exhibits comprising status and title online records of Monster's asserted trademark registrations, Maple Leaf's and NBA's interrogatory answers, admissions' responses, responses to production requests and initial disclosures, and Monster's annual Securities and Exchange Commission filings (55-58, 63 and 66 TTABVUE).
- Opposer's 2nd Notice of Reliance ("Opp 2<sup>nd</sup> NOR"), with exhibits comprising printed and online publications reporting on various facets of Monster's business (62 TTABVUE).
- Opposer's 3rd Notice of Reliance ("Opp 3<sup>rd</sup> NOR"), with exhibits comprising online publications and Monster's websites featuring some of Monster's products (61 and 65 TTABVUE).
- Opposer's 4th Notice of Reliance ("Opp 4<sup>th</sup> NOR"), with exhibits comprising portions of the discovery depositions of NBA employees Christopher Arena ("Arena Discov Depo Tr") and Anil George ("George Discov Depo Tr"), and the corresponding exhibits referenced in partial transcripts from those depositions (60 and 64 TTABVUE).
- Opposer's Testimony Declaration of Monster's Survey Expert, Itamar Simonson, Ph.D. ("Simonson Decl"), with exhibits comprising Dr. Simonson's expert report as well as documents and materials used in connection with a survey Dr. Simonson conducted in connection with these proceedings (59 TTABVUE).
- Opposer's Testimony Declaration of Monster's Chairman and CEO, Rodney Sacks ("Sacks Decl"), with exhibits discussing Monster's use and registration of its asserted marks (67-79 TTABVUE).

**B. Maple Leaf's and NBA's Evidence**

- Applicants' First Notice of Reliance ("App 1<sup>st</sup> NOR"), with exhibits comprising plain copies, as well as status and title online records of, Maple Leaf's asserted trademark registrations plus Maple Leaf's and NBA's additional registrations not asserted in Maple Leaf's counterclaims (85 TTABVUE).
- Applicants' 2nd Notice of Reliance ("App 2<sup>nd</sup> NOR"), with exhibits comprising Monster's interrogatory answers (86 TTABVUE).
- Applicants' 3rd Notice of Reliance ("App 3<sup>rd</sup> NOR"), with exhibits comprising additional portions of the discovery depositions of Messrs. Arena and George, filed pursuant to Trademark Rule 2.120(k)(4), 37 C.F.R. § 2.120(k)(4), third-party trademark registrations, a portion of Monster's website, and an announcement posted at the Sprint Center website announcing the cancellation of a game (87-88 TTABVUE).
- Applicants' Testimony Declaration of NBA's Vice President and Assistant General Counsel of Intellectual Property, Anil V. George ("George Decl"), with exhibits discussing NBA's search and clearance process for Maple Leaf's marks, as well as copies of decisions from jurisdictions outside the U.S. involving the parties' marks at issue in this proceeding (89 TTABVUE).
- Applicants' Testimony Declaration of Christopher Arena, NBA's Senior Vice President of On-Court and Brand Partnerships in the Global Merchandising Group ("Arena Decl"), with exhibits discussing the history, development, use and applications for registration of Applicant's opposed marks, as well as the mark Maple Leaf relies on in its counterclaims (90 TTABVUE).
- Applicants' Notice of Confidential Material ("App Conf Ntc"), with confidential exhibits discussed in Applicants' 2nd and 3rd Notices of Reliance as well as the Testimony Declaration of Mr. Arena (91 TTABVUE).
- Applicants' transcript from the oral cross-examination of Rodney Sacks ("Sacks CX Depo Tr"), with exhibits (94-95 TTABVUE).

**C. Monster's Rebuttal Evidence**

- Opposer's Rebuttal Testimony Declaration of Rodney Sacks ("Sacks Rebuttal Decl") (97 TTABVUE).
- Opposer's transcript from the oral cross-examination of Anil George ("George CX Depo Tr"), with exhibits (98-99 TTABVUE).
- Opposer's transcript from the oral cross-examination of Christopher Arena ("Arena CX Depo Tr"), with exhibits (100-101 TTABVUE).

## II. Evidentiary Motions and Objections

Before proceeding to the merits of the oppositions and counterclaims, we address the parties' evidentiary motions and objections.

### A. Monster's Motion to Strike

Simultaneous with the filing of its trial brief, Monster moved to strike portions of Mr. George's Testimony Declaration and Exhibit 2 thereto. Monster's motion also sought to strike Exhibit 5 introduced by Applicants' counsel during the cross-examination of Mr. George. The Board deferred consideration of Monster's motion to strike until final decision.<sup>7</sup>

#### 1. Decisions from Foreign Jurisdictions

Exhibit 2 to Mr. George's Testimony Declaration comprises a collection of decisions from jurisdictions outside the U.S. involving the parties' marks at issue in this proceeding.<sup>8</sup> The Board has long held that decisions of foreign tribunals are inadmissible on the ground that they can have no bearing on the question of the right to registration under this country's trademark law. *Continental Motors Corp. v. Cummins Engine Co., Inc.*, 132 USPQ 557, 559 (TTAB 1962). Monster's motion to strike Exhibit 2 to Mr. George's Testimony Declaration, including his declaration testimony pertaining thereto, is **granted**.

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<sup>7</sup> Monster's motion to strike, 102 TTABVUE; Maple Leaf's and NBA's opposition to Monster's motion, 105 TTABVUE; Board Order deferring consideration of motion, 108 TTABVUE.

<sup>8</sup> George Decl, 89 TTABVUE 4, 19-153, ¶ 7, Exh 2.

## 2. Settlement Discussions

Exhibit 5 introduced by Applicants' counsel during the cross-examination of Mr. George is a document titled "Monster Energy X MLSE: Enterprise Partnership Proposal."<sup>9</sup> Applicants offer this document to buttress Mr. George's declaration testimony that "Opposer has acted in a way that demonstrates that even **Opposer** does not believe that there is likely confusion between the parties' respective source identifiers[,] specifically, negotiations between the parties for "Opposer to become ... [the] official energy product sponsor" of Applicants' basketball team the Toronto Raptors (emphasis original).<sup>10</sup>

Viewed in context based on other evidence made of record, Exhibit 5 to Mr. George's cross-examination appears to have been generated as part of discussions among the parties to possibly settle ongoing trademark proceedings and litigation.<sup>11</sup>

Evidence of this type is not something the Board may consider:

**(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

...

**(2)** conduct or a statement made during compromise negotiations about the claim ....

Fed. R. Evid. 408(a)(2). *See also, Lebanon Seaboard Corp. v. R & R Turf Supply, Inc.*, 101 USPQ2d 1826, 1830 (TTAB 2012) ("[S]ettlement discussion[s] ... are not

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<sup>9</sup> George CX Depo Tr, 98 TTABVUE 47-50; 99 TTABVUE 64-66, Exh 5.

<sup>10</sup> George Decl, 89 TTABVUE 6, ¶ 12.

<sup>11</sup> George Decl, 89 TTABVUE 6, ¶¶ 12-13; George CX Depo Tr, 98 TTABVUE 47-51; Sacks Rebuttal Decl, 97 TTABVUE 3-4, ¶¶ 4-5.

admissible under Federal Rule of Evidence 408, which prohibits the use of such negotiations to prove or disprove a disputed claim.”). Monster’s motion to strike Exhibit 5 to Mr. George’s cross-examination is therefore **granted**.

## **B. Maple Leaf’s and NBA’s Evidentiary Objections**

Maple Leaf’s and NBA’s evidentiary objections were raised in an Appendix to Applicants’ Trial Brief.<sup>12</sup> Monster argues that the entirety of Maple Leaf’s and NBA’s Appendix raising its evidentiary objections should be stricken because: (1) “none of Applicants’ arguments relate to substantive evidentiary objections ...,” (2) “Applicants do not cite a single Federal Rule of Evidence or other applicable rule under which the cited evidence should be excluded[,]” and (3) “Applicants’ ‘evidentiary objections’ are instead nothing more than arguments concerning the weight that should be given to Monster’s evidence.”<sup>13</sup> Having read Maple Leaf’s and NBA’s Appendix, we find that it timely asserts substantive evidentiary objections. We therefore **deny** Monster’s request that Applicants’ Appendix be stricken.

### **1. Simonson Declaration, Report and Exhibits**

Monster submitted during its testimony period the Declaration, Report and Exhibits of its expert, Itamar Simonson, Ph.D., conveying the purpose, methodology and results of a survey he designed and conducted on Monster’s behalf.<sup>14</sup> The purposes and conclusions of the survey are as follows:

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<sup>12</sup> Applicants’ Trial Brief, 106 TTABVUE 56-62.

<sup>13</sup> Opposer’s Rebuttal Brief, 109 TTABVUE 30-31.

<sup>14</sup> Simonson Decl, 59 TTABVUE.

11. [Dr. Simonson] was asked by counsel for Monster to conduct a survey designed to determine whether and to what extent the  mark (“Claw Icon”) on Monster’s Monster drinks has acquired secondary meaning or distinctiveness. ....

13. The survey was designed to measure the level or degree, if any, to which the Claw Icon mark is associated with energy drinks emanating from the named source “Monster” or a sole, yet anonymous, source. The survey followed the accepted standards for litigation and other surveys.

15. The survey results indicate that the Monster Claw Icon mark has acquired secondary meaning and even fame. Specifically, after subtracting the Control, 67.2% of the respondents associated the Claw Icon mark with a particular company or companies and then named Monster. Furthermore, among those respondents who named just one company, 67.2% (after subtracting the Control) named Monster.

16. These results indicate that the degree to which the Claw Icon mark is recognized and uniquely associated with Monster far exceeds the level indicating secondary meaning. Indeed, the findings indicate that the mark is famous.<sup>15</sup>

“Applicants object to and [argue] the Board should disregard the Simonson Declaration” because: (1) “Dr. Simonson[’s] ... consumer survey was not designed to measure fame[;] ... [r]ather, it was designed to measure whether Monster’s M Claw Icon acquired secondary meaning[.]” (2) “Dr. Simonson’s legal conclusions regarding fame ... is something that is within the province of ... the Board to decide[.]” and (3) “Dr. Simonson’s findings regarding the alleged fame of Monster’s M Claw Icon are irrelevant because the survey at most establishes ‘niche’ fame in the context of energy drinks.”

Before considering Maple Leaf’s and NBA’s stated objections, we note Applicants do not provide any critique of Dr. Simonson’s credentials, survey methodology or

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<sup>15</sup> *Id.* at 6-8.

survey results. There also is no indication in the record that Maple Leaf and NBA cross-examined Dr. Simonson to support such critiques should Applicants have chosen to assert any.

Maple Leaf's and NBA's first objection conflates the concept of "fame" for likelihood of confusion and dilution purposes. "Fame for likelihood of confusion purposes and fame for dilution purposes, however, are distinct concepts. While dilution fame is an either/or proposition—fame either does or does not exist—likelihood of confusion fame varies along a spectrum from very strong to very weak." *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005) (cleaned up). Thus, "[a] mark may have acquired sufficient public recognition and renown to demonstrate that it is a strong mark for likelihood of confusion purposes without meeting the stringent requirements to establish that it is a famous mark for dilution purposes." *The Toro Co. v. ToroHead, Inc.*, 61 USPQ2d 1164, 1170 (TTAB 2001). "[For] the broadest protection ... [of a] mark against totally unrelated goods ..., [the trademark owner] must provide evidence that when the public encounters opposer's mark in almost any context, it associates the term, at least initially, with the mark's owner." *Toro v. Torohead*, 61 USPQ2d at 1181.

The questions that Dr. Simonson used in his survey were as follows:

After being exposed to Monster's  mark on an index card, respondents were asked:

Now, thinking about energy drinks, do you associate the symbol on this card with energy drinks from any particular company or companies?

Respondents who answered "Yes," were next asked:

“What company or companies?”

Those respondents who initially indicated that they associated the symbol with energy drinks from one particular company or companies, but then answered “Don’t know” when asked to identify the company or companies, were asked:

“Again, thinking about energy drinks... Do you associate the symbol on this card with energy drinks from one company or more than one company?”<sup>16</sup>

These are the types of secondary meaning survey questions the Board considered with approval in *Nextel Comms., Inc. v. Motorola, Inc.*, 91 USPQ2d 1393, 1402 (TTAB 2009).

By contrast, the Board accepted as proper the following format used to test the fame of the opposer’s mark in the dilution context (with the specific research goal being to assess the strength of the opposer’s slogan mark in comparison with other well-known slogans in the opposer’s industry):

Interviewers were given 25 top well-known consumer advertising slogans, including Opposer’s slogan mark, which they read to respondents. For each of the slogans, the respondent was asked:

“Do you recognize this slogan?”

If the respondent answered “yes,” a follow up question was asked:

“To what brand, product or industry do you attributed this slogan?”

*Nat’l Pork Bd. v. Supreme Lobster and Seafood Co.*, 96 USPQ2d 1479, 1489-90 (TTAB 2010). We therefore find that Dr. Simonson’s survey was designed to determine whether Monster’s mark has acquired secondary meaning or distinctiveness, and arguably fame, in the context of Monster’s likelihood of confusion claim, but not fame in the context of Monster’s dilution claim.

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<sup>16</sup> *Id.* at 11.

Because Dr. Simonson's survey was only designed and conducted to measure the level or degree of acquired secondary meaning or distinctiveness as to Monster's mark in the likelihood of confusion context, Applicants' objection that the survey at most establishes "niche" dilution fame in the context of energy drinks is well taken. While we **overrule** Maple Leaf's and NBA's objections to Dr. Simonson's Declaration and survey exhibits, we note that Dr. Simonson's survey findings have much more probative value in the context of Monster's likelihood of confusion claim than its dilution claim.

## 2. Point-of-Sale Catalogs

Monster submitted with the Declaration of Rodney Sacks "Exhibits 43-59 [that] are ... copies of various Monster POS [point-of-sale] catalogs showing apparel and accessories bearing the Claw Icon mark being offered for sale or distribution to distributors and retailers."<sup>17</sup> Of this set of exhibits, Maple Leaf and NBA object to Monster's reliance on Exhibits 45-48 and 57 on the grounds that: (1) "[t]here is no evidence that the catalogs were distributed or that any of the products therein were sold, let alone that they were sold prior to Applicant's first use[.]" and (2) this "evidence ... is inadequate as a matter of law to endow ... [Monster] with common law rights in the M Claw Icon [, because of] ... [t]he Board[s] ... general prohibition against accepting catalogs and catalog pages as specimens of use."<sup>18</sup> Monster responds that it "(1) is not using the point-of-sale catalogs in this proceeding as

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<sup>17</sup> Sacks Decl, 67 TTABVUE 41-42, ¶ 107; catalogs submitted as confidential at 74-78 TTABVUE.

<sup>18</sup> Applicants' Trial Brief, 107 TTABVUE 59-60.

specimens of use for a trademark application[.]” but rather (2) “relies on these catalogs, along with quantitative sales and distribution records, as additional evidence supporting Mr. Sacks’ testimony regarding Monster’s extensive common law rights.”<sup>19</sup>

Maple Leaf’s and NBA’s objections to Monster’s POS catalogs go to the weight rather than the admissibility of this evidence. *See Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at \*4 (TTAB 2019) (Board is capable of assessing the proper evidentiary weight to be accorded the testimony and evidence, including its imperfections and admissibility, and according it whatever probative value it may have). We therefore **overrule** Applicants’ objections to Monster’s POS catalogs, but shall keep these objections in mind when considering this evidence.

### 3. Sales Reports

Monster also submitted with Mr. Sacks’ Declaration “as Exhibit 60 ... copies of Monster’s reports from 2002-2011 maintained by Monster that show examples of Monster’s sales of (sic) distribution of clothing and accessories.”<sup>20</sup> Maple Leaf and NBA object to this exhibit because “it does not show use of any trademark on products, tags, labels, packaging, or the like. Indeed, there is no way to tell from Exhibit 60 which, if any, of Monster’s relevant trademarks is used in conjunction with each product.”<sup>21</sup> In response, Monster asserts:

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<sup>19</sup> Opposer’s Rebuttal Brief, 109 TTABVUE 34-35.

<sup>20</sup> Sacks Decl, 67 TTABVUE 41-42, ¶ 107; catalogs submitted as confidential at 74-78 TTABVUE.

<sup>21</sup> Applicants’ Trial Brief, 107 TTABVUE 62.

Applicants' suggestion that a company's sales or distribution reports would contain pictures of every item tracked therein is untenable. ... Applicants' argument wrongly requires divorcing an exhibit from the evidence as a whole. ... Monster's sales and distribution report shown in Exhibit 60 must be considered in conjunction with Monster's other evidence, including Monster's point-of-sale catalogs and Mr. Sacks' testimony [as to the sale and/or distribution of clothing and accessories, as well as images showing how Monster's mark is used on these products].<sup>22</sup>

Once again, Applicants' objections to Monster's POS catalogs go to the weight rather than the admissibility of this evidence. *RxD Media, LLC v. IP Application Dev. LLC*, 125 USPQ2d 1801, 1804 (TTAB 2018) ("the Board is capable of weighing the relevance and strength or weakness of the objected to testimony and evidence, including any inherent limitations"). We therefore **overrule** Applicants' objections to Monster's sales reports, but shall make note of these objections when evaluating this evidence.

### III. The Parties

Monster has promoted and sold energy drinks, as well as apparel and other products bearing the MONSTER ENERGY and  marks since 2002.<sup>23</sup> Monster's beverage and other products are sold in gas stations, convenience stores, gyms, health food stores, grocery stores, brick-and-mortar and online mass merchandisers, and at on-premise retailers such as bars, restaurants, and coffees shops.<sup>24</sup>

Maple Leaf is the proprietor of the Toronto Raptors ("Raptors"), a Canadian professional basketball team that competes in the National Basketball Association

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<sup>22</sup> Opposer's Rebuttal Brief, 109 TTABVUE 35-36.

<sup>23</sup> Sacks Decl, 67 TTABVUE 3-4, ¶¶ 3, 6.

<sup>24</sup> *Id.* at 4-5, ¶ 7.

("NBA"). The Raptors play home games at Scotiabank Arena in Toronto, Ontario, Canada, and at basketball venues and arenas throughout the United States. The Raptors basketball team began operations and joined the NBA in 1995. The team's iconography—including the teams' name, nickname, logos, and official mascot—draw on the popularity of dinosaurs. The team's official mascot, the "Raptor," is a red velociraptor dinosaur donning basketball shoes and a jersey numbered 95 for the year of the team's establishment.<sup>25</sup> The Raptors are one of the NBA's 30 teams. In the U.S., the Maple Leaf is the owner of record of its intellectual property ("IP"). The NBA is the exclusive trademark licensee of the Raptors, with the right to license out the team's IP to third parties.<sup>26</sup>

#### **IV. Entitlement to a Statutory Cause of Action**

To establish entitlement to a statutory cause of action under Trademark Act Section 13, 15 U.S.C., § 1063, a plaintiff must demonstrate "an interest falling within the zone of interests protected by the statute and ... proximate causation." *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \*4 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067-70 (2014)).<sup>27</sup> Stated another way, a plaintiff is entitled to a statutory cause

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<sup>25</sup> Arena Decl, 90 TTABVUE 3, ¶¶ 3-5.

<sup>26</sup> George Discov Dep Tr, 64 TTABVUE 101-02. Maple Leaf and NBA have designated a more detailed explanation of their relationship as confidential.

<sup>27</sup> Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of "standing." We now refer to this inquiry as entitlement to bring and maintain a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable.

of action by demonstrating a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at \*3 (Fed. Cir. 2020); *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). According to the Court of Appeals for the Federal Circuit, there is “no meaningful, substantive difference between the analytical frameworks expressed in *Lexmark* and *Empresa Cubana*.” *Corcamore*, 2020 USPQ2d 11277 at \*4. Thus, “a party that demonstrates a real interest in [opposing registration of] ... a trademark under [Trademark Act Sections 13 or 14, 15 U.S.C.] §[§] [1063 or] 1064 has demonstrated an interest falling within the zone of interests protected by [the Trademark Act]. ... Similarly, a party that demonstrates a reasonable belief of damage by the registration of a trademark demonstrates proximate causation within the context of § 106[3]. *Corcamore*, 2020 USPQ2d 11277 at \*7.

Monster claims ownership of the ,  and  marks and registrations therefor, and submitted into evidence the U.S. Patent and Trademark Office (“USPTO”) TESS database records showing Monster’s ownership and the current active status of the registrations.<sup>28</sup> Monster’s Mr. Sacks also testified to his company’s ownership of these trademark registrations.<sup>29</sup> These registrations on which Monster relies thus give Opposer entitlement to bring its statutory cause of action under Trademark Act Section 2(d). *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55

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<sup>28</sup> Opp 1<sup>st</sup> NOR, 55 TTABVUE 19-79, Exhs 1-14.

<sup>29</sup> Sacks Decl, 67 TTABVUE 48-54, ¶¶ 130-142, 144, 147; 72 TTABVUE 76-102, 105-107, Exhs 67-78, 80; 73 TTABVUE 7-9, Exh 83.

USPQ2d 1842, 1844 (Fed. Cir. 2000) (“[Plaintiff’s] registrations and the products sold under the mark they register suffice to establish [Plaintiff]’s direct commercial interest and its [entitlement to a statutory cause of action under Trademark Act Section 2(d)].”). Because Monster has established its entitlement to assert a Section 2(d) claim, it may assert any other ground that would bar registration, including its Section 43(c) dilution claim. *See, e.g., Sock It To Me, Inc. v. Aiping Fan*, 2020 U.S.P.Q.2d 10611, \*1 (T.T.A.B. 2020); *Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1877 (TTAB 2011). Monster has thus established its entitlement to a statutory cause of action.

On its counterclaims in Opposition Nos. 91222422 and 91222445, Maple Leaf claims ownership of the  mark and registrations therefor, and submitted into evidence the U.S. Patent and Trademark Office (“USPTO”) TSDR database records showing Maple Leaf’s ownership and the current active status of the registrations.<sup>30</sup> NBA’s Mr. Arena also testified to Maple Leaf’s ownership of one of these trademark registrations.<sup>31</sup> These registrations on which Maple Leaf relies thus imbue it with an entitlement to bring its statutory cause of action for its Trademark Act Section 2(d) counterclaim. *See Cunningham*, 55 USPQ2d at 1844 (Fed. Cir. 2000). More generally, Maple Leaf as “a counterclaimant, [and] as a defendant in ... [these] opposition[s], has inherent ... [entitlement] to assert its counterclaims.” *Delaware Quarries, Inc. v. PlayCore IP Sub, Inc.*, 108 USPQ2d 1331, 1332 (TTAB 2013).

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<sup>30</sup> App 1<sup>st</sup> NOR, 85 TTABVUE 6-30.

<sup>31</sup> Arena CX Depo Tr, 98 TTABVUE 23-24, 30-31, 145, Exh 3.

## V. Priority

As a result of Maple Leaf's counterclaims, priority is in issue with respect to the parties' registered marks as well as their assertions of common law rights in marks. *Central Garden & Pet Co. v. Doskocil Manufacturing Co.*, 108 USPQ2d 1134, 1139 (TTAB 2013) (plaintiff must prove priority in cancellations and in oppositions where there is a counterclaim to cancel its pleaded registration); *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981) (“[Proof of] proprietary rights in the term ... [plaintiff] relies upon to demonstrate likelihood of confusion as to source, ... may be shown by ownership of a registration, prior use of a technical ‘trademark,’ prior use in advertising, prior use as a trade name, or whatever other type of use may have developed a trade identity.”).

“To establish priority, the mark must be distinctive, inherently or otherwise, and Opposer must show proprietary rights in a mark as to which Applicant’s mark gives rise to a likelihood of confusion.” *DeVivo v. Ortiz*, 2020 USPQ2d 10153, \*3 (TTAB 2020) (citing *Otto Roth*, 209 USPQ at 43-45). Monster’s ,  and  marks are presumed to be inherently distinctive as evidenced by their registrations on the Principal Register without a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f). *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006).

Monster has been using its marks incorporating the  design since at least as early as 2002.<sup>32</sup> As noted in Appendix 2 below, Maple Leaf filed intent-to-use based

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<sup>32</sup> Sacks Decl, 67 TTABVUE 3, 9, ¶ 3, 19.

applications to register its  and  design marks in 2014. Mr. Arena testified that Maple Leaf began use of these marks at least as early as December 2014.<sup>33</sup> Appendix 2 also shows that NBA filed intent-to-use applications to register its  and  marks in 2015. Mr. Arena testified that NBA began use of these marks at least as early as February 2016.<sup>34</sup> As to its opposition claims, Monster therefore has trademark priority.

On its cancellation counterclaims, Maple Leaf, “the alleged prior user, bears the burden of proving its claim of priority by a preponderance of the evidence[.]” *West Florida Seafood, Inc. v. Jet Rests., Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1662 (Fed. Cir. 1994); *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989), which Maple Leaf has done. In fact, Maple Leaf’s  mark is presumed to be inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Trademark Act Section 2(f) (see Appendix 3 below). *Tea Bd. of India*, 80 USPQ2d at 1889. Mr. Arena testified, with supporting exhibits, that Maple Leaf began use of this mark at least as early as 1995 in connection with basketball game and exhibition services and a wide variety of collateral consumer products.<sup>35</sup> As stated above, Monster has been using its marks incorporating the  design since at

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<sup>33</sup> Arena Decl, 90 TTABVue 9, ¶ 22, 31

<sup>34</sup> *Id.* at 21, ¶¶ 54-66.

<sup>35</sup> *Id.* at 5, 41-76, ¶¶ 6-7, Exhs 5-9

least as early as 2002. As to its cancellation counterclaims, Maple Leaf therefore has trademark priority.

## VI. Focus upon Monster's Mark

We focus on Monster's  mark, standing alone, registered for the goods and services in International Classes 5, 9, 16, 18, 25, 32, 35 shown below in Appendix 1. This mark is more similar to Applicants' marks than are the  or  marks of Monster's other pleaded registrations, and the recitations of goods and services are no less similar to Applicants' goods and services than are the goods and services of Monster's other pleaded registrations. If we find confusion is likely between Monster's  mark and Applicants' marks, we need not consider likelihood of confusion with Monster's other pleaded marks; and if we find no likelihood of confusion between Monster's  mark Applicants' marks, we would not find a likelihood of confusion with Opposer's other pleaded marks. *See N. Face Apparel Corp. v. Sanyang Indus. Co.*, 116 USPQ2d 1217, 1225 (TTAB 2015); *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

## VII. Trademark Descriptions

Although the parties' marks contain some literal elements (i.e. words and/or numbers), their primary commercial impressions are that of designs. For proper understanding by the reader, we adopt the parties' descriptions and more detailed explanations of their own marks.

 – Nearly all of Monster's registrations for this design mark contain the following description: "The mark consists of the letter 'm' in the form of a claw; Color is not

claimed as a feature of the mark.”<sup>36</sup> Mr. Sacks describes the mark as an “M-Claw” or the “Claw Icon,” whose origins are the letter “M” standing for “Monster.” The jagged-edge stylization of the “M” is intended to evoke a monster and the liquid inside bursting out of a can with the result being torn metal.<sup>37</sup> We shall refer to this mark as Monster’s “M-Claw” Mark.



– All of Maple Leaf’s applications to register this design mark contain the following description: “The mark consists of a stylized design of a basketball and claw; Color is not claimed as a feature of the mark.”<sup>38</sup> Mr. Arena describes the mark as a basketball with claw-inspired seams resembling a raptor dinosaur claw, and Maple Leaf has named this design the “Raptors’ Secondary Ball Mark.”<sup>39</sup> Mr. Arena further explains that the claw’s positioning along the seams of the basketball evokes the aggression of a raptor dinosaur ripping through a basketball.<sup>40</sup> Ripping through the basketball indeed forms the seams; looked at more abstractly, the ripped seams could be thought of as forming a letter “E” or a backwards “three.”<sup>41</sup> We shall refer to this mark as Maple Leaf’s “Secondary Ball Mark.”

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<sup>36</sup> See Appendix 1 below, and registrations made of record at Opp. 1<sup>st</sup> NOR, 55 TTABVUE 19-23, 28-40, 53-65, 75-79, Exhs 1, 3-5, 9-11, 14.

<sup>37</sup> Sacks CX Depo Tr, 94 TTABVUE 40-42.

<sup>38</sup> See Appendix 2 below. Although automatically of record pursuant to Trademark Rule 2.122(b), abstract printouts from the USPTO’s TESS database of these applications are attached to Maple Leaf’s Answer in Opposition No. 91222422, 4 TTABVUE 32-44, Exh 2.

<sup>39</sup> Arena Decl, 90 TTABVUE 8, ¶ 17.

<sup>40</sup> Arena CX Depo Tr, 100 TTABVUE 24-27.

<sup>41</sup> *Id.* at 75-77.



– All of Maple Leaf’s applications to register this design mark contain the following description: “The mark consists of the wording ‘TORONTO RAPTORS’ and the stylized design of a basketball and claw all appearing within a circle; Color is not claimed as a feature of the mark; ‘TORONTO’ disclaimed.”<sup>42</sup> Mr. Arena describes this mark as a basketball with seams resembling the raptor dinosaur claw inside of a circle with the team’s name, “Toronto Raptors,” in block-lettering, and Maple Leaf has named this design the “Raptors’ Primary Ball Mark.”<sup>43</sup> We shall refer to this mark as Maple Leaf’s “Primary Ball Mark.”

★ – NBA’s applications to register this design mark contain the following description: “The mark consists of a star with claw marks; Color is not claimed as a feature of the mark.”<sup>44</sup> Mr. Arena testified that this mark includes the clawed star element as a tribute to the Raptors, and that these claw markings closely resemble those in the Raptors’ Ball Marks.<sup>45</sup> In fact, according to Mr. Arena, a consumer seeing just the claw portion within the star mark will know that the mark is associated with the Raptors, because the claw is the dominant portion of the mark.<sup>46</sup> NBA has named this design its “Star Mark.”<sup>47</sup> We shall refer to this mark as NBA’s “Star Mark.”

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<sup>42</sup> See Appendix 2 below. Although automatically of record pursuant to Trademark Rule 2.122(b), abstract printouts from the USPTO’s TESS database of these applications are attached to Maple Leaf’s Answer in Opposition No. 91222445, 4 TTABVUE 14-22, Exh 1.

<sup>43</sup> Arena Decl, 90 TTABVUE 8, ¶ 17.

<sup>44</sup> See Appendix 2 below. Although automatically of record pursuant to Trademark Rule 2.122(b), abstract printouts from the USPTO’s TESS database of these applications are attached to Maple Leaf’s Answer in Opposition No. 91222445, 4 TTABVUE 14-22, Exh 1.

<sup>45</sup> Arena Decl, 90 TTABVUE 20, ¶ 63; Arena CX Depo Tr, 100 TTABVUE 59-61.

<sup>46</sup> Arena CX Depo Tr, 100 TTABVUE 59-61.

<sup>47</sup> Arena Decl, 90 TTABVUE 20, ¶ 21



– NBA’s application to register this design mark contains the following description: “The mark consists of a banner with a star and the word ‘TO’ and number ‘16’; Within the star are three jagged marks representing talon tracks; Color is not claimed as a feature of the mark.”<sup>48</sup> Mr. Arena testified that this mark also includes the clawed star element as a tribute to the Raptors, and that these claw markings closely resemble those in the Raptors’ Ball Marks.<sup>49</sup> The word “TO” and the number “16” in the mark refers to the fact that the **2016** NBA All-Star Game was hosted by the Raptors team in **Toronto**, Canada that year.<sup>50</sup> NBA has named this design its “Banner Mark.”<sup>51</sup> We shall refer to this mark as NBA’s “Banner Mark.”



– None of Maple Leaf’s registrations for this design mark contain any description of the mark.<sup>52</sup> Mr. Arena describes the mark as a static, three-pronged dinosaur claw.<sup>53</sup> More specifically, the intended meaning of this mark is that of a Raptor’s paw print.<sup>54</sup> The paw print is formed by three talons on the top, and a basketball on the

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<sup>48</sup> See Appendix 2 below. Although automatically of record pursuant to Trademark Rule 2.122(b), an abstract printout from the USPTO’s TESS database of this applications is attached to NBA’s Answer in Opposition No. 91228458, 4 TTABVUE 14-15, Exh 1.

<sup>49</sup> Arena Decl, 90 TTABVUE 20, ¶ 63; Arena CX Depo Tr, 100 TTABVUE 59-61.

<sup>50</sup> Arena Discov Depo Tr, 60 TTABVUE 52-55.

<sup>51</sup> Arena Decl, 90 TTABVUE 20, ¶ 63.

<sup>52</sup> See Appendix 3 below, and registrations made of record at App 1<sup>st</sup> NOR, 85 TTABVUE 6-30, Exhs 1-4.

<sup>53</sup> Arena Decl, 90 TTABVUE 8, ¶ 19.

<sup>54</sup> Arena Discov Depo Tr, 60 TTABVUE 56.

bottom.<sup>55</sup> Maple Leaf has named this design the Raptors' "Prior Claw Mark."<sup>56</sup> We shall refer to this mark as Maple Leaf's "Prior Claw Mark."

### VIII. Likelihood of Confusion

Trademark Act Section 2(d) prohibits the registration of a mark that

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

Our analysis of likelihood of confusion is based on the factors to be considered as set out in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (hereinafter referred to as the "*DuPont* factors").

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source and to protect registrants from damage caused by registration of confusingly similar marks. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566. In making our determination, normally we consider each *DuPont* factor for which there is evidence and argument, *see In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019), and varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253,

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<sup>55</sup> Arena CX Depo Tr, 100 TTABVUE 23-24.

<sup>56</sup> Arena Decl, 90 TTABVUE 3-4, ¶ 5.

1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”). Two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

However, in some cases the differences between the involved and pleaded marks alone may be so significant as to preclude likelihood of confusion as a matter of law. *Kellogg Co. v. Pack'em Enters., Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (affirming the Board’s dismissal of Kellogg’s opposition based on the differences between the parties’ FROOT LOOPS and FROOTEE ICE & ELEPHANT Design marks as a matter of law). In *Kellogg*, the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) stated:

The Board held that “[c]onsidering the marks in their entirety, ... they differ so substantially in appearance, sound, connotation and commercial impression that there is no likelihood that their contemporaneous use by different parties will result in confusion.” The Board stated that it would so conclude even if opposer offered evidence at trial establishing ... [the other *DuPont* factors in its favor].

\* \* \*

We know of no reason why, in a particular case, a single *DuPont* factor may not be dispositive. *DuPont* recognized that in determining likelihood of confusion “each case must be decided on its own facts.” *DuPont*, 476 F.2d at 1361, 177 USPQ at 567. It also recognized that “each [of the thirteen elements] may from case to case play a dominant role.” *Id.* The court noted examples of cases in which a particular element made confusion likely or unlikely. *Id.* at 1362, 177 USPQ at 567.

In the present case, the Board ruled that the dissimilarity of “the marks in their entireties” itself made it unlikely that confusion would result from the simultaneous use of the marks. We cannot say that the Board committed any legal error in so holding.

*Kellogg*, 21 USPQ2d at 1144-45. *See also Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 119 USPQ2d 1286, 1290 (Fed. Cir. 2016) (affirming dismissal of Oakville’s opposition based on the differences as a matter of law between the parties’ MAYA and MAYARI marks); *Odom’s Tenn. Pride Sausage, Inc. v. FF Acquisition, LLC*, 600 F.3d 1343, 93 USPQ2d 2030, 2032 (Fed. Cir. 2010); *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1461 (Fed. Cir. 1998). There is therefore a 25-year line of Federal Circuit decisions affirming Board dismissals of likelihood of confusion oppositions based chiefly, if not solely, on the differences between the parties’ marks. We find it appropriate to resolve the present oppositions and counterclaims on this basis.

#### **A. The Similarity or Dissimilarity of the Marks**

In our evaluation of the similarity or dissimilarity of the parties’ marks, the first *DuPont* factor, we consider the strength of Opposer’s M-Claw (“) Mark and then compare the respective marks in their entireties.

##### **1. Strength of Monster’s Mark**

Before we turn to the similarity of the marks, we consider the strength of Opposer’s M-Claw Mark, as that will affect the scope of protection to which it is entitled. In determining the strength of a mark, we consider its conceptual strength, based on the nature of the mark itself, and its commercial strength, based on marketplace recognition of the mark. *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 (secondary meaning).”). The commercial strength of the mark also is affected by the number and nature of third-party uses of similar marks for similar goods. *DuPont*, 177 USPQ at 567.

As noted, Monster’s M-Claw Mark is presumed to be inherently distinctive as evidenced by its registrations on the Principal Register without a claim of acquired distinctiveness under Trademark Act Section 2(f), and Applicants have not challenged this presumption. Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *Tea Bd. of India*, 80 USPQ2d at 1889. Maple Leaf and NBA, however, contend that under the sixth *DuPont* factor, 177 USPQ at 567, Monster’s M-Claw Mark is “relatively weak” and “entitled only to a narrow scope of protection” due to the existence of certain third-party registrations on the Trademark Register.<sup>57</sup> The third-party registered marks on which Applicants rely are as follows:<sup>58</sup>

Mark	Owner	Goods/Services	Reg. No.	Reg. Date
	Boise Professional Baseball, LLC	Athletic clothing products, Cl. 25	4746450 (cancelled)	June 2, 2015
	Attack Dogs Total Fitness, LLC	Athletic clothing products, Cl. 25	5803074	July 16, 2019
	Tagco USA Inc.	Athletic clothing products, Cl. 25	5896321	Oct. 29, 2019
	Oakland University	Shirts and sweat shirts, Cl. 25; university education and entertainment services, 41	2470107	July 27, 2001

<sup>57</sup> Applicants’ Brief, 106 TTABVUE 39.

<sup>58</sup> App 3<sup>rd</sup> NOR, 88 TTABVUE 7-45, Exhs. 12-18.

Mark	Owner	Goods/Services	Reg. No.	Reg. Date
	Alligator Diesel Performance, LLC	On-line retail store services featuring performance truck parts and accessories, Cl. 35	4076006	Dec. 27, 2011
	Puma SE	Soaps and lotions, Cl. 3; protective pouches, cases and sleeves for tablet computers and other electronic devices, Cl. 9; trophies and jewelry, Cl. 14, backpacks, travel bags, luggage, handbags, and suitcases, Cl. 18, clothing, Cl. 25; haberdashery and trimming articles for garments, Cl. 26; sporting equipment and games, Cl. 28, Wholesale and retail store services, also on the Internet for the sale of a variety of items, Cl. 35	5651872	Jan. 15, 2019
	Blue Infusion Technologies, LLC	Gloves for outdoor wear, Cl. 25	4714696	April 7, 2015

However, third-party registrations are not evidence of third-party use in the likelihood of confusion context and, by themselves, do not show that consumers have been exposed to these marks. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 177 USPQ 462, 463 (CCPA 1973).

We immediately discount from consideration Boise Professional Baseball's mark because its registration has been cancelled. A cancelled registration is not evidence of any existing rights in the mark. *See Action Temp. Servs. v. Labor Force*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989). An expired or cancelled registration

is evidence of nothing but the fact that it once issued. *Sunnen Prods. Co. v. Sunex Int'l Inc.*, 1 USPQ2d 1744, 1747 (TTAB 1987).

We also find Alligator Diesel's mark is registered for services far removed from the goods and services at issue and, therefore, is not probative. See *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (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).

We find the remainder of the registered marks made of record by Maple Leaf and NBA to be of limited probative value for a number of reasons. To begin, the "relevant *DuPont* inquiry is '[t]he number and nature of **similar** marks in use on similar goods.'" *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693-94 (Fed. Cir. 2018) (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992) and *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1842 (Fed. Cir. 1990)) (emphasis added). Thus even though five of the active (non-cancelled) third-party marks are registered for several of the same or similar goods as is Monster's M-Claw mark, each of the third-party marks is distinguishable from the M-Claw Mark by overall commercial impression. While Monster's M-Claw Mark depicts a vertical, jagged claw-design with parallel lines going straight down, all of the third-party marks show lines that are diagonal by varying degrees, some slightly

curved, some not perfectly parallel to one another, and others with additional literal features (e.g., Puma's mark and Blue Infusion's mark).

Finally, while the Federal Circuit has held that “**extensive** 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,” *see 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) (emphasis added) (citing *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)), the record of third-party registrations in this case is far less than the amount of evidence found convincing in *Jack Wolfskin* and *Juice Generation* wherein “a considerable number of third parties’ use [of] similar marks was shown.” *Id.* We therefore find Maple Leaf's and NBA's third-party registration evidence, unaccompanied by any relevant third-party use evidence, insufficient to weaken the inherent strength of Monster's M-Claw Mark.

Turning next to commercial strength, this notion rests upon the extent to which “a significant portion of the relevant consuming public ... recognizes the mark as a source indicator.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (citing *Palm Bay Imps.*, 73 USPQ2d at 1694). This involves assessing the mark “along a spectrum from very strong to very weak.” *Id.* (internal citations omitted). At one end of the spectrum, a commercially stronger mark receives a wider latitude of legal protection in the likelihood of confusion analysis. *See Palm Bay Imps.*, 73 USPQ2d at 1694. By

contrast, “the weaker an opposer’s mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Juice Generation*, 115 USPQ2d at 1674.

Commercial strength may be measured indirectly by the volume of sales and advertising expenditures in connection with the goods sold under the mark, and other factors such as length of time of use of the mark; widespread critical assessments; notice by independent sources of the goods identified by the marks; and the general reputation of the goods. *Weider Publ’ns, LLC v. D & D Beauty Care Co.*, 109 USPQ2d 1347, 1354 (TTAB 2014); *see also Bose Corp. v. QVC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1308 (Fed. Cir. 2002) (recognizing indirect evidence as appropriate proof of strength).

Monster points to a plethora of evidence of the commercial strength of its M-Claw mark, based upon its asserted use of the M-Claw Mark since 2002:<sup>59</sup>

- Since 2002, sales of over 18 billion units of a wide variety of beverage products (currently 2.5 billion cans per year) in cans bearing the M-Claw Mark, resulting in over \$40 billion in total retail sales in the United States.
- Since 2003, sales of Monster’s beverage products bearing the M-Claw Mark in over 300,000 retail stores throughout the U.S. and online.
- As of 2019, holding a significant “dollar value market share” of the U.S. energy drink market (exact market share figure confidential).
- Since 2002, expenditures of approximately \$6.2 billion in promoting the MONSTER brand. Almost without exception, since that time, Monster’s advertisements and promotions for its MONSTER energy drinks have featured the Claw Icon.

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<sup>59</sup> Sacks Decl, 67 TTABVUE 4-6, 9, 12-35, 37-42, 45-48, ¶¶ 6, 7, 9, 11, 12, 18-20, 27-29, 31-43, 45-86, 92-93, 97-101, 104-110, 117-129. Mr. Sacks’ descriptions of these activities, expenditures and income are supported by a wealth of documentary and other visual material. *See* 67-79 TTABVUE and exhibits submitted therein.

- Allocation of a large proportion of its promotional budget on athlete and team endorsements, sponsoring athletic competitions, brand promotions at stadiums and venues, and subsidizing other events, many of which are webcast on the Internet.
  - Events include NASCAR; Road Racing World Championship Grand Prix (“MotoGP”), Formula One (“F1”) racing, X Games, Ultimate Fighting Championship (“UFC”), Supercross motorcycle racing, Pipeline Pro and Billabong surfing and E-sports competitive video gaming.
  - Sports venues include Los Angeles Angels’ stadium, Arizona Cardinals’ stadium, San Diego Chargers’ stadium, the Wells Fargo Center (Philadelphia), the Palace (Detroit), Sprint Center (Kansas City, MO, for Street League event).
  - Sponsored athletes include Tiger Woods (golf), Rob Gronkowski (football), Valentino Rossi (motorcycle racing), Jorge Lorenzo (motorcycle racing), Robby Gordon (NASCAR), Michael Schumacher (F1), Ben Spies (MotoGP), Rob Dyrdek (skateboarding), Ken Block (rally car driving), Jeremy McGrath (SuperCross, X Games).
  - Music Events include the Vans Warped Tour and Ozzfest concert tours.
- Use of Monster Ambassador Team members (“MAT”) to give out free samples of branded beverage products and branded merchandise bearing the Claw Icon at sporting events including NBA game locations.<sup>60</sup>
- Social media presence, including:
  - A website prominently displaying the M-Claw Mark with hundreds of thousands of unique visitors each month, and millions of unique visitors per year.
  - A Facebook page prominently displaying the M-Claw Mark having in excess of 20 million “likes.”
  - A Twitter account prominently displaying the M-Claw Mark having more than 3 million followers.
  - An Instagram account prominently displaying the M-Claw Mark having more than 5 million followers.
  - A YouTube channel prominently displaying the M-Claw Mark having more than 2 million subscribers.
- Licensee payments to Monster of millions of dollars in royalties on multiple millions of dollars’ worth of licensed apparel and accessories (exact figures confidential) displaying the M-Claw Mark (bearing in mind Applicants’

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<sup>60</sup> NBA’s Vice President and General Counsel, Mr. George, derisively refers to this practice as “ambush marketing.” George Decl, 89 TTABVUE 5, ¶ 11.

criticisms of Monster's business records lacking a degree of specificity as to which of Monster's marks appear on the listed goods).

- Since 2002, sales or distribution by Monster itself of millions of units of clothing items and accessories, most of which prominently display the M-Claw Mark, with an estimated retail value in the tens of millions of dollars (exact figure confidential).
- Partnering with video game publishers to have Monster branding (particularly the M-Claw Mark) appear in the video games themselves.

We also return briefly to Dr. Simonson's Declaration, Report and Exhibits that we discussed more extensively in the evidentiary sections of this decision, indicating that 67.2% of respondents associated Monster's M-Claw Mark with energy drinks emanating from the named source "Monster" or a sole, yet anonymous, source. As we noted, from these survey results Dr. Simonson opines that the M-Claw has acquired secondary meaning and even fame for likelihood of confusion purposes. Maple Leaf and NBA do not challenge Dr. Simonson's qualifications, his survey methodology, the survey's results or Dr. Simonson's conclusions therefrom.

The Federal Circuit cautions that "[i]t is the duty of a party asserting that its mark is famous to clearly prove it." *Coach Servs., Inc. v. Triumph Learning LLC*, 101 U.S.P.Q.2d 1713, 1720 (Fed. Cir. 2012). Here, Monster clearly has shown that its M-Claw Mark is commercially strong and famous for energy drinks in the likelihood of confusion context under the considerations discussed in *Bose*, 63 USPQ2d at 1305-09 and *Omaha Steaks* 128 USPQ2d at 1689-92.

Maple Leaf and NBA indeed concede Monster's M-Claw design is famous (in the likelihood of confusion context) for energy drinks, but argue that this fame does not

extend to other markets.<sup>61</sup> The cross-examination testimony of Monster’s Chairman and CEO, Mr. Sacks, supports Applicants’ argument. To keep the M-Claw brand “authentic, unique, credible and cool,” Monster does not want it diluted by spreading licenses for clothing, gear, and merchandise too broadly. This means not only limiting the volume of non-beverage products on which the M-Claw is depicted, but also the types of outlets through which these items are sold.<sup>62</sup> Monster also distinguishes itself from so-called “corporate” brands by being more cutting edge and avoiding traditional advertising<sup>63</sup> such as in magazine ads, or on TV, radio or billboards.<sup>64</sup> Monster prefers instead to focus its promotional efforts and expenditures on athlete endorsements, sponsoring athletic competitions and associated product placements such as on athletes’ helmets, sports gear and uniforms.<sup>65</sup>

Notably, as shown from the bullet-pointed discussion above, Monster’s income from sales of non-beverage merchandise bearing the M-Claw Mark (such as branded clothing and accessories) is but a fraction of its income from sales of beverage products. Moreover, Monster’s involvement in sporting events in connection with the M-Claw Mark is limited to endorsements and sponsorships (to reinforce customer affinity with Monster’s beverage products) rather than the per se operation of sports teams or sports leagues such as the Raptors or the NBA. We therefore find that

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<sup>61</sup> Applicant’s Brief, 106 TTABVUE 43-44.

<sup>62</sup> Sacks CX Depo Tr, 94 TTABVUE 112-121.

<sup>63</sup> *Id.* at 109-112.

<sup>64</sup> *Id.* at 133-34.

<sup>65</sup> Sacks Decl, 67 TTABVUE 7-8, ¶¶ 15-16.

Monster's M-Claw Mark is famous in the likelihood of confusion context for energy drinks, but this fame does not extend to other products or services. *See, e.g., Harley-Davidson Motor Co., Inc. v. Pierce Foods Corp.*, 231 USPQ 857, 859-62 and (TTAB 1986) (while the marks HARLEY and HOG were deemed well-known in connection with motorcycles, motorcycle parts and accessories, this did not extend to the opposer's acquisition of trademark rights for these marks in connection with food products).

## 2. Comparison of the Marks

We now consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imps.*, 73 USPQ2d at 1691; *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), *aff'd mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

"The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) (quoting *Coach Servs.*, 101 USPQ2d at 1721 (internal quotation marks omitted)). The focus is on the recollection of average consumers – here, members of the general public who purchase beverages and affinity merchandise, and sports fans – who normally retain a general rather than a specific impression of trademarks. *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007).

“[W]here the question of likelihood of confusion ... involves design marks which are not capable of being spoken, the question of the similarity of the marks must be determined primarily on the basis of their visual similarity.” *In re Vienna Sausage Mfg. Co.*, 16 USPQ2d 2044, 2047 (TTAB 1990). “[W]hen letter marks are presented in a highly stylized form, so that they are essentially design marks incapable of being pronounced or conveying any inherent meaning, then differences in the lettering style and design may be sufficient to prevent a likelihood of confusion. In these cases similarity of appearance is usually controlling and the decision will turn primarily on the basis of the visual similarity of the marks.” *Textron Inc. v. Maquinas Agricolas “Jacto” S.A.*, 215 USPQ 162, 163 (TTAB 1982). Even though Monster indicates in its registrations that its mark “consists of a stylized letter M in the form of a claw,” and Monster’s company name begins with an “M,” we do not know that consumers would verbalize the mark as an “M” because there is nothing in the record to show this.

“[T]he purchaser and prospective purchaser’s state of mind or reaction must be considered along with the fallibility of the human memory and its propensity to retain but an overall impression of designs and similar type marks.” *Envirotech Corp. v. Solaron Corp.*, 211 USPQ 724, 733 (TTAB 1981). In such situations, “the question of ... [the marks’] similarity ... must, of necessity, be a subjective one especially in the absence of any consumer oriented reaction survey.” *Franklin Mint Corp. v. Master Mfg. Co.*, 209 USPQ 350, 354 (TTAB 1980), *aff’d*, 667 F.2d 1005, 212 USPQ 233 (CCPA 1981).

“[I]n a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed [or services with which it is associated].” *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983). On the other hand, while in “a mark compris[ing] both a word and a design ... the word [portion] is normally accorded greater weight because it would be used by purchasers to request the goods ..., [the Federal Circuit has] cautioned that there is no general rule that the ... [literal] portion ... will form the dominant portion of ... [a] mark.” *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (internal citations and quotation marks omitted).”

In accordance with these principles, we first compare Monster’s M-Claw Mark to Maple Leaf’s Primary and Secondary Ball Marks:

**Monster’s  
M-Claw Mark**



**Maple Leaf’s  
Primary Ball Mark**



**Maple Leaf’s  
Secondary Ball Mark**



Although, in the marketplace, the parties’ marks likely would not be seen side-by-side, *In re i.am.symbolic*, 123 USPQ2d at 1748, we present them here in such a fashion simply for purposes of analysis.

Monster’s M-Claw mark comprises a set of three vertical, jagged, parallel lines curved to the left at the top so as to form a letter “M” – the first letter of Opposer’s company name MONSTER. Abstractly, the vertical lines depict the results of a downward ripping motion. In contrast, Maple Leaf’s Secondary Ball Mark is the image of a basketball depicting the results of a ripping motion from left-to-right

through three seams on the left-hand side of the basketball. The center image of Maple Leaf's Primary Ball Mark is a negative reproduction of Maple Leaf's Secondary Ball Mark. The center image is surrounded by a thick circle in which the team name TORONTO RAPTORS is shown, further distinguishing it from Monster's mark. Monster's mark is purely a claw. Maple Leaf's marks are essentially basketballs with much less prominent and significant claw elements. We therefore find that Monster's M-Claw Mark is so different from both of Maple Leaf's Primary and Secondary Ball Marks in appearance, sound (if any), meaning and overall commercial impression so as to preclude a finding of likelihood of confusion.

We now compare Monster's M-Claw Mark to NBA's Star and Banner Marks:

**Monster's  
M-Claw Mark**



**NBA's  
Star Mark**



**NBA's  
Banner Mark**



As we did above with Maple Leaf's marks, even though the parties' marks likely would not be seen side-by-side, *In re i.am.symbolic*, 123 USPQ2d at 1748, we present them here in such a fashion simply for purposes of analysis.

We incorporate here by reference our description and evaluation of Monster's M-Claw Mark set out above. NBA's Star Mark is the image of a Star showing the results of a ripping motion from left-to-right on the left-hand side of the Star. The center image of NBA's Banner Mark is the entirety of NBA's Star Mark. The center Star image is seen as an overlay to a horizontal banderol (a/k/a a narrow forked flag, streamer or ribbon) showing the letters "T-O" on the left and the number "16" on the

right, further distinguishing it from Monster’s mark. As we said above, Monster’s mark is purely a claw. NBA’s marks are essentially a star or star-and-banderol with much less prominent and significant claw elements. We find that Monster’s M-Claw Mark is so different from both of NBA’s Star and Banner Marks in appearance, sound (if any), meaning and overall commercial impression so as to preclude a finding of likelihood of confusion.

Had Monster relied solely on its trademark registrations, our comparison of the parties’ marks normally would be confined to the drawing pages of Monster’s registrations versus Maple Leaf’s and NBA’s trademark applications. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) (“[W]e do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and the application. We must compare the marks as they appear in the drawings ....”). However, Monster’s claims include reliance on its common law rights in the M-Claw Mark. We therefore reproduce below a sampling of Monster’s M-Claw Mark as used in the marketplace:

Beverage Cans<sup>66</sup>



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<sup>66</sup> Opp 3<sup>rd</sup> NOR 65 TTABVUE 41-43.

Clothing & Accessories<sup>67</sup>



Athletic Gear<sup>68</sup>



Social Media<sup>69</sup>

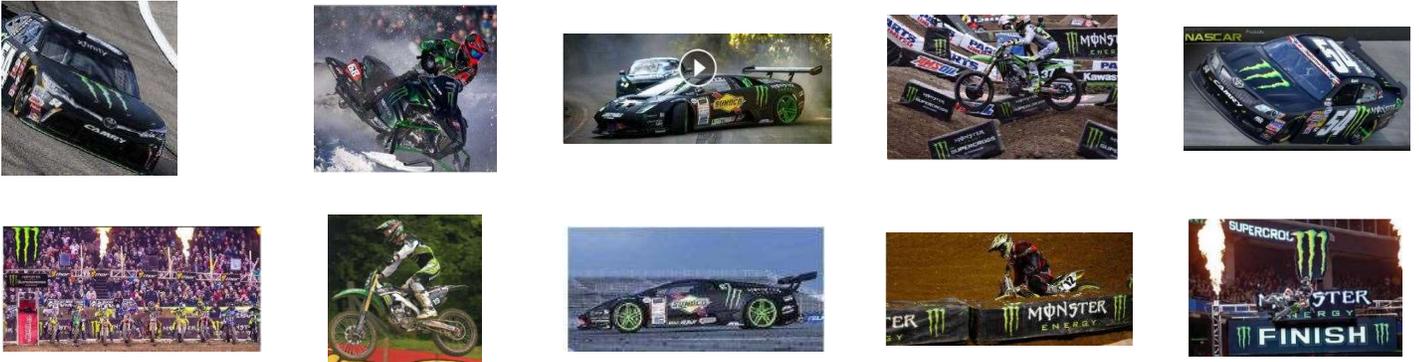


<sup>67</sup> App 2<sup>nd</sup> NOR, 86 TTABVUE 60, Suppl Int Ans No 1; Opp 3<sup>rd</sup> NOR 65 TTABVUE 46; Sacks Decl, 69 TTABVUE 136; Sacks Decl, 70 TTABVUE 36; Sacks Decl, 71 TTABVUE 173, 177, 179, 180, 185; Sacks Decl, 72 TTABVUE 54.

<sup>68</sup> Opp 3<sup>rd</sup> NOR, 61 TTABVUE 61; Opp 3<sup>rd</sup> NOR, 65 TTABVUE 60; Sacks Decl, 70 TTABVUE 45, 49, 75.

<sup>69</sup> Sacks Decl, 71 TTABVUE 3, 49, 128, 163.

Racing<sup>70</sup>



Pro Gaming<sup>71</sup>



As this sampling shows, the vast majority of Monster’s common law uses of the M-Claw Mark are in the same configuration and alignment as shown in Monster’s trademark registrations – that is, a set of three vertical, jagged, parallel lines curved to the left at the top so as to form a letter “M,” with the vertical lines depicting a downward ripping motion.<sup>72</sup> Therefore, for the same reasons discussed above in comparing Applicants’ marks to Monster’s registered M-Claw Mark, we find Maple Leaf’s Primary and Secondary Ball Marks and NBA’s Star and Banner Marks readily distinguishable from Monster’s rights in its M-Claw Mark at common law.<sup>73</sup>

<sup>70</sup> Opp 3<sup>rd</sup> NOR 61 TTABVUE 34, 39, 45, 106, 110, 142, 150; Sacks Decl, 69 TTABVUE 96, 124, 144.

<sup>71</sup> Opp 3<sup>rd</sup> NOR 65 TTABVUE 74, 82, 86.

<sup>72</sup> The one notable exception is Monster’s golf bag, where the M-Claw is shown vertically and on its side. The record does not show how many of these golf bags have been purchased by consumers.

<sup>73</sup> The parties acknowledge that there have been no instances of actual confusion between Monster’s M-Claw Mark and Maple Leaf’s Primary or Secondary Ball Marks, nor between

**B. Summary: Likelihood of Confusion**

While we find Monster’s M-Claw Mark distinctive and famous for likelihood of confusion purposes, the significant differences in appearance, sound (if any), meaning and commercial impression between Monster’s mark and Maple Leaf’s and NBA’s involved marks precludes a finding of likelihood of confusion. *Kellogg v. Pack’em*, 21 USPQ2d at 1145. We therefore dismiss Monster’s likelihood of confusion claims.

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Monster’s M-Claw Mark and NBA’s Star or Banner Marks. Opp 1<sup>st</sup> NOR, 55 TTABVUE 132, Maple Leaf Int Ans No 31; App 2<sup>nd</sup> NOR 86 TTABVUE 36-37, Monster Int Ans No 13; Sacks CX Depo Tr, 94 TTABVUE 196-198. “[A]ctual confusion is not necessary to show a likelihood of confusion.” *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). “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 of time in the same markets as those served by opposer under its marks.” *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). The record indicates appreciable and continuous use by Monster and Maple Leaf of their respective marks for a significant period of time (five years) in what Monster claims to have been overlapping markets. Sacks Decl, 67 TTABVUE 3-48, ¶¶ 3-127 and supporting exhibits; Arena Decl, 90 TTABVUE 9-13, 15, 20-21, ¶¶ 22-23, 26-33, 36, 37, 41, 62-65, Exhs 5-7, 9, 10, 12, 13-15, 16, 22. There has been a more-than-reasonable opportunity for confusion to have occurred. We find the absence of reported instances of actual confusion between Monster’s M-Claw Mark and Maple Leaf’s marks further supports our finding of no likelihood of confusion based on the differences between the parties’ marks.

The same cannot be said with respect to NBA’s Star and Banner Marks. The NBA developed and used these marks in connection with the 2016 NBA All-Star Game in Toronto, Canada, where they were displayed prominently at this annual event. The NBA sold clothing and apparel items bearing the marks for a limited period of time in 2016, primarily in and around the arena in Toronto where the game was played. NBA’s Star and Banner Marks have not been used since then. Arena Decl, 90 TTABVUE 20-21, ¶¶ 62-67, Exhs 22-23; Arena CX Depo Tr, 100 TTABVUE 59-61, 73-75, 82, Exh 13. With respect to NBA’s Star and Banner Marks, the absence of actual confusion is neutral.

## **IX. Dilution**

To prevail on its dilution claim pursuant to the Trademark Dilution Revision Act (“TDRA”) of 2006, Trademark Act Section 43(c), 15 U.S.C. § 1125(c), Monster must show that:

(1) it owns a famous mark that is distinctive; (2) [Maple Leaf or NBA] ... is using a mark in commerce that allegedly dilutes [Monster’s] ... famous mark; (3) [Maple Leaf’s or NBA’s] ... use of its mark[s] began after the plaintiffs mark became famous; and (4) [Maple Leaf’s or NBA’s] ... use of its mark[s] is likely to cause dilution by blurring or by tarnishment.

The TDRA defines dilution by blurring as an “association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.” 15 U.S.C. § 1125(c)(2)(B). Dilution by tarnishment is defined as “an association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.” 15 U.S.C. § 1125(c)(2)(C).

*Coach Servs.*, 101 USPQ2d at 1723-24. In passing we note that, by the most generous reading of Monster’s Notices of Opposition, Monster asserts no claim(s) for dilution by tarnishment.

### **A. Fame**

To begin, we consider whether Monster’s M-Claw Mark is sufficiently famous for dilution purposes. Under the TDRA, a mark is famous if it “is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.” 15 U.S.C. § 1125(c)(2)(A). By using the “general consuming public” as the benchmark, the TDRA eliminated the possibility of “niche fame,” which some courts had recognized under the previous version of the statute. *Coach Servs.*, 101 USPQ2d at 1724; *see also Top Tobacco, LP v. N. Ail. Operating Co.*, 509 F.3d 380, 85 USPQ2d 1251, 1254 (7th Cir. 2007) (noting that the

reference to the general public “eliminated any possibility of ‘niche fame,’ which some courts had recognized before the amendment”).

*Coach Servs.* concisely states much of what we said above regarding Dr. Simonson’s Declaration, Report and Survey:

Fame for likelihood of confusion and fame for dilution are distinct concepts, and **dilution fame requires a more stringent showing**. ... While fame for dilution is an either/or proposition — it either exists or does not — fame for likelihood of confusion is a matter of degree along a continuum. ... Accordingly, a mark can acquire sufficient public recognition and renown to be famous for purposes of likelihood of confusion without meeting the more stringent requirement for dilution fame.

[D]ilution fame is difficult to prove. The judicial consensus is that fam[e] is a rigorous standard. ... **[F]ame for dilution is a difficult and demanding requirement[.]** ... [A]lthough all trademarks are distinctive — very few are famous. ... Importantly, the owner of the allegedly famous mark must show that its mark became famous prior to the filing date of the trademark application or registration against which it intends to file an opposition or cancellation proceeding.

**[F]ame for dilution requires widespread recognition by the general public.** ... To establish the requisite level of fame ..., [a]n opposer must show that, when the general public encounters the mark in almost any context, it associates the term, at least initially, with the mark's owner. In other words, **a famous mark is one that has become a household name.**

*Coach Servs.* , 101 USPQ2d at 1724-25 (emphasis added, cleaned up).

Based on our review of the record that we discussed above regarding Monster’s likelihood of confusion claims, we find that: (i) Monster’s M-Claw Mark has been advertised nationwide since 2002, although mostly limited to the energy drink market and sponsorship of extreme sports; (ii) the amount, volume, and geographic extent of sales of goods Monster has offered under the M-Claw Mark has been notably large, although again limited to energy drinks and to a much more limited extent

collateral clothing and accessories supporting the brand; (iii) the extent of actual recognition of Monster's M-Claw Mark appears limited to sports drinks; and (iv) Appendix 1 to our opinion sets forth Monster's M-Claw registrations on the Principal Register. *See* Trademark Act Section 43(c)(2)(A), 15 U.S.C. § 1125(c)(2)(A). Additionally, because it was not designed to test dilution-type fame, we give low probative value to the results of Dr. Simonson's secondary meaning survey in considering whether Monster's M-Claw mark is famous for dilution purposes.

True, Monster's advertising and sales of products under the M-Claw Mark have been impressive. However, we do not find that the M-Claw Mark meets the rigorous standards for establishing that it is a famous mark under the TDRA.

**B. Similarity or Dissimilarity of the Marks**

Even were we to find (which we do not) that Monster's M-Claw Mark is famous for dilution purposes, Monster still must demonstrate on its dilution by blurring claim "[t]he degree of similarity between ... [Maple Leaf's or NBA's marks] and the ... [M-Claw] mark." Trademark Act Section 43(c)(2)(B)(i), 15 U.S.C. § 1125(c)(2)(B)(i). In determining the similarity or dissimilarity of the marks for dilution purposes,

[the Board] use[s] the same test as for determining the similarity or dissimilarity of the marks in the likelihood of confusion analysis, that is, the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. (citation omitted). While we are not concerned in this context with whether a likelihood of confusion exists, we still consider the marks, not on the basis of a side-by-side comparison, but rather in terms of whether the marks are sufficiently similar in their overall commercial impressions that the required association exists. [That is, the marks must be] ... sufficiently similar to ... trigger consumers to conjure up Opposer's famous mark and associate Applicant[s'] marks with Opposer's mark.

*TiVo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1115-16 (TTAB 2018). Where “[A]pplicant[s]’ mark[s] ... engender[] ... different appearance[s], meaning[s] and commercial impression[s] from [O]pposer’s mark[,] [t]he similarities/dissimilarities of the marks factor favors [A]pplicant[s].” *Rolex Watch U.S.A., Inc. v. AFP Imaging Corp.*, 101 U.S.P.Q.2d 1188, 1195 (TTAB 2011).

Based on our review of the parties’ marks as we discussed above regarding Monster’s likelihood of confusion claims, we find that Maple Leaf’s and NBA’s marks are readily distinguishable from Monster’s M-Claw in appearance, sound (if any), meaning and commercial impression such that none of the former conjure up the latter. The similarities/dissimilarities of the marks factor therefore also favors Applicants.

### **C. Summary: Dilution**

We find Monster’s M-Claw is not sufficiently famous for dilution purposes. Additionally, as with Monster’s likelihood of confusion claim, the significant differences in appearance, sound (if any), meaning and commercial impression between Monster’s mark and all of Maple Leaf’s and NBA’s involved marks precludes a finding of likely dilution. We therefore dismiss Monster’s dilution claims.

### **X. Maple Leaf’s Likelihood of Confusion Counterclaim**

As argued, Maple Leaf’s counterclaim appears not as a direct assertion that confusion between its Prior Claw Mark and Monster’s M-Claw Mark is likely, but rather as an odd contingent claim:

Monster’s ... [M-Claw Mark] is so distinctly different from each of Applicants’ Marks that the Board should dismiss Monster’s opposition in its entirety based on the first [*DuPont*] factor alone. However, if the

Board nevertheless finds such marks are confusingly similar (which it should not do), then it should also find that the marks at issue [on Maple Leaf's] cancellation ... [counterclaim]—Monster's ... [M-Claw Mark] and ... [Maple Leaf's] Prior Claw Mark—are confusingly similar.<sup>74</sup>

Since we dismissed Monster's likelihood of confusion and dilution claims, that should end the matter as to Maple Leaf's counterclaims. Nonetheless, we will proceed with our analysis.

### **A. The Similarity or Dissimilarity of the Marks**

In our evaluation of the similarity or dissimilarity of the parties' marks, the first *DuPont* factor, we consider the strength of Maple Leaf's Prior Claw Mark (“”) and then compare the respective marks in their entireties.

#### **1. Strength of Maple Leaf's Mark**

Before we turn to the similarity of the marks, we consider the strength of Maple Leaf's Prior Claw Mark, as that will affect the scope of protection to which it is entitled. In determining the strength of a mark, we consider its conceptual or inherent strength and its commercial or marketplace strength. *In re Chippendales*, 96 USPQ2d at 1686.

Maple Leaf's Prior Claw Mark is inherently distinctive as evidenced by its registrations on the Principal Register without a claim of acquired distinctiveness under Trademark Act Section 2(f). *Tea Bd. of India*, 80 USPQ2d at 1889. Monster does not dispute this.

Maple Leaf also contends that:

The Prior Claw Mark has, at the very least, acquired distinctiveness; indeed, all of MLSE's asserted registrations have attained

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<sup>74</sup> Applicants' Brief, 106 TTABVUE 51.

“incontestable” status. ... Moreover, the Prior Claw Mark has become widely known to the consuming public through ... [Maple Leaf]’s continuous and extensive use for approximately **twenty-five (25) years**. Specifically, [Maple Leaf] ... has continuously and extensively used the Prior Claw Mark throughout the United States in connection with a variety of goods and services related to the Raptors basketball team, generating substantial sales and commercial success. ... As a result, the public has become familiar with the many branded marks of the team, including ... [Maple Leaf]’s Prior Claw Mark, and these marks are now widely recognized among the general public.<sup>75</sup> (Emphasis original).

In response, Monster asserts that:

[Maple Leaf] ... concludes ... [that its Prior Claw Mark is strong and entitled to broad protection] because ... [Maple Leaf] has continuously and extensively used the Prior Claw Mark throughout the United States in connection with a variety of goods and services related to the Raptors basketball team, generating substantial sales and commercial success. ... Applicants admit, however, that the sales figures they rely on were **global**, and not specific to the United States. ... Applicants further admit that the team’s sales and marketing activities took place primarily in Canada. ... [Maple Leaf] similarly concludes, based solely on Mr. Arena’s testimony, that “the public has become familiar with the many branded marks of the team, including the Raptors’ Prior Claw Mark, and these marks are now widely recognized among the general public.” ... But again, Mr. Arena concedes that he did not conduct a survey regarding the extent to which fans may recognize the Raptors prior claw mark, and is merely offering his personal opinion. ... Because [Maple Leaf] has failed to establish that [Maple Leaf]’s Prior Mark is strong and widely known, this factor weighs strongly in Monster’s favor.<sup>76</sup> (Emphasis original).

We agree with Monster that Maple Leaf has not demonstrated that its Prior Claw Mark enjoys commercial strength.

It is true that Maple Leaf owns four incontestable trademark registrations for its Prior Claw Mark (two issued in 1994, two issued in 2003) for goods and services in

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<sup>75</sup> Applicants’ Brief, 106 TTABVUE 53.

<sup>76</sup> Opposer’s Rebuttal Brief, 109 TTABVUE 26.

International Classes 16, 25, 28 and 41.<sup>77</sup> However, the incontestability provisions of the Trademark Act only conclusively establish the fact of distinctiveness sufficient for registration but not the degree of distinctiveness of a registered mark. *See* Trademark Act Sections 7(b) and 15(b), 15 U.S.C. §§ 1057(b) and 1115(b).<sup>78</sup> Maple Leaf's incontestable registrations alone, therefore, do not establish that its Prior Claw Mark is commercially strong and for that reason entitled to a broad scope of protection.

Mr. Arena testified that “since at least as early as 1995, ... [Maple Leaf] has continuously and extensively used ... the Raptors’ Prior Claw Mark, throughout the United States in connection with a variety of goods and services related to the Raptors basketball team, including ... basketball game and exhibition services and a wide variety of collateral consumer products.”<sup>79</sup> Mr. Arena’s testimony continues by noting the early commercial sales success Maple Leaf had with the former marks it

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<sup>77</sup> App 1<sup>st</sup> NOR, 85 TTABVUE 6-30. *See also*, Appendix III below.

<sup>78</sup> *See also*, *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 61 USPQ2d 1705, 1710 (9th Cir. 2002) (“Although the incontestable status of plaintiff’s ENTREPRENEUR mark gives plaintiff the exclusive right to use its trademark in printed publications pertaining to business opportunities, plaintiff cannot have the exclusive right to use the *word* ‘entrepreneur’ in any mark identifying a printed publication addressing subjects related to entrepreneurship.”); *Oreck Corp. v. U.S. Floor Sys., Inc.*, 803 F.2d 166, 231 USPQ 634, 638 (5th Cir. 1986) (“Incontestable status does not make a weak mark strong.”); *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1518 n.25 (TTAB 2016) (On the question of whether the incontestability of a registration indicates that the registered mark must be considered strong, the “statutory presumptions do not affect the likelihood of confusion analysis. [R]egistrations alone are incompetent to establish any facts with regard to ... any reputation [the registered marks] enjoy or what purchasers’ reactions to them may be.”) (citing *Safer Inc. v. OMS Invs. Inc.*, 94 USPQ2d 1031, 1036 (TTAB 2010).

<sup>79</sup> Arena Decl, 90 TTABVUE 5, ¶ 6.

developed for the Toronto Raptors in 1995 (including the Prior Claw Mark),<sup>80</sup> but not much more than that.<sup>81</sup> In fact, although Mr. Arena is not entirely clear on this point, it appears Maple Leaf discontinued using the Prior Claw Mark after it adopted and began using the Primary and Secondary Ball Marks in late 2014.<sup>82</sup>

Mr. Arena further testified that “fans have become familiar with the many branded marks of the ... [Toronto Raptors], including the Raptors’ Prior Claw Mark, and these marks are now widely recognized and famous among the general public.”<sup>83</sup> However, on cross-examination, Mr. Arena acknowledged that no survey had been conducted regarding the extent to which fans may recognize the Maple Leaf’s Prior Claw Mark, and that his statements to this effect were his personal opinion.<sup>84</sup> Due to insufficient evidence, we therefore find that Maple Leaf’s Prior Claw Mark is not commercially strong nor is it entitled to broad protection. *Cf. Bose Corp*, 63 USPQ2d at 1308; *Weider Publ’ns*, 109 USPQ2d at 1354.

## 2. Comparison of the Marks

We now consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression, *See Palm Bay Imps.*, 73 USPQ2d at 1691; *DuPont*, 177 USPQ at 567, applying the same principles we used

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<sup>80</sup> *Id.* at 5-6, ¶¶ 7-9.

<sup>81</sup> On cross-examination, Mr. Arena was not able to quantify Maple Leaf’s merchandise sales confined solely to the Prior Claw Mark. Arena CX Dep Tr, 100 TTABVUE 23-24, 33-36.

<sup>82</sup> Arena Decl, 90 TTABVUE 8-10, ¶¶ 19-23.

<sup>83</sup> *Id.* at 5, ¶ 8.

<sup>84</sup> Arena CX Dep Tr, 100 TTABVUE 33-36.

above to compare Monster's M-Claw Mark to Maple Leaf's Primary and Secondary Ball Marks as well as to NBA's Star and Banner Marks.

For convenience, we present Maple Leaf's Prior Claw Mark next to Monster's M-Claw Mark even though they would not appear side-by-side in the marketplace:

**Maple Leaf's  
Prior Claw Mark**



**Monster's  
M-Claw Mark**



As we noted in the Trademark Descriptions section of this decision, Mr. Arena describes Maple Leaf's Prior Claw Mark as a static, three-pronged dinosaur claw.<sup>85</sup> More specifically, the intended meaning of this mark is that of a Raptor's paw print.<sup>86</sup> The paw print is formed by three talons on the top, and a basketball on the bottom.<sup>87</sup> The M-Claw Mark consists of the letter "M" in the form of a claw.<sup>88</sup> Mr. Sacks states that the origins of the mark are the letter "M" standing for "Monster." The jagged-edge stylization of the "M" is intended to evoke a monster and the liquid inside bursting out of a can with the result being torn metal.<sup>89</sup>

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<sup>85</sup> Arena Decl, 90 TTABVUE 8, ¶ 19.

<sup>86</sup> Arena Discov Depo Tr, 60 TTABVUE 56.

<sup>87</sup> Arena CX Depo Tr, 100 TTABVUE 23-24.

<sup>88</sup> See Appendix 1 below, and registrations made of record at Opp. 1<sup>st</sup> NOR, 55 TTABVUE 19-23, 28-40, 53-65, 75-79, Exhs 1, 3-5, 9-11, 14.

<sup>89</sup> Sacks CX Depo Tr, 94 TTABVUE 40-42.

We find evident dissimilarities between the marks in that Maple Leaf's Prior Claw Mark is formed by a basketball on the bottom and three talons on the top pointing upward; whereas Monster's M-Claw presents the after-effect of a creature's (e.g., monster's or animal's) scratching or tearing downward. Maple Leaf and NBA themselves acknowledge that "there are obvious differences between Monster's M Claw Icon and ... [Maple Leaf's] Prior Claw Mark,"<sup>90</sup> and so does Mr. Arena:

Q. ... [C]omparing Maple Leaf's old mark and Monster's claw, do you believe that the old mark, Maple Leaf's old mark is similar in appearance to Monster's claw?

A. I do not.

Q. And why is that?

...

A. I don't even know where to begin. [Maple Leaf's old mark] has a basketball, [Monster's claw] does not; [Maple Leaf's old mark] is a claw, sort of static, [Monster's claw] is, I don't know what it is, blood dripping, claw marks, ripping; [Maple Leaf's old mark], I guess if you had to look at it, it might be a W if you had to see something abstract in it; [Monster's claw] maybe is an M, closer to Adidas's three stripes than anything because they're equidistant apart and equal; [Maple Leaf's old mark] is from an animal, [Monster's claw] is – the only animal I can see is three sea horses going to the left. So I don't see any similarity at all. The only similarity is that there is three of something.<sup>91</sup>

Neither Applicants' Brief nor Mr. Arena's deposition testimony could have said it better. We find that Maple Leaf's Prior Claw Mark is so different from Monster's M-Claw Mark in appearance, sound (if any), meaning and overall commercial impression so as to preclude a finding of likelihood of confusion.

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<sup>90</sup> Applicants' Brief, 106 TTABVUE 52.

<sup>91</sup> Arena CX Depo Tr, 100 TTABVUE 32-.33

**B. Summary: Likelihood of Confusion**

While we find Maple Leaf's Prior Claw Mark inherently distinctive, there is insufficient evidence to find that it is commercially strong. Moreover, the significant differences in appearance, sound (if any), meaning and commercial impression between Maple Leaf's Prior Claw Mark and Monster's M-Claw Mark preclude a finding of likelihood of confusion. We therefore deny Maple Leaf's likelihood of confusion counterclaims.

**Decision:**

Monster's oppositions are dismissed in their entirety on all asserted grounds. Maple Leaf's counterclaims for cancellation are denied in their entirety.

## Appendix 1

### Applicants' Opposed Trademark/Service Mark Applications

#### Maple Leaf Sports & Entertainment Ltd.'s Opposed Applications in Opposition No. **91222422**

**Mark, Appln. No.,  
Filing Date, Filing Basis**



(The mark consists of a stylized design of a basketball and claw; Color is not claimed as a feature of the mark.)

Appln. No. 86480573

Filing Date: December 15, 2014

Filing Basis: Intent-to Use,  
Trademark Act § 1(b)

**Goods/Services**

Audio recordings and video recordings featuring entertainment and information in the field of basketball; audio discs, video discs, computer laser discs, pre-recorded audio and video cassettes, pre-recorded audio and video tapes, pre-recorded compact discs, pre-recorded computer laser discs, all featuring entertainment and information related to basketball; computer accessories, namely flash drives, computer stands, mouse pads, mice, disc cases, computer carry-on cases, computer sleeves, keyboard wrist pads, all related to basketball; computer programs for viewing information, statistics or trivia about basketball; computer software, namely screen savers featuring basketball themes; computer software to access and view computer wallpaper; computer browser software for use in viewing and displaying data on the Internet; computer skins, namely, fitted plastic film for covering and providing a scratch proof barrier for computer devices; computer game software; video game software, video game cartridges; radios, electronic audio speakers, headphones and ear buds, wireless telephones, telephones; cell phone accessories, namely headsets, skins, face plates and cell phone covers; electronics accessories, namely skins, covers and stands for MP3 players, electronic tablets and portable personal digital assistant devices; decorative switch plate covers, video monitors, computer monitors, binoculars; sunglasses; eyeglass frames; eyewear straps and chains; eyeglass and sunglass cases; magnets; disposable cameras; credit cards and pre-paid telephone calling cards magnetically encoded; downloadable video recordings, video stream recordings, and downloadable audio recordings in the field of basketball provided over the Internet; downloadable computer software for viewing databases of information, statistical information, trivia, polling information, and interactive polling in the field of basketball provided over the Internet; downloadable computer game software; downloadable interactive video games and downloadable trivia game software provided over the internet; downloadable computer software for use as screensavers and wallpaper, to access and display computer browsers, for use in viewing data on the Internet, for use in designing plastic film computer skins to protect computer monitors, for use in creating avatars for playing games and for use in remotely manipulating computer cursors over the Internet; downloadable electronic publications in the nature of magazines, newsletters, coloring books, game schedules all in the field of basketball provided over the Internet; downloadable catalogs provided over the Internet featuring an array of basketball-themed products; downloadable greeting cards provided over the Internet, Cl. 9



(The mark consists of a stylized design of a basketball and claw.)

Appln. No. 86480603

Filing Date: December 15, 2014

Filing Basis: Intent-to Use,  
Trademark Act § 1(b)

Publications and printed matter, namely, basketball trading cards, trading cards, stickers, decals, commemorative basketball stamps, collectible cardboard trading discs, memo boards, clipboards, paper coasters, post cards, place mats of paper, facial tissues, note cards, memo pads, note pads, ball point pens, crayons, felt tip markers, rubber bands, pencils, pen and paper holders, desktop document stands, scrap books, rubber stamps, drafting rulers, paper banners and flags, 3-ring binders, stationery folders, wirebound notebooks, portfolio notebooks, unmounted and mounted photographs, posters, calendars, bumper stickers, book covers, bookmarks, wrapping

**Mark, Appln. No.,  
Filing Date, Filing Basis**



(The mark consists of a stylized design of a basketball and claw; Color is not claimed as a feature of the mark.)

Appln. No. 86480655

Filing Date: December 15, 2014

Filing Basis: Intent-to Use,

Trademark Act § 1(b)



(The mark consists of a stylized design of a basketball and claw; Color is not claimed as a feature of the mark.)

Appln. No. 86480693

Filing Date: December 15, 2014

Filing Basis: Intent-to Use,

Trademark Act § 1(b)



(The mark consists of a stylized design of a basketball and claw.)

Appln. No. 86480716

Filing Date: December 15, 2014

Filing Basis: Intent-to Use,

Trademark Act § 1(b)

**Goods/Services**

paper, children's activity books, children's coloring books; statistical books, guide books, and reference books, all in the field of basketball; magazines in the field of basketball, catalogs in the field of basketball, commemorative game and souvenir programs related to basketball, paper pennants, stationery, stationery-type portfolios, post cards, invitation cards, printed certificates, greeting cards, Christmas cards, holiday cards, informational statistical sheets for basketball topics; newsletters, brochures, pamphlets, and game schedules in the field of basketball; bank checks, check book covers, check book holders, comic books; non-magnetic credit cards and telephone calling cards not magnetically encoded; money clips, Cl. 16

Athletic bags, shoe bags for travel, overnight bags, umbrellas, backpacks, baby backpacks, knapsacks, duffel bags, tote bags, beach bags, beach tote bags, drawstring pouches, luggage, luggage tags, patio umbrellas, beach umbrellas, valises, attaché cases, billfolds, wallets, briefcases, canes, business card cases, book bags, all purpose sports bags, golf umbrellas, gym bags, purses, coin purses, fanny packs, waist packs, cosmetic cases sold empty, garment bags for travel, handbags, key cases, leather key chains, suitcases, toiletry cases sold empty, trunks for traveling and rucksacks, foot lockers, pet clothing, pet leashes, and pet collars, Cl. 18

Clothing, namely, hosiery, footwear, basketball shoes, basketball sneakers, slippers, T-shirts, shirts, polo shirts, sweatshirts, sweatpants, pants, tank tops, jerseys, shorts, pajamas, sport shirts, rugby shirts, sweaters, belts, ties, nightshirts, hats, caps, visors, warm-up suits, warm-up pants, warm-up tops/shooting shirts, jackets, wind resistant jackets, parkas, coats, baby bibs not of paper, head bands, wrist bands, aprons, undergarments, boxer shorts, slacks, ear muffs, gloves, mittens, scarves, woven and knit shirts, jersey dresses, dresses, cheerleading dresses and uniforms, swim wear, bathing suits, swimsuits, bikinis, tankinis, swim trunks, bathing trunks, board shorts, wet suits, beach cover-ups, bathing suit cover-ups, bathing suit wraps, sandals, beach sandals, beach hats, sun visors, swim caps, bathing caps, novelty headwear with attached wigs, Cl. 25

Toys, games and sporting goods, namely, basketballs, golf balls, playground balls, sports balls, rubber action balls and foam action balls, plush balls for games, plastic balls for games, basketball nets, basketball backboards, miniature basketball backboards, pumps for inflating basketballs and needles therefore; golf clubs, golf bags, golf putters, golf accessories, namely, divot repair tools, tees, ball markers, golf bag covers, club head covers, golf gloves, golf ball sleeves, golf putting greens; billiard cue racks, billiard balls, billiard ball racks, dart board cabinets, electronic basketball table top games, basketball table top games, basketball board games, action skill games, adult's and children's party games, trivia information games and electronic video arcade game machines, basketball kit comprised of a net and whistle, dolls, decorative dolls, collectible dolls, toy action figures, bobblehead action figures, stuffed toys, plush toys, jigsaw puzzles, toy building blocks, Christmas tree ornaments and Christmas stockings; toy vehicles in the nature of cars, trucks, trains and vans, all containing basketball themes, novelty foam toys in the shapes of fingers and trophies, toy trophies, playing cards, card games, toy noisemakers, pet toys; beach toys, namely, beach balls, inflatable balls, toy pails, toy shovels, sand toys, sand box toys, water-

**Mark, Appln. No.,  
Filing Date, Filing Basis**



(The mark consists of a stylized design of a basketball and claw; Color is not claimed as a feature of the mark.)

Appln. No. 86480739

Filing Date: December 15, 2014

Filing Basis: Intent-to Use,

Trademark Act § 1(b)

**Goods/Services**

squirting toys; pool accessories, namely, swim floats, pool floats, toy water rafts, foam floats, swim rings, pool rings, foam rings, body boards, surf boards, swim fins, surf fins, arm floats and water wing swim aids, all for recreational use; volleyball game kits comprised of ball, net, sidelines and whistle, and water polo game kits comprised of ball, net and whistle; decorative cloth wind socks; miniature stadium reproductions, namely, small toy plastic models of a stadium; snow globes; video game machines for use with television and video game hand held controllers for use with console video gaming systems, Cl. 28

Entertainment and educational services in the nature of ongoing television and radio programs in the field of basketball and rendering live basketball games and basketball exhibitions; the production and distribution of radio and television shows featuring basketball games, basketball events and programs in the field of basketball; conducting and arranging basketball clinics and camps, coaches clinics and camps, dance team clinics and camps and basketball games; entertainment services in the nature of personal appearances by a costumed mascot or dance team at basketball games and exhibitions, clinics, camps, promotions, and other basketball-related events, special events and parties; fan club services; entertainment services, namely providing a website featuring multimedia material in the nature of television highlights, interactive television highlights, video recordings, video stream recordings, interactive video highlight selections, radio programs, radio highlights, and audio recordings in the field of basketball; providing news and information in the nature of statistics and trivia in the field of basketball; on-line non-downloadable games, namely, computer games, video games, interactive video games, action skill games, arcade games, adults' and children's party games, board games, puzzles, and trivia games; electronic publishing services, namely, publication of magazines, guides, newsletters, coloring books, and game schedules of others on-line through the Internet, all in the field of basketball; providing an online computer database in the field of basketball, Cl. 41

**Maple Leaf Sports & Entertainment Ltd.'s Opposed Applications in Opposition No. 91222445**

**Mark, Appln. No.,  
Filing Date, Filing Basis**



(The mark consists of the wording "TORONTO RAPTORS" and the stylized design of a basketball and claw all appearing within a circle; Color is not claimed as a feature of the mark; "TORONTO" disclaimed.)

Appln. No. 86480248

Filing Date: December 15, 2014

Filing Basis: Intent-to Use,

Trademark Act § 1(b)

**Goods/Services**

Audio recordings and video recordings featuring entertainment and information in the field of basketball; audio discs, video discs, computer laser discs, pre-recorded audio and video cassettes, pre-recorded audio and video tapes, pre-recorded compact discs, pre-recorded computer laser discs, all featuring entertainment and information related to basketball; computer accessories, namely, flash drives, computer stands, mouse pads, mice, disc cases, computer carry-on cases, computer sleeves, keyboard wrist pads, all related to basketball; computer programs for viewing information, statistics or trivia about basketball; computer software, namely, screen savers featuring basketball themes; computer software to access and view computer wallpaper; computer browser software for use in viewing and displaying data on the Internet; computer skins, namely, fitted plastic film for covering and providing a scratch proof barrier for computer devices; computer game software; video game software, video game cartridges; radios, electronic audio speakers, headphones and ear buds, wireless telephones, telephones; cell phone accessories, namely, headsets, skins, face plates and cell phone covers; electronics accessories, namely, skins, covers and stands for MP3 players,

**Mark, Appln. No.,  
Filing Date, Filing Basis**



(The mark consists of the wording "TORONTO RAPTORS" and the stylized design of a basketball and claw all appearing within a circle; Color is not claimed as a feature of the mark; "TORONTO" disclaimed.)

Appln. No. 86480297

Filing Date: December 15, 2014

Filing Basis: Intent-to Use,  
Trademark Act § 1(b)



(The mark consists of the wording "TORONTO RAPTORS" and the stylized design of a basketball and claw all appearing within a circle; Color is not claimed as a feature of the mark; "TORONTO" disclaimed.)

Appln. No. 86480313

Filing Date: December 15, 2014

Filing Basis: Intent-to Use,  
Trademark Act § 1(b)

**Goods/Services**

electronic tablets and portable personal digital assistant devices; decorative switch plate covers, video monitors, computer monitors, binoculars; sunglasses; eyeglass frames; eyewear straps and chains; eyeglass and sunglass cases; magnets; disposable cameras; credit cards and pre-paid telephone calling cards magnetically encoded; downloadable video recordings, video stream recordings, and downloadable audio recordings in the field of basketball provided over the Internet; downloadable computer software for viewing databases of information, statistical information, trivia, polling information, and interactive polling in the field of basketball provided over the Internet; downloadable computer game software; downloadable interactive video games and downloadable trivia game software provided over the internet; downloadable computer software for use as screensavers and wallpaper, to access and display computer browsers, for use in viewing data on the Internet, for use in designing plastic film computer skins to protect computer monitors, for use in creating avatars for playing games and for use in remotely manipulating computer cursors over the Internet; downloadable electronic publications in the nature of magazines, newsletters, coloring books, game schedules all in the field of basketball provided over the Internet; downloadable catalogs provided over the Internet featuring an array of basketball-themed products; downloadable greeting cards provided over the Internet, Cl. 9

Jewelry; costume jewelry; beaded jewelry; rubber or silicon wristbands in the nature of a bracelet, beaded necklaces; beads for use in the manufacture of jewelry; earrings, necklaces, rings, bracelets, cuff links, pendants, charms for collar jewelry and bracelets; clocks; watches; watch bands and watch straps, watch cases, watch fobs; banks, jewelry boxes, tie clips; medallions; non-monetary coins of precious metal; precious metals; key chains of precious metal; key chains as jewelry; figures and figurines of precious metal; trophies of precious metals, Cl. 14

Publications and printed matter, namely, basketball trading cards, trading cards, stickers, decals, commemorative basketball stamps, collectible cardboard trading discs, memo boards, clipboards, paper coasters, post cards, place mats of paper, facial tissues, note cards, memo pads, note pads, ball point pens, crayons, felt tip markers, rubber bands, pencils, pen and paper holders, desktop document stands, scrap books, rubber stamps, drafting rulers, paper banners and flags, 3-ring binders, stationery folders, wirebound notebooks, portfolio notebooks, unmounted and mounted photographs, posters, calendars, bumper stickers, book covers, bookmarks, wrapping paper, children's activity books, children's coloring books; statistical books, guide books, and reference books, all in the field of basketball; magazines in the field of basketball, catalogs in the field of basketball, commemorative game and souvenir programs related to basketball, paper pennants, stationery, stationery-type portfolios, post cards, invitation cards, printed certificates, greeting cards, Christmas cards, holiday cards, informational statistical sheets for basketball topics; newsletters, brochures, pamphlets,

**Mark, Appln. No.,  
Filing Date, Filing Basis**



(The mark consists of the wording "TORONTO RAPTORS" and the stylized design of a basketball and claw all appearing within a circle; Color is not claimed as a feature of the mark; "TORONTO" disclaimed.)

Appln. No. 86480332

Filing Date: December 15, 2014

Filing Basis: Intent-to Use,  
Trademark Act § 1(b)



(The mark consists of the wording "TORONTO RAPTORS" and the stylized design of a basketball and claw all appearing within a circle; Color is not claimed as a feature of the mark; "TORONTO" disclaimed.)

Appln. No. 86480362

Filing Date: December 15, 2014

Filing Basis: Intent-to Use,  
Trademark Act § 1(b)



(The mark consists of the wording "TORONTO RAPTORS" and the stylized design of a basketball and claw all appearing within a circle; Color is not claimed as a feature of the mark; "TORONTO" disclaimed.)

Appln. No. 86480532

Filing Date: December 15, 2014

Filing Basis: Intent-to Use,  
Trademark Act § 1(b)

**Goods/Services**

and game schedules in the field of basketball; bank checks, check book covers, check book holders, comic books; non-magnetic credit cards and telephone calling cards not magnetically encoded; money clips, Cl. 16

Athletic bags, shoe bags for travel, overnight bags, umbrellas, backpacks, baby backpacks, knapsacks, duffel bags, tote bags, beach bags, beach tote bags, drawstring pouches, luggage, luggage tags, patio umbrellas, beach umbrellas, valises, attaché cases, billfolds, wallets, briefcases, canes, business card cases, book bags, all purpose sports bags, golf umbrellas, gym bags, purses, coin purses, fanny packs, waist packs, cosmetic cases sold empty, garment bags for travel, handbags, key cases, leather key chains, suitcases, toiletry cases sold empty, trunks for traveling and rucksacks, foot lockers, pet clothing, pet leashes, and pet collars, Cl. 18

Toy boxes and chests, pillows and seat cushions; portable and folding stadium seats and cushions; non-metal and non-leather key rings; non-metal and non-leather key chains, tags and fobs; picture frames; hand-held mirrors; roller shades for windows with suction cups; magazine caddies; wall plaques made of wood, wall plaques made of plastic; soft sculpture wall decorations; non-metal reusable bottle caps; non-metal clips for tablecloths; wooden signboards, decorative mobiles; steel furniture; recliners, chairs and stools; tables; portable and folding sports seats and stools; furniture; juvenile furniture; bedroom furniture; clothes hangers and coat hangers; non-metal trophy cups; bean bag chairs; non-metal coat racks; non-metal stands for holding and displaying various types of balls; dividers for drawers; plastic figurines; plastic pet identification tags; sleeping bags; wood boxes; furniture chests; gift package decorations made of plastic; plastic flags; plastic novelty license plates; plastic name badges; non-metal name plates, Cl. 20

Entertainment and educational services in the nature of ongoing television and radio programs in the field of basketball and rendering live basketball games and basketball exhibitions; the production and distribution of radio and television shows featuring basketball games, basketball events and programs in the field of basketball; conducting and arranging basketball clinics and camps, coaches clinics and camps, dance team clinics and camps and basketball games; entertainment services in the nature of personal appearances by a costumed mascot or dance team at basketball games and exhibitions, clinics, camps, promotions, and other basketball-related events, special events and parties; fan club services; entertainment services, namely providing a website featuring multimedia material in the nature of television highlights, interactive television highlights, video recordings, video stream recordings, interactive video highlight selections, radio programs, radio highlights, and audio recordings in the field of basketball; providing news and information in the nature of statistics and trivia in the field of basketball; on-line non-downloadable games, namely, computer games, video games, interactive video games, action skill games, arcade games, adults' and children's party games, board games, puzzles, and trivia games; electronic publishing services, namely, publication of magazines, guides, newsletters,

**Mark, Appln. No.,  
Filing Date, Filing Basis**



(The mark consists of the wording "TORONTO RAPTORS" and the stylized design of a basketball and claw all appearing within a circle; Color is not claimed as a feature of the mark; "TORONTO" disclaimed.)  
Appln. No. 86480507  
Filing Date: December 15, 2014  
Filing Basis: Intent-to Use,  
Trademark Act § 1(b)



(The mark consists of the wording "TORONTO RAPTORS" and the stylized design of a basketball and claw all appearing within a circle; Color is not claimed as a feature of the mark; "TORONTO" disclaimed.)  
Appln. No. 86480488  
Filing Date: December 15, 2014  
Filing Basis: Intent-to Use,  
Trademark Act § 1(b)



(The mark consists of the wording "TORONTO RAPTORS" and the stylized design of a basketball and claw all appearing within a circle; Color is not claimed as a feature of the mark; "TORONTO" disclaimed.)  
Appln. No. 86480463  
Filing Date: December 15, 2014  
Filing Basis: Intent-to Use,  
Trademark Act § 1(b)

**Goods/Services**

coloring books, and game schedules of others on-line through the Internet, all in the field of basketball; providing an online computer database in the field of basketball, Cl. 41

Audio broadcasting; cable television broadcasting; radio broadcasting; subscription television broadcasting; television broadcasting; video broadcasting; web-casting services in the nature of providing on-line chat rooms and on-line interactive chat rooms with guests for transmission of messages among computer users concerning the field of basketball; broadcasting programs over the internet; providing on-line electronic bulletin boards for transmission of messages among computer users concerning the field of basketball; providing multiple-user access to a global computer information network for the purpose of participating in interactive polling in the field of basketball; wireless communications services, namely, transmission of graphics to mobile telephones; wireless electronic transmission of voice signals, data, facsimiles, images and information; wireless broadband communications services, Cl. 38

Retail store services, computerized on-line retail store services, online ordering services, electronic retail store services via computer, and electronic mail order catalog services, all featuring an array of basketball-themed merchandise; promoting the goods and services of others by arranging for sponsors to affiliate these goods and services with a basketball program; promoting the sale of goods and services of others through the distribution of promotional contests provided over the internet; conducting public opinion poll surveys and public opinion poll surveys in the field of basketball for non-business, non-marketing purposes over the internet, Cl. 35

Toys, games and sporting goods, namely, basketballs, golf balls, playground balls, sports balls, rubber action balls and foam action balls, plush balls for games, plastic balls for games, basketball nets, basketball backboards, miniature basketball backboards, pumps for inflating basketballs and needles therefore; golf clubs, golf bags, golf putters, golf accessories, namely, divot repair tools, tees, ball markers, golf bag covers, club head covers, golf gloves, golf ball sleeves, golf putting greens; billiard cue racks, billiard balls, billiard ball racks, dart board cabinets, electronic basketball table top games, basketball table top games, basketball board games, action skill games, adult's and children's party games, trivia information games and electronic video arcade game machines, basketball kit comprised of a net and whistle, dolls, decorative dolls, collectible dolls, toy action figures, bobblehead action figures, stuffed toys, plush toys, jigsaw puzzles, toy building blocks, Christmas tree ornaments and Christmas stockings; toy vehicles in the nature of cars, trucks, trains and vans, all containing basketball themes, novelty foam toys in the shapes of fingers and trophies, toy trophies, playing cards, card games, toy noisemakers, pet toys; beach toys, namely, beach balls, inflatable balls, toy pails, toy shovels, sand toys, sand box toys, water-squirting toys; pool accessories, namely, swim floats, pool floats, toy water

**Mark, Appln. No.,  
Filing Date, Filing Basis**



(The mark consists of the wording "TORONTO RAPTORS" and the stylized design of a basketball and claw all appearing within a circle; Color is not claimed as a feature of the mark; "TORONTO" disclaimed.)  
Appln. No. 86480434  
Filing Date: December 15, 2014  
Filing Basis: Intent-to Use,  
Trademark Act § 1(b)



(The mark consists of the wording "TORONTO RAPTORS" and the stylized design of a basketball and claw all appearing within a circle; Color is not claimed as a feature of the mark; "TORONTO" disclaimed.)  
Appln. No. 86480405  
Filing Date: December 15, 2014  
Filing Basis: Intent-to Use,  
Trademark Act § 1(b)



(The mark consists of the wording "TORONTO RAPTORS" and the stylized design of a basketball and claw all appearing within a circle; Color is not claimed as a feature of the mark; "TORONTO" disclaimed.)  
Appln. No. 86480388  
Filing Date: December 15, 2014  
Filing Basis: Intent-to Use,  
Trademark Act § 1(b)

**Goods/Services**

rafts, foam floats, swim rings, pool rings, foam rings, body boards, surf boards, swim fins, surf fins, arm floats and water wing swim aids, all for recreational use; volleyball game kits comprised of ball, net, sidelines and whistle, and water polo game kits comprised of ball, net and whistle; decorative cloth wind socks; miniature stadium reproductions, namely, small toy plastic models of a stadium; snow globes; video game machines for use with television and video game hand held controllers for use with console video gaming systems, Cl. 28

Clothing, namely, hosiery, footwear, basketball shoes, basketball sneakers, slippers, T-shirts, shirts, polo shirts, sweatshirts, sweatpants, pants, tank tops, jerseys, shorts, pajamas, sport shirts, rugby shirts, sweaters, belts, ties, nightshirts, hats, caps, visors, warm-up suits, warm-up pants, warm-up tops/shooting shirts, jackets, wind resistant jackets, parkas, coats, baby bibs not of paper, head bands, wrist bands, aprons, undergarments, boxer shorts, slacks, ear muffs, gloves, mittens, scarves, woven and knit shirts, jersey dresses, dresses, cheerleading dresses and uniforms, swim wear, bathing suits, swimsuits, bikinis, tankinis, swim trunks, bathing trunks, board shorts, wet suits, beach cover-ups, bathing suit cover-ups, bathing suit wraps, sandals, beach sandals, beach hats, sun visors, swim caps, bathing caps, novelty headwear with attached wigs, Cl. 25

Cloth banners, cloth wall hangings, cloth and fabric pennants; bed, bath and household linens, sheets, blankets, comforters, curtains, draperies, quilts, bedspreads, towels, pillow cases and shams, dish towels, golf towels, oven mitts, textile tablecloths and place mats, stadium blankets, throw blankets, cloth handkerchiefs, cloth flags, unfitted fabric furniture covers, shower curtains, Cl. 24

Beverage glassware, drinking glasses, shot glasses, mugs and cups made of ceramic, earthenware, glass and porcelain; beer mugs; drinking glasses, namely, tumblers; plastic cups, wastepaper baskets, plastic water bottles sold empty, stainless steel water bottles sold empty, bowls, plates, beverage stirrers, jugs, decorative and commemorative plates, glass jars, grill covers, portable beverage coolers, coasters not of paper and not being of table linen, lunch boxes, bottle openers, salt and pepper shakers, drinking flasks, insulating sleeve holders for bottles, insulating sleeve holders for beverage cans, cookie tins, drinking straws, piggy banks, Cl. 21

NBA Properties, Inc.'s Opposed Applications in Opposition No. **91226092**

**Mark, Appln. No.,  
Filing Date, Filing Basis**



(The mark consists of a star with claw marks; Color is not claimed as a feature of the mark.)

Appln. No. 86641420

Filing Date: May 26, 2015

Filing Basis: Intent-to Use,

Trademark Act § 1(b)

**Goods/Services**

Clothing, namely, hosiery, footwear, basketball shoes, basketball sneakers, slippers, T-shirts, shirts, polo shirts, sweatshirts, sweatpants, pants, tank tops, jerseys, shorts, pajamas, sport shirts, rugby shirts, sweaters, belts, ties, nightshirts, hats, caps, visors, warm-up suits, warm-up pants, warm-up tops/shooting shirts, jackets, wind resistant jackets, parkas, coats, baby bibs not of paper, head bands, wrist bands, aprons, undergarments, boxer shorts, slacks, ear muffs, gloves, mittens, scarves, woven and knit shirts, jersey dresses, dresses, cheerleading dresses and uniforms, swim wear, bathing suits, swimsuits, bikinis, tankinis, swim trunks, bathing trunks, board shorts, wet suits, beach cover-ups, bathing suit cover-ups, bathing suit wraps, sandals, beach sandals, beach hats, sun visors, swim caps, bathing caps, novelty headwear with attached wigs, Cl. 25



(The mark consists of a star with claw marks; Color is not claimed as a feature of the mark.)

Appln. No. 86641438

Filing Date: May 26, 2015

Filing Basis: Intent-to Use,

Trademark Act § 1(b)

Entertainment and educational services in the nature of ongoing television and radio programs in the field of basketball and rendering live basketball games and basketball exhibitions; the production and distribution of radio and television shows featuring basketball games, basketball events and programs in the field of basketball; conducting and arranging basketball clinics and camps, coaches clinics and camps, dance team clinics and camps and basketball games; entertainment services in the nature of personal appearances by a costumed mascot or dance team at basketball games and exhibitions, clinics, camps, promotions, and other basketball-related events, special events and parties; fan club services; entertainment services, namely, providing a website featuring multimedia material in the nature of television highlights, interactive television highlights, video recordings, video stream recordings, interactive video highlight selections, radio programs, radio highlights, and audio recordings in the field of basketball; providing news and information in the nature of statistics and trivia in the field of basketball; on-line non-downloadable games, namely, computer games, video games, interactive video games, action skill games, arcade games, adults' and children's party games, board games, puzzles, and trivia games; electronic publishing services, namely, publication of magazines, guides, newsletters, coloring books, and game schedules of others on-line through the Internet, all in the field of basketball; providing an online computer database in the field of basketball, Cl. 41

NBA Properties, Inc.'s Opposed Application in Opposition No. **91228458**

**Mark, Appln. No.,  
Filing Date, Filing Basis**



(The mark consists of a banner with a star and the word "TO" and number "16"; Within the star are three jagged marks representing talon tracks; Color is not claimed as a feature of the mark.)

**Goods/Services**

Entertainment and educational services in the nature of ongoing television and radio programs in the field of basketball and rendering live basketball games and basketball exhibitions; the production and distribution of radio and television shows featuring basketball games, basketball events and programs in the field of basketball; conducting and arranging basketball clinics and camps, coaches clinics and camps, dance team clinics and camps and basketball games; entertainment services in the nature of personal appearances by a costumed mascot or dance team at basketball games and exhibitions, clinics, camps, promotions, and other basketball-related events, special events and parties; fan club services; entertainment services, namely,

Appln. No. 86641393  
Filing Date: May 26, 2015  
Filing Basis: Intent-to Use,  
Trademark Act § 1(b)

providing a website featuring multimedia material in the nature of television highlights, interactive television highlights, video recordings, video stream recordings, interactive video highlight selections, radio programs, radio highlights, and audio recordings in the field of basketball; providing news and information in the nature of statistics and trivia in the field of basketball; on-line non-downloadable games, namely, computer games, video games, interactive video games, action skill games, arcade games, adults' and children's party games, board games, puzzles, and trivia games; electronic publishing services, namely, publication of magazines, guides, newsletters, coloring books, and game schedules of others on-line through the Internet, all in the field of basketball; providing an online computer database in the field of basketball. Cl. 41

## Appendix 2

### Monster Energy Company's Asserted Registered Trademarks/Service Marks

Mark, Reg. No., Reg. Date	Goods/Services	Asserted in Opp. No(s).
 (The mark consists of a stylized letter M in the form of a claw; Color is not claimed as a feature of the mark.) Reg. No. 4051650 Issued: November 8, 2011	Clothing, namely, t-shirts, hooded shirts and hooded sweatshirts, sweat shirts, jackets, pants, bandanas, sweat bands and gloves; headgear, namely hats and beanies, Cl. 25	91222422 91222445 91226092 91228458
 (Color is not claimed as a feature of the mark.) Reg. No. 2903214 Issued: November 16, 2004	Drinks, namely, carbonated soft drinks, carbonated drinks enhanced with vitamins, minerals, nutrients, amino acids and/or herbs, carbonated and non-carbonated energy or sports drinks, fruit juice drinks having a juice content of 50% or less by volume that are shelf stable, [ <del>and water;</del> ] *but excluding perishable beverage products that contain fruit juice or soy, whether such products are pasteurized or not.*, Cl. 32	91222422 91222445 91226092 91228458
 (The mark consists of the letter "m" in the form of a claw; Color is not claimed as a feature of the mark.) Reg. No. 3434821 Issued: May 27, 2008	Nutritional supplements, Cl. 5	91222422 91222445 91226092 91228458
 (The mark consists of the letter "m" in the form of a claw; Color is not claimed as a feature of the mark.) Reg. No. 3434822 Issued: May 27, 2008	Non-alcoholic beverages, namely, energy drinks, excluding perishable beverage products that contain fruit juice or soy, Cl. 32	91222422 91222445 91226092 91228458
 (The mark consists of the letter "M" in the form of a claw; Color is not claimed as a feature of the mark.) Reg. No. 3963668 Issued: May 17, 2011	Stickers; sticker kits comprising stickers and decals; decals; posters, Cl. 16	91222422 91222445 91226092 91228458
	All purpose sport bags; all-purpose carrying bags; backpacks; duffel bags, Cl. 18	91222422 91222445 91226092

Mark, Reg. No., Reg. Date	Goods/Services	Asserted in Opp. No(s). 91228458
<p>(The mark consists of a stylized letter “M” in the form of a claw; Color is not claimed as a feature of the mark.) Reg. No. 3963669 Issued: May 17, 2011</p>	<p>Promoting goods and services in the sports, motorsports, electronic sports, and music industries through the distribution of printed, audio and visual promotional materials; promoting sports and music events and competitions for others, Cl. 35</p>	<p>91222422 91222445 91226092 91228458</p>
 <p>(The mark consists of the letter “M” in the form of a claw; Color is not claimed as a feature of the mark.) Reg. No. 4721432 Issued: April 14, 2015</p>	<p>Sports helmets; video recordings featuring sports, extreme sports, and motor sports, Cl. 9</p>	<p>91222422 91222445 91226092 91228458</p>
 <p>(The mark consists of the letter “M” in the form of a claw; Color is not claimed as a feature of the mark.) Reg. No. 4011301 Issued: Aug. 16, 2011</p>	<p>Clothing, namely, t-shirts, hooded shirts and hooded sweatshirts, sweat shirts, jackets, pants, bandanas, sweat bands and gloves; headgear, namely, hats and beanies, Cl. 25</p>	<p>91222422 91222445 91226092 91228458</p>
 <p>(The mark consists of a stylized letter “M” and stylized words “MONSTER ENERGY”; Color is not claimed as a feature of the mark; “Energy” disclaimed.) Reg. No. 3908601 Issued: Jan. 18, 2011</p>	<p>Stickers; sticker kits comprising stickers and decals; decals, Cl. 16</p>	<p>91222422 91222445 91226092 91228458</p>
 <p>(The mark consists of a stylized letter “M” and stylized words “MONSTER ENERGY”; Color is not claimed as a feature of the mark; “Energy” disclaimed.) Reg. No. 3908600 Issued: January 18, 2011</p>		

Mark, Reg. No., Reg. Date	Goods/Services	Asserted in Opp. No(s).
 <p>(The mark consists of a stylized letter "M" and stylized words "MONSTER ENERGY"; Color is not claimed as a feature of the mark; Energy" disclaimed.) Reg. No. 3914828 Issued: February 1, 2011</p>	Sports helmets, Cl. 9	91222422 91222445 91226092 91228458
 <p>(The mark consists of a stylized letter "M" and stylized words "MONSTER ENERGY"; Color is not claimed as a feature of the mark; "Energy" disclaimed.) Reg. No. 3923683 Issued: February 22, 2011</p>	All purpose sport bags; All-purpose carrying bags; Backpacks; Duffle bags, Cl. 18	91222422 91222445 91226092 91228458
 <p>(Color is not claimed as a feature of the mark; "Energy" disclaimed) Reg. No. 3134841 Issued: August 29, 2006</p>	Beverages, namely, carbonated soft drinks, carbonated soft drinks enhanced with vitamins, minerals, nutrients, amino acids and/or herbs, carbonated [ <del>and non carbonated</del> ] energy and sports drinks, fruit juice drinks having a juice content of 50% or less by volume that are shelf stable, [ <del>and aerated water, soda water and seltzer water,</del> ] but excluding perishable beverage products that contain fruit juice or soy, whether such products are pasteurized or not, Cl. 32	91222422 91222445 91226092 91228458
 <p>(The mark consists of a stylized letter "M" to the left of the stylized words "MONSTER ENERGY"; Color is not claimed as a feature of the mark.) Reg. No. 4332062 Issued: May 7, 2013</p>	Silicone wrist bands; Silicone bracelets; Jewelry, namely, bracelets and wristbands, Cl. 14	91222422 91222445 91226092 91228458
<p><del><b>M MONSTER ENERGY</b></del> Reg. No. <del>3134842</del> Issued: <del>August 29, 2006</del></p> <p>(Opposer's reliance on this registered mark withdrawn, per Opposer's</p>	<p><del>Beverages, namely, carbonated soft drinks, carbonated drinks enhanced with vitamins, minerals, nutrients, amino acids and/or herbs, carbonated [and non carbonated] energy or sports drinks, fruit juice drinks having a juice content of 50% or less by volume that are shelf stable, [and water,] but</del></p>	<p><del>91226092</del> <del>91228458</del></p>

**Mark, Reg. No.,  
Reg. Date**

Brief at 103 TTABVUE 14,  
n.1)

~~**M MONSTER ENERGY**~~

~~Reg. No. 3044314~~

~~Issued: January 17, 2006~~

**Goods/Services**

~~excluding perishable beverage products that contain fruit juice  
or soy, whether such products are pasteurized or not, Cl. 32~~

~~Nutritional supplements in liquid [and non liquid ] form, but  
excluding perishable beverage products that contain fruit juice  
or soy, whether such products are pasteurized or not, Cl. 5~~

**Asserted in  
Opp. No(s).**

~~91226092~~

~~91228458~~

(Opposer's reliance on  
this registered mark  
withdrawn, per Opposer's  
Brief at 103 TTABVUE 14,  
n.1)

Appendix 3

Maple Leaf Sports & Entertainment Ltd.'s Registered Trademarks Asserted on its Counterclaims in Opposition Nos. **91222422** and **91222445**

**Mark, Reg. No.,  
Reg. Date**



Reg. No. 2770504  
Issued: October 7, 2003

**Goods/Services**

Publications and printed matter, namely basketball trading cards, dance team trading cards, mascot trading cards, entertainment trading cards, stickers, decals, commemorative basketball stamps, post cards, paper place mats, note cards, memo pads, ball point pens, pencils, 3-ring binders, folders, wirebound notebooks, portfolio notebooks, unmounted and mounted photographs, posters, calendars, bumper stickers, book covers, gift wrapping paper, children's activity books, statistical books, guide books and reference books for basketball, magazines in the field of basketball, commemorative game programs, paper pennants, stationery, stationery-typed portfolios, and statistical sheets for basketball topics, newsletters and pamphlets in the field of basketball for distribution to the television and radio media, Cl. 16



Reg. No. 2751531  
Issued: August 19, 2003

Clothing, namely, hosiery, footwear, T-shirts, sweat shirts, sweatpants, pants, tank tops, jerseys, shorts, pajamas, sport shirts, rugby shirts, sweaters, belts, ties, nightshirts, hats, warm-up suits, jackets, parkas, coats, cloth bibs, head bands, wrist bands, aprons, boxer shorts, slacks, caps, ear muffs, and gloves, Cl. 25



Reg. No. 2757748  
Issued: April 13, 1994

Toys and sporting goods, namely, basketballs, golf balls, playground balls, sports balls, rubber action balls and foam action balls, basketball nets, basketball backboards, pumps for inflating basketballs and needle therefor, golf clubs, golf bags, computerized basketball table games, video game cartridges, basketball table top games, basketball board games, electronic video arcade game machines, basketball kit comprising of a basketball net and whistle, dolls, stuffed toys, jigsaw puzzles and Christmas tree ornaments, Cl. 28



Reg. No. 2754672  
Issued: April 13, 1994

Entertainment services in the nature of basketball games and basketball exhibitions rendered live and in stadia and through the media of radio and television broadcasts; mascot and dance teams performances; conducting and arranging basketball clinics, Cl. 41

Monster Energy Company's Trademark/Service Mark Registrations that Maple Leaf Sports & Entertainment Ltd. Seeks to Cancel on its Counterclaims in Opposition Nos. **91222422** and **91222445**

**Mark, Reg. No.,  
Reg. Date**



(The mark consists of a stylized letter M in the form of a claw; Color is not claimed as a feature of the mark.)

Reg. No. 4051650  
Issued: November 8, 2011

**Goods/Services**

Clothing, namely, t-shirts, hooded shirts and hooded sweatshirts, sweat shirts, jackets, pants, bandanas, sweat bands and gloves; headgear, namely hats and beanies, Cl. 25

**Mark, Reg. No.,  
Reg. Date**



(The mark consists of the letter "M" in the form of a claw; Color is not claimed as a feature of the mark.)

Reg. No. 3963668

Issued: May 17, 2011

**Goods/Services**

Stickers; sticker kits comprising stickers and decals; decals; posters, Cl. 16



(The mark consists of a stylized letter "M" in the form of a claw; Color is not claimed as a feature of the mark.)

Reg. No. 3963669

Issued: May 17, 2011

All purpose sport bags; all-purpose carrying bags; backpacks; duffel bags, Cl. 18



(The mark consists of the letter "M" in the form of a claw; Color is not claimed as a feature of the mark.)

Reg. No. 4721432

Issued: April 14, 2015

Promoting goods and services in the sports, motorsports, electronic sports, and music industries through the distribution of printed, audio and visual promotional materials; promoting sports and music events and competitions for others, Cl. 35



(The mark consists of the letter "M" in the form of a claw; Color is not claimed as a feature of the mark.)

Reg. No. 4011301

Issued: Aug. 16, 2011

Sports helmets; video recordings featuring sports, extreme sports, and motor sports, Cl. 9



(The mark consists of a stylized letter "M" and stylized words "MONSTER ENERGY"; Color is not claimed as a feature of the mark; "Energy" disclaimed.)

Reg. No. 3908601

Issued: Jan. 18, 2011

Clothing, namely, t-shirts, hooded shirts and hooded sweatshirts, sweat shirts, jackets, pants, bandanas, sweat bands and gloves; headgear, namely, hats and beanies, Cl. 25

**Mark, Reg. No.,  
Reg. Date**



MONSTER  
ENERGY

(The mark consists of a stylized letter "M" and stylized words "MONSTER ENERGY"; Color is not claimed as a feature of the mark; "Energy" disclaimed.)

Reg. No. 3908600

Issued: January 18, 2011

**Goods/Services**

Stickers; sticker kits comprising stickers and decals; decals, Cl. 16



MONSTER  
ENERGY

(The mark consists of a stylized letter "M" and stylized words "MONSTER ENERGY"; Color is not claimed as a feature of the mark; "Energy" disclaimed.)

Reg. No. 3914828

Issued: February 1, 2011

Sports helmets, Cl. 9



MONSTER  
ENERGY

(The mark consists of a stylized letter "M" and stylized words "MONSTER ENERGY"; Color is not claimed as a feature of the mark; "Energy" disclaimed.)

Reg. No. 3923683

Issued: February 22, 2011

All purpose sport bags; All-purpose carrying bags; Backpacks; Duffle bags, Cl. 18



(The mark consists of a stylized letter "M" to the left of the stylized words "MONSTER ENERGY"; Color is not claimed as a feature of the mark.)

Reg. No. 4332062

Issued: May 7, 2013

Silicone wrist bands; Silicone bracelets; Jewelry, namely, bracelets and wristbands, Cl. 14