

This Opinion is Not a
Precedent of the TTAB

Oral Hearing: July 17, 2019

Mailed: September 8, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Brothers Franchising & Development, LLC

v.

Three Brothers Brewing, LLC

—————
Opposition No. 91232361
—————

Laura L. Myers, Cynthia A. Moyer and John C. Pickerill of Fredrikson &
Byron, P.A., for Brothers Franchising & Development, LLC.

Elizabeth S. Skilling and Robert F. Friedman of Harman Claytor Corrigan &
Wellman, for Three Brothers Brewing, LLC.

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Before Cataldo, Taylor and Dunn,
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Three Brothers Brewing, LLC (“Applicant”) has filed an application seeking
registration on the Principal Register of the standard character mark BROTHERS

CRAFT BREWING (CRAFT BREWING disclaimed), for “Beer, ale, lager, stout, porter, shandy” in Class 32.¹

Brothers Franchising & Development, LLC (“Opposer”) has opposed registration of Applicant’s mark on the ground of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on its claim of priority and likelihood of confusion with the following registered marks:²

Registration No.	Mark	Goods/Services
4738963 ³	BROTHERS (standard characters)	Bar and restaurant services (Class 43)
4029137 ⁴	BROTHERS BAR & GRILL (standard characters) [“BAR & GRILL” disclaimed]	Bar and restaurant services (Class 43)
2644084 ⁵	 [“EST. 1967” disclaimed]	Bar and restaurant services (Class 42)

¹ Application Serial No. 86517894 was filed on January 29, 2015, and is based upon Applicant’s bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

² 1 TTABVUE. TTABVUE refers to the Board’s electronic docket. Citations in this opinion are to the TTABVUE docket entry number and, where applicable, the electronic page number where the document appears. For material or testimony that has been designated confidential, the TTABVUE docket entry number where such material or testimony is located is referenced.

³ Issued May 19, 2015.

⁴ Issued September 20, 2011; Section 8 & 15 affidavits, accepted and acknowledged.

⁵ Issued October 9, 2002; renewed.

Registration No.	Mark	Goods/Services
2644083 ⁶	BROTHERS EST. 1967 (typed format ⁷) [“EST. 1967” disclaimed]	Bar and restaurant services (Class 42 ⁸)
2414423 ⁹	 [“EST. 1967” and “BAR & GRILL” disclaimed]	Bar and restaurant services (Class 42)
2358395 ¹⁰	IT'S BROTHERS EST. 1967 (typed format) [“EST. 1967” disclaimed]	Bar and restaurant services (Class 42)

Opposer submitted with its Notice of Opposition copies of registration certificates of its pleaded registrations, along with electronic copies thereof from the Trademark Status Document Retrieval (“TSDR”) database of the USPTO showing the then-current status and title of the registrations.¹¹

Opposer also asserts common law rights in the mark BROTHERS for beer since as early as 2011, and ownership of Application Serial No. 87290891 for the mark

⁶ Issued October 29, 2002; renewed.

⁷ Prior to November 2, 2003, “standard character” drawings were known as “typed” drawings. A typed mark is the legal equivalent of a standard character mark. TMEP § 807.03(i) (Oct. 2018).

⁸ Bar and restaurant services are presently classified in International Class 43.

⁹ Issued December 19, 2000; renewed.

¹⁰ Issued June 13, 2000, renewed.

¹¹ 1 TTABVUE 14-27.

BROTHERS, with a filing date of January 5, 2017 and claiming a date of first use in commerce of December 31, 2011, for use in connection with beer. Not. of Opp. ¶¶ 3 and 4.¹²

Applicant, in its answer, denies the salient allegations in the notice of opposition.¹³

I. Opposer's Request for Judicial Notice

Before turning to the merits of the appeal, we address “Opposer’s Request for Judicial Notice.” By that request, Opposer asks that the Board take judicial notice of the non-precedential final decision issued in connection with Opposition No. 91227068, another proceeding to which Opposer (but not Applicant) is a party. Applicant objects and moves to strike the request, arguing that “an unrelated TTAB decision is not the proper type of ‘fact’ that is properly subject to judicial notice” and that that decision was based, in large part, on identical services.”

Not only is the decision not a “fact” that is subject to judicial notice,¹⁴ the Board does not take judicial notice of USPTO records, including prior decisions that reside

¹² 1 TTABVUE 8. A status copy of the application taken from the TSDR data base is attached to the notice of Opposition. *Id.* at 42-43.

¹³ 6 TTABVUE. In ¶¶ 15-20 of the Answer, Applicant makes various allegations which are in the nature of amplifications of its denials, and we construe them as such. *See generally* TBMP § 311.02(d). In addition, Paragraph 21 thereof states: “BCB reserves its rights [sic] amend its answer to reflect defenses supported by the evidence.” By this statement, Applicant attempts to reserve the right to assert valid defenses in this proceeding. Such a statement is not an affirmative defense but merely an advisory statement that Applicant may amend its pleading at some future date. A defendant cannot reserve unidentified defenses since it does not provide a plaintiff fair notice of such defenses. We accordingly give no further consideration to Paragraph 21.

¹⁴ “The only kind of fact that may be judicially noticed by the Board is a fact that is ‘not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’” TRADEMARK TRIAL AND APPEAL

therein. *Cf. N.J. Inst. of Tech. v. Medjet, Inc.*, 47 Fed. Appx. 921, 927 (Fed. Cir. 2002) (in a patent case, court declined to take judicial notice of the decisions and orders entered in a prior state court action); *Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290, 1293 (TTAB 1986) (Board refused to take judicial notice of petitioner's pleaded, and rejected, application for purposes of establishing petitioner's statutory entitlement to a cause of action); *Wright Line Inc. v. Data Safe Services Corp.*, 229 USPQ 769, 770 n.5 (TTAB 1985) ("Board does not take judicial notice either of applications (or registrations) which reside in the Office, or of papers which may appear therein"). Accordingly, Opposer's motion is denied.

We add that we are thoroughly familiar with the decisions the Board issues. We also point out that while parties may cite to non-precedential decisions, such decisions are not binding on the Board. *In re Constr. Research & Tech. GmbH*, 122 USPQ2d 1583, 1585 n.6 (TTAB 2017) ("Board decisions which are not designated as precedent are not binding on the Board, but may be cited and considered for whatever persuasive value they may hold."); *In re Fiat Grp. Mktg. & Corporate Commc'ns S.p.A.*, 109 USPQ2d 1593, 1596 n.6 (TTAB 2014); *In re Procter & Gamble Co.*, 105 USPQ2d 1119, 1121 (TTAB 2012).

Moreover, as is often noted by the Board and the courts, each case must be decided on its own merits. The determination of registrability of a mark in another case does not control the merits in the case now before us. *In re Nett Designs Inc.*, 236 F.3d

BOARD MANUAL OF PROCEDURE ("TBMP") Section 704.12 (2019), and the authorities cited therein, including Fed. R. Evid. 201(b).

1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“[D]ecisions regarding other registrations do not bind either the agency or this court.”); *see also*, *In re Kent-Gamebore Corp.*, 59 USPQ2d 1373 (TTAB 2001); *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001).

II. The Record

As an initial matter, the parties stipulated that documents produced by Applicant after April 24, 2018, Bates numbered BCB000356-BCB000384, are authentic and can be submitted by notice of reliance.¹⁵

The record in this case consists of the pleadings and, by rule, the file of Applicant’s application. Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1). As noted above, also of record are copies of Opposer’s pleaded registrations obtained from the TSDR database submitted with Opposer’s Notice of Opposition.

During the assigned testimony periods, the parties submitted the following:

Opposer’s Evidence:

- Opposer’s Notices of Reliance on (a) the discovery deposition of Applicant, with exhibits (submitted in redacted form and as a confidential filing); (b) by stipulation, documents produced by Applicant (referenced in detail at footnote 15); (c) Applicant’s supplemental answers to Opposer’s first set of

¹⁵ 15 TTABVUE. These documents, designated as confidential and redacted in their entirety, were submitted as Exh. B. to Opposer’s 4th Notice of Reliance, 22 TTABVUE 3-31. The non-redacted copies were submitted at 20 TTABVUE. As previously noted, TTABVUE is the Board’s electronic docket. In lieu of a party’s internal docketing system, because the Board primarily uses TTABVUE in reviewing evidence, it prefers that citations to non-confidential parts of the record include the TTABVUE docket entry number and the TTABVUE page number. For material or testimony that has been designated confidential and which does not appear on TTABVUE, the TTABVUE docket entry number where such material or testimony is located should be included in any citation.

interrogatories; and (d) Applicant's answers to Opposer's second set of interrogatories

- Testimony declaration, with exhibits, of Tony DeSalvo, Opposer's Chief Operating Officer (DeSalvo decl.)
- Rebuttal testimony declaration, with exhibits, of Tony DeSalvo (DeSalvo rebuttal decl.)

Applicant's Evidence:

- Applicant's Notice of Reliance on (a) Opposer's answers to Applicant's first set of interrogatories, with certain documents; (b) Opposer's answers to Applicant's second set of interrogatories; (c) third-party registrations
- Testimony deposition, with exhibits, of Anthony John [Tony] DeSalvo (DeSalvo test.)¹⁶

III. Entitlement to Statutory Cause of Action¹⁷ and Priority

To establish entitlement to a statutory cause of action under Sections 13 or 14 of the Trademark Act, a plaintiff must demonstrate 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 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d

¹⁶ Anthony John DeSalvo is identified in other proceeding filings as Tony DeSalvo.

¹⁷ Our decisions have previously analyzed the requirements of Section 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of "standing." Mindful of the Supreme Court's direction in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014), we now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable.

1023, 1025 (Fed. Cir. 1999). Opposer's entitlement to oppose registration of Applicant's mark is established by its six pleaded registrations, properly made of record with its Notice of Opposition, which the record shows to be valid and subsisting, and owned by Opposer. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 (TTAB 2015). Because Opposer's pleaded registrations are properly of record, priority is not in issue in the opposition with respect to those marks for the services listed therein. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

For the sake of economy, and because of the presumptions accorded under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), we focus our analysis of the issue of likelihood of confusion between Applicant's mark and the marks in Registration No. 4738963 for BROTHERS and Registration No. 4029137 for BROTHERS BAR AND GRILL (BAR AND GRILL disclaimed), both in standard characters and both for "bar and restaurant services." Because the marks in the other pleaded registration feature additional points of difference from Applicant's mark, if the opposition cannot be sustained on the basis of Registration Nos. 4738963 and 4029137, it could not be sustained on the basis of the other pleaded registered marks. *See, e.g., In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).¹⁸

¹⁸ In fact, the pleaded registrations are sufficient to support the claim and, consequently, we do not reach the issue of whether Opposer has established prior common law rights in the mark BROTHERS for beer. Nor do we reach the issues of whether Applicant's affirmative defense that Opposer abandoned its common law use of BROTHERS in connection with beer was tried by consent. We hasten to add that our decision would be the same if we had considered these issues.

IV. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019) (Board considers each *DuPont* factor for which there is evidence and argument). When analyzing these factors, the overriding concern is not only to prevent buyer confusion as to the source of the goods and services, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

As noted, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973) (internal citations removed). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors, and the other *DuPont* factors for which there is evidence and argument, are discussed below.

A. Strength of the Pleaded Mark

We first examine the strength of Opposer's marks to determine the scope of protection which it is accorded. The strength of a mark rests on 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. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)). In determining the strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition. *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014); see also *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 fifth *DuPont* factor, the "fame" or strength of the prior mark, and the sixth *DuPont* factor, the number and nature of similar marks in use for similar goods, *DuPont*, 177 USPQ at 567, may be considered in tandem to determine the strength of Opposer's mark and the scope of protection to which it is entitled. *Bell's Brewery, Inc.*, 125 USPQ2d at 1345.

Opposer maintains that its marks are well-known, and argues that:

As a result of Opposer's longstanding use and investment in its BROTHERS marks, consumers have come to associate the BROTHERS marks with Opposer.¹⁹

¹⁹ 36 TTABVUE 19 (Opposer's brief, p. 14).

1. Commercial Strength

We first analyze the commercial strength of Opposer's marks. The commercial strength of a mark is not a binary factor in the context of a likelihood of confusion analysis. *Joseph Phelps v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d at 1734. Rather, likelihood of confusion fame "varies along a spectrum from very strong to very weak." See *Palm Bay v. Veuve Clicquot* 73 USPQ2d at 1694 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003)). Fame for likelihood of confusion purposes arises as long as a "significant portion of the relevant consuming public ... recognizes the mark as a source indicator." *Id.*

Commercial strength or fame "may be measured indirectly by the volume of sales and advertising expenditures in connection with the services 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 services identified by the marks; and the general reputation of the services." *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1056 (TTAB 2017); see also *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305-06 (Fed. Cir. 2002).

To demonstrate the commercial strength of its BROTHERS mark, Opposer primarily relies on the declaration, with exhibits, of its Chief Operating Officer Tony DeSalvo who states that:²⁰

- Opposer has used its BROTHERS marks in connection with restaurant services since 1990;

²⁰ 23 TTABVUE 2-3 (DeSalvo decl. ¶¶ 3 and 5).

- Opposer currently operates twenty restaurants in ten states across the United States, i.e., Indiana, Illinois, Ohio, Colorado, Wisconsin, Iowa, Kansas, Nebraska, Minnesota, and Kentucky;
- Over the past ten years, Opposer's restaurants have generated over \$288 million in revenues and Opposer has invested over \$6.5 million in advertising its restaurants under the BROTHERS marks.

Although Opposer has been using its mark in connection with restaurant services for more than twenty-five years as of the date of the DeSalvo declaration, that use has been confined primarily to the Midwest and a couple of adjacent states. Further, the testimony as to Opposer's sales and advertising figures, as Applicant notes, lacks context, i.e., how they translate into evidence of market share for Opposer's services. As the Federal Circuit has stated, "[r]aw numbers of product sales and advertising expenses may have sufficed in the past to prove fame of a mark, but raw numbers alone in today's world may be misleading ... Consequently, some context in which to place raw statistics is reasonable." *Bose Corp.* 63 USPQ2d at 1309. Because there is no context for Opposer's figures, we cannot gauge the relative level of success or the degree of exposure the relative public has had to Opposer's BROTHERS and BROTHER BAR & GRILL marks.

"In view of the extreme deference that is accorded to a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, we think that it is the duty of a plaintiff asserting that its mark is famous to clearly prove it." *Blue Man Prods. Inc. v. Tarmann*, 75 USPQ2d 1811, 1819 (TTAB 2005). Nonetheless, the evidence convinces us that Opposer's BROTHERS and BROTHERS BAR & GRILL marks have achieved some commercial success, just not a level that would require the highest level of protection.

Accordingly, we find that Opposer's marks fall in the mid-range of the commercial strength spectrum.

2. Inherent Strength

"In order to determine the conceptual strength of the cited mark, we evaluate its intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary (or fanciful) continuum of words." *In re Davia*, 110 USPQ2d 1810, 1815 (TTAB 2014). Opposer's marks BROTHERS and BROTHERS BAR & GRILL are entitled to a rebuttable presumption that they are inherently distinctive as evidenced by their registration on the Principal Register without claims of acquired distinctiveness under Section 2(f) of the Trademark Act. *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006). 15 U.S.C. §1057(b). Nonetheless, "evidence of third-party registrations [for the same or similar goods or services] is relevant to 'show the sense in which a mark is used in ordinary parlance,' ... that is, some segment that is common to both parties' marks may have 'a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.'" *Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millenium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (quoting *Juice Generation, Inc. v. GS Enters., LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015)); *see also In re I-Coat Co.*, 126 USPQ2d 1730, 1735 (TTAB 2018) (third-party registrations can be used to demonstrate that a term may have a commonly accepted meaning); *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1173 (TTAB 2011) (third-party registrations indicate term CLASSIC has suggestive meaning as applied to tobacco products).

As discussed below, we find that the arbitrary term BROTHERS forms the dominant commercial impression of Opposer's registered marks BROTHERS and BROTHERS BAR & GRILL.²¹ An arbitrary mark is a "known word used in an unexpected or uncommon way." *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004). See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (an arbitrary term is "conceptually strong as a trademark").

Applicant maintains that Opposer's BROTHERS mark is inherently weak and entitled to minimal protection. Applicant argues that "the term 'Brothers' is simply suggestive of businesses founded and/or operated by brothers or people who consider themselves brothers." In support of that position, Applicant has made of record a number of use-based registrations issued to third-parties for BROTHERS-formative marks primarily for beer.²²

²¹ 37 TTABVUE 22. We take judicial notice of the definition of "brothers" which is defined, in part, as:

1: a male who has the same parents as another or one parent in common with another

2: one related to another by common ties

3: a fellow member – used as a title for ministers in some evangelical denominations
merriam-webster.com/dictionaries/brothers, retrieved March 19, 2020. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006)

²² 28 TTABVUE 37-78. None of the third-party registrations are for bar and restaurant services and only three are for taproom services. However, because we have found beer to be related to Opposer's bar and restaurant services, we find the third-party registrations for beer and other alcoholic beverages pertinent to our analysis.

Opposer questions the probative value of the third-party registrations, arguing that Applicant did not provide evidence of use of the marks in commerce. Opposer is correct that these registrations are not evidence that the registered marks are in use on a commercial scale. *See In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016). Nor, consequently and as we make clear, do they show that consumers have become so used to seeing these registered marks in the market place that they have learned to distinguish among them by minor differences. *Id.*; *see also Sock It To Me, Inc.*, 202 USPQ2d 10611 at *9.

However, as noted, they may show that a term carries a descriptive or suggestive meaning. That is, similar to dictionary definitions, “third party registrations are relevant to prove that some segment of the composite marks which both contesting parties use has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation*, 115 USPQ2d at 1675 (quoting 2 McCarthy on Trademarks and Unfair Competition § 11:90 (4th ed. 2015)). We list the third-party registrations below:²³

²³ Unless otherwise specified, all of the listed registrations registered on the Principal Register. Also, we have not considered the cancelled registrations, Registration Nos. 4276141, 1710305, 5471201, 4172001, 3819327, and 38784252, which have no probative value. *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 109 USPQ2d 1949, 1956 n.9 (2014) (cancelled registrations are not probative), *vacated and remanded on other grounds*, 786 F.3d 960, 114 USPQ2d 1827 (Fed. Cir. 2015), *original decision aff'd*, *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d 1184 (TTAB 2017), *civil action filed sub nom Snyder's Lance, Inc. v. Frito-Lay N. Am., Inc.*, No. 3:17-CV-00652 (W.D.N.C. Nov. 6, 2017).

Similarly, the marks in Registration No. 4895562 () (BROTHA FROM ANOTHER MOTHER), and Registration No. 4880007 (YOU MUD, BRO?) do not include the term BROTHER(S), or its abbreviated form BROS., and have little probative value.

Registration No.	Mark	Goods/Services
661443		Fresh fruits, fresh melons
4882282	BASTARD BROTHERS BREWING COMPANY (Brewing Company disclaimed)	Beer
4734713	BEERDED BROTHERS BREWING (Brewing disclaimed)	Beer
5130595 (Supplemental Register)	BISSEL BROTHERS (Brothers disclaimed)	Beer
5161392	 BITTER BROTHERS BREWING CO. (Bitter and Brewing Co. disclaimed)	Beers; black beer; malt beer; malt liquor; pale beer
5161391	BITTER BROTHERS BREWING COMPANY (Bitter and Brewing Company disclaimed)	Beer; brewed malt-based alcoholic beverage in the nature of a beer; malt beer; malt liquor; pale beer
4470795	BLOOD BROTHERS	Non-alcoholic cocktail mixes
2208665	BOOTH BROS	Dairy products, namely, fluid milk, lowfat milk, skim milk
2208664	<i>Booth Bros</i>	Dairy products, namely, fluid milk, lowfat milk, skim milk
4845391	BROTHER BENJAMIN	Beer
5514866	BROTHER PERKIN'S BROWN ALE (Brown Ale disclaimed)	Beer
4555981	BROTHER THELONIOUS	Beer
5051630	BROTHERS	Alcoholic drinks except beers, namely, hard ciders, hard apple ciders, hard pear ciders, fruit flavored hard ciders, flavored hard ciders and hard ciders containing fruit juices
4487273	BURNING BROTHERS BREWING (Brothers and Brewing disclaimed)	Beer
4356725 (Registered under 2(f))	CHENEY BROTHERS (Brothers disclaimed)	Non-alcoholic fruit- and vegetable-juice beverages and wholesale distributorship services in the field of, among other things, beverages (in relevant part)
4189574 (Registered under 2(f))	CHIVAS BROTHERS	Alcoholic beverages except beers

Registration No.	Mark	Goods/Services
4949889	DRINK JUICE BRO (Juice disclaimed)	Fruit juice; vegetable juices; vegetable-fruit juices
4423780	DUTCH BROS. BLUE REBEL	Energy drinks
5492654	 (Beer Co. disclaimed)	Beer; clothing items; and taproom services
5498159	EAST BROTHER BEER CO. (Beer Co. disclaimed)	Beer; taproom services; clothing items
3361442 (Registered under 2(f))	GRIESEDIECK BROS.	Beer
5419307	HALF BROTHERS BREWING COMPANY (Brewing Company disclaimed)	Beer, taproom services; clothing items
4954150 (Registered under 2(f))	HANSON BROTHERS (Brothers disclaimed)	Beer
5281636	LAKE BROTHERS BEER COMPANY (Brothers Beer Company disclaimed)	Beer, ale, lager, stout, porter, shandy
4649180	O BROTHER WHERE ALDO	Beer
4273451	 (Juicery disclaimed)	Fruit juice; non-alcoholic fruit juice beverages, vegetable and vegetable- fruit juices
5556620	QUAFF BROTHERS	Beer
4483523	 [Imperial Red Ale and Brewing Company Warrenville IL disclaimed]	Ale
2070416	THE BREW BROTHERS	Beer
5027927	 (Trade Mark and Brothers Beer Co disclaimed)	Beer

Registration No.	Mark	Goods/Services
4560177	TWO BROTHERS BREWING CO. (Brewing Co. disclaimed)	Beer
2319407	 (Brewing Company disclaimed)	Beer

Of the thirty-two live registrations listed above, seven, i.e., Registration Nos. 661443, 2208664, 2280665, 4356725, 4949889, 4423780, and 4273451, cover goods that on the face of their identifications are not related to the beer/alcohol and restaurant and bar industries and, accordingly, have little, if any, probative value. *See i.am.symbolic*, 123 USPQ2d at 1751 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (the third-party registrations are of limited probative value because the goods identified in the registrations appear to be in fields which are removed from the goods at issue).

Of those third party registrations for related goods and services, the registered marks create commercial impressions distinct from Opposer's registered marks. The marks in Registration Nos. 4734713 (BEERDED BROTHERS BREWING), 4470795 (BLOOD BROTHERS), 5498159 (EAST BROTHER BEER CO), 4882282 (BASTARD BROTHERS BREWING COMPANY), 5556620 (QUAFF BROTHERS) and 4649180 (O BROTHER WHERE ALDO) do not share the religious or familial connotations of

the majority of the marks, and are of limited value because they have unique and distinct commercial impressions resulting from their wording.

The nineteen remaining registrations, save one, are for marks that include additional distinctive wording and other matter not present in Opposer's pleaded marks, including given and surnames that, when combined with the word BROTHER(S), contribute to their suggestive connotation. For example, the marks in Registration Nos. 4845391 (BROTHER BENJAMIN), 5514866 (BROTHER PERKIN'S BROWN ALE), and 4555981 (BROTHER THELONIOUS) have connotations of individuals in a religious order; and the marks in, for example, Registration Nos., 5130595 (BISEL BROTHERS), 4954150 (HANSON BROTHERS), and 3361442 (GRIESE DIECK BROS.) combine surnames with the word "BROTHERS" or its abbreviation "BROS.," and convey a connotation of particular related individuals. These third-party registrations tend to confirm Applicant's contention that the term "BROTHERS," particularly when combined with additional distinguishing and personifying matter not present in Opposer's pleaded marks, suggests a familial or otherwise affiliated, connotation. That is, the third-party marks are similar to each other. The question still remains whether Applicant's and Registrant's marks when viewed as a whole are confusingly similar.

The mark in Registration No. 5051060, BROTHERS, the only third-party mark that has no additional terms or other matter to contribute to its overall commercial impression, is the only mark that is as similar to Applicant's mark as are Opposer's pleaded marks. It is registered without any claim of acquired distinctiveness and

therefore is entitled to the 7(b) presumptions of inherent distinctiveness, as is and as noted above, Opposer's pleaded marks.

While as stated, the third-party registrations may show that the term BROTHERS, when combined with other distinctive matter, suggests that the providers of beer enjoy a familial or other relationship, they do not support the conclusion that the term BROTHERS, alone or combined with nondistinctive matter, is inherently weak. Considering both inherent and commercial strength, we find Opposer's marks BROTHERS and BROTHERS BAR & GRILL are entitled to the ordinary scope of protection given inherently distinctive marks.

We add that even if we found the scope of the cited registered marks to be narrowed based on Applicant's evidence, it would not change the result in this case, as even weaker marks may be entitled to protection against registration of very similar marks for related goods and services. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1401 182 USPQ 108, 109 (CCPA 1974) ("Confusion is confusion. The likelihood thereof is to be avoided, as much between 'weak' marks as between 'strong' marks, or as between a 'weak' and a 'strong' mark."); *see also i.am.symbolic*, 127 USPQ2d at 1636 n. 13.

B. The Marks

We next address the *DuPont* likelihood of confusion factor focusing on "the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay v. Veuve Clicquot*, 73 USPQ2d at 1692 (citing *DuPont*, 177 USPQ at 567). "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.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quotation omitted).

Because this factor is based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, there is nothing improper in assigning more or less weight to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Nat’l Data*, 224 USPQ at 751.

We find, on comparison, that Applicant’s mark BROTHERS CRAFT BREWING and Opposer’s marks BROTHERS and BROTHERS BAR & GRILL are similar in that all three include the term BROTHERS as the dominant or sole part of the marks. Neither the wording “CRAFT BREWING” in Applicant’s mark nor the wording “BAR & GRILL” in one of Opposer’s marks serves to distinguish the marks. The wording “CRAFT BREWING” has little to no source-indicating significance because it immediately describes a characteristic of Applicant’s beer and has been disclaimed.

Similarly, the wording “BAR & GRILL” simply describes the type of services recited in the registration and, it too, has been disclaimed. As such, this wording is entitled to less weight in our determination. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (descriptive terms are properly given less weight).

The significance of the word BROTHERS as the dominant element of Applicant’s mark and one of the cited marks is further reinforced by its position as the first word in those marks. *See Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). *See also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word). “[I]f the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral differences.” *In re Denisi*, 225 USPQ 624, 624 (TTAB 1985). The peripheral differences here are unquestionably descriptive and latter terms that, as noted, fail to distinguish the marks.

While, as Applicant points out, there are differences between the marks when viewed on a side-by-side basis, we find that when considered in their entirety, Applicant’s mark BROTHERS CRAFT BREWING and Opposer’s BROTHERS and BROTHER BAR & GRILL marks are similar in appearance, sound, connotation and

commercial impression due to the shared term, BROTHERS, and that similarity outweighs the differences in appearance and sound identified by Applicant.

The *DuPont* factor of the similarity of the marks thus favors a finding of likelihood of confusion.

C. Relatedness of the Goods and Services – “Something More”

We now consider the second *DuPont* factor which “considers ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.’” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567); *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014). It is not necessary that the goods and services be identical or competitive, or even that they move in the same channels of trade, to support a finding of likelihood of confusion. Rather, it is sufficient that the goods and services are related in some manner, or that the circumstances surrounding their marketing are such that they would or could be encountered by the same persons in situations that would give rise, because of the similarity of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods and services. *Coach Servs.*, 101 USPQ2d at 1721; *Thor Tech*, 90 USPQ2d at 1635; *Monsanto Co. v. Enviro-Chem Corp.*, 199 USPQ 590, 595-96 (TTAB 1978).

Here, we look to determine the relationship, if any, between Applicant’s “beer, ale, lager, stout, porter, shandy”²⁴ with Registrant’s “bar and restaurant services.”

Applicant, citing *Coors Brewing, supra*, which relies on *Jacobs v. International Multifoods Corp.*, 668 F.2d 1234, 1235 (CCPA 1982), maintains that “[t]he question of whether restaurant services and beer are sufficiently related as to cause the likelihood of confusion is subject to a well-established requirement that the Opposer show ‘something more.’”²⁵ Applicant argues:

Opposer is incorrect when it suggests that, notwithstanding the well-established requirement set forth by *Jacobs* and *Coors* that it need to demonstrate “something more,” it is somehow not required to do so because it included the term “bar services” in its registrations. Opposer’s Brf. at 11-12. The very premise of *Coors* is that restaurants serve beer. The fact that Opposer uses the word “bar” in its registration affects neither the basis nor applicability of the “something more” requirement.

(Applicant’s brief, p. 8).²⁶

By contrast, Opposer asserts that Applicant misunderstands the decision in *Coors Brewing* because that case involved an ex parte appeal in which the owner of the registered mark had no opportunity to introduce any evidence surrounding use of its

²⁴ Both Applicant and Opposer focus their discussion on beer and we shall do the same. Notably, we need not find similarity as to each and every product listed in Applicant’s description of goods. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of goods in a particular class in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014).

²⁵ 37 TTABVUE 13.

²⁶ 37 TTABVUE 14.

mark, and the Board's evidence was based on abstract evidence regarding unrelated third-party trademarks. (Opposer's rebuttal brief, p. 10).²⁷ Unlike in that case, Opposer argues that in this case it has introduced evidence regarding the nature of the parties' use of their respective marks in commerce that establishes "something more." Opposer further argues that it "falls within the 'tiny percentage' [of restaurants who also serve as the source of beer] and is relying on its *own sales of private label beer* to demonstrate that 'something more' exists to support a finding that Opposer's bar and restaurant services are highly related to Applicant's beer." (*Id.* at 11-12).²⁸

We begin our analysis by pointing out that *Coors Brewing* and *Jacobs* both concerned the requirement to show relatedness through "something more" in the specific context of **restaurant** services on the one hand and food and beverage products on the other. The court explained in *Coors Brewing* that this requirement is based in part on the very large number of U.S. restaurants:

It is not unusual for restaurants to be identified with particular food or beverage items that are produced by the same entity that provides the restaurant services or are sold by the same entity under a private label. Thus, for example, some restaurants sell their own private label ice cream, while others sell their own private label coffee. But that does not mean that any time a brand of ice cream or coffee has a trademark that is similar to the registered trademark of some restaurant, consumers are likely to assume that the coffee or ice cream is associated with that restaurant. The *Jacobs* case stands for the contrary proposition, and in light of the very large number of restaurants in this country and the great variety in the

²⁷ 38 TTABVUE 15.

²⁸ 38 TTABVUE 17-18.

names associated with those restaurants, the potential consequences of adopting such a principle would be to limit dramatically the number of marks that could be used by producers of foods and beverages.

68 USPQ2d at 1064.

To determine whether confusion is likely to result from use of similar marks for food or beverage items and restaurant services, courts and the Board look for evidence of a “specific commercial relationship between [the goods] and restaurant services” that indicates consumers would be likely to believe an association exists between the specific food or beverage items involved in the proceeding and restaurant services. *In re Opus One*, 60 USPQ2d 1812, 1813-15 (TTAB 2001). For example, the Board has found the “something more” requirement to be met where an applicant’s mark made clear that its restaurant specialized in registrant’s type of goods. *See In re Golden Griddle Pancake House Ltd.*, 17 USPQ2d 1074 (TTAB 1990) (GOLDEN GRIDDLE PANCAKE HOUSE for restaurant services confusingly similar to GOLDEN GRIDDLE for table syrup); *In re Azteca Restaurant Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999) (AZTECA MEXICAN RESTAURANT for restaurant services confusingly similar to AZTECA for Mexican food items). The Board also found the requirement met where the registered mark was “a very unique, strong mark” and there was a commercial relationship between the goods (mustard) and restaurants. *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1469 (TTAB 1988) (no evidence of third-party use or registrations of marks containing the expression “Mucky Duck”); *see also Opus One*, 60 USPQ2d at 1813-15 (finding “something more” based on “strong

and arbitrary character of registrant’s OPUS ONE mark” and the fact that the record showed that registrant’s wines were actually sold in applicant's restaurant).

We begin our analysis by noting that Opposer’s recited services are not only restaurant services, but also **bar** services. While we do not find that the inclusion of “bar services” in Opposer’s recited bar and restaurant services, alone, establishes a commercial relationship between those services and Applicant’s beer and, as Applicant points out, the Board previously has required a showing of “something more” for “restaurant and bar services,”²⁹ the record in this case reflects that the respective goods and services are complementary and related. Before discussing the record in detail, we take judicial notice of the definition of “bar” which is defined, in part as: “5 b : a room or establishment where alcoholic drinks and sometimes food are served” and the definition of “beer,” defined, in part, as “1 : an alcoholic beverage usually made from malted cereal grain (such as barley), flavored with hops, and brewed by slow fermentation.”³⁰

The record shows that Opposer’s bar and restaurant services feature an extensive beer menu, and Applicant’s beer, while currently only distributed in Virginia, is sold to distributors for further sale and distribution in trade channels that include restaurants.³¹ Under these circumstances we find Applicant’s beer complementary to

²⁹ In that regard, Applicant cited to the unpublished decisions in *In re Tin Roof Brewing Co., LLC*, No. 86598212, 2017 WL 4154957 (TTAB Aug. 24, 2017) and *In re Iron Hill Brewery, LLC*, Serial No. 86682532, 2017 WL 3773113 (TTAB Jul. 28, 2017).

³⁰ Both definitions are taken from the Merriam-Webster online dictionary, www.merriam-webster.com, retrieved April 15, 2020.

³¹ 18 TTABUE. We note Applicant designated as confidential the broad trade channels in which its beer is distributed along with specific distribution information. While we treat the

Opposer's bar and restaurant services as it could be sold as a menu item in Opposer's BROTHERS and BROTHERS BAR & GRILL establishments.³²

In addition, the record shows the requisite "something more" to establish that beer and bar and restaurant services are related in this case. More particularly, the record confirms that Opposer's bar services comprise the most significant portion of Opposer's bar and restaurant services, both in the ratio of bar to restaurant services and in that the bar is a focal point in Applicant's establishments. Mr. DeSalvo, in his testimony deposition, particularly testifies as to Opposer's business model as follows:

So we -- even though we are based out of LaCrosse, Wisconsin and we've got, you know, many, many, many Brothers' beers here, we want to establish a relationship with the -- on a couple of levels with our guests. Our guests are anywhere between 21 and let's say 55 or 60. Right? And we will take, well, every market has a lot of similarities, you know, we know what works well with Brothers and what doesn't. We -- we want to be able to establish, say, for I will use the downtown Denver. Downtown Denver, don't hold me to this, but it's 20 miles away from our Lone Tree, Colorado location where these two beers were, right? But what we have got, the downtown Denver location will have guests that are very specific to downtown Denver, more urban, more metropolitan, where they will have a different set of likes and dislikes. Where Lone Tree, Colorado is more suburban and will have different likes and dislikes. So, we empower our management to establish a relationship with

specifics as confidential, we do not consider the broad trade channel categories to be so and have generally referred to them. *See Noble House Home Furnishings, LLC v. Floorco Enters., LLC*, 118 USPQ2d 1413, 1416 n.21 (TTAB 2016) (the Board must be able to discuss the record evidence in its opinions unless there is an overriding need for confidentiality). *Cf.* Trademark Rule 2.116(g), 37 C.F.R. 2.116(g) ("The Board may treat as not confidential that material which cannot reasonably be considered confidential, notwithstanding a designation as such by a party.").

³² While the record shows that there are geographic distinctions in where the parties are presently offering their respective goods and services, there are no geographic limitations in Applicant's application and the pleaded registrations.

those locations, and our model, typically 30 percent liquor, 30 percent food, and 25 percent on average is beer, we want to be able to give the guest what they want while being still true to our core brand.

DeSalvo test., pp. 49-51.³³ To reiterate, sales of beer account for approximately 25% of Opposer’s annual sales, and beer is prominently featured on the menus.³⁴ While Opposer does not have a BROTHERS-labeled beer on the menu of record, it uses the BROTHERS mark to identify its beverage selections. Moreover, the BROTHERS beverage menu features a selection of more than 45 beers. (DeSalvo decl., exh. 1; DeSalvo test., exh. 1).³⁵



³³ 32 TTABVUE 52-54.

³⁴ 29 TTABVUE 2, 5-6; (DeSalvo rebuttal decl. ¶¶ 2, 4, ext. A).

³⁵ 23 TTABVUE 7-8; 32 TTABVUE 93-94.

WHAT WE'RE TAPPIN'

Beer Name	Origin	ABV%	Reg	1/2	Full
Miller Lite	Milwaukee, WI	4.2	\$4.25	\$5.25	\$10.00
Crown Light	Golden, CO	4.2	\$4.25	\$5.25	\$10.00
Ball Light	St. Louis, MO	4.2	\$4.25	\$5.25	\$10.00
Budweiser	St. Louis, MO	5.0	\$4.25	\$5.25	\$10.00
Young's Lager	Pennsville, PA	4.4	\$4.25	\$5.25	\$10.00
Indiana Pale Ale					
Dogfish Head 40 Lizard	Milton, DE	6.8	\$5.00	\$6.50	\$13.00
Upland Dogfish	Bloomington, IN	6.8	\$5.00	\$6.50	\$13.00
Billy Two Handed	Kalamazoo, MI	7.8	\$5.00	\$6.50	\$13.00
Downside Lul'ute	Secaucus, NJ	7.2	\$5.50	\$7.00	\$13.50
Texas Rhapsody	Indianapolis, IN	7.8	\$5.50	\$7.00	\$13.50
Ballast Point Citradra Sculpta	San Diego, CA	7.8	\$5.50	\$7.00	\$13.50
Boonville All Day	Grand Rapids, MI	4.7	\$5.00	\$6.50	\$13.00
Import PA					
Two Brothers 1/2 Avo Ranger Truckster	Fort Collins, CO	6.8	\$5.50	\$7.00	\$13.50
Indiana Pale Ale					
San King Craft	Indianapolis, IN	5.6	\$5.00	\$6.50	\$13.00
Sierra Nevada Pale Ale	Chico, CA	5.9	\$5.00	\$6.50	\$13.00
Three Floyds New York	Marietta, GA	5.5	\$5.50	\$7.00	\$13.50
Sierra West 420 Extra Pale Ale	Atlanta, GA	5.7	\$5.00	\$6.50	\$13.00
Scottish Ale					
San King West Mix	Indianapolis, IN	5.3	\$5.00	\$6.50	\$13.00
Imperial					
San King West Mix					
Dogfish Head SeaQuench Ale	Milton, DE	4.8	\$5.00	\$6.50	\$13.00
Wheat/Wit/White					
111 Urban Wheat	Chicago, IL	4.2	\$5.00	\$6.50	\$13.00
Indy Cream	Kalamazoo, MI	5.8	\$5.00	\$6.50	\$13.00
Upland Wheat	Bloomington, IN	4.7	\$5.00	\$6.50	\$13.00
Blue Moon Belgian White	Golden, CO	5.4	\$5.00	\$6.50	\$13.00
Blue Moon Seasonal	Indianapolis, IN	5.3	\$5.00	\$6.50	\$13.00
Pilsner					
Prohibition Square Valkyrie's	Indianapolis, IN	5.8	\$5.00	\$6.50	\$13.00
Pilsnager					
San King Pilsner	Lawrence, Belgium	5.2	\$5.00	\$6.50	\$13.00
1848 Special	Mexico City, Mexico	4.4	\$5.00	\$6.50	\$13.00
Double/Triple Ale					
San King Double Cream Ale	Indianapolis, IN	5.3	\$5.00	\$6.50	\$13.00
Lager Ale					
Two Brothers Pilsner	Fort Collins, CO	5.2	\$5.00	\$6.50	\$13.00
Amber Lager					
San Antonio Boston Lager	Boston, MA	4.8	\$5.00	\$6.50	\$13.00
Das Eigel And Lager	Mexico City, Mexico	4.7	\$5.00	\$6.50	\$13.00
Four/Pinto					
Scott's Line Double Stout	Mid-Corwells, IN	5.3	\$5.00	\$6.50	\$13.00
Quinness	Dublin, Ireland	4.8	\$5.00	\$6.50	\$13.00
Big Waddy Boston Kettle	Seabrook, VT	7.2	\$5.00	\$6.50	\$13.00
Cider/Shandy/Port Beer					
Agony Orchard Cider Apple	Walpole, NH	5.8	\$5.00	\$6.50	\$13.00
18 Charly Beer Bar Cider	Paw, VT	5.7	\$5.50	\$7.00	\$13.50
Leaning Tower of Pilsner Shandy	Chippewa Falls, WI	4.2	\$5.00	\$6.50	\$13.00
Leaning Tower of Cider/Port Shandy					
Hardhead					
1848	Indianapolis, IN	4.5	\$5.00	\$7.00	\$13.50
Theater Beer Company	Berlin, VT	4.2	\$5.00	\$6.50	\$13.00

FEATURES

- QUICK APPS - GRAB A BITE TO EAT!

- \$6.25 Wisconsin Cheese Curds
- \$9.79 Nachos - Chili or Chicken
- \$7.59 Jumbo Potato Skins
- \$7.49 Firecracker Pies
- \$7.99 Cheese and Bacon
- \$8.79 Quesadilla - Beef, Chicken, or BBQ Chicken
- \$9.99 Boneless Wings

CLASSIC SUPPER CLUB COCKTAILS

Manhattan - \$10.00
 Southern Old Fashioned - \$10.00
 Tom Collins - \$10.00
 Moscow Mule - \$10.00
 Wisconsin Brager - \$10.00

BOTTLES

Bud Light	\$4.25	PBR 16oz Case	\$4.25
Budweiser	\$4.25	Cider	\$4.25
Crown Light	\$4.25	Smirnoff Ice	\$3.50
Miller Lite	\$4.25	Coke	\$3.50
Miller High Life	\$4.25	Heurkin	\$3.50
Mich Ultra	\$4.25	Red Bull Case	\$4.50
Reddy Apple Ale	\$4.25		

GRAPES BY THE GLASS

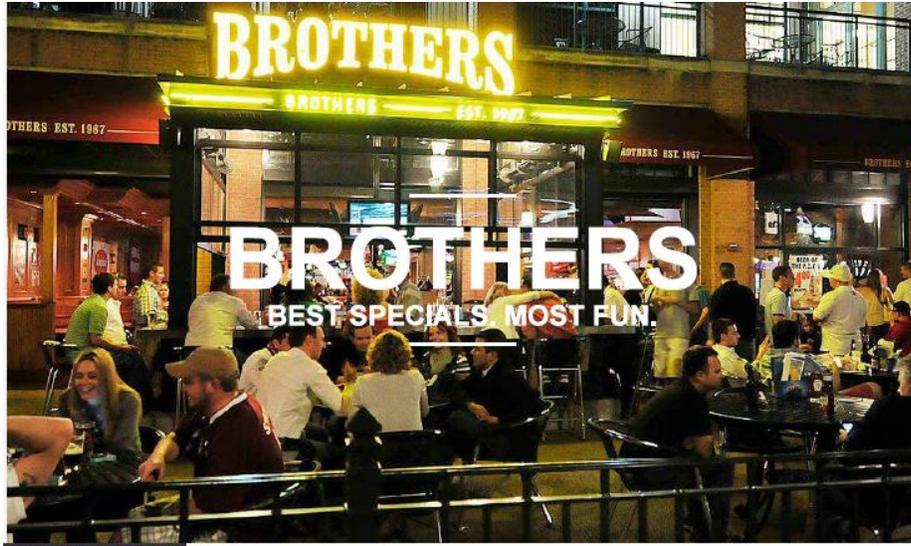
Color	Wine Name	Price	Wine Name	Price
RED	Jacob's Creek Cabernet	\$7	Beaulieu Vineyard Pinot	\$8
RED	Jacob's Creek Chardonnay	\$7	Beaulieu Vineyard Merlot	\$8
RED	Beaulieu Vineyard Chardonnay	\$8	Beaulieu Vineyard Merlot	\$8
RED	Beaulieu Vineyard Pinot Grigio	\$8	Beaulieu Vineyard Merlot	\$8
RED	Beaulieu Vineyard Pinot Noir	\$8	Beaulieu Vineyard Merlot	\$8
RED	Beaulieu Vineyard Pinot Noir	\$8	Beaulieu Vineyard Merlot	\$8
RED	Beaulieu Vineyard Pinot Noir	\$8	Beaulieu Vineyard Merlot	\$8
RED	Beaulieu Vineyard Pinot Noir	\$8	Beaulieu Vineyard Merlot	\$8

CLASSIC
Brother's Supper Club
COCKTAILS

Similarly, record images of Opposer's bar and restaurant establishments, a sampling of which is shown below, show that the bar area comprises a significant part and focal point of those establishments:³⁶



³⁶ 29 TTABVUE 3-4; 30 TTABVUE 3, 5, 50.



Further, Opposer has sold beer under its BROTHERS marks and intends to continue to do so in the future.³⁷ While we note the gap in Opposer's private label or BROTHERS-labeled beer sales, the record reflects that Opposer offered for sale and sold beer under the BROTHERS mark from 2006 through 2009,³⁸ and again as of

³⁷ 32 TTABVUE 3 (DeSalvo decl. ¶ 7).

³⁸ *Id.*

2017 as shown by its beer tap rebranding efforts in relation to its collaboration with Breck beer.³⁹

Opposer's BROTHERS and BROTHERS BAR & GRILL marks are the only registrations of record for BROTHERS-formative marks that cover bar and restaurant services. We acknowledge the single third-party registration for the mark BROTHERS (alone) of record for, as identified in part, hard ciders specifically excluding beer. This single registration covers goods that are not as closely related to Opposer's registered services. Moreover, the addition of the wording BAR & GRILL in one of the pleaded marks clearly highlights Opposer's bar services.

At bottom, on this record, we find beer and bar and restaurant services to be complementary and Opposer has used its strong BROTHERS mark in connection with both beer and bar and restaurant services. Consumers therefore would likely infer that Applicant's goods, offered under a very similar mark, emanate from the same source as Opposer's bar services, or are sponsored by Opposer.

We thus find that the *DuPont* factor of the relatedness of the goods and services favors a finding of likelihood of confusion.

D. Channels of Trade/Classes of Consumers

We next address the third *DuPont* factor which considers "[t]he similarity or dissimilarity of established, likely-to-continue trade channels." *DuPont*, 177 USPQ at 567. Since neither Applicant's BROTHER'S CRAFT BREWING application nor

³⁹ 32 TTABVUE 21-23, 55-56 (DeSalvo test. 19-21, 53-54); 29 TTABVUE 8 (DeSalvo rebuttal decl., exh. B).

Opposer's pleaded registrations for the standard character marks BROTHERS and BROTHERS BAR & GRILL provide any limitations on the channels of trade and classes of purchasers, we must presume that Opposer's services and Applicant's goods are rendered/sold through all the normal and usual trade channels for such goods and services and that they are offered to all usual purchasers of such goods and services. *See Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d1001, 1005 (Fed. Cir. 2002); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

It is undisputed that bars, as well as restaurants, commonly serve beer and that patrons of bars and restaurants are exposed to both the bar's and/or restaurant's service mark and to the trademarks under which the beer is labeled and by which it is listed on the bar's and/or restaurant's menu or drink list. To that extent, and as noted above, Applicant's beer and Opposer's bar and restaurant services are complementary goods and services which may be encountered together by the same purchasers.

The record also shows that the ordinary trade and distribution channels for beer include bars and restaurants. Indeed, the record in this case shows that Applicant's beer is sold to distributors for ultimate sale in restaurants and that Opposer operates a combination bar and restaurant, which features numerous beers on its drink menu.⁴⁰ Thus, the trade channels and classes of consumers for both Applicant's beer

⁴⁰ We recognize the then-current geographical distinctions, as discussed later in this decision, of Applicant's beer distribution and Opposer's rendering of bar and restaurant services, but

and Opposer's bar and restaurant services overlap. Applicant did not argue to the contrary and, in fact, is silent on this issue.

The third *DuPont* factor therefore also favors a finding of likelihood of confusion.

E. Actual Confusion

Applicant's assertion that there is no evidence of actual confusion between the marks in "over three years of overlapping use"⁴¹ is entitled to very little weight. Contrary to that contention, the record show that the marks have had little opportunity for overlapping use because Applicant has primarily, if not solely, used its mark in the state of Virginia while Opposer, as of July 24, 2018, had yet to expand its operations into the state.⁴² Thus, the opportunity for actual confusion to have occurred in the marketplace is minimal. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000). Moreover, it is not necessary to show actual confusion in order to establish likelihood of confusion. *Herbko Int'l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. (2002)); *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990), *aff'g HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989). Accordingly, the eighth *DuPont* factor, the length of time during

this does not detract from our finding that the ordinary trade and distribution channels for beer include bars and restaurants.

⁴¹ 37 TTABVUE 23, (Applicant's brief, p. 18).

⁴² 22 TTABVUE 35; Opposer's Not of Rel., Exh. C ("BCB's [sic] only sells its products in Virginia"); 23 TTABUE 2, T. DeSalvo Decl. ¶ 3 (Virginia is one of the states in which Opposer "is actively pursuing opportunities").

and conditions under which there has been contemporaneous use without actual confusion, is neutral.

F. Conclusion

We have considered all of the arguments and evidence of record and all relevant *DuPont* factors. We find the marks at issue very similar, the goods and services related, and the trade channels and classes of consumers to overlap. We further find that the evidentiary record (1) satisfies the “something more” requirement as it pertains to the relatedness of beer and bar and restaurant services, and (2) does not demonstrate that Opposer’s BROTHERS and BROTHERS BAR & GRILL marks are so weak that they are not entitled to protection against Applicant’s very similar mark BROTHER CRAFT BREWING, which is dominated by the term BROTHERS, notwithstanding the presence of the additional terms CRAFT BREWING.

“In reaching this conclusion, we bear in mind that Applicant, as the subsequent user, had an obligation to select a mark that avoided confusion with existing marks. *See Bridgestone Ams. Tire Operations LLC v. Federal Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1063 (Fed. Cir. 2012) (citing *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002) (“This court resolves doubts about the likelihood of confusion against the newcomer because the newcomer has the opportunity and the obligation to avoid confusion with existing marks.”)); *Planters Nut & Chocolate Co. v. Crown Nut Co.*, 305 F.2d 916, 134 USPQ 504, 511 (CCPA 1962) (“[A]ll doubt as to whether confusion, mistake, or deception is likely is to be resolved against the newcomer.”).

Opposition No. 91232361

Decision: Opposition No. 91232361 is sustained.