

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 16, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Delicato Vineyards
v.
Philip Carter Strother
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Opposition No. 91244351
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Donald A. Thompson of Thompson & Co.,
for Delicato Vineyards

M. Justin Griffin of Virginia Small Business Law, PLLC,
for Philip Carter Strother.

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Before Taylor, Heasley, and Johnson,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Philip Carter Strother (“Applicant”) seeks registration on the Principal Register of the mark GNARLED ORCHARD (in standard characters) for “hard cider”, in International Class 33.¹

Delicato Vineyards (“Opposer”) has opposed registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on likelihood of

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¹ Application Serial No. 87842336 was filed on March 20, 2018, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

confusion with its registered standard character mark GNARLY HEAD for “wines” in International Class 33.²

Applicant, in his Answer, denied the salient allegations of the Notice of Opposition.³

I. Entitlement to a Statutory Cause of Action and Priority

To establish entitlement to a statutory cause of action under Section 13 of the Trademark Act, 15 U.S.C. § 1063, an opposer 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 1023, 1025 (Fed. Cir. 1999).⁴

Opposer’s entitlement to oppose registration of Applicant’s mark is established by its pleaded registration, which the record shows to be valid and subsisting, and owned by Opposer.⁵ *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

² 1 TTABVUE. Registration No. 3165705, issued October 31, 2006; renewed.

³ 5 TTABVUE.

⁴ 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.” 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.

⁵ Notice of Opposition ¶ 1, ex. A, 1 TTABVUE 3, 6, Opposer’s first notice of reliance, 10 TTABVUE 5-12.

USPQ2d 1497, 1501 (TTAB 2015).

In addition, because Opposer's pleaded registration is of record, priority is not at issue with respect to the goods covered by Opposer's pleaded registration. *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)).

II. The Record

The record consists of the pleadings and the file of opposed Application Serial No. 87842336, *see* Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), as well as the following:

A. Opposer's Evidence

- Opposer's first notice of reliance,⁶ containing Trademark Status and Document Retrieval (TSDR) printouts showing Opposer's current ownership of subsisting registrations for GNARLY HEAD for "wines" (Reg. no. 3165707), NOBLE VINES for "alcoholic beverages except beers"⁷ in Class 33, and the design marks



⁸

and



⁹

both for "alcoholic beverages except beers" in Class 33.

⁶ 10 TTABVUE.

⁷ Reg. No. 5059679, issued Oct. 11, 2016.

⁸ Reg. No. 5059622, issued Oct. 11, 2016. According to Opposer's description, "The mark consists of a mature and gnarled grape vine with grapes and leaves."

⁹ Reg. No. 4777145, issued July 21, 2015. According to Opposer's description, "The mark consists of a mature and gnarled grape vine with grapes and leaves, and with dust particles at the base of the grape vine."

- Opposer’s second notice of reliance, containing Opposer’s discovery requests and Applicant’s responses thereto.¹⁰
- Opposer’s third notice of reliance, containing the deposition of Applicant, Philip Carter Strother.¹¹
- Opposer’s fourth notice of reliance, containing screenshots of webpages at Applicant’s websites.¹²
- Opposer’s fifth notice of reliance, containing a third party registration and application, as well as results pages from searches of the Trademark Electronic Search System (TESS) USPTO database.¹³
- The testimonial declaration of Andrew Blok, Portfolio Director, Marketing at Opposer Delicato Vineyards.¹⁴
- Opposer’s request for judicial notice of dictionary definitions of “wine” and “cider.”¹⁵

B. Applicant’s Evidence

- Applicant’s notice of reliance, containing two registrations for third-party marks containing the word “GNARLY,” and results pages from searches of the TESS database purporting to show live registrations for marks including the words “GNARLY” or “GNARLED.”¹⁶
- The testimonial declaration of Applicant, Philip Carter Strother.¹⁷

¹⁰ 11 TTABVUE.

¹¹ 12 TTABVUE.

¹² 13 TTABVUE.

¹³ 14 TTABVUE.

¹⁴ 15 TTABVUE, 16 TTABVUE 9 (confidential).

¹⁵ 22 TTABVUE.

¹⁶ 19 TTABVUE.

¹⁷ 20 TTABVUE.

III. Evidentiary Issue

Before proceeding to the merits, we address an evidentiary matter. In its reply brief, Opposer objects to three pieces of evidence proffered by Applicant.¹⁸

Applicant asserts that “[t]here are over 8,000 craft breweries in the United States now and that is not counting the local distilleries and wineries. <https://www.brewersassociation.org/statistics-and-data/national-beerstats/>. There are over 30 alone in the city of Richmond, Virginia. <https://www.visitrichmondva.com/drink/richmond-beer-trail/>.” Opposer objects that these web addresses are outside the trial record, not subject to judicial notice, and hearsay.¹⁹ We agree that the mere listing of a web address is insufficient to make the webpages associated with that address of record, *see Int’l Dairy Foods Ass’n v. Interprofession du Gruyere*, 2020 USPQ2d 10892, *7-8 (TTAB 2020), so these website references have been given no consideration.

Applicant also cites Dictionary.com for the propositions that: “A cider is the juice pressed from apples used for drinking... after fermentation (hard cider). *Dictionary.com* Wine is the fermented juice of grapes. *Dictionary.com*”²⁰ Opposer objects to these definitions “because they are not in the trial record, they have not been furnished to the Board, and their accuracy can ‘reasonably be questioned.’ *See* FRE 201; *In re Red Bull GmbH*, 78 U.S.P.Q.2d 1375, *3-4 (T.T.A.B. 2006) (declining

¹⁸ Opposer’s reply brief, 24 TTABVUE 6.

¹⁹ *Id.*

²⁰ Applicant’s brief, 23 TTABVUE 16.

to take judicial notice of definition at wordsmyth.net).”²¹

We note that Applicant has not provided copies of the dictionary definitions to which he refers. We may, however, take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); *DeVivo v. Ortiz*, 2020 USPQ2d 10153, *6 n. 26 (TTAB 2020). And we may do so even when copies of definitions are not made of record. See *M/S Dhariwal (HUF) 100% EOU v. Zarda King Ltd.*, 2019 USPQ2d 14909, *1 n. 7 (TTAB 2019). Dictionary.com, which provides definitions from the *Random House Unabridged Dictionary*, as well as the *American Heritage* and *Harper Collins* dictionaries, is sufficiently reliable to be the subject of judicial notice. See *In re Red Bull*, 78 USPQ2d at 1378 (finding the *Encarta Dictionary* acceptable material for judicial notice). And Opposer has asked us to take judicial notice of essentially the same definitions of wine and cider (although it provided better support for its definitions by attaching pages from the online *Merriam-Webster* and *American Heritage* dictionaries).²² We will accordingly take judicial notice of these definitions.

Opposer also objects to Applicant’s testimony that certain alcoholic beverage consumers have grown increasingly sophisticated in recent years. Applicant specifically testified that:

It is my experience that different types of alcoholic beverages tend to appeal to different people. There are bourbon drinkers, wine drinkers, craft beverage drinkers, and just standard national brand beer drinkers. The types of people that visit wineries and craft beverage facilities have a

²¹ Opposer’s reply brief, 24 TTABVUE 6.

²² 22 TTABVUE.

deeper understanding and knowledge of their favorite type of beverage. As this market has grown in the last 5 to 10 years, the consumer has grown very sophisticated and is not likely to be easily confused.²³

Opposer objects that this “is lay opinion not ‘rationally based on the witness’s perception.’”²⁴ Applicant described his background and experience, however, stating that “I am the owner of Virginia Perfection Farm, Inc. DBA Valley View Farm and the majority owner of Stillhouse Vineyards, LLC DBA Philip Carter Winery.”²⁵ At his deposition, Applicant testified at length about his background, stating that his family was connected to wine production dating back to the 1700s; that he is sole owner of Strother Family Vineyards; that he had been a majority owner of Stillhouse Vineyards for approximately twelve (12) years; that 97% of the wine the vineyards is sold directly out the front door of the winery; that wine and hard cider are served on site to visitors at the Valley View Farm tasting room; that he is familiar with the demographic groups that like hard cider and wine;²⁶ and that in his experience, “while people like to sample different things, they usually stick to what they like.”²⁷

This supportive testimony culled from Applicant’s deposition inclines us to accept Applicant’s declaration as lay opinion testimony, admissible for what it’s worth. *See Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1484-1485 (TTAB 2017) (Opinion testimony proffered by a lay witness based on his own personal experience

²³ Strother decl. ¶ 11, 20 TTABVUE 4.

²⁴ Applicant’s reply brief, 24 TTABVUE 6 (citing Fed. R. Evid. 701).

²⁵ Strother decl. ¶1, 20 TTABVUE 2.

²⁶ Strother dep. 14:21-15:1, 16:24-17:4, 22:21-23:1, 30:12-31:3, 9-13, 52:1-6, 178:18-22, 182:6-10, 183:1-6, 12 TTABVUE 14-15, 16-17, 22-23, 30-31, 52, 150, 154-155.

²⁷ Strother dep. 201:12-14, 12 TTABVUE 172.

can be admissible as lay opinion.). Its substantive significance will be addressed later. Had Opposer raised its objections earlier, Applicant might have culled even more supportive testimony from his deposition, but he could not do so, as Opposer raised its objections in its reply brief. “Objections raised for the first time in a reply brief are untimely because they effectively foreclose the adverse party from responding to the objections.” *Grote Inds., Inc. v. Truck-Lite Co., LLC*, 126 USPQ2d 1197, 1199 (TTAB 2018). Consequently, the objection is overruled.

IV. Applicable Law

Trademark Act Section 2(d) bars registration of a mark that “so resembles a mark registered in the Patent and Trademark Office ... 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. . . .” 15 U.S.C. § 1052(d).

We base our determination of likelihood of confusion under Section 2(d) on an analysis of all of the probative facts of record under the applicable *DuPont* factors. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). As we apply the *DuPont* factors, we bear in mind the fundamental principles underlying the Trademark Act in general and Section 2(d) in particular, which are “to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers.” *Park N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985) *quoted in Matal v. Tam*, 582 U.S. ___, 122 USPQ2d 1757, 1762 (2017); *see also DuPont*, 177 USPQ at 566.

In making our determination, we have considered each pertinent *DuPont* factor.

In re Guild Mortg. Co., 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019). See *Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”)).

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, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). “In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services.” *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, *5 (TTAB 2019) (citing *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004)).

A. Relatedness of the Goods and Channels of Trade

The second and third *DuPont* factors concern “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration...” and “[t]he similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). A proper comparison of the goods “considers whether ‘the consuming public may perceive [the respective goods ... of the parties] as related enough to cause confusion about the source or origin of the goods....’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir.

2014) (quoting *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)).

Applicant argues that “there is a fundamental difference between cider and wine that a consumer will recognize when purchasing the item. A cider is the juice pressed from apples used for drinking... after fermentation (hard cider). ... Wine is the fermented juice of grapes. ... A consumer, even an unsophisticated consumer, would be able to notice the difference between a cider and a wine....”²⁸ “...Gnarly Head does not sell an apple wine, or any fruit wine other than grapes for that matter, in which a consumer would confuse for a cider.”²⁹

The issue, though, “is not whether the goods of plaintiff and defendant are likely to be confused but rather whether there is a likelihood that purchasers will be misled into the belief that they emanate from a common source.” *Anheuser-Busch, LLC v. Innvopak Sys. Pty. Ltd.*, 115 USPQ2d 1816, 1825 (TTAB 2015) (quoting *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989)). It is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such that they would be encountered by the same persons in situations that would give rise, because 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. *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1353 (TTAB 2015).

Relatedness of this sort may be shown by evidence that the goods are advertised or sold together. *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, *5 (TTAB 2020). In

²⁸ Applicant’s brief, 23 TTABVUE 16, citing Dictionary.com.

²⁹ *Id.*

this case, the evidence shows that Applicant advertises and sells both goods: hard cider and wine. Applicant—the owner of Valley View Farm and majority owner of Stillhouse Vineyards, doing business as Philip Carter Winery³⁰—has, for example, placed this advertisement on his farm’s website:



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Applicant was asked at his deposition:

Q Do those people ever drink wine when they come to Valley View Farm?

A Do they ever drink wine? Of course, yes.

Q Do they often drink wine and hard cider when they come to Valley View Farm?

A Different people enjoy different products.³²

...

Q Do I understand correctly that hard cider

³⁰ Strother decl. ¶ 1, 20 TTABVUE 2.

³¹ Ex. C to Opposer’s second set of requests for admission, request no. 31, 11 TTABVUE 33, 40.

³² Strother dep. 20:9-14, 12 TTABVUE 30.

is currently being served at Valley View Farm?

A Correct.³³

...

A I mean, it's fair, it's fair to say we are producing a variety of different types of craft beverages.³⁴

Q What craft beverages are sold at the Founders' fest?

A Wine, beer, cider and mead.³⁵

Applicant's websites advertise hard cider and wine together as "craft beverages":

³³ Strother dep. 31:1-3, 12 TTABVUE 31.

³⁴ Strother dep. 33:20-22, 12 TTABVUE 33.

³⁵ Strother dep. 160:10-12, 12 TTABVUE 135.



Gnarled Orchard Hard Cider

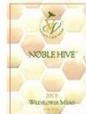
Valley View Farm is the home of Gnarled Orchard Hard Cider – Hard Cider with a Knotty Twist®. Valley View Farm currently serves and sells Virginia hard ciders, Virginia Apple, Barrel Select, and Peach Cider. Hard cider is a delightful refreshment from a real farming tradition.



Noble Hive Mead

Honey wines as natural as natural can be, our Noble Hive Mead will be produced with wildflower honey gathered on our family land in Fauquier, Virginia. We use pure, on location fruits and our own honey to create every bottle with the utmost precision and flavor. The mead is produced in part from the honey harvested from the Valley View Apiary and a portion of all Noble Hive Mead sales are donated to support the Global Honey Bee Initiative lead by George Mason University.

Honey Wines
Wildflower and Peach Blossom



Valley View Cellars

Valley View Farm has strong historical family connections to Virginia Wine production, and is surrounded by a vibrant cohort of Fauquier County's wineries. We began planting vineyards in 2017, adding wine-grape production to our agricultural endeavors.

Fruit Wines
Vovo's Peach Wine is made from red haven and Sugar Giant peaches harvested from the peach orchards at Valley View Farm.



Strother Family Vineyards

The grapes grown in the Strother Family Vineyards at Valley View Farm are used to make wines for both Valley View Farm and Philip Carter Winery.

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Applicant's Philip Carter Winery website proclaims "We also have select hard ciders and wines available for both tasting and purchase, including our own Valley View creations."



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Applicant’s sale of both kinds of goods establishes the existence of “circumstances surrounding their marketing” that “could give rise to the mistaken belief that they emanate from the same source” especially, as in this case, when sold under similar marks. *Coach Servs.*, 101 USPQ2d at 1722. If anything, Applicant’s testimony identified more commonalities than differences between wine and hard cider. “They’re all fermented products,” he testified.³⁸

Q Mr. Strother, in your experience why do people drink wine?

A For pleasure.

Q Can you elaborate on that at all?

A No. Because it means something different to everybody, and I think that's part of the answer.

Q In your experience why do people drink hard cider?

³⁷ 13 TTABVUE 7.

³⁸ Strother dep. 38:18-19, 12 TTABVUE 38.

A For pleasure.³⁹

Applicant asserts in his deposition that his hard cider marketing plan targets beer drinkers, not wine drinkers:

A The target demographic is the beer drinker. And it's also primarily a younger audience. The millenials come to mind. But the hard cider's catching on so fast that it's going to other segments at this point as well. All the demographics. But it's, it attracts a lot of the male crossovers. Women like hard cider but it's also pulling in the male consumer who had traditionally avoided wineries and only was drinking beer. So for some reason they're crossing over and don't mind a pint of cider.⁴⁰

However, we have often found that beer and wine are related goods for purposes of a likelihood of confusion analysis. *See, e.g., Anheuser-Busch v. Innvopak*, 115 USPQ2d at 1826-27 (wine related to beer); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261 (TTAB 2011) (HB for wine likely to be confused with HB and design for beer); *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (CHRISTOPHER COLUMBUS for beer likely to be confused with CRISTOBAL COLON for sweet wine). So Applicant's target demographic of beer drinkers does not narrow the potential class of consumers so severely as to exclude wine purchasers.

Applicant argues that alcoholic beverage consumers tend to have settled tastes, such that they would tend to avoid venturing from hard cider to wine:

A [M]y experience is that people have distinctly different palates many times. And while

³⁹ Strother dep. 203:24-204:7, 12 TTABVUE 174-75.

⁴⁰ Strother dep. 181:23-182:10, 12 TTABVUE 153-154.

people like to sample different things, they usually stick to what they like. Which is why I'm creating a, the Gnarled Orchard Hard Cider brand which is distinctly different from my premium wine brand so as to capture a wholly separate market.⁴¹

He conceded, however, that some consumers are more venturesome than others:

A [I]t's fair to say that people do, that they mix and match and do a variety of all different types of things. We offer a tasting of the full, full offering of beverages. Some people choose to just do wine. Some people just do ciders. Some people just do the mead. **And some people do them all.**⁴²

This comports with the Board's observation that "[a] typical consumer of alcoholic beverages may drink more than one type of beverage and may shop for different alcoholic beverages in the same liquor store. Moreover, a person may serve more than one kind of alcoholic beverage before or during a meal or at a party." *Schieffelin & Co. v. The Molson Cos. Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989). The relevant class of consumers thus encompasses ordinary adult consumers and purchasers of alcoholic beverages—a class that encompasses purchasers of wine and hard cider, among other libations.

Concerning channels of trade, Applicant argues that "[f]or the foreseeable future, Mr. Strother intends to sell hard cider solely at his farm, Valley View Farm, and

⁴¹ Strother dep. 201:11-17, 12 TTABVUE 172.

⁴² Strother dep. 52:22-53:3, 12 TTABVUE 52-53 (emphasis added).

possibly his winery, Phillip Carter Winery.”⁴³ As Opposer correctly observes, though, neither the Application, for “hard cider,” nor the cited Registration, for “wine,” has any trade channel restriction.⁴⁴

So even though Applicant may initially limit his sales of GNARLED ORCHARD hard cider to his farm and winery, his unrestricted identification of goods would permit him to expand his channels of trade.⁴⁵ “Indeed, the owner of an unrestricted registration is entitled to change its current trade channels at any time.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018). As the Federal Circuit has made clear, “The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.” *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

In fact, Applicant was asked:

Q Do you anticipate that Gnarled Orchard
Hard Cider will ever be sold in restaurants?

A It’s possible.

Q How about bars?

A It’s possible. Hard to say. I certainly
would welcome that opportunity.

Q Right.

A Hard to say.

Q Do you anticipate that it would be sold in
grocery stores?

A I’d welcome that opportunity, but that’s

⁴³ Applicant’s brief, 23 TTABVUE 8; *see also* Strother dep. 155:11-21, 12 TTABVUE 131.

⁴⁴ Opposer’s brief, 21 TTABVUE 6.

⁴⁵ Opposer’s brief, 21 TTABVUE 9-10.

years off.

Q Okay. Do you anticipate that Gnarled Orchard Hard Cider will be sold in beer and wine stores?

A I -- yes. **I anticipate it to be sold anywhere and everywhere it can.** But the likelihood of that happening in the near future is minimal.⁴⁶

Consequently, Applicant's unrestricted channels of trade could expand to overlap with Opposer's. As Opposer's Portfolio Director of Marketing testifies, "Wine and hard cider are often promoted and distributed by the same merchants, enjoyed by the same patrons, and consumed at the same occasions."⁴⁷ He adds, "GNARLY HEAD wine has been marketed and sold in association with other alcoholic beverages, such as beer and hard cider."⁴⁸ For example:



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⁴⁶ Strother dep. 190:2-19, 12 TTABVUE 162 (emphasis added).

⁴⁷ Andrew Blok decl. ¶ 16, 15 TTABVUE 6.

⁴⁸ Blok decl. ¶ 12, 15 TTABVUE 5.

⁴⁹ Blok decl. ex. 8, 15 TTABVUE 76. We accord no probative value to Opposer's fifth notice of reliance, consisting of third-party evidence from the USPTO database. 14 TTABVUE. Evidence of third-party registrations identifying both parties' respective goods may be relevant to show their relatedness. *See, e.g., Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013). But Opposer adduces evidence of only one registered mark (exhibit one, Reg. no. 5194360, CIDER IS WINE, for "hard cider"), which, despite its connotation, does not identify both parties' goods. Exhibit two, Application Ser. No.

An overlap of the parties' trade channels would be hard to avoid, given the breadth of Opposer's existing channels of trade:

GNARLY HEAD wine is available in all 50 states and the District of Columbia. GNARLY HEAD wine is available almost everywhere that alcoholic beverages are sold, including grocery stores, drug stores, convenience stores, liquor stores, bars, restaurants, duty-free stores, airlines, cruise ships, wholesale clubs, and military bases. GNARLY HEAD wine is notably available in thousands of retail outlets throughout the United States.⁵⁰

We find accordingly that the *DuPont* factors concerning the similarity or relatedness of Applicant's and Opposer's goods, classes of consumers, and channels of trade weigh in favor of finding a likelihood of confusion.

B. Consumers' Care and Sophistication

The fourth *DuPont* factor is "the conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing." *DuPont*, 177 USPQ at 567. Applicant suggests that "There has been [such] enormous growth in buyer sophistication of wine, that there is not a substantial likelihood of confusion between an apple cider and a grape wine."⁵¹ As we indicated earlier, Applicant's lay opinion will be admitted and considered for what it is worth.

88415238, HARD CIDER FOR THE WINE ENTHUSIAST, for "hard cider") had no evidentiary value either, as it did not identify both parties' goods, and was only an application, which was abandoned. *See In re Inn at St. John's*, 126 USPQ2d at 1745 *aff'd* 777 Fed. Appx. 516 (Fed. Cir. 2019) (application is evidence only that it was filed). And exhibits three through five are nothing more than Trademark Electronic Search System (TESS) search results pages listing applications and registrations, which are not sufficient to make the third-party registrations of record. *See Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012). Hence, Opposer's fifth notice of reliance carries no probative value.

⁵⁰ Blok decl. ¶ 6, 15 TTABVUE 4.

⁵¹ Applicant's brief, 23 TTABVUE 5.

It is not worth much, however, for several reasons. First, as noted, the issue is not whether consumers are likely to confuse the goods; it is whether they are likely to confuse the **source** of the goods. *Anheuser-Busch v. Innvopak*, 115 USPQ2d at 1825. Second, as also noted, the relevant public here consists of ordinary adult purchasers of alcoholic beverages. There is no reason to believe that these customers will be particularly sophisticated. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 765 (TTAB 1986) (“we conclude that the highly sophisticated purchaser argument propounded by applicant is not supported by the record and that it is the average ordinary adult wine consumer who must be looked at in determining likelihood of source confusion in this case.”). Third, the standard is that of the least sophisticated potential purchaser. *Stone Lion v. Lion Capital*, 110 USPQ2d at 1163 *cited in In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) *aff’d* 778 Fed. Appx. 962 (Fed. Cir. 2019) (“Board precedent requires our decision to be based on the least sophisticated potential purchasers.”). Fourth, since there is no restriction in the subject Application and Registration as to price or quality, there is no reason to infer that the consumers of these alcoholic beverages will be particularly discriminating or careful in their purchases. *See Somerset Distilling Inc. v. Speymalt Whisky Dist. Ltd.*, 14 USPQ2d 1539, 1542 (TTAB 1989). In fact, the two parties tend to parallel one another in pricing, selling glasses of their respective drinks in the range of five to ten dollars, and bottles for eight to 15 dollars.⁵² And fifth, as noted below, alcoholic

⁵² Applicant’s brief, 23 TTABVUE 9, Applicant’s answer to interrogatory nos. 4, 15; TTABVUE 49, 51, Strother dep. 188:4-7, 12 TTABVUE 160; Opposer’s brief, 11 21 TTABVUE 7.

beverages are often ordered by the glass, in restaurants and bars, where consumers have little opportunity to scrutinize the marks' differences with care. *Schieffelin v. Molson*, 9 USPQ2d at 2073 (“We also take into consideration the fact that the products of the parties are of the type ordered verbally in bars and restaurants.”).

For these several reasons, there is no reason to believe that consumers' care or sophistication will impel them to avert confusion regarding the parties' marks on their respective goods. The fourth *DuPont* factor is neutral.

C. Strength of Opposer's Mark

The fifth *DuPont* factor is “[t]he fame of the prior mark (sales, advertising, length of use).” *DuPont*, 177 USPQ at 567. Likelihood of confusion fame varies along a spectrum from very strong to very weak. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017). We consider the inherent strength of Opposer's GNARLY HEAD mark based on the nature of the mark itself, and its commercial strength based on its marketplace recognition. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010).

A “mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods.” *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006). *See also In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517 (TTAB 2016). Opposer's registration does not contain a Section 2(f) claim of acquired distinctiveness, so GNARLY HEAD is deemed inherently distinctive.

The commercial 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*, 122 USPQ2d at 1734. 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 the 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].” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1056 (TTAB 2017).

Opposer adduces the following evidence that its GNARLY HEAD mark is commercially strong for wines and entitled to a broad scope of protection:

- Opposer has sold GNARLY HEAD wine continuously since at least as early as April 2005 in the United States.⁵³
- As noted, GNARLY HEAD wine is now available in thousands of retail outlets in all 50 states and the District of Columbia.⁵⁴
- GNARLY HEAD Old Vine Zinfandel was the first varietal for the brand and remains the leading varietal for the brand. For nearly a decade, GNARLY HEAD Old Vine Zinfandel has been among the five best-selling zinfandels in the country in its price range. GNARLY HEAD Old Vine Zinfandel achieved this status no later than 2010. GNARLY HEAD Old Vine Zinfandel maintained this status through 2018.⁵⁵
- GNARLY HEAD wine has expanded to encompass many other varietals, such as cabernet sauvignon, merlot, pinot noir, sauvignon blanc, chardonnay, and pinot grigio, as well as various red and white blends.⁵⁶

⁵³ Blok decl. ¶2, 15 TTABVUE 3.

⁵⁴ Blok decl. ¶6, 15 TTABVUE 4

⁵⁵ Blok decl. ¶¶ 2, 4, 15 TTABVUE 3.

⁵⁶ Blok decl. ¶2, 15 TTABVUE 3.

- GNARLY HEAD is among the 50 best-selling brands in the United States, across all brands in the glass-bottled wine category regardless of price point.⁵⁷
- Across all varietals, Opposer sells millions of bottles of GNARLY HEAD wine annually.⁵⁸
- Opposer spends millions of dollars every year, investing more each year, to advertise, market, and promote GNARLY HEAD wine.⁵⁹
- GNARLY HEAD has cultivated its presence on social media platforms, such as Facebook, Twitter, and Instagram. GNARLY HEAD has garnered over 250,000 followers on Facebook alone.⁶⁰
- GNARLY HEAD has earned critical acclaim from many industry publications, including Wine Enthusiast and Wine Spectator. For example, GNARLY HEAD Old Vine Zinfandel recently earned 90 points from Wine Enthusiast. Also, GNARLY HEAD has earned over 70 gold medals at various industry tasting competitions. For example, GNARLY HEAD Old Vine Zinfandel recently earned 95 points and a double gold medal at the 2019 San Francisco International Wine Competition.⁶¹

Opposer has touted the critical acclaim of the GNARLY HEAD brand in its marketing:



⁵⁷ Blok decl. ¶ 5, 15 TTABVUE 3-4.

⁵⁸ Blok decl. ¶5, 16 TTABVUE 3 (confidential).

⁵⁹ Blok decl. ¶8, 16 TTABVUE 4 (confidential).

⁶⁰ Blok decl. ¶ 19, 15 TTABVUE 4-5.

⁶¹ Blok decl. ¶ 10, 15 TTABVUE 5.

⁶² Blok decl. ex. 3, 15 TTABVUE 49.

Applicant protests that Opposer has not produced evidence of substantial market share, large profits or sales throughout the entire wine industry that would give it the level of protection of famous brands. “While their brand surely has some accolades, its level of fame should be placed lower on the fame spectrum, therefore weighing less on the likelihood of confusion.”⁶³

But “[m]arket share is but one way of contextualizing ad expenditures or sales figures.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1690 (Fed. Cir. 2018). This context can be supplied by other means, such as detailing Opposer’s advertising, promotion, marketing, and market recognition of goods bearing its mark. *Id.* Opposer has done so. Although its sales and advertising figures are confidential, they are substantial, and its successful expansion of its brand in fifteen years across the entire country, from its original zinfandel to a variety of varietals, bespeaks the swelling public recognition of its mark.

Based on the foregoing, we find that Opposer’s GNARLY HEAD mark has achieved a high degree of commercial strength on the spectrum of “very strong to very weak.” *Joseph Phelps*, 122 USPQ2d at 1734. As the Federal Circuit has noted, “strong marks enjoy a wide latitude of legal protection.” *Kenner Parker Toys Inc. v. Rose Art Indus. Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992), cert. denied, 506 U.S. 862, 113 S.Ct. 181 (1992), “All courts agree that ‘stronger’ marks are given ‘stronger’ protection—protection over a wider range of related products and services and variations on visual and aural format.” *See* 2 J. Thomas McCarthy, MCCARTHY

⁶³ Applicant’s brief, 23 TTABVUE 20.

ON TRADEMARKS AND UNFAIR COMPETITION § 11:73 (5th ed. 2020).

D. Comparison of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of the parties' marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) *aff'd* 777 Fed. Appx. 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

Opposer contends that:

The first word predominates in both GNARLY HEAD and GNARLED ORCHARD, not only because it is first, but also because it begins with an unusual letter combination ("Gn"), and it evokes vivid imagery. Moreover, "Gnarly" and "Gnarled" are effectively the same word. They begin with the same, highly unusual, five-letter sequence. They convey almost the same meaning and commercial impression. Also, they have almost the same appearance and sound.⁶⁴

Applicant contends that GNARLY, as used by Opposer, conveys a different connotation and commercial impression from GNARLED, as used by Applicant:

There are two definitions of the term "gnarly." Gnarly could mean rough and twisted with age or it could also mean "difficult, dangerous, challenging." ... It is evident by [Opposer's] advertising that they intend to use "gnarly" to mean difficult, dangerous, and challenging. ... In [Opposer's] advertisement examples, notice that each person in the photo is injured in some manner; therefore, portraying that the wine is difficult, dangerous or challenging.⁶⁵

⁶⁴ Opposer's brief, 21 TTABVUE 16.

⁶⁵ Applicant's brief, 23 TTABVUE 12-13.



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Applicant, in contrast, maintains that he uses GNARLED in the sense of old, weathered, bent trees.⁶⁷ He further argues that the suffixes in the marks, GNARLY HEAD and GNARLED ORCHARD, suffice to distinguish them (citing *In re Hearst Corp.*, 982 F.2d 493, 25 USPQ2d 1238 (Fed. Cir. 1992)).⁶⁸

We find, however, that GNARLY overlaps GNARLED in sight, sound, connotation, and commercial impression. Both words begin with the same four-letter combination “GNARL.” Both add a two-letter suffix. Both are adjectives. And Opposer’s GNARLY encompasses both meanings: dangerous and twisted with age. Its advertisements also refer to old, weathered, twisted vines, as large as trees:

⁶⁶ Applicant’s brief, 23 TTABVUE 13.

⁶⁷ Applicant’s brief, 23 TTABVUE 7; Applicant’s dep. 91:11-12, 12 TTABVUE 78.

⁶⁸ Applicant’s brief, 23 TTABVUE 11-12.



KRAMER VINEYARD - HOME TO GNARLY HEAD OLD ZINFANDEL VINES

Old Zinfandel Vines date back to the early 1900s when Italian immigrants settled on the west side of Lodi and planted Zinfandel.

The best vineyards are still owned and managed by these families, some going on their fourth generation as farmers.

Gnarly Head Old Vine Zin is sourced from these family owned and managed vineyards with long term contracts; many that began with a handshake years ago.

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Thus, the words GNARLED and GNARLY overlap in connotation and commercial impression. They appear prominently as the first word in each mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (“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); *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”) *cited in In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1090 (TTAB 2016).

It is settled that “one feature of a mark may make a greater impression on the public’s awareness than another portion, and thus for rational reasons, we may consider that dominant portion to be more significant than another.” *TiVo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1116 (TTAB 2019) (citing *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)). Hence, although we compare the marks in their entireties, “it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark.”

⁶⁹ Blok decl. ex. 1, 15 TTABVUE 11.

In re Bay State Brewing, 117 USPQ2d 1958, 1960 (TTAB 2016); *see also Somerset Distilling v. Speymalt Whisky*, 14 USPQ2d at 1542.

Given this marked similarity in the marks' dominant lead components, the differences in their suffixes, HEAD and ORCHARD, do not suffice to distinguish them. According to Opposer, GNARLY HEAD refers to the twisted heads of aged vines, such as those depicted in its advertisement above.⁷⁰ According to Applicant, GNARLED ORCHARD refers to an orchard that is weathered and bent.⁷¹ Both parties seek to evoke a similar impression: twisted, fruit-bearing plants from which their fermented alcoholic beverages are made.⁷²

In the marketplace, consumers may not necessarily encounter the marks in proximity and must rely upon their recollections to compare them. *Neutrogena Corp. v. Bristol-Myers Co.*, 410 F.2d 1391, 161 USPQ 687, 688 (CCPA 1969) (many consumers "may have but dim recollections from having previously seen or heard one or the other of the involved marks."). *In re Integrated Embedded*, 120 USPQ2d 1504,

⁷⁰ Opposer's brief, 21 TTABVUE 7, Blok decl. ¶3, 15 TTABVUE 3.

⁷¹ Applicant's brief, 23 TTABVUE 7, Strother dep. 82:18-21, 91:11-12, 12 TTABVUE 69, 78.

⁷² Blok decl. ¶3, 15 TTABVUE 3; Strother dep. 138:5-13, 12 TTABVUE 114. Applicant argues that "HEAD" in GNARLY HEAD cannot connote a vine because a third party owns a prior registration for GNARLY VINE for wine (Reg. No. 2826938). Applicant concludes: "If the term 'head' truly means 'vine', as they so claim here, their trademark could not be in existence today, for it has the same meaning, connotation, appearance, and commercial impression for a product in the same line of business, as a previously registered mark." Applicant's brief, 23 TTABVUE 14-15. But "[O]ne third-party registration has little probative value, especially in the absence of evidence that the mark is in use on a commercial scale or that the public has become familiar with it." *Bond v. Taylor*, 119 USPQ2d 1049, 1055 (TTAB 2016) (quoting *In re Mr. Recipe*, 118 USPQ2d at 1089). In any event, the existence of confusingly similar marks already on the Register will not aid an applicant in registering yet another confusingly similar mark. *AMF Inc. v. Am. Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016).

1513 (TTAB 2016). “[W]e recognize that purchasers have fallible memories.” *In re Davia*, 110 USPQ2d at 1813.

This especially holds true with alcoholic beverages such as wine and hard cider, which, as both parties acknowledge, are often served by the glass in restaurants or bars,⁷³ where consumers order them orally without seeing the bottle labels. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1185-86 (TTAB 2018) (quoting *In re Bay State Brewing*, 117 USPQ2d at 1961 (when ordering from a bartender or restaurant server, “many consumers ... will not have the opportunity to see a label.”)). These settings can be noisy at times. *See Guinness United Distillers & Vintners B.V. v. Anheuser-Busch, Inc.*, 64 USPQ2d 1039, 1044 (S.D.N.Y. 2002) (noting “the often chaotic conditions under which alcoholic beverages are purchased in bars...”).

Consequently, “minor differences in the sound of these marks may go undetected by consumers and, therefore, would not be sufficient to distinguish the marks.” *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012). “Those consumers who do recognize the differences in the marks may believe that applicant’s mark is a variation of opposer’s mark that opposer has adopted for use on a different product.” *Schieffelin v. Molson*, 9 USPQ2d at 2073.

Consequently, the sight, sound, connotation and commercial impression of the marks, taken in their entirety, are more similar than dissimilar, and the first *DuPont* factor weighs in favor of finding a likelihood of confusion.

⁷³ Blok decl. ¶ 13, 15 TTABVUE 5; Strother dep. 42:19-24, 190:2-7, 195:14-196:5, 12 TTABVUE 42, 162, 166-167.

E. Conclusion

When we consider the record and the relevant likelihood of confusion factors, and all of the parties' arguments and evidence relating thereto, we conclude that consumers familiar with Opposer's wines offered under its mark would be likely to believe, upon encountering hard cider offered under Applicant's mark, that the goods originated with or are associated with or sponsored by the same entity. There is therefore a likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).

V. Decision

The opposition to registration of the mark GNARLED ORCHARD in Application Serial No. 87842336 is sustained, and registration to Applicant is refused.