

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: January 25, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

—
Coulter Ventures, LLC

v.

Rogue Ridge, LLC

—
Opposition No. 91252714
Cancellation No. 92074531

—
Louis DiSanto, Katherine Laatsch Fink, Anna King, John Webb Jr., and Evi
Christou of Banner & Witcoff, Ltd.,¹

for Coulter Ventures, LLC.

Antoinette M. Tease of Antoinette M. Tease, P.L.L.C.,

for Rogue Ridge, LLC.


—
Before Wellington, Heasley, and Elgin,
Administrative Trademark Judges.

¹ The motion, filed September 27, 2022, for the withdrawal of Liz Brodzinski as counsel for Coulter Ventures, LLC, 75 TTABVUE, is **granted**.

Citations in this opinion to the briefs and other materials in the case docket refer to TTABVUE, the Board's online docketing system in the Opposition parent case unless otherwise noted. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020).

Opinion by Elgin, Administrative Trademark Judge:

In these consolidated proceedings, Coulter Ventures, LLC opposes registration of Rogue Ridge, LLC's pending application for the composite mark R ROGUE RIDGE

and design  (Opposition No. 91252714) ("the Opposition")² and petitions to cancel Rogue Ridge's Registration No. 6059112 for the standard character mark ROGUE RIDGE (Cancellation No. 92074531) ("the Cancellation"),³ both for "Mountain bicycles; electric mountain bicycles" in International Class 12.⁴

In both proceedings, Coulter asserts claims of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on the marks registered on the Principal Register and listed below:⁵

ROGUE FITNESS in standard characters (FITNESS disclaimed) for "Personal trainer services" in International Class 41;⁶

² Application Serial No. 87562770 was filed on August 9, 2017 on the basis of bona fide intent to use the mark in commerce, Trademark Act Section 1(b), 15 U.S.C. § 1051(b). The mark is described as consisting of "a bicycle gear with the letter 'R' protruding from the right side of the bicycle gear, with the word 'ROGUE' in bold, capitalized letters centered underneath the gear, and the word 'RIDGE' in smaller, bold and capitalized letters underneath the word 'ROGUE' centered underneath the gear." Color is not claimed as a feature of the mark.

³ Registration No. 6059112 was issued on May 19, 2020.

⁴ Despite consolidation, each proceeding retains its separate character and separate judgments will be entered in each proceeding file. *See Dating DNA, LLC v. Imagini Holdings, Ltd.*, 94 USPQ2d 1889, 1893 (TTAB 2010). For ease of reference, we refer to Opposer/Petitioner Coulter Ventures, LLC as "Coulter," and to Applicant/Respondent Rogue Ridge, LLC as "Rogue Ridge."

⁵ The notice of opposition and answer in the Opposition are at 1 TTABVUE and 4 TTABVUE. The petition for cancellation and answer in the Cancellation are at 1 TTABVUE and 8 TTABVUE.

⁶ Registration No. 3501073 (the '073 Registration) was issued on September 16, 2008 and has been renewed.

ROGUE FITNESS in standard characters (FITNESS disclaimed) for “weight lifting equipment, namely, weight lifting bars, weight lifting plates, weight lifting bumpers, weight lifting collars, storage racks for weight lifting bars, storage racks for weight lifting plates, weight lifting sleds, gymnastic rings, straps for gymnastic rings, pullup bars, weight lifting racks, weight lifting benches, plyometric boxes, medicine balls, kettlebells, jump ropes” in International Class 28; “on-line retail store services featuring weight lifting equipment and accessories” in International Class 35; “weight lifting training services” in International Class 41; and “custom design of weight lifting equipment, facilities, and packages for others” in International Class 42;⁷

ROGUE in standard characters for “Weight lifting equipment, namely, weight lifting bars, weight lifting plates, weight lifting bumpers, weight lifting collars, storage racks for weight lifting bars, storage racks for weight lifting plates, weight lifting sleds, gymnastic rings, straps for gymnastic rings, pullup bars, weight lifting racks, weight lifting benches, plyometric boxes, medicine balls, kettlebells, jump ropes” in International Class 28, and “On-line retail store services featuring weight lifting equipment and accessories in International Class 35;⁸

ROGUE BAR in standard characters (BAR disclaimed) for “Barbells” in International Class 28;⁹ and

ROGUE in standard characters for “Barbells; Weight lifting equipment, namely, dumb-bells, weight lifting belts, weight lifting bars, weight lifting plates, weight lifting bumpers, weight lifting collars, storage racks for weight lifting bars, storage racks for weight lifting plates, weight lifting sleds, gymnastic rings, straps for gymnastic rings, pullup bars, weight lifting racks, weight lifting benches, plyometric boxes, medicine balls, kettlebells, jump ropes,

⁷ Registration No. 4055351 (the '351 Registration) issued on November 15, 2011 and has been renewed.

⁸ Registration No. 4056202 (the '202 Registration) issued on April 12, 2011 and has been renewed.

⁹ Registration No. 5411489 (the '489 Registration) issued on February 27, 2018 and has been maintained.

sit-up devices, weight lifting chalk bowls and stands, weighted vests and vest plates, weight lifting wrist wraps, climbing ropes, conditioning ropes, exercise ropes, wall balls and wall ball targets, sandbags, parallettes, peg boards, weight lifting gloves, workout gloves, gymnastic grips; jump rope and weightlifting belt hangers and racks; stationary bicycles; abdominal mats” in International Class 28.¹⁰

Coulter also pleaded common law rights “in the mark ROGUE, alone and in combination with other words, for use in connection with the sale of, inter alia, apparel, weight lifting equipment, stationary bicycles, and accessories and personal training services that that predate Applicant’s filing date.”¹¹

In its answers to the notice of opposition and petition for cancellation, Rogue Ridge denied the salient allegations thereof and asserted various putative “affirmative” defenses.¹² Many of these defenses, however, are not true affirmative defenses or are essentially amplifications of its denials we need not address. *JNF LLC v. Harwood Int’l Inc.*, 2022 USPQ2d 862, at *3 n.8 (TTAB 2022) (citing *Mars Generation, Inc. v. Carson*, 2021 USPQ2d 1057, at *3-4 (TTAB 2021)).

Rogue Ridge asserts as an affirmative defense in the Opposition that Coulter’s claim is “barred by the doctrines of waiver and estoppel because [Coulter] failed to oppose Serial Nos. 87562718 or 87562744.”¹³ Rogue Ridge did not pursue this defense in its final brief, so it is forfeited or waived. *See, e.g., TPI Holdings, Inc. v.*

¹⁰ Registration No. 5524929 (the ’929 Registration) issued on July 24, 2018 and has been maintained.

¹¹ Opposition, 1 TTABVUE 7 ¶ 4; Cancellation, 1 TTABVUE 8, ¶ 4.

¹² Opposition, 4 TTABVUE 4-5; Cancellation, 8 TTABVUE 5.

¹³ Opposition, 1 TTABVUE 5.

TrailerTrader.com LLC, 126 USPQ2d 1409, 1413 n.28 (TTAB 2018) (“Respondent also asserted ‘estoppel, acquiescence and waiver,’ but does not argue any of these in its brief. They are therefore waived.”) (citation omitted).

The cases are fully briefed.¹⁴

We deny the Cancellation and sustain the Opposition for the reasons stated below.

I. The Record¹⁵

The record consists of the pleadings and, pursuant to Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), the prosecution files for Rogue Ridge’s involved application and registration. In addition, Coulter introduced:

- Copies of the records from the USPTO’s Trademark Status & Document Retrieval (TSDR) database for Coulter’s pleaded registrations showing the status and title of those registrations;¹⁶
- Testimony Declaration of Kevin Mueller, General Counsel for Coulter, and attached Exhibits F-001-019, including the expert report and survey by Matt Ezell;¹⁷
- Testimony Declaration of Caleb Heitman, Director of Finance for Coulter, and Exhibits E-001-006;¹⁸

¹⁴ Opposer’s main brief is at 117 TTABVUE (public) and 118 TTABVUE (confidential) and its reply brief is at 121 TTABVUE (public) and 122 TTABVUE (confidential). Applicant’s brief is at 119 TTABVUE (public) and 120 TTABVUE (confidential).

¹⁵ We note that the parties have over-designated certain evidence as confidential and submitted it under seal, such as surveys conducted for purposes of this litigation. “The Board may treat as not confidential that material which cannot reasonably be considered confidential, notwithstanding a designation as such by a party.” *Adamson Sys. Eng’g, Inc. v. Peavey Elecs. Corp.*, 2023 USPQ2d 1293, at *6 (TTAB 2023) (quoting Trademark Rule 2.116(g), 37 C.F.R. § 2.116(g)). We have discussed such materials as required given our need to “be able to discuss the evidence of record, unless there is an overriding need for confidentiality, so that the parties and a reviewing court will know the basis for [our] decision[.]” *Noble House Home Furnishings, LLC v. Floorco Enters., LLC*, 118 USPQ2d 1413, 1416 n.21 (TTAB 2016).

¹⁶ Opposition, 1 TTABVUE 12-53 and 35 TTABVUE; Cancellation, 1 TTABVUE 12-65.

¹⁷ 59 (public) and 60 (confidential) TTABVUE.

¹⁸ 61 (public) and 62 (confidential) TTABVUE.

- Notice of Reliance on Official Records and Exhibits B-001-265;¹⁹
- Notice of Reliance on Discovery Responses and Exhibit D-001;²⁰
- Notice of Reliance on Printed Publications and Exhibits C-001-393;²¹
- Rebuttal Notice of Reliance on Official Records and Exhibits F-001-002;²²
- Rebuttal Notice of Reliance on Printed Publications and Exhibits G-001-011;²³
- Rebuttal Expert Testimony of Dr. Bruce Isaacson;²⁴ and
- Rebuttal Expert Testimony of Matt Ezell.^{25, 26}

Rogue Ridge introduced:

- Notice of Reliance on Discovery Responses, and exhibits;²⁷
- Notice of Reliance on Discovery Responses, and exhibits;²⁸
- Testimony Declaration and Discovery Deposition of Mark Garcia, Rogue Ridge's co-founder;²⁹
- Expert Testimony Declaration and Supplemental Testimony Declaration of Brian M. Sowers;³⁰
- Discovery Deposition Testimony of Dylan Jones, founder of Avus Designs;³¹

¹⁹ 36-40 TTABVUE.

²⁰ 41 TTABVUE.

²¹ 42-58 TTABVUE.

²² 110 TTABVUE.

²³ 111, 116 TTABVUE.

²⁴ 112 (public) and 113 (confidential) TTABVUE.

²⁵ 114 (public) and 115 (confidential) TTABVUE.

²⁶ Coulter filed thousands of pages of evidence separated into almost thirty-five notices of reliance, plus exhibits attached to the testimony declarations. Despite including indexes and using TTABVUE citations to entire exhibits, Coulter did little else to direct us to the relevant portions of its evidence – as it might have by using pin cites or highlighting portions of exhibits. This made the review of the evidence much more challenging and time consuming than it needed to be. *Cf. In re Thermo LabSystems, Inc.*, 85 USPQ2d 1285, 1290 n.7 (TTAB 2007) (“It is [the party’s] obligation to point to particular items of evidence that support its position, not to invite the ... Board to search for it.”).

²⁷ 71 (confidential) and 72 (public) TTABVUE.

²⁸ 73 TTABVUE.

²⁹ 77-80 TTABVUE; 83-84 (public) and 85 (confidential) TTABVUE.

³⁰ 81, 82 TTABVUE.

³¹ 86-88 TTABVUE. The Board previously granted Rogue Ridge’s motion to use the discovery deposition of Dylan Jones as trial testimony. *See* 67 TTABVUE 1.

- Testimony Declaration of Trey Ferguson, CEO of Rock Ridge Outdoors, LLC;³²
- Notice of Reliance on the file histories of Rogue Ridge’s subject application and registration and exhibits;³³
- Notice of Reliance on Official Records and exhibits;³⁴
- Notice of Reliance on Discovery Responses and exhibits;³⁵
- Notice of Filing Videos;³⁶
- Notice of Reliance on Printed Publications and Internet Materials and exhibits.³⁷
- Testimony Declaration of Mike Marshall, owner of Zee Creative;³⁸ and
- Trial Deposition Testimony of Matt Ezell.³⁹

II. Evidentiary Issue

Before proceeding to the merits of Coulter’s claims, we resolve a preliminary evidentiary issue relating to the admissibility of the expert testimony of Brian M. Sowers offered by Rogue Ridge.

Under the applicable schedule set by the Board, the deadline for disclosure of expert reports was April 18, 2021.⁴⁰ On April 16, 2021, Rogue Ridge filed a

³² 89 (public) and 90 (confidential) TTABVUE.

³³ 91 TTABVUE.

³⁴ 92-93 TTABVUE.

³⁵ 94 TTABVUE (confidential), 103 TTABVUE. Rogue Ridge filed a motion to amend its Notice of Reliance, previously filed during the trial period, to include inadvertently excluded exhibits, indicating that counsel for Coulter “does not oppose this motion.” 102 TTABVUE. We construe this motion seeking to reopen the testimony period to supplement the record, and **grant** the motion as unopposed.

³⁶ 95 and 101 TTABVUE. Because Coulter did not object to the submission of certain of Rogue Ridge’s exhibits (documents and videos) under a notice of reliance, i.e., without a foundational or authenticating witness, these objections have been waived. *See Moke Am. LLC v. Moke USA, LLC*, 2020 USPQ2d 10400, at *3-9 (TTAB 2020).

³⁷ 96-97 TTABVUE.

³⁸ 98 TTABVUE.

³⁹ 99 (confidential) and 100 (public) TTABVUE.

⁴⁰ 11 TTABVUE 3.

notification of service of Mr. Sowers’ “expert report and declaration.”⁴¹ This report, as discussed further below, offers a survey designed to test whether Rogue Ridge’s use of ROGUE RIDGE is likely to cause confusion with Coulter or its pleaded marks (the “Sowers Survey”).

Coulter did not disclose an expert by the deadline; instead, Coulter moved to suspend proceedings for ninety days to afford Coulter a reasonable period of time to conduct expert discovery and consider serving a rebuttal expert report.⁴² The Board granted the motion in part and allowed it until June 15, 2021 to disclose any planned rebuttal expert testimony.⁴³ *See* Trademark Rule 2.120(a)(2)(iii), 37 C.F.R. § 2.120(a)(2)(iii) (“Upon disclosure by any party of plans to use expert testimony . . . the Board . . . may issue an order regarding expert discovery and/or set a deadline for any other party to disclose plans to use a rebuttal expert.”). On that date, Coulter filed the expert disclosure of Dr. Bruce Isaacson in rebuttal to the Sowers Survey and report.⁴⁴ On June 28, 2021, Rogue Ridge filed notice of service of a “Supplemental Declaration” by Mr. Sowers responding to Dr. Isaacson’s criticism.⁴⁵

On July 7, 2021, Coulter moved to “strike” Mr. Sower’s Supplemental Declaration on the grounds that it did not qualify as a supplemental expert report under Fed. R.

⁴¹ *See* 14 TTABVUE.

⁴² 15 TTABVUE.

⁴³ 20 TTABVUE 4.

⁴⁴ 112 and 113 TTABVUE.

⁴⁵ 22 TTABVUE.

Civ. P. 26(e)(1)(A) and constituted an improper sur-rebuttal expert report.⁴⁶ The Board deferred the motion until final decision.⁴⁷ Rogue Ridge filed Mr. Sower's two expert reports during its trial period as testimony.⁴⁸ In its main brief, in addition to the deferred motion to strike the Supplemental Declaration, Coulter also attached a motion to strike Mr. Sower's original expert report as untimely testimony because it was executed outside of the trial period.⁴⁹ We consider the attached motion first.

Rogue Ridge's thirty-day testimony period, as reset, closed October 15, 2022.⁵⁰ Mr. Sower's declaration, submitted September 27, 2022, was executed on April 2, 2021.⁵¹ Under Trademark Rule 2.121(a), 37 C.F.R. § 2.121(a), "[n]o testimony shall be taken or evidence presented except during the times assigned, unless by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board." The Board neither approved a stipulation nor granted a motion allowing testimony to be taken outside the testimony period. Accordingly, we agree that Mr. Sower's testimony by declaration was untimely.

Nonetheless, the premature scheduling or submission of testimony is an error that can be corrected on seasonable objection. *Int'l Dairy Foods Ass'n v. Interprofession du Gruyère*, 2020 USPQ2d 10892, at *3 n.12 (TTAB 2020) (subsequent history omitted);

⁴⁶ 23 TTABVUE.

⁴⁷ 28 TTABVUE 2.

⁴⁸ 81 and 82 TTABVUE.

⁴⁹ 117 TTABVUE 54-55.

⁵⁰ See 68 TTABVUE.

⁵¹ See 81 TTABVUE 27.

Of Counsel Inc. v. Strictly of Counsel Chartered, 21 USPQ2d 1555, 1556 n.2 (TTAB 1991). A party may waive an objection to evidence by failing to raise the objection at the appropriate time – namely, within the same twenty day period after the filing of the affidavit or declaration in which the adverse party is allowed to request cross-examination. *Moke Am. LLC*, 2020 USPQ2d 10400, at *6. Here, Coulter waited until filing its main brief to assert an objection that the testimony was executed prematurely, thereby preventing Rogue Ridge from curing the deficiency. Consequently, the attached motion to strike and Coulter’s objection to the original Sowers report has been waived.⁵²

Turning back to Coulter’s deferred motion to strike Mr. Sower’s Supplemental Declaration, this motion was filed prior to the parties’ testimony period, and before any testimony was made of record. As the Board recently held in another proceeding in which Coulter is party, a motion to strike testimony before it has been offered into evidence at trial or in connection with a motion for summary judgment, and even before the offering party has served pretrial disclosures stating its intent to rely on this report, is premature as “there was no evidence or disclosure for the Board to ‘strike.’” *Monster Energy Co. v. Coulter Ventures, LLC*, 2023 USPQ2d 916, at *4 (TTAB 2023) (citing cases). Absent the benefit of this recent precedential decision, the parties relied on the Board’s order deferring the motion to trial; we exercise our discretion to consider it now.

⁵² See 119 TTABVUE 18. We note that, although Mr. Sower’s Supplemental Declaration, executed June 28, 2021, suffers from the same malady (see 82 TTABVUE 17), Coulter did not move to strike it as untimely. Nonetheless, the outcome here would be the same.

Coulter argued that the Supplemental Declaration did not attempt to correct any inaccuracies based on information that was not available at the time of the initial disclosure, but rather, improperly responded to Dr. Isaacson's report and attempted to bolster previously disclosed and flawed opinions and to add similarly flawed new opinions.⁵³ Further, relying on *Newegg Inc. v. Schoolhouse Outfitters, LLC*, 118 USPQ2d 1242, 1244 (TTAB 2016) ("*Newegg*"), Coulter contended that Rogue Ridge was required to seek leave of the Board to submit the Supplemental Declaration because Dr. Isaacson did not submit a counter-survey.⁵⁴

In response, Rogue Ridge conceded that, "[t]he June 28 supplemental report was not intended to correct any inaccuracies; rather, it was intended to rebut the substantive arguments made by Dr. Isaacson in his June 15 report."⁵⁵ Rogue Ridge argued that the Board should allow the Supplemental Declaration out of fairness, and (buried in a footnote) asked that, "if and to the extent that the Board determines that a motion is necessary, Rogue Ridge respectfully requests that the Board treat this brief as a motion for leave to serve the supplemental declaration."⁵⁶

Dr. Isaacson's rebuttal was served after the expert disclosure deadline, when Coulter was only permitted to serve a rebuttal report. Thus, Mr. Sower's Supplemental Declaration is a sur-rebuttal report, and Rogue Ridge did not seek

⁵³ 23 TTABVUE 2-3.

⁵⁴ *Id.* at 4-5. In *Newegg*, the Board granted a motion to serve a sur-rebuttal expert report, but only to the extent it rebutted and/or critiqued the methodology of a counter-survey. 118 USPQ2d at 1244.

⁵⁵ 24 TTABVUE 3

⁵⁶ *Id.* at 4 n.4.

leave from the Board to serve it. But this case is unlike the situation in *Monster Energy*, 2023 USPQ2d 916, at *2, where the Board permitted an expert sur-rebuttal declaration because the rebuttal report presented “new evidence in the form of a different survey performed according to a different methodology on the issue of likelihood of confusion.” *Id.* (quoting *Newegg*, 118 USPQ2d at 1244).⁵⁷ In short, Mr. Sower’s Supplemental Declaration is impermissible bolstering. *See id.* at *2-3 (citing *Gemological Inst. of Am., Inc. v. Gemology Headquarters Int’l, LLC*, 111 USPQ2d 1559, 1561-62 (TTAB 2014) (a report that seeks to clarify an expert’s earlier opinions and rebut contradictory testimony is impermissible bolstering)).

In view thereof, Coulter’s deferred motion to strike the Sowers Supplemental Declaration is **granted**, and Rogue Ridge’s cross-motion for leave to serve it is **denied**.

III. Coulter’s Burden of Proof

As plaintiff in both proceedings, Coulter bears the burden of proving its entitlement to a statutory cause of action and its Section 2(d) claim by a preponderance of the evidence. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000) (opposer bears the burden of proving likelihood of confusion by a preponderance of the evidence); *Cerveceria*

⁵⁷ Rogue Ridge pointed, however, to Exhibit 4 and ¶ 44 of Dr. Isaacson’s report referencing an expert survey conducted by The Bike Cooperative, evidently to trigger the exception permitted in *Newegg*. *See* 24 TTABVUE 4 n.5. But Mr. Sowers does not address this survey in his Supplemental Declaration, and therefore *Newegg* is inapplicable. We note that Rogue Ridge could have, but did not, cross-examine Dr. Isaacson on his testimony, nor did Rogue Ridge move to strike his report as improper rebuttal expert testimony.

Centroamericana S.A. v. Cerveceria India Inc., 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989) (petitioner’s burden is to establish the case for cancellation by a preponderance of the evidence).

IV. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action is an element of the plaintiff’s case in every inter partes proceeding. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *4 (Fed. Cir. 2020); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Illyrian Imp., Inc. v. ADOL Sh.p.k.*, 2022 USPQ2d 292, at *17 (TTAB 2022). “A party in the position of plaintiff may [oppose] registration of a mark when such [opposition] is within the zone of interests protected by the statute, 15 U.S.C. § 106[3], and the plaintiff has a reasonable belief in damage that is proximately caused by registration of the mark.” *JNF*, 2022 USPQ2d 862, at *3-4 (citing *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 2022 USPQ2d 602, at *2 (Fed. Cir. 2022) and *Corcamore*, 2020 USPQ2d 11277, at *6-7)).

Coulter properly made of record TSDR printouts showing the current status and title of its pleaded registrations for the ROGUE formative marks.⁵⁸ Because Coulter’s registrations are of record, it has established its statutory entitlement to bring Section 2(d) claims that are not wholly without merit. *See Lipton Indus. Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982); *New Era Cap Co.*, 2020 USPQ2d 10596, at *6.

⁵⁸ *See supra* note 16.

V. Section 2(d) Claims

A. Priority

1. Opposition

In the Opposition, priority is not an issue with respect to the goods and services identified in Coulter's five pleaded registrations, against which Rogue Ridge did not assert a counterclaim. *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)).

2. Cancellation

Coulter must prove its priority in the Cancellation. *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1474 (TTAB 2014) ("In a cancellation proceeding such as this one where both parties own registrations, priority is in issue."); *Calypso Techn., Inc. v. Calypso Capital Mgt., LP*, 100 USPQ2d 1213, 1219 (TTAB 2011) ("With respect to the cancellation proceeding, because both parties have registrations, it is plaintiff's burden to demonstrate that its use of its . . . mark is prior to defendant's use of its registered marks."). Coulter may rely on prior common law use of its pleaded marks as trademarks or through use analogous to trademark use to prove priority. The pleaded marks must be distinctive, inherently or otherwise, and Coulter must show priority of use.⁵⁹ See *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 44-45 (CCPA 1981).

⁵⁹ As to distinctiveness, Coulter pleaded that "the public has come to associate the ROGUE Marks with the goods and services of Petitioner [Coulter]." Cancellation, 1 TTABVUE 8, ¶ 9.

Under Section 7(c) of the Trademark Act, 15 U.S.C. § 1057(c), parties are entitled to rely upon the filing dates of applications underlying the pleaded and subject registrations for purposes of establishing their constructive use dates. *Larami Corp. v. Talk to Me Programs, Inc.*, 36 USPQ2d 1840, 1844 (TTAB 1995) (parties may rely on the constructive use (filing) dates for purposes of priority).

Because Rogue Ridge did not introduce evidence of use of its mark in commerce before the filing date of the underlying application for its registration, i.e., August 9, 2017, this is the earliest date it may rely upon for priority. Thus, inasmuch as the filing dates of Coulter's applications underlying its '073, '351, '202, and '489 Registrations precede that date, Coulter has demonstrated priority in the Cancellation as to the marks and goods and services in these Registrations.

The underlying application filing date of Coulter's '929 Registration does not predate August 9, 2017. Consequently, Coulter must demonstrate by competent evidence that it used its ROGUE RIDGE mark in commerce in connection with the goods identified in this registration prior to August 9, 2017. *Research in Motion Ltd. v. Defining Presence Mktg. Grp.*, 102 USPQ2d 1187, 1195 n.23 (TTAB 2012). This is particularly important because Coulter's argument relies heavily on use of its

Rogue Ridge denied this allegation. *Id.*, 8 TTABVUE 3, ¶ 9. In any event, because Rogue Ridge did not raise an issue in its brief as to the inherent distinctiveness of Coulter's pleaded marks, we need not concern ourselves with this issue. *See, e.g., Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1023 ("Respondent has not raised an issue as to the distinctiveness of petitioner's mark or otherwise put petitioner on notice of this defense, and therefore we find that the mark is distinctive.") (citing *Wet Seal Inc v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1634 (TTAB 2007) (absent argument or evidence from applicant, opposer's mark deemed distinctive)); *Chicago Corp. v. N. Am. Chicago Corp.*, 20 USPQ2d 1715, 1717 n. 5 (TTAB 1991) (rejecting applicant's argument that opposer failed to prove that its mark was distinctive where applicant failed to plead the issue or introduce evidence of non-distinctiveness).

ROGUE mark in connection with “stationary bicycles” (also called “exercise bicycles”), which is identified only in the '929 Registration.

According to testimony declarations submitted by Kevin Mueller (Coulter’s General Counsel) and Caleb Heitman (Coulter’s Director of Finance), Coulter made its first sale of the ROGUE-branded stationary bicycles on December 21, 2017, four months after Rogue Ridge’s priority date.⁶⁰ Coulter also made of record evidence of its retail sales of third-party stationary bicycles starting in 2009.⁶¹ But retail services of the sale of stationary bicycles was neither pleaded by Coulter nor tried by implied consent of the parties. *See, e.g., Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1115 n.3 (TTAB 2009) (dilution claim argued in brief not considered because claim was unpleaded). Accordingly, Coulter has not proven its claim of priority as to the goods recited in the '929 Registration, including “stationary bicycles.”

3. Conclusion

Priority is not at issue in the Opposition. In the Cancellation, Coulter has proven priority as to the goods and services recited in the '073, '351, '202, and '489

⁶⁰ Mueller Decl. ¶ 8 (59 TTABVUE 8); Heitman Decl. ¶ 8 (61 TTABVUE 8). The date of first use recited in the '929 Registration is October 10, 2007, but this is not evidence of priority. Trademark Rule 2.122(b)(2), 37 C.F.R. § 2.122(b)(2).

⁶¹ *See* 117 TTABVUE 16; *see* Heitman Decl. ¶¶ 7-10 (61 and 62 TTABVUE 8-9). In addition, Coulter provided evidence of promotional use of its mark on mountain bicycles (i.e., use analogous to trademark use) in 2012. *See* 117 TTABVUE 17 (citing evidence). Promotional use, in certain circumstances, may be sufficient to prove priority. *See, e.g., McDonald’s Corp. v. McKinley*, 13 USPQ2d 1895, 1898 n.6 (TTAB 1989) (finding goods need not be sold “in order to come within the ambit of the statute.”). However, Coulter did not plead “use analogous to trademark use” in its petition for cancellation, and a single promotional event followed by over a decade of nonuse falls well short of proving priority for use in connection with mountain bicycles.

Registrations, but not the '929 Registration which includes “stationary bicycles.” Thus, we give the evidence relating to stationary bicycles consideration in support of the claim of likelihood of confusion in the Opposition only, not the Cancellation.


B. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits the registration of a mark if it is “likely, when used on or in connection with the goods of the applicant, to cause confusion” with a registered mark. *See QuikTrip West, Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 2021 USPQ2d 35, at *2 (Fed. Cir. 2021). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *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 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); *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *2 (TTAB 2019).

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential

characteristics of the goods and differences in the marks.”). These factors, and others, are discussed below.

We focus our analysis in the Opposition on the standard character mark ROGUE in Coulter’s ‘929 Registration (including stationary bicycles), which, of all the marks in the pleaded registrations, has the most points in common with the Rogue Ridge’s

composite mark . In the Cancellation concerning Rogue Ridge’s standard character ROGUE RIDGE mark, however, we focus our analysis on the standard character mark ROGUE in Coulter’s ‘202 Registration for various weightlifting and other exercise equipment.

If we find confusion likely between these marks and Rogue Ridge’s involved marks for the identified goods, we need not consider the likelihood of confusion between each of Rogue Ridge’s marks and Coulter’s other pleaded marks. On the other hand, if we find no likelihood of confusion based on the ‘929 and ‘202 Registrations, respectively, we would not find confusion likely based on Coulter’s other pleaded marks and the goods and services for which they are registered. *See Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *12 (TTAB 2023) (confining likelihood of confusion analysis to most similar pleaded mark) (citing *Sock It To Me, Inc. v. Aiping Fan*, 2020 USPQ2d 10611, at *6 (TTAB 2020)) (subsequent history omitted).

1. Similarity or Dissimilarity of Goods

We first consider the similarity of the goods, the second *DuPont* factor, 177 USPQ at 567, based on the identifications of goods in Rogue Ridge’s involved application and registration on the one hand and Coulter’s pleaded ‘202 and ‘929 registrations on the

other. *Can. Imperial Bank of Com. v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987)); *see also Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

The parties' goods need not be identical or competitive to support a finding of likelihood of confusion. It is sufficient that the parties' goods are related in some manner, or that the conditions and activities surrounding the marketing of the goods are such that they could or would be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012).

Likelihood of confusion may be found if relatedness is established for any item encompassed by the identification of goods within a particular class in the registration. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014). We must construe the goods in the registrations as broadly as reasonably possible "to include all [goods] . . . of the nature and type described therein," *In re OSF Healthcare Sys.*, 2023 USPQ2d 1089, at *4 (TTAB 2023) (quoting *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413 (TTAB 2018)).

Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used together or used by the same

purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both parties' goods. *See, e.g., In re Davia*, 110 USPQ2d, 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores). In addition, “[t]he . . . registration[s] themselves may provide evidence of the relationship between the [goods and] services.” *Monster Energy*, 2023 USPQ2d 87, at *14 (citations omitted).

As an initial matter, we take judicial notice that a “stationary bicycle” is defined as “an exercise apparatus that can be pedaled like a bicycle.”⁶² Coulter’s website evidence confirms that its “stationary bicycles” are secured to an immobile stand:⁶³



⁶² MERRIAM-WEBSTER DICTIONARY (www.merriam-webster.com). *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013) (the Board may take judicial notice of online dictionaries that exist in printed format or have regular fixed editions).

⁶³ 44 TTABVUE 83.

There is no indication in the evidence of record that “stationary bicycles” as listed in the ’929 Registration means an actual bicycle with two wheels that is temporarily positioned on a stand for indoor use, often called a bicycle (or bike) “trainer.”⁶⁴

Coulter provided a large volume of evidence to support its argument that the parties’ goods are related under the second *DuPont* factor. This included approximately 250 third-party pending applications and registrations for goods including bicycles (although not necessarily the narrower “mountain bicycles” or “electric mountain bicycles”) on the one hand, and “stationary” or “exercise” bicycles, or exercise or weight training equipment of the types identified in Coulter’s ’202 Registration (such weight lifting bars, pullup bars, kettlebells, jump ropes, and the like) on the other; websites of third parties purporting to sell mountain bicycles and/or electric mountain bicycles and stationary bicycles and/or exercise or weight training equipment; and various publications from 1990 to 2020 discussing both mountain biking or bicycles as well as stationary bicycles or exercise or weight training equipment.⁶⁵

At first blush, Coulter’s evidence of relatedness of the goods appears to be substantial (at least by volume); much of it, however, does not survive close scrutiny. Pending applications are evidence only that the applications were filed on a certain date. *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1193 n.8 (TTAB 2007); *see also Olin Corp. v. Hydrotreat, Inc.*, 210 USPQ 63, 65 n.5 (TTAB 1981) (“Introduction

⁶⁴ *See, e.g.*, 111 TTABVUE 42-43 (Exh. G-007)

⁶⁵ *See generally* 36-40 and 42-58 TTABVUE.

of the record of a pending application is competent to prove only the filing thereof.”⁶⁶ Of the hundreds of third-party registrations made of record, the vast majority are registered exclusively under either the Paris Convention, Trademark Act Section 44(e), 15 U.S.C. § 1126(e), or the Madrid Protocol, Trademark Act Section 66(a), 15 U.S.C. § 1141f(a), with no evidence that Sections 8 or 71 affidavits or declarations of use were filed as to the relevant goods. 15 U.S.C. §§ 1058, 1141k. Third-party registrations not based on use in U.S. commerce lack probative value in showing that the involved goods and services may emanate from the same source. *In re 1st USA Realty Prof'ls Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007) (citing *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993)).⁶⁷

Also of limited probative value are third-party uses and registrations that do not cover the same goods in the parties' registrations or application. This includes, for example, use in connection with bicycle trainers rather than stationary bicycles, and electric bicycles that are not “mountain bicycles.” *See Omaha Steaks Int'l v. Greater*

⁶⁶ We have not considered the listing of registrations in Coulter's brief which were not supported by the evidence of record (e.g., applications which, apparently, registered after the time at which Coulter printed the records filed as evidence). The Board's well-established practice is not to take judicial notice of USPTO records. *See e.g., In re Wada*, 48 USPQ2d 1689, 1689 n.2 (TTAB 1998) (denying request to take judicial notice of “thousands of registered marks incorporating the term NEW YORK for products and services that do not originate in New York state or city”) (subsequent history omitted).



⁶⁷ Coulter provided excerpts of the webpages of some of these parties. *See, e.g., 54 TTABVUE* (Exhs. C-257 to C-306); 112 TTABVUE 60-471 (listing website URLs) (Isaacson Decl. Exh. 3). The Board may consider Internet evidence only for what is shown on its face, and not for the truth of assertions within it, “whether there is an objection or not.” *WeaponX Perf. Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1040 n.18 (TTAB 2018). Nonetheless, with the exception of Decathlon, *see id.* at 49 (Exh. C-260) (showing mountain bikes and weights under “customers also liked”) and 39 TTABVUE 422-32 (Exh. B-172) (registration under Section 44(e)), these webpages do not show the relevant registered goods.

Omaha Packing Co., 908 F.3d 1315, 128 USPQ2d 1686, 1694 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *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).

We find the following registrations of record to be probative of the relatedness of the goods in each proceeding (relevant goods summarized). The registrations relevant only to the Opposition (e.g., including stationary or exercise bicycles) are marked with an asterisk; the registrations relevant only to the Cancellation (i.e., not including stationary or exercise bicycles) are marked with a hashtag:⁶⁸

- APROVE and Design by Aprove Products Co., LTD. for bicycles and electric bicycles; stationary exercise bicycles; bags specially adapted for sports equipment, exercise balls (Reg. No. 4103502) (Exh. B-029);
- BH and Design by Beistegui Hermanos, S.L. for bicycles of all types; stationary exercise bicycles; weightlifting machines (Reg. No. 4513016) (Exh. B-032);
- COMBI and Design by Combi Corporation for bicycles; stationary exercise bicycles; and various weightlifting equipment such as barbells, dumb-bell shafts for weight lifting, dumb-bells, weight lifting belts (Reg. No. 2999534) (Exh. B-047);
- GARNEAU by Gestion Strada Inc. for bicycles and stationary bicycles (Reg. Nos. 3374468) (Exh. B-064);*
- GIANT and Design by Giant Manufacturing Co., LTD. for bicycles; electric bicycles; and stationary exercise bicycles (Reg. No. 3860759) (Exh. B-065);*

⁶⁸ See 36-40 TTABVUE.

- HANGO (Stylized) by J.D. Components Co., LTD. for motorized bicycles, non-motorized bicycles; and stationary exercise bicycles (Reg. No. 2893699) (Exh. B-069);*
- KETTLERUSA by Kettler International, Inc. for bicycles; and exercise bicycles and manually-operated exercise and body building equipment (Reg. No. 3973088) (Exh. B-077);
- MINOURA (Stylized) by Minoura Co., LTD. for bicycles and stationary exercise bicycles (Reg. No. 1734349) (Exh. B-090);*
- NIDEC (Stylized) by Nidec Corporation for bicycles and stationary exercise bicycles (Reg. No. 4000531) (Exh. B-094);*
- PUNISHER by Bike USA, Inc. for bicycles; mountain bicycles; and stationary exercise bicycles (Reg. No. 4264166) (Exh. B-101);*
- RIO 2016 and Design by United States Olympic and Paralympic Committee for bicycles, electric power assisted bicycles; stationary exercise bicycles; jump ropes, barbells and weight-lift benches (Reg. No. 4152658) (Exh. B-107);
- TRANZ X (Stylized) by J.D. Components Co., LTD. for motorized and non-motorized bicycles; and stationary exercise bicycles (Reg. No. 2809025) (Exh. B-122);*
- X-SPEED and Design by Shenzhen Family Enterprise Co., LTD. for bicycles; upright exercise bicycles, recumbent exercise bicycles; manually operated weight-lifting and weight-resistance machines, hand-grippers, weight-lifting bars and weights (Reg. No. 3187746) (Exh. B-134);
-  by Gestion Strada Inc. for bicycles and stationary bicycles (Reg. No. 3805347) (Exh. B-140);*
- ALBOTT by Qingdao Huajin Aigo E-Commerce Co., LTD. for bicycles; stationary cycles; weights; kettlebells; weight lifting equipment, namely, bars, benches; a weighted bar to improve posture and overall fitness (Reg. No. 6097552) (Exh. B-154);
- ENKEEO by Alphabet Brand Management (Shenzhen) Co., LTD. for electric bicycles and stationary exercise bicycles (Reg. No. 5968737) (Exh. B-176);*
- KESPOR by Jian Zhang for bicycles; electric bicycles; and stationary exercise bicycles (Reg. No. 5010620) (Exh. B-189);*
-  by Le LTD. for bicycles and stationary exercise bicycles (Reg. No. 5000065) (Exh. B-192);*

- O' by Overstock.Com, Inc. for bicycles; dumbbells, barbells, weight benches (Reg. No. 4632592) (B-197);#
- PARAFIT by Top Product Inc. for bicycles; stationary cycles; dumbbells, exercise balls, chest pulls, exercise weights and pulleys, weight lifting machines, medicine balls (Reg. No. 4919304) (Exh. B-200);
- QABA and Design by Aosom E-Commerce Inc. for bicycles; stationary cycles; abdominal boards; Exercise equipment, namely, chest expanders, chest pulls; inflatable balls, pulleys, weight lifting machines (Reg. No. 4722445) (Exh. B-203);
- TAUKI (Stylized) by Ningbo Supermax Sports & Leisure Equipment Co., LTD for bicycles and stationary exercise bicycles (Reg. No. 4780512) (Exh. B-220);*
- TOVINI T and Design by Hangzhou Nysa Import and Export Co., LTD for bicycles and stationary exercise bicycles (Reg. No. 5563838) (Exh. B-224);*
- ULTRAPOWERSPORTS and Design by Zhiqiang Li for bicycles; stationary exercise bicycles; and various exercise and weightlifting equipment such dumbbells; exercise benches; exercise bands, training bars, weights (Reg. No. 5370977) (Exh. B-229);
- VIA VELO by Via Velo Sports LTD for bicycles; mountain bicycles; stationary exercise bicycles; and various exercise and weightlifting equipment including dumbbells, weights, training bars and benches, kettlebells (Reg. No. 5538856) (Exh. B-234);
- W W W and Design by Beto Engineering and Marketing Co., LTD. for bicycles; stationary exercise bicycles; and weights, dumb-bells, weightlifting and exercise benches (Reg. No. 5156941) (Exh. B-236);
- Y SCOOT and Design by Yvolve Sports LTD. for bicycles and stationary exercise bicycles (Reg. No. 5018575) (Exh. B-239);*
- Y SCOOT by Yvolve Sports LTD. for bicycles and stationary exercise bicycles (Reg. No. 5018576) (Exh. B-240);*
- ZAAP (Stylized) by Shop247.Com, Inc. for bicycles; electrically powered bicycles; stationary bikes; weightlifting machines, free weights for weightlifting (Reg. No. 5247652) (Exh. B-242); and
- ZANMAX Z and design by Shenzhen Haiweili E-Commerce Co., LTD. for bicycles and stationary exercise bicycles (Reg. No. 5852710) (Exh. B-243).*

In sum, as relevant to the Opposition, there are thirty registrations of record from twenty-seven third parties demonstrating that stationary bicycles, like those identified by Coulter's '929 Registration on the one hand, and bicycles (though not necessarily mountain bicycles), on the other hand, may emanate from a common source. As to the Cancellation, there are fourteen registrations of record from fourteen third parties demonstrating that various exercise or weight training equipment of the kind identified in the Coulter's '202 Registration and bicycles (though not necessarily mountain bicycles) may emanate from a common source.

Turning to the evidence of third-party common law use, many of the webpage examples provided by Coulter do not show what it claims – in particular, the examples from third parties Trek Bikes, Specialized, Kona Bikes, Cannondale, Pinarello, Raleigh Bikes, State Bicycle Co., Marin Bikes, Orbea, Polygon Bikes, Argon 18, Fuji Bikes, and City Grounds (Exhs. C-314 to C-334, C-340 to C-358) do not show that these parties offer stationary bicycles.⁶⁹ We find, however, that two of Coulter's proffered common law uses, Schwinn (Exh. C-307 to C-313) and Diamondback Fitness (Exhs. C-335 to C-339), display stationary bicycles and mountain bicycles under the same marks.⁷⁰ Coulter also adduced industry publications and third-party articles that discuss electric bicycles, bicycles, stationary bicycles, and a few about “exercise

⁶⁹ See 55-57 TTABVUE. None of the common law uses show a relationship between mountain bicycles or electric mountain bicycles and the exercise or weightlifting equipment identified in the '202 Registration.

⁷⁰ 55 TTABVUE 139-75; 56 TTABVUE 69-100.

equipment,” to demonstrate that consumers may recognize them as related products.⁷¹

Coulter also presented a confidential “business survey” conducted in 2022 by Mr. Matt Ezell to test “the percentage of stationary bicycle owners who are also owners of bicycles and the type(s) of bicycles owned”; Coulter claims the survey is relevant to the second *DuPont* factor (limited, pursuant to our findings above, to the Opposition).⁷² We note as an initial matter that a survey offered in litigation before the Board is not a freestanding piece of evidence, but instead is offered as the basis for expert opinion testimony. *See generally Promark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1247-50 (TTAB 2015). Mr. Ezell presented the results of his survey, but he did not supply any opinion testimony about what it means; rather, it was Coulter’s attorneys who argue the import of the survey in Coulter’s briefs.

⁷¹ *See* 117 TTABVUE 41-43 (discussing Exhs. C-046 to C-066).

⁷² *See id.* at 40. As noted above, Mr. Ezell’s unsworn expert report and survey, dated June 7, 2021, was attached as an exhibit to the Testimony Declaration Kevin Mueller (*see* 59 TTABVUE 10, ¶ 12; 60 TTABVUE 18-27). Rogue Ridge did not object to the submission of the untimely and unsworn report as trial testimony, but did cross examine Mr. Ezell by oral deposition (99 TTABVUE) (confidential). During Coulter’s rebuttal testimony period, Mr. Ezell submitted a sworn testimony declaration in which he corrected Table 3 of his findings and confirmed that the remainder of the original unsworn report is true and correct. *See* 114 (public) and 115 (confidential) TTABVUE. Rogue Ridge did not object to the corrected and belatedly sworn testimony. We note also that Coulter neglected to submit any evidence of Mr. Ezell’s knowledge or expertise in designing or conducting surveys. Nevertheless, Rogue Ridge submitted evidence of Mr. Ezell’s experience in the field, *see* 100 TTABVUE 21-22, 29-35, 63-65, 93-95. Rogue Ridge also did not challenge Mr. Ezell’s knowledge or expertise in designing and conducting surveys. In view thereof, we have considered the survey and Mr. Ezell’s opinions for whatever probative value they have. *See* Fed. R. Evid. 702; *cf. Hilson Res., Inc. v. Society for Human Res. Mgmt.*, 27 USPQ2d 1423, 1437 (TTAB 1993) (discussing surveys conducted by individuals who were not experts in conducting or administering surveys for trademark litigation).

We also find the design and methodology of the survey and Mr. Ezell's conclusions to be confusing. Apart from the question of whether it is appropriate to survey the discrete question of whether current stationary bicycle owners also currently own mountain bicycles to demonstrate similarity of the goods or channels of trade, there are several problems with Mr. Ezell's survey. Most significantly, we are unable to discern from his testimony and evidence how many individuals started the survey (and how and from where they were chosen), how many respondents qualified to take the survey as stationary bicycle owners, how many of those stationary bicycle owners reported that they also own a mountain bicycle, and whether the results of the survey are statistically significant. Given these issues, although the Ezell survey standing on its face shows some overlap in customers, we find it to be of slight probative value as to the second *DuPont* factor. See e.g., *Natl Pork Bd. v. Supreme Lobster and Seafood Co.*, 96 USPQ2d 1479, 1484-85 (TTAB 2010) (the Board generally treats survey flaws as affecting the probative weight of a survey, rather than its admissibility).

In sum, the weight of the evidence is sufficient to demonstrate that stationary bicycles in the '929 Registration and mountain bicycles are somewhat related such that purchasers would confuse the source of such products if they were identified by similar marks. Accordingly, the similarity of the goods favors finding a likelihood of confusion in the Opposition. However, the evidence of similarity of weight training and exercise equipment of the kind identified in the '202 Registration and mountain

bicycles is weak. We find the goods at issue in the Cancellation to be more dissimilar than similar, disfavoring a finding of likelihood of confusion in that proceeding.

2. Similarity or Dissimilarity of Channels of Trade and Classes of Consumers

The third and fourth *DuPont* factors concern the similarity or dissimilarity of the channels of trade and classes of consumers. We must compare Rogue Ridge's and Coulter's respective goods as they are identified in the subject application and involved and pleaded registrations. *See Stone Lion Cap. Partners*, 110 USPQ2d at 1161; *Octocom Sys.*, 16 USPQ2d at 1787.

Notwithstanding Rogue Ridge's arguments and evidence that the actual scope of its commercial use of its mark is limited to electric mountain bicycles used primarily for hunting, we may not limit, by resort to extrinsic evidence, the scope of goods as identified in its application and registration. *E.g., In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *In re FCA US LLC*, 126 USPQ2d 1214, 1217 n.18 (TTAB 2018) (“[W]e may consider any such [trade channel] restrictions only if they are included in the identification of goods or services”). We presume, therefore, that Rogue Ridge's goods “mountain bicycles; electric mountain bicycles” move in all channels of trade that would be normal for such goods, and that they would be purchased by all the usual classes of purchasers for those goods. *See Citigroup Inc. v. Cap. City Bank Grp.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261

(Fed. Cir. 2011); *In re Integrated Embedded*, 120 USPQ2d 1504, 1515 (TTAB 2016); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).⁷³

The evidence above indicates that stationary bicycles and mountain bicycles may be found in the same trade channels. Coulter also made of record, inter alia, some news articles and industry publications to show that purchasers of mountain bicycles also purchase or use stationary bicycles, and to a lesser extent, exercise or weight training equipment of the type identified in the '202 Registration.⁷⁴ We find the other proffered evidence supporting similarity of channels of trade and classes of consumers to be of little probative value. For example, there is evidence in the record indicating that some retailers sell mountain bicycles and stationary bicycles on their websites; there is little evidence of record, however, to indicate that these goods are offered to purchasers in proximity to each other.⁷⁵ There also is no evidence that “fitness trade shows” are a normal channel of trade for the involved goods in the United States.⁷⁶

⁷³ The fact that both parties advertise and sell their goods via their own websites and social media accounts is not probative of an overlap in channels of trade. The Board has long recognized that the “Internet is such a pervasive medium that virtually everything is advertised and sold through the Internet,” *Bond v. Taylor*, 119 USPQ2d 1049, 1055 (TTAB 2016) (quoting *Parfums de Coeur, Ltd. v. Lazarus*, 83 USPQ2d 1012, 1021 (TTAB 2007)), and “the mere fact that goods and services may both be advertised and offered through the Internet is not a sufficient basis to find that they are sold through the same channels of trade.” *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1743 (TTAB 2014) (quoting *Parfums de Coeur*, 83 USPQ2d at 1021).

⁷⁴ See 43 TTABVUE 144-50 (Exh. C-049), 300 (Exh. C-066).

⁷⁵ See 55 TTABVUE 139-45 (Exh. C-307); 57 and 58 TTABVUE (Exhs. C-359 to C-364); 111 TTABVUE 61-72 (Exh. G-010).

⁷⁶ See 111 TTABVUE 21-39 (Exh. G-004-006) (displaying various exhibitors at trade shows in Germany), Exh. G-011 (video promo for a 2017 fitness show in Hawaii).

Other third-party surveys and studies made of record by Coulter⁷⁷ are of dubious probative value because Coulter “did not proffer a witness with first-hand knowledge of the study to explain how the study was conducted and the significance of the study.” *Coach Servs. v. Triumph Learning LLC*, 96 USPQ2d 1600, 1611 (TTAB 2010). Nor has Coulter demonstrated that it has relied on these studies in the course of its business. *Cf. Chanel, Inc. v. Makarczyk*, 110 USPQ2d 2013, 2022 (TTAB 2014) (considering pre-litigation consumer recognition surveys commissioned and used in the ordinary course of business); *NASDAQ Stock Mkt., Inc. v. Antartica, S.r.l.*, 69 USPQ2d 1718, 1729 (TTAB 2003) (considering results of annual awareness surveys to demonstrate fame).

We find that there is some evidence, albeit weak, that stationary bicycles on the one hand and mountain bicycles or electric mountain bicycles are sold through similar channels of trade to similar classes of consumers. But we find Coulter has not demonstrated that exercise and weight training goods and mountain bicycles are sold through similar channels of trade to similar classes of consumers. These factors weigh slightly in favor of a finding of likelihood of confusion in the Opposition, but against a finding of likelihood of confusion in the Cancellation.

3. Strength of Coulter’s ROGUE Marks

Before comparing the marks, we first consider the strength and any weakness of Coulter’s pleaded ROGUE marks because that determination informs us as to their

⁷⁷ See, e.g., 40 TTABVUE 712-1275 (Exhs. B-263, 264); 112 TTABVUE 502-18 (Isaacson Decl. Exh. 7); 43 TTABVUE 307-15 (Exh. C-067)).

scope of protection. In doing so, we consider the fifth and sixth *DuPont* factors in tandem (i.e., “the fame of the prior mark (sales, advertising, length of use) and “the number and nature of similar marks in use on similar goods”). *DuPont*, 177 USPQ at 567. The fifth *DuPont* factor enables Opposer to expand the scope of protection afforded its pleaded mark by adducing evidence of “[t]he fame of the prior mark (sales, advertising, length of use”); the sixth *DuPont* factor allows Applicant to contract that scope of protection by adducing evidence of “[t]he number and nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567 (cited in *Sock It To Me*, 2020 USPQ2d 10611, at *8).

Under the fifth factor, likelihood of confusion strength is not “an all-or-nothing measure.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (Fed. Cir. 2017). It “varies along a spectrum from very strong to very weak.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)).

To determine a mark’s place on that spectrum, we consider its inherent strength, based on the nature of the mark itself, and its commercial strength, based on its marketplace recognition. See *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 2023 USPQ2d 737, at *4 (Fed. Cir. 2023); *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength.”); *Bell’s Brewery, Inc. v.*

Innovation Brewing, 125 USPQ2d 1340, 1345 (TTAB 2017); *Top Tobacco, L.P. v. N. Atlantic Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) (market strength is the extent to which the relevant public recognizes a mark as denoting a single source); *see also* 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. Dec. 2023 update) (“The first enquiry is for conceptual strength and focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another’s use.”) (“McCarthy”).

Because Coulter’s pleaded ROGUE marks are registered on the Principal Register without a claim of acquired distinctiveness, the marks are presumed to be inherently distinctive. *See New Era Cap Co.*, 2020 USPQ2d 10596, at *10 (“Opposer’s mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act.”), *quoted in Monster Energy*, 2023 USPQ2d 87, at *20. There is no evidence in the record that would suggest that ROGUE is anything but a conceptually strong mark.⁷⁸

Commercial strength may be measured indirectly, by volume of sales and advertising expenditures and factors such as length of use of the mark, widespread

⁷⁸ Rogue Ridge asks that we take judicial notice of dictionary definitions of the term “rogue.” 119 TTABVUE 28-29. Rogue Ridge does not suggest, however, that any of these meanings indicate conceptual weakness of ROGUE as applied to Coulter’s goods.

critical assessments, notice by independent sources of the goods or services identified by the mark, and general reputation of the goods or services. *Weider Publ'ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1354 (TTAB 2014). Under cover of Mr. Heitman's testimony declaration, Coulter presented confidential evidence of its total revenue in the United States under ROGUE marks from 2008 to 2020, which exceeds ten figures in total and currently more than nine figures per year.⁷⁹ These summary figures are not, however, broken down by sales of particular products or services, so we cannot discern exactly how much of that revenue is attributable to the products at issue here.

Mr. Heitman also presented confidential evidence of "total U.S. revenue for sales of stationary bicycles" from 2009 to 2020. From the exhibits attached to Mr. Heitman's declaration, we deduce that sales of ROGUE-branded stationary bicycles (under the ECHO mark) from 2017-2020 are in the high eight-figures, with over half that amount in 2020 alone.⁸⁰ These numbers, even without the benefit of industry context, are substantial.

Mr. Heitman's confidential evidence of Coulter's marketing expenditures from 2010 to 2020 also are very significant and annually fall in the eight figure range.⁸¹

⁷⁹ 62 TTABVUE 6 (confidential). We discuss sales and marketing figures only generally, given their confidential nature.

⁸⁰ See Heitman Decl. Exh. 6 (62 TTABVUE 38) (confidential). Substantially lower sales figures for 2021 are shown, but because Mr. Heitman does not describe them in his testimony, it is not clear whether these are partial year figures and if so, for how many months, and whether the spike in sales in 2020 was caused by any outside factors, such as the Covid-19 crisis which is generally known to have shut down fitness facilities.

⁸¹ Heitman Decl. ¶ 6 (62 TTABVUE 7) (confidential).

These numbers suffer from some deficiencies in that they are not broken down into expenditures solely attributable to the United States, and there is no indication as to what (or which products) these expenditures were used for. Thus, we have no basis to translate these numbers into potential exposure of Coulter's pleaded marks for the involved goods to the relevant purchasing public in the United States (i.e., members of the general public who engage in physical fitness activities).

Nonetheless, Coulter (via the testimony of Mr. Mueller) provided circumstantial evidence of its marketing programs, including occasionally sponsoring competitions, events, broadcasts, and athletes; targeted online advertising; and other promotional activities. Mr. Mueller also provided confidential visitor data regarding Coulter's website (at roguefitness.com) and social media accounts, which are substantial and number in the many millions.⁸² Finally, Mr. Mueller supplied evidence of what he termed "widespread, unpaid promotion of [Coulter's] products and brand by media and product commentators throughout the United States," including awards and news articles.⁸³ Taken together, even with its deficiencies, the data plus the circumstantial evidence points to commercial success of the goods sold under the pleaded marks.

We are not persuaded that Rogue Ridge's evidence of third-party registrations for "rogue" formative marks diminishes the conceptual or commercial strength of

⁸² Mueller Decl. ¶¶ 14-21 (59 (public) and 60 (confidential) TTABVUE 10-13). Although Mr. Mueller is Coulter's General Counsel, he states that he is "actively involved in aspects of the day-to-day business operations of [Coulter], including but not limited to . . . marketing, advertising, promoting, and distributing [Coulter's] goods and services." 59 TTABVUE 6, ¶ 3.

⁸³ Muller Decl. ¶¶ 22-23 (59 TTABVUE 13-14).

Coulter’s mark ROGUE. Evidence of extensive third-party use of a term in connection with the same or similar goods in the relevant marketplace is probative of the term’s weakness as a trademark. *See DuPont*, 177 USPQ at 567; *In re FCA US LLC*, 126 USPQ2d 1214, 1224 (TTAB 2018) (“Evidence of third-party use may reflect commercial weakness.”) (citation omitted); *In re Morinaga Nyugyo KK*, 120 USPQ2d 1738, 1745 (TTAB 2016). The probative value of third-party trademarks as to commercial strength depends entirely upon their usage. *E.g.*, *Scarves by Vera, Inc. v. Todo Imps., Ltd.*, 544 F.2d 1167, 192 USPQ 289, 294 (2d Cir. 1976) (“The significance of third-party trademarks depends wholly upon their usage. Defendant introduced no evidence that these trademarks were actually used by third parties, that they were well promoted or that they were recognized by consumers.”). However, “third-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered for similar goods or services.” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017); *see also Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694 (CCPA 1976) (third-party registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used.”).

The third-party registrations submitted by Rogue Ridge are of limited probative value because they do not cover the same goods as in Coulter’s pleaded registrations.⁸⁴ *See Omaha Steaks*, 128 USPQ2d at 1694 (finding it is error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on

⁸⁴ *See* 92 TTABVUE 71-135.


goods shown to be similar”); *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); *TAO Licensing*, 125 USPQ2d at 1058 (third-party registrations in unrelated fields “have no bearing on the strength of the term in the context relevant to this case.”). And, there is no proof of the extent of use of any of these marks. In sum, we conclude that Rogue Ridge’s evidence does not diminish the strength of Coulter’s mark.

4. Similarity or Dissimilarity of the Marks

We turn next to the first *DuPont* factor focusing on “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps.*, 73 USPQ2d at 1691 (quoting *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.*, 101 USPQ2d at 1721 (quotation omitted).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entirety, 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 stating that, for rational reasons, more or less weight has been given 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.

Rogue Ridge’s marks are the standard character mark ROGUE RIDGE (Cancellation) and the composite mark R ROGUE RIDGE  (Opposition). Coulter’s mark is ROGUE in standard characters. Coulter argues that Rogue Ridge’s marks contain the dominant term ROGUE and adds the term RIDGE, which term it claims is commercially weak based on evidence of third-party registrations and common law use of mark including the term in connection with bicycles and bicycle accessories.⁸⁵ Rogue Ridge counters that the marks are distinguishable, pointing to the alliteration of “rogue” and “ridge,” and the meaning of the term “ridge” as indicative of mountains and thus its goods.⁸⁶ As to the composite mark, Rogue Ridge points to the prominent gear and slashed R portion of the design, which it claims causes “an association in the minds of consumers between this particular icon and our company.”⁸⁷

⁸⁵ 117 TTABVUE 32-34 (citing 36 TTABVUE 5-7, 101–193 (Exhs. B-007 to B-022) and 52 TTABVUE 178 to 54 TTABVUE 20 (Exhs. C-218 to C-254)). We do not consider Coulter’s arguments as to actual use of the marks, 117 TTABVUE 34-37, which is not relevant to our analysis.

⁸⁶ *See* 119 TTABVUE 27-29.


⁸⁷ *Id.* at 15 (citing Declaration of Mark Garcia ¶ 6 (77 TTABVUE 3)).

Turning first to the Cancellation, both Coulter's pleaded mark and Rogue Ridge's registered mark are presented in standard characters, and thus are not limited to any particular depiction. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-11 (Fed. Cir. 2012); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186-87 (TTAB 2018); *In re RSI Sys., LLC*, 88 USPQ2d 1445, 1448 (TTAB 2008); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988).

Purchasers in general are inclined to focus on the first word or portion in a trademark (here, ROGUE), especially where the first word is followed by a highly descriptive term. *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is likely to be impressed upon the mind of a purchaser and remembered"); *see also Palm Bay Imps.*, 73 USPQ2d at 1692. Coulter's third-party evidence indicates that RIDGE, although not disclaimed as descriptive, is not an uncommon term as applied to bicycles (including use-based registrations for BOLINAS RIDGE, ECHO RIDGE, MOUNTAIN RIDGE, NORTHERN RIDGE, RED RIDGE, RIDGE, ROCKY RIDGE, and WOLF RIDGE), indicating it is relatively weak as applied to these goods, and that ROGUE will be perceived as the dominant element in the mark.

Thus, we conclude that when considered in their entirety, the marks at issue in the Cancellation are more similar than dissimilar in appearance, sound, and connotation, and that, when viewed as a whole, the marks engender similar commercial impressions.



We reach the same conclusion as to the pending composite mark  at issue in the Opposition. When a mark consists of a literal portion and a design portion, the literal portion usually is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods; therefore, the literal portion normally is accorded greater weight in determining whether marks are confusingly similar. *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *4 (TTAB 2020) (citing, inter alia, *Viterra*, 101 USPQ2d at 1911); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). And in this case, the subject mark prominently features the term ROGUE over the smaller, subordinate term RIDGE. Consumers, therefore, are more likely to remember and call for ROGUE over the entire mark ROGUE RIDGE. *Cf. Stawski v. Lawson*, 129 USPQ2d 1036, 1055 (TTAB 2018) (PROSPER confusingly similar to PROSPER RIDGE, both for wines). And, because Coulter's mark is in standard characters, it may be displayed in a manner similar to Rogue Ridge's stylized font.⁸⁸ In addition, the design element at the top of the subject composite mark suggests a mechanical component that may be present on both mountain and stationary bicycles, such as a gear, chainwheel, or sprocket.

Thus, we conclude that when considered in their entirety, the marks at issue in the Opposition also are more similar than dissimilar in appearance, sound, and connotation, and that, when viewed as a whole, the marks engender similar

⁸⁸ Indeed, Coulter presented evidence that it uses a "stencil" font not entirely dissimilar to Rogue Ridge's stylized font. *See* Mueller Decl. ¶ 24 and Exhs. F-005 to F-007 (59 TTABVue 14, 22-27).

commercial impressions. This factor favors a finding that confusion is likely between Coulter's pleaded mark and Rogue Ridge's composite mark.

5. Sophistication of Consumers

The fourth *DuPont* factor also concerns the conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing. *DuPont*, 177 USPQ at 567. Because the respective identifications include exercise and weight training equipment and stationary bicycles, and mountain bicycles and electric mountain bicycles, without any limit regarding a particular price point, we must treat the goods as including less expensive (in the tens or hundreds of dollars) as well as more costly goods (in the thousands of dollars). *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration). We accordingly presume that purchasers for these goods include ordinary consumers. *See Stone Lion*, 110 USPQ2d at 1163-64 (recognizing Board precedent requiring consideration of the "least sophisticated consumer in the class").

Even accepting that certain of the parties' goods may be marketed to more careful purchasers with some advanced knowledge, we note that with similar goods and similar marks, even a careful, sophisticated consumer of these goods is not likely to note the differences in the marks. *Cunningham*, 55 USPQ2d at 1846 (alleged sophistication of golfers is outweighed by the Board's findings of strong similarity of marks and identity of goods).

Furthermore, careful purchasers who do notice the difference in the marks will not necessarily conclude that there are different sources for the goods, but may see the marks as variations of each other (i.e., ROGUE RIDGE as a line of ROGUE products), pointing to a single source. *See, e.g., Kangol Ltd. v. Kangaroos U.S.A., Inc.*, 974 F.2d 161, 23 USPQ2d 1945, 1946 (Fed. Cir. 1992) (“What is important is not whether people will necessarily confuse the marks, but whether the marks will be likely to confuse people into believing that the goods they are purchasing emanate from the same source.”) (citations omitted).

Accordingly, we find this factor to be neutral in both proceedings.

6. Actual Confusion and Survey Evidence

Under the seventh and eighth *DuPont* factors, i.e., the nature and extent of any actual confusion and the length of time during and condition under which there has been concurrent use without evidence of confusion, Coulter does not point to any evidence of actual confusion and argues these factors are neutral.⁸⁹ However, it is not necessary to show actual confusion in order to establish likelihood of confusion. *See Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546, 223 USPQ 1025 (Fed. Cir. 1990).

Rogue Ridge relies on the Sowers Survey, which was commissioned to determine the likelihood of confusion between the parties’ marks as applied to stationary bicycles and electric mountain bicycles (in light of our findings above, relevant only to the Opposition). Historically, a properly conducted survey has been considered akin

⁸⁹ 117 TTABVUE 48. Rogue Ridge does not address the eighth *DuPont* factor.

to actual confusion. See *Blue Cross and Blue Shield Ass'n v. Harvard Comty. Health Plan Inc.*, 17 USPQ2d 1075, 1078 n.7 (TTAB 1990) (Even though “applicant's study/survey . . . had certain defects . . . it nevertheless constitutes evidence of specific instances of actual confusion.); *but see* 6 McCarthy § 32:184 (“[S]urvey evidence is circumstantial, not direct, evidence of the likelihood of confusion. Surveys do not measure the degree of actual confusion by real consumers making mistaken purchases. Rather, surveys create an experimental environment from which we can get useful data from which to make informed inferences about the likelihood that actual confusion will take place.”). Thus, a properly conducted survey is circumstantial evidence from which we may infer a likelihood of actual confusion.

Mr. Sowers designed and conducted an *Eveready* style survey first approved by the Seventh Circuit. *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366, 188 USPQ 623 (7th Cir. 1976) (concerning EVEREADY for batteries). An *Eveready* survey is a reliable format that the Board accepts. See *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1829 (TTAB 2015) (an *Eveready*-type survey is a “widely used and well-accepted format for likelihood of confusion surveys.”); *Starbucks U.S. Brands, LLC v. Ruben*, 78 USPQ2d 1741, 1753 (TTAB 2006) (“[G]iven the way in which this survey format carefully follows the *Ever-Ready* likelihood of confusion survey format, we find that it is reliable and therefore of probative value on the issue of likelihood of confusion herein.”). In the typical *Eveready* survey, respondents are

shown the junior user's mark in connection with the junior party's applied-for goods and are asked open-ended questions about the source of the junior party's goods.⁹⁰

In this case, Mr. Sowers developed an Internet survey that included U.S. residents aged 18 and older who were likely to purchase an electric mountain bicycle in the next twelve months.⁹¹ After showing the qualified respondents Rogue Ridge's standard character mark ROGUE RIDGE (or a control group stimulus REBEL RIDGE), Mr. Sowers asked the following questions:⁹²

Q1. Who or what company do you believe puts out electric mountain bikes with this brand name? *(Please answer as completely as possible. You are not limited by the size of the answer box.)*

Q2. Why do you say that? *(Please answer as completely as possible. You are not limited by the size of the answer box.)*

Q3. What other brands or products, if any, do you believe are put out by the company using this brand name? *(Please answer as completely as possible. You are not limited by the size of the answer box.)*

Q4. Why do you say that? *(Please answer as completely as possible. You are not limited by the size of the answer box.)*

Q5. Do you believe the company that puts out products with this brand name has a business connection or affiliation with another company? *(Select one only)*

- Yes, I **do** believe the company that puts out products with this brand name has a business connection or affiliation with another company

⁹⁰ In *Union Carbide*, the survey asked: "Who do you think puts out the lamp shown here? [showing a picture of defendant's EVER-READY lamp and mark], and "What makes you think so?" 188 USPQ at 640.

⁹¹ Sowers Decl. ¶ 22 (81 TTABVUE 11).

⁹² See *id.* at ¶¶ 42-54 (81 TTABVUE 18-21).

- No, I **do not** believe the company that puts out products with this brand name has a business connection or affiliation with another company
- Don't know/Unsure

Q6. With what other company or companies do you believe the company that puts out products with this brand name has a business connection or affiliation *(Please answer as completely as possible. You are not limited by the size of the answer box.)*

Q7. Why do you say that? *(Please answer as completely as possible. You are not limited by the size of the answer box.)*

Q8. Do you believe the company that puts out products with this brand name needed to get the permission or approval from another company to use this brand name? *(Select one only)*

- Yes, I **do** believe the company that puts out products with this brand name needed to get the permission or approval from another company to use this brand name
- No, I **do not** believe the company that puts out products with this brand name needed to get the permission or approval from another company to use this brand name
- Don't know/Unsure

Q9. From what other company or companies do you believe the company that puts out products with this brand name needed to get permission or approval? *(Please answer as completely as possible. You are not limited by the size of the answer box.)*

Q10. Why do you say that? *(Please answer as completely as possible. You are not limited by the size of the answer box.)*

Q11. Which, if any, of the following types of bikes are you likely to personally purchase in the **next 12 months**? *(Select all that apply)*

- Non-electric mountain bike
- Interactive stationary bike (i.e., can connect remotely to online classes, trainings, etc.)

- Non-interactive stationary bike (i.e., air bike or fan bike that does not allow for connecting remotely to online classes, trainings, etc.)
- Cruiser bike
- Racing bike (e.g., road bike)
- None of the above
- Don't know/Unsure

Mr. Sowers' team coded the open-ended responses to questions 1, 3, 6, and 9 for mentions of a particular company, brand name, or product in the answer, counting as confused any mentions of "Rogue" or "Go Rogue" and nothing else, or mentions of "fitness equipment" or "exercise equipment" and nothing else, and/or any mention of non-electric style bicycles. Mr. Sowers combined the data from these four questions and subtracted the test group results from the control group to find 5.6% net confusion.⁹³ He concluded that "relevant consumers are not likely to be confused by Rogue Ridge's use of the ROGUE RIDGE mark in connection with electric mountain bikes . . . [because] these results are below the levels that courts have found to be probative of likelihood of confusion."⁹⁴

Coulter, relying on the rebuttal opinion of Dr. Isaacson, challenged the survey's design and methodology as well as Mr. Sower's conclusions on five grounds:⁹⁵ (1) an *Eveready* survey was the improper format because there is no evidence that the senior trademark is well known, or that the parties' goods do not compete in the

⁹³ *Id.* at ¶ 64 (81 TTABVUE 26).

⁹⁴ *Id.* at ¶¶ 65-67 (citing McCarthy § 32:189).

⁹⁵ 121 TTABVUE 8-12.

marketplace;⁹⁶ (2) Dr. Isaacson reanalyzed the survey data to include as confused “verbatim responses that mentioned ‘Rogue’ with other words [an additional 8.2%] or that mentioned ‘Rogue Ridge’ [an additional 19.4%]” as responses that might have referred to Coulter, and found a net likelihood of confusion of 25.0%;⁹⁷ (3) the survey used the leading terminology “brand name” rendering the results unreliable;⁹⁸ (4) the survey tested ROGUE RIDGE in plain text rather than the composite mark (which is at issue in the Opposition); and (5) the survey limited qualified respondents to potential purchasers of electric mountain bicycles.

Of these critiques, we find the last to be significant. Rogue Ridge agrees that the Sowers Survey sought to measure the potential purchasers for the goods that Rogue Ridge actually sells (electric mountain bicycles).⁹⁹ But, the goods at issue here are mountain bicycles AND electric mountain bicycles. Thus, the proper survey universe is consumers who are prospective consumers of either mountain bicycles or electric mountain bicycles. We may not extrapolate results from the narrower set of consumers to the broader set. In short, we accord the Sowers Survey low probative weight.

⁹⁶ This argument is somewhat at odds with Coulter’s assertion that it has a commercially very strong mark.

⁹⁷ We disagree that it was improper for Mr. Sowers to exclude responses that included ROGUE RIDGE as possibly referring to Coulter.

⁹⁸ Although the better practice would have been to use terminology such as “brand, company, or business,” we disagree that use of “brand name” rendered the survey entirely unreliable.

⁹⁹ 119 TTABVUE 42.

In the absence of evidence in support of the seventh and eighth *DuPont* factors, we find them neutral.

7. Other *DuPont* Factors

In addition to the eighth *DuPont* factors discussed above, Coulter briefly discussed the ninth through thirteenth factors, and asserts that they either favor a finding of likely confusion or are neutral.¹⁰⁰ We address them briefly as well.

The ninth factor “considers ‘[t]he variety of goods on which a mark is or is not used (house mark, ‘family’ mark, product mark).” *Monster Energy*, 2023 USPQ2d 87, at *39 (quoting *DuPont*, 177 USPQ at 567). Coulter argued ROGUE is a house mark applied to a “wide variety” of products.¹⁰¹ We find this factor neutral because Coulter’s products and services are confined to a single area, exercise and weight training, and not a “wide variety” of products.

Rogue Ridge argued, relevant to the eleventh factor (the defendant’s right to exclude others from use of its mark), that it has the right to exclude others from use of its mark on bicycles, pointing to its successful cancellation of Registration No. 5168287 (ROGUE for bicycles).¹⁰² Because this cancellation was the result of judgment for loss of interest, we find this proceeding not probative of the extent of Rogue Ridge’s rights, and therefore we find this factor to be neutral.

¹⁰⁰ 117 TTABVUE 48-49.

¹⁰¹ *Id.* at 48.


¹⁰² *See* 119 TTABVUE 42 (citing 92 TTABVUE 17-68).

There is no evidence as to the remaining *DuPont* factors (i.e., the tenth, twelfth, or thirteenth), and thus we need not consider them.¹⁰³

8. Summary of the *DuPont* Factors

We have considered all of the evidence made of record, and the arguments related thereto, carefully. *In re Charger Ventures*, 64 F.4th 1375, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023) (“[I]t is important . . . that the Board . . . weigh the *DuPont* factors used in its analysis **and** explain the results of that weighing.”) (emphasis in bold here, in italics in the original).

a. Opposition

We find that Coulter’s ROGUE mark and Rogue Ridge’s composite mark  are similar, and Rogue Ridge’s goods are similar to Coulter’s goods in the ‘929 Registration, and may be sold through similar channels of trade to the same purchasers. This outweighs the *DuPont* factors that disfavor likelihood of confusion. In view thereof, Coulter has proven likelihood of confusion by a preponderance of the evidence.

b. Cancellation

We find that Coulter’s ROGUE mark and Rogue Ridge’s standard character ROGUE RIDGE mark are similar. However, Coulter has not demonstrated prior use

¹⁰³ Coulter argued that Rogue Ridge “uses the ROGUE RIDGE Marks in commerce in an artistic style that is clearly intended to copy the ROGUE Marks as used in commerce,” 117 TTABVue 36, but does not assert this is relevant to the thirteenth *DuPont* factor. In any event, there is no evidence of record indicating that any similarity in style was intentional copying.

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of goods that are sufficiently related to Rogue Ridge's goods, or that such goods are sold through the same channels of trade to the same purchasers. The other factors are neutral. Therefore, we find confusion unlikely.

Decision

Opposition No. 91252714 is **sustained**. Cancellation No. 92074531 is **denied**.