

This Opinion is Not a
Precedent of the TTAB

Mailed: March 24, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Luxco, Inc.
v.
Everwild Spirits, LLC

Opposition No. 91268045

Michael R. Annis, Brendan R. Zee-Cheng, and Emily M. Holtzman of Husch
Blackwell LLP
for Luxco, Inc.

Adam C. Armstrong of Bruns, Connell, Vollmar & Armstrong
for Everwild Spirits, LLC.

Before Wellington, Goodman and Heasley, Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Everwild Spirits, LLC (“Applicant”) seeks registration of the standard character



mark: **EVERWILD**, and the composite mark: _____, both for “wine; distilled spirits” in Class 33, the latter with a disclaimer of the term “Spirits.”¹



Luxco, Inc. (“Opposer”) opposes registration of Applicant’s marks under Section 2(d) of the Trademark Act (“the Act”), 15 U.S.C. § 1052(d), on the ground that they so resemble Opposer’s registered and previously-used marks that they are likely to cause confusion.² In its notice of opposition, Opposer alleges prior common law rights in and registration of several marks containing the term EVERCLEAR for alcoholic beverages, including the following three registrations on the Principal Register:³

¹ Application Serial No. 90028117 (EVERWILD) was filed on June 30, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on a declaration of a bona fide intent to use the mark in commerce. Application Serial No. 90179180 (composite mark) was filed on September 14, 2020, also based on a declaration of a bona fide intent to use the mark in commerce.

² Opposer also pleaded that “Applicant did not have a bona fide intent to use the EVERWILD Marks in U.S. commerce on the specified goods when it filed its applications for the marks covering the goods therein.” 1 TTABVUE 7 (N. of Opp. ¶ 18). However, Opposer did not pursue this claim at trial. We therefore consider any lack of bona fide intent to use claim to be waived.

Citations to the record refer to TTABVUE, the Board’s online docketing system. Specifically, the number preceding “TTABVUE” corresponds to the docket entry number(s), and any number(s) following “TTABVUE” refer to the page number(s) of the docket entry where the cited materials appear.

³ 1 TTABVUE 5 (N. of Opp. ¶¶ 5-7). Copies of the pleaded registrations were properly introduced into the record. 5 TTABVUE (Opp. NOR Exhibs. 1-2, 4). Reg. No. 4573765 issued on July 22, 2014; Reg. No. 544403 issued on June 26, 1951, based on a claim of acquired distinctiveness under Section 2(f) of the Act; and Reg. No. 1950891 issued on January 23, 1996. Opposer also pleaded ownership and relied upon Reg. No. 1679591 (PURPLE PASSION

Mark	Reg. No.	Goods
EVERCLEAR (in standard characters)	4573765	Class 33: Alcoholic beverages except beers.
	544403	Class 33: Grain or ethyl alcohol for beverage purposes.
	1950891	Class 33: ethyl alcohol for beverage purposes.

Opposer refers to its marks as the “EVERCLEAR Marks” and alleges that they “are extremely well known, famous and are uniquely associated with [Opposer] in connection with [Opposer’s] goods offered under and in conjunction with the EVERCLEAR Marks by reason of the long, continuous use and extensive promotion by [Opposer] and/or its predecessors-in-interest.”⁴

Applicant’s, in its Answer, denies the salient allegations of the Notice of Opposition.⁵

EVERCLEAR, stylized with design); however, this registration was cancelled on September 30, 2022, during the briefing of this proceeding.

⁴ 1 TTABVUE 6 (N. of Opp. ¶ 8).

⁵ 4 TTABVUE (Answer).

Applicant also asserted in its Answer, as affirmative defenses, that the “Notice of Opposition is barred by the equitable doctrines of waiver, estoppel, laches, and/or delay.” 4 TTABVUE 5. Applicant did not pursue any of these defenses at trial, and we therefore consider them waived. *CBC Mortgage Agency v. TMRR, LLC*, 2022 USPQ2d 748, *3 (TTAB 2022); *Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, *3 n.5 (TTAB 2022). See also TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 801.01 (2022) (“If a party fails to reference a pleaded claim or affirmative defense in its brief, the Board will deem the claim or affirmative defense to have been waived”).

We further note that asserted as an “affirmative defense” that the “Notice of Opposition fails to state a claim upon which relief may be granted.” 4 TTABVUE 5. This is not a true affirmative defense because it relates to the sufficiency of the pleading of Opposer’s claim rather than a statement of a defense to a properly pleaded claim. In any event, Applicant did not file a motion to dismiss or pursue this “defense” at trial, and we therefore consider any

The case is fully briefed.⁶

I. Record; Evidentiary Objection

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the files of Applicant's involved applications.

Opposer introduced:

- Notice of Reliance ("Opp. NOR") and accompanying Exhibits 1-33;⁷
- Declaration of Opposer's Branded Spirits Finance Director, Chris Noll ("Noll Decl."), and accompanying exhibit;⁸
- Declaration of Opposer's Vice President of Marketing, Fletcher Buchman ("Buchman Decl."), and accompanying exhibits;⁹
- Declaration of Opposer's Brand Manager for Tequila and White Spirits, McKenna Burst ("Burst Decl."), and accompanying exhibits;¹⁰ and
- Declaration of Opposer's survey expert witness, Hal Poret ("Poret Decl."), and accompanying exhibit.¹¹

Applicant introduced:

- Notice of Reliance ("App. NOR") and accompanying Exhibits A-FF;¹² and

such has been waived because it was not pursued. *U.S. Olympic Comm. v. Tempting Brands Netherlands B.V.*, 2021 USPQ2d 164, at *4 (TTAB 2021) (defendant's failure to state a claim is not a "true affirmative defense" and, because it was not argued by motion or pursued at trial, is waived).

⁶ The parties designated portions of their briefs as "Confidential" under the Board's Standard Protective Order. Opposer's redacted main brief appears at 21 TTABVUE and its redacted rebuttal brief appears at 27 TTABVUE. Applicant's redacted brief appears at 24 TTABVUE.

⁷ 5-6 TTABVUE, including materials designated "Confidential."

⁸ 8-9 TTABVUE, including a copy designated "Confidential."

⁹ 9-10 TTABVUE, including a copy designated "Confidential."

¹⁰ 11-12 TTABVUE, including a copy designated "Confidential."

¹¹ 13 TTABVUE.

¹² 16-17 TTABVUE, including materials designated "Confidential."

- Declaration of Applicant's co-owner and CEO, Rick Lynch ("Lynch Decl."), and accompanying Exhibits A-B.¹³

Shortly after Applicant's trial period, Opposer filed a "Notice of Evidentiary Objections to Applicant's Declaration of Rick Lynch."¹⁴ Opposer objects to Mr. Lynch's testimony regarding a "Brand Survey" on the basis that "(1) Mr. Lynch was not properly disclosed as an expert pursuant to TBMP 401.03 and Fed. R. Civ. P. 26(a)(2), and (2) the testimony comprises expert testimony which lacks foundation under Federal Rule of Evidence 702."¹⁵ Opposer reiterated this objection in its trial brief.¹⁶

Applicant did not respond to Opposer's evidentiary objection. Moreover, Applicant does not reference or otherwise appear to rely on Mr. Lynch's testimony, or related exhibits, regarding Applicant's "Brand Survey" in its brief.

A survey offered in litigation before the Board is not a freestanding piece of evidence, but is instead offered as the basis for expert opinion testimony. *See generally Promark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1247-50 (TTAB 2015). *See also M2 Software, Inc. v. Madacy Ent., Corp.*, 421 F.3d 1073, 76 USPQ2d 1161, 1171 (9th Cir. 2005) ("district judges properly rejected the ... survey because the survey's creator did not qualify as an expert on designing or analyzing consumer surveys" (internal quotations omitted)). On the other hand, a survey need

¹³ 18-19 TTABVUE, including materials designated "Confidential."

¹⁴ 20 TTABVUE.

¹⁵ *Id.* at 2.

¹⁶ 21 TTABVUE 44. Opposer added the following language in its brief: "...and (3) the 'Brand Survey' is inadmissible hearsay pursuant to Federal Rule of Evidence 801 and 802." *Id.*

not always be introduced as an “expert survey,” or by an expert witness, in order to be admissible; the Board has held that brand awareness studies commissioned in the ordinary course of business are admissible as evidence of consumer recognition of marks. *See, e.g., Chanel, Inc. v. Makarczyk*, 110 USPQ2d 2013, 2022 (TTAB (2014) (multiple consumer surveys commissioned by Chanel over the years; introduced via testimony of Chanel Division President of fashion, watches & fine Jewelry); *NASDAQ Stock Mkt., Inc. v. Antartica, S.r.l.*, 69 USPQ2d 1718, 1724 (TTAB 2003) (NASDAQ commissioned annual surveys to measure awareness of its stock market among the investing and general public; introduced via testimony of NASDAQ’s senior vice president of worldwide marketing and financial products).

Here, Applicant does not argue its “Brand Survey” was conducted in the normal course of business.¹⁷ Thus, Mr. Lynch’s testimony regarding the “Brand Survey” constitutes opinion expert testimony under Rule 702 of the Federal Rules of Evidence and Applicant was required by Trademark Rule 2.120(a)(2)(iii) to disclose any expert opinion regarding any survey. Because Applicant did not designate Mr. Lynch as an expert, nor move under Trademark Rule 2.120(a)(2) for leave to use Mr. Lynch’s opinion testimony regarding the survey, Opposer’s objection thereto is sustained.

Accordingly, Mr. Lynch’s testimony regarding its “Brand Survey,” and related exhibits, are given no further consideration in this proceeding.¹⁸

¹⁷ Indeed, Mr. Lynch testified that one reason he conducted the survey was that he “also wanted to gauge our demographic’s feeling on whether Opposer’s brands and the Everwild brand appeared related in name, imagery, meaning, etc.” 19 TTABVUE (Lynch Decl. ¶ 20).

¹⁸ Specifically, we do not consider the Lynch Decl. ¶¶ 20-24 (at 18 TTABVUE 7-9).

II. Opposer's Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at *3 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (2021) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A party in the position of plaintiff may oppose registration of marks when doing so is within the zone of interests protected by the statute and it has a reasonable belief in damage that would be proximately caused by registration of the marks. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020), *cert. denied*, 141 S.Ct. 2671 (2021) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and a reasonable belief in damage by the registration of a mark, which demonstrates damage proximately caused by registration of the mark).

Here, Opposer's pleaded registrations for marks containing the term EVERCLEAR, along with the testimony of its witnesses, which have been properly introduced, establish that it is entitled to oppose registration of Applicant's EVERWILD and EVERWILD SPIRITS (stylized with design) marks on the ground of likelihood of confusion. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (registration establishes "standing"); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (testimony that opposer uses its mark "is sufficient to support opposer's allegations of a reasonable belief that

it would be damaged ...” where opposer alleged likelihood of confusion). Moreover, we note Applicant has not challenged Opposer’s entitlement to a cause of action in this proceeding.

III. Priority

Because Applicant has not counterclaimed to cancel any of Opposer’s pleaded registrations, priority is not at issue with respect to these registered marks vis-à-vis Applicant’s marks and goods. *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

IV. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). We consider the likelihood of confusion factors about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Opposer bears the burden of proving a likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf*, 55 USPQ2d at 1848.

We focus our analysis on Opposer's registered standard character mark EVERCLEAR for "alcoholic beverages except beers." If we find confusion likely between this registered mark and Applicant's two marks, we need not consider the likelihood of confusion in connection with Opposer's other pleaded marks. On the other hand, if we find no likelihood of confusion between the EVERCLEAR mark and Applicant's marks, we would not find confusion likely based on Opposer's other pleaded marks. *In re Max Capital Grp.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. Identity of Goods; Trade Channels and Classes of Consumers

We begin our analysis by considering the *DuPont* factor involving the "similarity or dissimilarity and nature of the goods or services as described in an application or registration." *DuPont*, 177 USPQ at 567; *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Concurrently, we also assess the *DuPont* factor involving "the similarity or dissimilarity of established, likely-to-continue trade channels," *DuPont*, 177 USPQ at 567, and the classes of consumers to which the services are marketed. *Coach Servs.*, 101 USPQ2d at 1723 (considering together "the similarity or dissimilarity of the trade channels in which the parties' goods are sold and the purchasers to whom the parties' goods are marketed").

Here, the goods are legally identical because Applicant's identified goods "wine; distilled spirits," are fully encompassed by Opposer's "alcoholic beverages, excluding beer."¹⁹ See *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) ("Applicant's broadly worded identification of 'furniture' necessarily encompasses Registrant's narrowly identified 'residential and commercial furniture.'"). See also *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *6 (TTAB 2019).

Because the goods are legally identical, we presume that the channels of trade and classes of purchasers for these goods also overlap. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011). In other words, consumers of Opposer's alcoholic beverages will encounter Applicant's distilled spirits and wine in the same, normal trade channels, such as a liquor store.

¹⁹ We take judicial notice that "distilled spirit, also called distilled liquor" is defined as an alcoholic beverage (such as brandy, whisky, rum, or arrack) that is obtained by distillation from wine or other fermented fruit or plant juice or from a starchy material (such as various grains) that has first been brewed. The alcoholic content of distilled liquor is higher than that of beer or wine." From ENCYCLOPEDIA BRITANNICA online website, <https://www.britannica.com/topic/distilled-spirit/Producing-the-mash>, accessed and obtained March 20, 2023. The Board may take judicial notice of definitions, including online authoritative resources that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). See also, *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013).

The legal identity of the goods and their channels of trade and classes of purchasers weighs heavily in favor of finding a likelihood of confusion.

B. Alleged Strength and Weakness of Opposer’s Mark

In determining the strength or weakness of Opposer’s EVERCLEAR mark, we consider both its conceptual strength based on the nature of the mark itself and its commercial recognition in the marketplace. *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596 at *10 (TTAB 2020); *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength . . . and its marketplace strength . . .”). “[T]he strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak.” *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003). *See also Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017).

As to whether EVERCLEAR is commercially strong or weak, the fifth *DuPont* factor enables Opposer to expand the scope of protection afforded its mark through evidence showing “[t]he fame of the prior mark (sales, advertising, length of use),” while the sixth *DuPont* factor allows Applicant to contract that scope of protection by adducing evidence of third-party use of similar marks on similar goods. *Made in Nature v. Pharmavite*, 2022 USPQ2d 557, *17 (TTAB 2022) (citing *DuPont*, 177 USPQ at 567).

Opposer argues that its EVERCLEAR mark is “famous and strong.”²⁰ In terms of commercial strength, Opposer relies on a brand awareness survey conducted by its expert witness, Mr. Hal Poret, who concluded that EVERCLEAR is “very well known among consumers of alcohol products in general and among consumers of wine and distilled spirits in particular.”²¹ The survey found the level of awareness for EVERCLEAR as a brand name to be 72.5% amongst all alcohol consumers; for purposes of comparison, Absolute received 89.8% and Dogfish received 38.8%.²² Given the parties’ goods overlap as to “distilled spirits” and “wine,” we note the survey reflects the following degrees of awareness for EVERCLEAR within these relevant consumer subgroups:²³

- 77.2% among consumers of liquor/ distilled spirits; and
- 70.8% among consumers of wine.

Opposer also points to its, and its predecessors-in-interest’s, long use of the EVERCLEAR mark since 1917, as well as impressive sales figures, in volume and revenue, for alcoholic beverage products, from 2009 to 2021.²⁴ EVERCLEAR-branded goods are the “highest selling and number ranked (by sales numbers and cases) neutral grain alcohol brand in the United States.”²⁵ Opposer’s EVERCLEAR goods

²⁰ 21 TTABVUE 30; 13 TTABVUE 30.

²¹ 13 TTABVUE 29 (Poret Decl. Exhib. 1 “Survey Regarding Awareness of EVERCLEAR Mark”).

²² *Id.*

²³ *Id.*

²⁴ 9 TTABVUE 9-10 (Buchman Decl. ¶¶ 20-25); and 8 TTABVUE (Noll Decl. ¶ 14). Exact figures were designated “confidential.”

²⁵ *Id.*, ¶ 25.

have also received some unsolicited media attention, including being named in third-party recipes for cocktails.²⁶ For example:



MY BAKING ADDICTION

In a large pitcher, stir together 1/4 cup cold water, 1/4 cup of superfine sugar, 32 oz. of pomegranate juice, 6 oz. of Everclear, and 1/4 cup of lime juice (about three limes). Chill until you're ready to serve. Then, stir in 24 oz. of ginger beer and enjoy. If you'd like, you can garnish with fresh lime and pomegranate seeds.

Recipe from My Baking Addiction.

[red arrows supplied in illustration].²⁷

²⁶ 11 TTABVUE (Burst Decl. Exhibs. 9, 11-13, 16-17, and 19).

²⁷ *Id.*, Burst Decl. Exhib. 9.

A 2020 New York Times article focused on Opposer's EVERCLEAR-branded goods, including its new-found popularity as a germ-killing alternative during the Covid epidemic, while, at the same time, Opposer was attempting to position its EVERCLEAR goods as a cocktail ingredient and appeal to more upscale consumers:²⁸

How Everclear Became a Pandemic Favorite

Long the stuff of fraternity parties, the 190-proof grain alcohol wants to go from DIY germ killer to cocktail ingredient.

You know 190-proof Everclear by reputation. The bartender's equivalent of jet fuel, this high-octane neutral grain spirit is more than twice the strength of standard vodka, and is illegal in 11 states.

It's been mythologized by generations of fraternity parties and celebrated in song. Art Alexakis, the frontman of the 1990s post-grunge band Everclear, once referred to the liquor as "pure white evil." Bushwick Bill, the late rapper from the Geto Boys, claimed that he shot himself in the eye in 1991 while plastered on Everclear and PCP.

How strange, then, that this storied party propellant has become a tool against the pandemic.

While we do not consider the statements made in the article for the truth of the matter asserted by the author, the article is probative for purposes of showing the way the EVERCLEAR mark is regarded by the author and how readers will perceive the mark. *See Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1708 (TTAB 2010) ("probative value [of Internet materials] is strictly confined to showing that the public may have been exposed to those internet websites and therefore may be aware of the information or advertisements contained therein"). And, implicit in

²⁸ *Id.*, Burst Decl. Exhib. 10.

the article is that EVERCLEAR has been well-known for a long time in connection with alcoholic beverages.

Opposer further highlights its efforts to police the register and marketplace from what it considers to be confusingly similar marks. Opposer maintains “an active enforcement program to protect its rights in the EVERCLEAR brand” focusing on “EVER-formative marks used in connection with distilled spirits, beer, wine, liqueurs, and shandy, and even in other product categories unrelated to beverage alcohol.”²⁹ Opposer’s witness, Mr. Buchman, described Opposer’s policing efforts, including filing oppositions and sending cease and desist letters to prevent third-parties from registering or using putative confusingly similar marks, such as FOREVER CLEAR “in connection with alcoholic beverages,” EVER CLEVER for beer, and EVERLOVE for vodka.³⁰

Applicant, on the other hand, argues that Opposer’s EVERCLEAR mark is not commercially strong and takes issue with it being a “market leader,” asserting that Opposer’s market share “is misleading as it relates only to the neutral grain spirits” and “lacks context as to how it fits into the overall market share of wine, distilled spirits and/or ‘alcoholic beverages except beer.’”³¹ However, Applicant’s goods are

²⁹ 21 TTABVUE 33, citing Buchman Decl. ¶¶ 26, 30-40 (at 9 TTABVUE).

³⁰ See 9 TTABVUE; Buchman Decl. ¶¶ 26, 30-40.

³¹ 24 TTABVUE 29.

“distilled spirits,” which includes “neutral grain spirits.”³² Thus, we must presume Applicant’s goods under the EVERWILD and EVERWILD SPIRITS (stylized with design) marks encompass the neutral grain spirits market, where EVERCLEAR is the market-leading brand.

Applicant also contends that Opposer “paints a confusing picture of its sale and revenue data.”³³ Applicant contends that Opposer’s declaration testimony evidence reflects “raw numbers with no context” and “Opposer appears to be attempting to capture the downstream sales of its product by third-parties, or perhaps double count its sales, in order to inflate its true bottom line.”³⁴ In addition, Applicant points out “[n]one of Opposer’s witnesses testified [to] the raw numbers in [the related testimonial exhibits to] support its ‘retail revenue’ figure.”³⁵

Applicant also argues that “[t]here are marks similar to the EVERCLEAR mark[] in use on similar goods.”³⁶ Applicant points out that despite Opposer’s stated efforts to police its EVERCLEAR mark in connection with the marks: EVER CLEVER and EVER GRAIN, both in connection with beer, these two third-party marks are “still

³² “Neutral spirits” is defined as “ethyl alcohol distilled at or above 190 proof, often used in blended alcoholic beverages.” Online version AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, FIFTH EDITION (2016). Retrieved March 23, 2023.

³³ 24 TTABVUE 29.

³⁴ *Id.* at 30.

³⁵ *Id.*

³⁶ 24 TTABVUE 34.

used in connection with beer.”³⁷ Indeed, although Opposer successfully opposed registration of these marks, Applicant submitted evidence showing they are still being used in commerce on beer.³⁸ Applicant also submitted evidence of use of another third-party mark, EVER AND EVER, on beer.³⁹

Applicant also argues that EVERCLEAR is a conceptually weak mark, in that it “suggest[s] an alcoholic beverage that is always clear.”⁴⁰ In this regard, Applicant relies on the plain definitions of EVER (“at all times; always”) and CLEAR (“to make clear or bright. To free from impurities, blemishes, cloudiness, muddiness...”), and argues that Opposer’s mark “engender[s] a commercial impression of something that is always or constantly transparent, bright, light, easily perceptible, or free from impurities.”⁴¹ Applicant contends that this suggestive meaning is corroborated by Opposer’s marketing of its goods as “liquid blank canvas” or “blank liquid canvas” that is odorless, flavorless & colorless.⁴²

Based on the parties’ arguments and review of the entire record, we find that Opposer’s mark has some conceptual weakness due to its suggestive meaning. We hasten to add that Opposer’s EVERCLEAR registration is on the Principal Register and thus is presumed to be inherently distinctive. Trademark Act Section 7(b), 15

³⁷ *Id.*

³⁸ 16 TTABVUE; Applicant’s NOR Exhibs. G-L.

³⁹ *Id.*; Exhibs. P-Q.

⁴⁰ *Id.* at 33.

⁴¹ *Id.* at 26.

⁴² 24 TTABVUE 25; citing to Burst Decl. ¶ 11 and Exhib. 44.

U.S.C. 1057(b); *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006) (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”).⁴³

Moreover, based on the record before us, we find EVERCLEAR is also well-known and a commercially very strong mark among consumers of alcoholic beverages, particularly in connection with distilled spirits. The mark has a strong commercial presence and Opposer’s success in the sales of its EVERCLEAR-branded goods is probative and impressive. The Poret brand awareness survey shows that high percentages of relevant consumer subgroups are aware of the EVERCLEAR mark in connection with alcoholic beverages, particularly amongst consumers of distilled spirits and wine.

Applicant’s evidence of three third-parties using an EVER-formative mark in connection with beer is not only limited in number, but is also of little probative value because the overlapping goods of the parties are distilled spirits and wine, and beer is specifically excluded from Opposer’s registration. *See Nat’l Cable Television Ass’n, Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991) (discounting third-party use and registration evidence as “not only unpersuasive but essentially meaningless,” where “[n]one of the third party marks

⁴³ The registration on which we base our likelihood of confusion analysis, namely, Reg. No. 4573765, issued without a Section 2(f) claim of acquired distinctiveness.

and uses of ACE made of record are nearly as closely related to the activities of the parties as the virtually identical uses of the parties are to each other.”); *Key Chems., Inc. v. Kelite Chems. Corp.*, 464 F.2d 1040, 175 USPQ 99, 101 (CCPA 1972) (“... great majority of those registered marks are for goods unrelated to those in issue, and [have] little weight in the circumstances present here”). The parties’ goods, as identified in the application and registration, are identical as to distilled spirits and wine, and there is no evidence of third-party use of an EVER-formative mark in connection with such goods.

In sum, while Opposer’s EVERCLEAR mark may suggest a quality of its goods, it is very well-known and a commercially very strong mark and thus entitled to a broad scope of protection.

C. Similarity of the Marks


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

We also keep in mind that the degree of similarity between the marks necessary to find a likelihood of confusion declines where, as here, the marks are being used on legally identical goods and are offered in the same trade channels to the same class of consumers. *In re Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed Cir. 2010); *In re Max Capital*, 93 USPQ2d at 1248.

In comparing Opposer’s EVERCLEAR mark with Applicant’s EVERWILD mark, the obvious similarity between them is that both begin with the prefix EVER, followed by a single-syllable term. The shared prefix EVER renders the marks similar to one another in sight and sound, and we again note the dearth of evidence of others using an EVER-formative mark in connection with distilled spirits or wine.

Nonetheless, we must consider the marks in their entireties and, here, the marks obviously differ by the secondary terms, CLEAR and WILD. Thus, in terms of the marks’ connotations and commercial impressions, while the shared prefix EVER helps convey a similar meaning of “always” in each mark, Opposer’s EVERCLEAR mark may be understood as “always clear” and Applicant’s EVERWILD mark may convey a different meaning of “always wild.”



In evaluating Applicant’s other mark, , the term EVERWILD is the dominant element and, for reasons mentioned, it bears some similarity to Opposer’s EVERCLEAR mark. The addition to EVERWILD of the disclaimed word, SPIRITS, a highly descriptive or generic word for Applicant’s “distilled spirits,” has

extremely little significance for purposes of distinguishing this mark. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (citing *In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); *Cunningham v. Laser Golf Corp.*, 55 USPQ2d 1846 (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat’l Data Corp.*, 224 USPQ 752).

Similarly, the design element in Applicant’s mark plays a less meaningful role than the literal term, EVERWILD. “[W]hen a mark consists of both words and a design, ‘the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.’” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co., KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015) (citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 21 USPQ 198, 200 (Fed. Cir. 1983)). Greater weight is often given to the wording because that is what purchasers would use to refer to or request the goods. *In re Viterra*, 101 USPQ2d at 1911; *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018).

Overall, comparing the marks in their entireties as we must, we find Opposer’s EVERCLEAR mark is similar to Applicant’s EVERWILD and EVERWILD SPIRITS (stylized with a design) marks based on the shared prefix EVER. We do not ignore the differences between the marks and, accordingly, this factor weighs somewhat in favor of finding confusion likely.

D. Purchasing Conditions—Impulse versus Sophisticated

The fourth *DuPont* factor involves consideration of “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because the purchasers of these products are held to a lesser standard of purchasing care.

Opposer argues that the “products bearing applicant’s and opposer’s marks are relatively inexpensive” and that, accordingly, they “may be subject to impulse buying, [and] this factor weighs in favor of a likelihood of confusion.”⁴⁴ The record shows that Opposer’s goods cost as little as \$17.99 for a 750ml bottle of distilled spirits.⁴⁵ Given this relatively low price point, we agree with Opposer that consumers of distilled spirits or wine will not exercise a higher level of care in making their purchasing selection. We also keep in mind that the standard of care is that of the least sophisticated potential purchaser. *Stone Lion*, 110 USPQ2d at 1163, *cited in In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) (“Board precedent requires our decision to be based on the least sophisticated potential purchasers.”).

Accordingly, we find that this *DuPont* factor is neutral in our analysis.

⁴⁴ 21 TTABVUE 39-40.

⁴⁵ 10 TTABVUE (Buchman Decl. Exhib. 37).

V. Conclusion

Because Opposer's EVERCLEAR mark is commercially very strong and entitled to a broader than normal scope of protection, and the parties' goods are identical and will be offered in the same trade channels to the same classes of consumers, who will not exercise any special care in their purchasing selection, we find that Applicant's use of either of its marks, EVERWILD and EVERWILD SPIRITS (stylized with a design), is likely to cause confusion. 15 U.S.C. § 1052(d).

Decision: The opposition based on likelihood of confusion is sustained as to both applications.