

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 3, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board

—
Sazerac Brands, LLC

v.

Eagle Trace Brewing Company LLC

—
Opposition No. 91272260

Cynthia Johnson Walden, Ryan E. Thomas, Ryan C. Steinman, and Nathan C. Ranns, of Fish & Richardson P.C., for Sazerac Brands, LLC.

Daniel E. Kattman and Heidi R. Thole, of Reinhart Boerner Van Deuren s.c., for Eagle Trace Brewing Company LLC.

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Notice of Correction

By the Board:

On August 22, 2024, the Board mailed a final decision in this matter. It has since come to the Board's attention that there were several typographical errors in the decision, as originally issued, which have been corrected in the attached, revised copy of the decision. Specifically:

(1) The wording "or disclaimers of wording" has been deleted from the following sentence on page 13 of the decision:

Here, because Opposer's marks are registered on the Principal Register without claims of acquired distinctiveness, they are considered presumptively valid, inherently distinctive, and at most, suggestive of the identified goods.

(2) The wording "EARLE RARE website" has been replaced by the wording "EAGLE RARE website" on page 18 of the decision.

(3) The following sentence on page 26 of the decision,

While RARE has not been disclaimed in Opposer's registration of the mark, we find that that term has a somewhat laudatory meaning.

has been revised to

RARE has been disclaimed in Opposer's registration of the mark, and we find that that term has a somewhat laudatory meaning.

(4) The following sentence on page 33 of the decision,

Historically, a properly conducted survey has been considered akin to actual confusion.

has been revised to

Historically, the results of a properly conducted survey have been considered akin to actual confusion.

The time for filing an appeal or commencing a civil action regarding the Board's decision continues to run from the mailing date of the August 22, 2024 decision. *See* Trademark Rule 2.145(d), 37 C.F.R. § 2.145(d).

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—
Before Goodman, Lebow, and Casagrande,
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Eagle Trace Brewing Company LLC, seeks to register the following standard-character marks on the Principal Register:

- EAGLE PARK DISTILLING for “distilled spirits; alcoholic beverages, except beer” in International Class 33;¹ and


¹ Application Serial No. 90339247 (the '247 Application) was filed on November 24, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use anywhere and in commerce since at least as early as December 31, 2017.

- EAGLE PARK BREWING COMPANY for “alcoholic beverages, namely beer” in International Class 32.²

Opposer, Sazerac Brands, LLC, has opposed both applications on the ground of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). In support of its asserted claims, Opposer pleads prior rights in and ownership of the following marks registered on the Principal Register:

- EAGLE RARE (standard characters) for “bourbon whiskey” in International Class 33;³ and



-  for “whiskey” in International Class 33.⁴

Applicant denies the salient allegations of the Notice of Opposition in its Answer.

For the reasons discussed below, we dismiss the opposition.

² Application Serial No. 90337630 (the '630 Application) was filed on November 23, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant's claim of first use anywhere and in commerce since at least as early as December 31, 2017.

³ Registration No. 1065407, issued May 10, 1997; renewed. “RARE” is disclaimed.

⁴ Registration No. 3254611, issued June 26, 2007; renewed. The mark consists of eagle in flight over water. Color is not claimed as a feature of the mark.

Collectively, we refer to Opposer's pleaded marks as “Opposer's Eagle Marks.”

I. The Record

The record includes the pleadings, the file of the opposed applications by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), Opposer's pleaded registrations by operation of Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1),⁵ and additional evidence submitted by the parties during their respective testimony periods.

Opposer, during its case-in-chief, submitted a notice of reliance on Internet materials consisting of screenshots of publicly accessible third-party retail websites advertising Opposer's products offered under its pleaded marks;⁶ a notice of reliance on discovery materials (including Applicant's initial disclosures, and Applicant's responses to Opposer's requests for production of documents, interrogatories, and requests for admission) and portions of the deposition of Applicant's co-founder and president, Max Borgardt;⁷ the testimony declaration of Opposer's expert witness, Sarah Butler and her Expert Report;⁸ and the testimony declaration of Andrew Duncan, Global Brand Director of American Whiskey of Sazerac Company, Inc., the

⁵ Pursuant to Trademark Rule 2.122(b)(1), the notice of opposition was accompanied by "current cop[ies], printout[s], or screenshot[s] of information from the electronic database records of the Office from TSDR showing the current status and title (owner) of the registration[s]," thus making them of record in this proceeding. It was therefore unnecessary for Opposer to again make them of record during its testimony period. 17 TTABVUE.

⁶ 18 TTABVUE.

⁷ 19 TTABVUE (public), 20 TTABVUE (confidential). Responses to requests for production of documents introduced through a notice of reliance are admissible solely for the purpose of showing that a party has stated that there are no responsive documents, as Applicant has done in certain of its responses. *See McGowen Precision Barrels, LLC v. Proof Rsch., Inc.*, 2021 USPQ2d 559, at *5 n.6 (TTAB 2021).

⁸ 21 TTABVUE ("Butler Expert Report").

parent company of Opposer, with exhibits.⁹

Applicant, during its case-in-chief, submitted a notice of reliance on Internet materials and USPTO records, including dictionary definitions; third-party registrations for “trademarks that include the term ‘EAGLE’ for alcoholic beverages”; printouts “from websites that show products with trademarks that contain the word ‘EAGLE’ for alcoholic beverages”; printouts pertaining to “the criteria for a ‘craft brewery’ or ‘microdistillery’”; printouts of “results from alcohol and spirit competition awards”; printouts of “articles on grammatical structure”; USPTO records for “trademarks ... identifying an animal and registered for alcoholic beverages”; Opposer’s responses to Applicant’s interrogatory nos. 14, 20, 23 and 33;¹⁰ and the testimony declaration of Max Borgardt, with exhibits.¹¹

Opposer, during its rebuttal testimony period, submitted the rebuttal testimony declaration of Andrew Duncan, with exhibits;¹² a rebuttal notice of reliance on third-party registrations;¹³ and the rebuttal testimony declaration of Nathan C. Ranns, one of Opposer’s attorneys, regarding his investigation of into the use of third-party marks identified in Applicant’s notice of reliance.¹⁴

⁹ 22 TTABVUE (public), 23 TTABVUE (confidential) (“Duncan Test. Decl.”).

¹⁰ 32 TTABVUE.

¹¹ 31 TTABVUE (“Borgardt Test. Decl.”).

¹² 33 TTABUVE (confidential), 34 TTABVUE (public) (“Duncan Rebuttal Test. Decl.”).

¹³ 35 TTABVUE.

¹⁴ 36 TTABVUE.

II. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action must be established 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) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26, 109 USPQ2d 2061, 2067 n.4 (2014)). 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, Trademark Act Section 13, 15 U.S.C. § 1063, and the plaintiff has a reasonable belief in damage that is proximately caused by registration of the mark. *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 2022 USPQ2d 602, at *2 (Fed. Cir. 2022) (citing *Lexmark*, 572 U.S. at 129, 132); *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020).

Opposer’s entitlement to oppose registration of Applicant’s mark on the ground of likelihood of confusion is established by its pleaded registrations, which are of record and support a colorable claim for likelihood of confusion. *See, e.g., Lipton Indus. Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) (reasonable belief in damage may be established by “assert[ing] a likelihood of confusion which is not wholly without merit”); *Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, at *13-14 (TTAB 2022) (valid and subsisting pleaded registration establishes opposer’s direct commercial interest in the proceeding and its belief in damage) (citing *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000)).

III. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d). “Because Opposer relies on its asserted [EAGLE RARE and Eagle composite mark] registrations that have been made of record, and Applicant has not challenged these registrations by way of any cancellation counterclaim(s), Opposer’s priority ... is not at issue with respect to the goods identified” therein. *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *19-20 (TTAB 2021) (citing *King Candy Co. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)).

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. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) (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 and services. *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.”).

Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848. We consider the likelihood of confusion factors for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

A. Comparison of the Goods and Channels of Trade

“The second *DuPont* factor ‘considers [t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,’ while the third *DuPont* factor considers ‘the similarity or dissimilarity of established, likely-to-continue trade channels.’” *In re Embiid*, 2021 USPQ2d 577, at *22 (TTAB 2021) (quoting *In re Detroit Athl. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567)).

The comparison of goods is a key factor because it “considers whether ‘the consuming public may perceive [the respective goods] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)). We determine the relatedness of the goods as identified in the parties’ applications and registrations. *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *19 (TTAB 2021).

Once again, the ’247 Application (EAGLE PARK DISTILLING) identifies “distilled spirits; alcoholic beverages, except beer”; the ’630 Application (EAGLE PARK BREWING COMPANY) identifies “alcoholic beverages, namely beer”; and

Opposer's Eagle Marks respectively identify "bourbon whiskey" (EAGLE RARE) and "whiskey" (Eagle design).

1. The '247 Application (EAGLE PARK DISTILLING)

The "distilled spirits" and "alcoholic beverages, except beer" identified in the '247 Application are both broad descriptions that encompass the more narrowly described "bourbon whiskey" and "whiskey" identified in Opposer's Eagle Mark Registrations.¹⁵ The identifications of goods overlap on their face and are legally identical. *See Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *15-16 (TTAB 2023) ("If an application or registration describes goods or services broadly, and there is no limitation as to their nature, it is presumed that the registration encompasses all goods or services of the type described.") (quoting *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013)).

Legally identical goods are presumed to travel in the same channels of trade to the same classes of purchasers. *In re Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (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); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721,

¹⁵ As requested by Opposer in its brief, 41 TTABVUE 30, we take judicial notice of the definitions of "whiskey" and "bourbon" from the MERRIAM-WEBSTER dictionary. "Whiskey" is "a liquor distilled from fermented wort (such as that obtained from rye, corn, or barley mash)." "Bourbon" is a whiskey distilled from a mash made up of not less than 51 percent corn plus malt and rye." Thus, bourbon is a type of whiskey. *See* merriam-webster.com/dictionary/whiskey and merriam-webster.com/dictionary/bourbon (accessed July 9, 2024). "The Board may take judicial notice of information from dictionaries and encyclopedias," and we do so here. *See B.V.D. Licensing Corp. v. Body Action Design Inc.*, 846 F.2d 727, 6 USPQ2d 1719, 1721 (Fed. Cir. 1988) ("dictionaries and encyclopedias may be consulted").

723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *see also In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) (“Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers”), *quoted in In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672-73 (TTAB 2018).

With respect to the ’247 Application, the comparisons of the goods, trade channels, and classes of customers weigh in favor of finding a likelihood of confusion.

2. The ’630 Application (EAGLE PARK BREWING COMPANY)

In contrast to our comparison between the goods identified in Opposer’s Eagle Mark registrations and those in the ’247 Application, there is no overlap between the “whiskey” and “bourbon whiskey” in Opposer’s Eagle Mark Registrations and the “beer” in the ’630 Application.

Opposer, however, makes no distinction between the goods in the ’247 and ’630 Applications, treating them the same. Specifically, Opposer argues that:

The EAGLE PARK Marks cover “distilled spirits; alcoholic beverages, except beer” in Class 33 and “alcoholic beverages, namely, beer” in Class 32, whereas Opposer’s EAGLE Marks cover “bourbon whiskey” and “whisky” in Class 33. “Bourbon” is a type of whiskey, and “whiskey” (or “whisky”) is a type of distilled spirit. The parties’ goods therefore plainly overlap, travel through the same trade channels, and are available to the same class of customers.¹⁶

Applicant points out in response that:

Opposer has not provided any evidence regarding the relatedness between the goods identified in Opposer’s trademark registrations and

¹⁶ 41 TTABVUE 30 (Opposer’s Brief) (citations omitted).

the goods identified in Applicant's EAGLE PARK BREWING COMPANY trademark [application]. In fact, Opposer completely ignores any analysis of the EAGLE PARK BRREWING COMPANY goods, stating at multiple points throughout its trial brief that "bourbon whiskey" are the only goods "relevant to the instant dispute". ... However, there are two applications at issue in this case: "EAGLE PARK BREWING COMPANY" for "alcoholic beverages, namely, beer", and EAGLE PARK DISTILLING for "distilled spirits; alcoholic beverages, except beer". Applicant disagrees that the goods identified in the EAGLE PARK BREWING COMPANY trademark application are similar to the goods identified in [Opposer's] registrations for the purposes of likelihood of confusion. In fact, Opposer does not, in its analysis of the second duPont factor, even argue that goods identified the Applicant's EAGLE PARK BREWING COMPANY trademark application are related to Opposer's Goods.¹⁷

Opposer, on reply, contends that it need not prove that beer and whiskey are related because the Board has already found so in the past. According to Opposer's rationale:

The Board has time and again found that alcoholic beverages are sufficiently related to other alcoholic beverage products as to cause a likelihood of confusion. ...

...

Applicant's incomplete and conclusory arguments cannot overcome the extensive case law establishing the relatedness of various alcoholic beverages under the second *DuPont* factor.¹⁸

Opposer's argument is unavailing because we have long held that "[t]here is no per se rule that holds that all alcoholic beverages are related." *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009). Even though whiskey and beer (and other alcoholic beverages) have been found related in other cases, we must decide the outcome of this proceeding, just as we do with all cases, based on the facts

¹⁷ 43 TTABVUE 32-33 (Applicant's Brief) (citations omitted).

¹⁸ 44 TTABVUE 13 (Opposer's Reply Brief).

and evidence submitted in this case. *See, e.g., In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973) (explaining that each case must be decided on its own facts and “the differences are often subtle ones”).

Opposer also asserts Applicant’s offering of “both beer and distilled spirits under its EAGLE PARK Marks ... suggests these different types of alcoholic beverages commonly emanate from the same source.”¹⁹ However, one example of the same company using two different marks (EAGLE PARK DISTILLING and EAGLE PARK BREWING COMPANY) for different alcoholic beverages does not, itself, suffice to establish relatedness of the goods.

Opposer has failed to demonstrate on this record that beer and whiskey are related for purposes of finding a likelihood of confusion.

Turning to channels of trade, we find that they are overlapping with respect to the parties’ goods due to Applicant’s admissions during discovery. Specifically, Applicant admitted that its goods, “as identified in the EAGLE PARK Applications, travel and are promoted in the same or similar channels of trade as Opposer’s goods, as identified in the EAGLE Registrations.”²⁰ Applicant also admits that “EAGLE PARK branded products and EAGLE RARE branded products are sold or offered in at least some of the same retail stores”²¹

¹⁹ *Id.* at 13.

²⁰ 19 TTABVUE 103 (Applicant’s response to request for admission no. 9).

²¹ *Id.* (Applicant’s response to request for admission no. 11).

Based on the foregoing, with respect to the '630 Application, the second *DuPont* factor weighs against a finding of likelihood of confusion, whereas the third *DuPont* factor weighs in favor of it.

B. Strength of Opposer's Marks

Before comparing Applicant's marks to Opposer's marks, we address the parties' evidence and arguments related to the strength of Opposer's marks that may affect the scope of protection to which they are entitled. *See In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) (“[T]he strength of the cited mark is — as always — relevant to assessing the likelihood of confusion under the *DuPont* framework.”). The fifth *DuPont* factor enables an opposer to prove that its pleaded marks are entitled to an expanded scope of protection by adducing evidence of “[t]he fame of the prior mark (sales, advertising, length of use),” while the sixth *DuPont* factor allows an 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 v. Fan*, 2020 USPQ2d 10611, at *8 (TTAB 2020).

To determine a mark's strength, we consider its inherent strength, based on the nature of the mark itself, and its commercial strength, based on its recognition in the marketplace. *See Spireon, Inc. v. Flex Ltd.*, 71 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); 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION²² § 11:80 (5th ed. (March 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.”).

1. Conceptual Strength

To determine the inherent or conceptual strength of Opposer’s pleaded EAGLE RARE and Eagle Design marks, we evaluate their intrinsic nature, that is, where they lie “along the generic-descriptive-suggestive-arbitrary (or fanciful) continuum of words.” *In re Davia*, 110 USPQ2d 1810, 1814 (TTAB 2014). Here, because Opposer’s marks are registered on the Principal Register without claims of acquired distinctiveness, they are considered presumptively valid, inherently distinctive, and at most, suggestive of the identified goods. Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *see also See Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (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.”).

In addition, as Opposer notes, “there is nothing about [its] EAGLE Marks that suggests a connection between the marks and Opposer’s ‘bourbon whiskey’ or ‘whisky’

²² Hereafter, MCCARTHY ON TRADEMARKS.

goods.” Opposer argues that its marks are therefore “arbitrary and conceptually strong.”²³ See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (an arbitrary term is “conceptually strong as a trademark”); *Nautilus Group, Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173 (Fed. Cir. 2004) (defining an arbitrary mark as a “known word used in an unexpected or uncommon way” and observing that such marks are typically strong).

Applicant, nevertheless, argues that Opposer’s Eagle Marks are entitled to a lesser scope of protection because they “already coexist with third party marks containing the word ‘EAGLE’ for alcoholic beverages, including beer, wine, tequila, vodka and liquors ...”²⁴ Further to this contention, Applicant introduced a number of third-party registrations of Eagle-formative marks for use in connection with alcoholic beverages, specifically, beer, wine, and distilled beverages.²⁵ “The existence of third-party registrations on similar goods can bear on a mark’s conceptual strength.” See *Spireon*, 2023 USPQ2d 737, at *20 (citing *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015)).

Such registrations could ... show that the PTO, by registering several marks with such a common segment, recognizes that portions of such composite marks other than the common segment are sufficient to distinguish the marks as a whole and to make confusion unlikely. That

²³ 41 TTABVUE 32 (Opposer’s Brief).

²⁴ 43 TTABVUE 38 (Opposer’s Brief).

²⁵ 32 TTABVUE 69-263. Opposer points out that many of the third-party registrations introduced by Applicant are cancelled or have expired. However, we have not considered those registrations and do not list them here. See, e.g., *In re Brown-Forman Corp.*, 81 USPQ2d 1284, 1286 n.3 (TTAB 2006) (“Expired and/or cancelled registrations generally are evidence only of the fact that the registrations issued.”).

is, the presence of such a descriptive or suggestive weak segment in conflicting composite marks is not per se sufficient to make confusion likely.

Spireon, 2023 USPQ2d 737, at *4. Further, such registrations “reflect a belief, at least by the registrants, who would be most concerned about avoiding confusion and mistake, that various [EAGLE-formative] marks can coexist provided there is a difference.” *Jerrold Elecs. Corp. v. Magnavox Co.*, 199 USPQ 751, 758 (TTAB 1978) (internal citation omitted).²⁶

We find the following the third-party registrations relevant to our consideration:

Registered for beer:

EAGLE CREEK BREWING COMPANY, EAGLE HARBOR IPA, EAGLE ROCK BREWERY, AGUILA (English translation: Eagle), DESERT EAGLE BREWING COMPANY, CRYING EAGLE, CRYING EAGLE BREWING COMPANY, CRYING EAGLE BREWING COMPANY and Design, EARTH EAGLE BREWINGS, and EARTH EAGLE BREWINGS and Design.²⁷

Registered for distilled spirits:

BLACK EAGLE for whiskey; AQUILA (English translation: Eagle) for tequila; CABALLERO AGUILA (English translation: Gentlemen Eagle) for tequila, WHITE EAGLE for vodka; EAGLES’ NEST and Design for distilled spirits derived from grapes, and wines; and ESCUDO AGUILA

²⁶ Although Opposer quotes the Federal Circuit’s statement in *Olde Tyme Foods, Inc. v. Roundy’s, Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992) that “registration evidence may not be given any weight,” 41 TTABVUE 35, the Court cited, as support for that contention, its predecessor’s decision in *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973), that “[t]he existence of [third-party] registrations is not evidence of what happens in the market place or that consumers are familiar with them” Thus, it is clear that the Court was referring to a mark’s commercial strength, not its conceptual strength.

²⁷ 32 TTABVUE 104-06 (Registration Nos. 4712938); 123-25 (Registration No. 4944948); 141-43 (Registration No. 4251863); 152-56 (Registration No. 2714763); 186-87 (Registration No. 4628739); 175-77 (Registrations No. 5219682); 181-83 (Registration No. 5219212), 178-80 (Registration No. 5423687); 188-89 (Registration No. 5396211); 190-91 (Registration No. 5396212).

REAL (English translation: royal eagle shield) for tequila.²⁸

With respect to the beer registrations, we note that the marks in the first three registrations – EAGLE CREEK BREWING COMPANY, EAGLE HARBOR IPA, and EAGLE ROCK BREWERY – each have a structure that is similar to Applicant’s EAGLE PARK BREWING COMPANY for beer in the ’630 Application. That is, they each begin with the word “eagle” used as an attributive noun and gives the impression of a geographic location. The list also includes the mark AGUILA which, according to the translation in the registration file, translates as “eagle” and thus has a similar connotation to Opposer’s Eagle Marks.²⁹ The remaining beer registrations use “eagle” as a second term and have different connotations. With respect to the distilled spirit registrations, the most probative is for the mark BLACK EAGLE, which identifies whiskey and thus is most similar to Opposer’s Eagle Marks. The other registrations, which identify different spirits, are less probative.

The number of pertinent third-party registrations – ten for beer, and six for distilled spirits (including one for whiskey) – are modest in number as compared to the other cases where extensive evidence of third-party registrations was considered “powerful on its face,” e.g., *Juice Generation*, 115 USPQ2d at 1674, or “voluminous,” e.g., *Jack Wolfskin Austrang Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015). Nevertheless,

²⁸ *Id.* at 164-66 (Registration No. 1801664); 157-61 (Registration No. 1416880); 213-15 (Registration No. 3890969); 261-63 (Registration No. 2629232); 130-34 (Registration No. 3968253); and 226-28 (Registration No. 4724076).

²⁹ *Id.* at 35-36, 152.

we find that they have some effect of slightly weakening the conceptual strength of Opposer's Eagle Marks with respect to beer and whiskey.

2. Commercial Strength

Commercial or marketplace strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Bd. of India*, 80 USPQ2d at 1899. Commercial strength may be measured indirectly by the volume of sales and advertising expenditures in connection with the goods sold under the mark, and supported by other indicia such as length of time of use of the mark; widespread critical assessments; notice by independent sources of the goods identified by the marks; and the general reputation of the goods. *Weider Publ'ns, LLC v. D & D Beauty Care Co.*, 109 USPQ2d 1347, 1354 (TTAB 2014); *see also Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1308 (Fed. Cir. 2002) (recognizing indirect evidence as appropriate proof of strength).

Opposer argues that its EAGLE Marks “are well known and entitled to a broad scope of protection.”³⁰ To demonstrate the commercial strength of its Eagle Marks, Opposer relies on the testimony of Andrew Duncan, “Global Brand Director, American Whiskey” of Opposer's parent corporation, Sazerac Company, Inc.³¹ We have carefully considered his testimony and highlight some of the important aspects here.

Regarding length of use, Mr. Duncan testified that Opposer, its parent company,

³⁰ 41 TTABVUE 33 (Opposer's Brief).

³¹ 22-23 TTABVUE 2 (Duncan Test Decl., ¶ 1).

and its predecessor-in-interest (Joseph E. Seagram & Sons, Inc.) have continually marketed and offered bourbon whiskey under the mark EAGLE RARE since at least as early as 1975.³² Around December 2001, Opposer's parent company adopted the Eagle Composite mark, which it transferred to Opposer in 2015.³³ Although evidence introduced through Mr. Duncan's testimony shows that the Opposer's Eagle Design Mark has appeared on certain bottles of Opposer's EAGLE RARE,³⁴ there is no accompanying testimony regarding the extent of its use.

Regarding advertising, Mr. Duncan testified that Opposer has invested "a great deal of financial resources in promotion of the brand" and he provided confidential figures regarding the amount spent on advertising under the mark over the past five years.³⁵ However, we have no context within which to place those figures. For example, we do not know the amounts spent on advertising for similar products sold by Opposer's competitors. Mr. Duncan also testified that EAGLE RARE bourbon has been promoted on Opposer's "dedicated EAGLE RARE website" for 18 years, as well as on its other websites; through trade publications "over the years"; and through other means such as through Opposer's social media accounts on Facebook, Twitter, and Instagram,³⁶ though we do not know whether the number of followers is significant in comparison to competitor brands in the industry.

³² *Id.* at 3, 5 (¶¶ 9, 14).

³³ *Id.* at 5 (¶¶ 15-16).

³⁴ *See, e.g., Id.* at 23 (¶ 48).

³⁵ 23 TTABVUE 15 (Duncan Test. Decl. ¶ 33) (confidential only).

³⁶ 22-23 TTABVUE 7 (Duncan Test. Decl. ¶¶ 22-23, 29).

Regarding sales revenue, Mr. Duncan provided confidential figures of gross sales for the previous five years (2018-2022), and testified that “[r]evenue generated from sales of EAGLE RARE bourbon whiskey has been steadily increasing over time.”³⁷ However, as with Opposer’s advertising figures, Opposer’s sales figures are unaccompanied by evidence of its mark share, which would put its sales figures in context and help to show the extent of the mark’s exposure to the relevant public. As the Federal Circuit has explained, “[r]aw numbers of product sales and advertising expenses may have sufficed in the past to prove fame of a mark, but raw numbers alone in today’s world may be misleading. ... Consequently, some context in which to place raw statistics is reasonable.” *Bose Corp.*, 63 USPQ2d at 1309; *see also Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007) (raw numbers alone in today’s world may be misleading).

In terms of media coverage, Mr. Duncan testified that “EAGLE RARE has been the subject of extensive unsolicited media articles discussing the popularity and success of the EAGLE RARE brand,” including in “national news publications and magazines such as Forbes, Uproxx, and Business Insider,” as well as in local news outlets and “websites popular among those in the beverage industry”³⁸

Mr. Duncan further testified that Opposer and its parent company “enters its EAGLE RARE products into industry competitions by sending samples of its bourbon

³⁷ *Id.* at 6 (¶ 19).

³⁸ *Id.* at 16 (¶ 36).

whiskey to be rated by industry experts.”³⁹ As a result, Opposer’s EAGLE RARE bourbon whiskey has received numerous accolades over the years, including approximately 41 awards in just the previous five years (2018-2022), and “nearly a hundred different awards and accolades since 2009.”⁴⁰

Mr. Duncan also testified about Opposer’s enforcement activities, and provided examples that have resulted in abandonment or withdrawal of third-party applications trademark applications filed for Eagle-formative marks for alcoholic beverages.⁴¹ Opposer argues that this evidence further demonstrates the strength of its Eagle Marks.⁴² Applicant points out, in response, that none of the oppositions listed by Opposer included a final judgment on the merits and asserts that any settlements or agreements obtained as a result of Opposers actions “are not probative concerning likelihood of confusion but are rather only probative of Opposer’s financial muscle against smaller companies.”⁴³ We agree that the effect of Opposer’s enforcement activity evidence is limited given the lack of record evidence showing that Opposer’s policing efforts have, themselves, led to the public recognition and renown of its Eagle Marks. *See, e.g., Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693 (Fed. Cir. 2018) (“the mere fact that lawsuits were filed is not reasonably probative of the fame inquiry, which is

³⁹ *Id.* at 13 (¶ 30).

⁴⁰ *Id.* at 13-14 (¶ 31).

⁴¹ *Id.* at 17-21 (¶¶ 40-44).

⁴² 41 TTABVUE 34 (Opposer’s Brief).

⁴³ 43 TTABVUE 36 n. 3 (Applicant’s Brief).

focused on whether the mark has achieved extensive public recognition and renown, not on enforcement efforts”) (citation and internal quotation marks omitted).

We have carefully considered the evidence presented by Opposer regarding the commercial strength of its Eagle marks, some of which we have highlighted here. As mentioned, Opposer has provided little evidence related specifically to the strength of its Eagle Design Mark. In fact, Mr. Duncan only mentions that mark once in his testimony to note that it was adopted in 2015.⁴⁴ We thus do not know the extent of its use, or even whether it appears on all of its EAGLE RARE whiskey bourbon. As a consequence, we cannot attribute any commercial strength to that mark.

On the other hand, the evidence suggests that Opposer has enjoyed strong commercial success with respect to its EAGLE RARE bourbon. That suggestion, however, is limited by the lack of detail and context. We find on this record that Opposer’s EAGLE RARE mark is moderately strong, commercially, in connection with bourbon and is therefore entitled to a slightly broader scope of protection than might be accorded a mark with less recognition.

Applicant, for its part, argues that the strength of Opposer’s Eagle Marks has been weakened by the number of third party uses for eagle-formative marks in connection with alcoholic beverages. While third-party registrations, as discussed above, may bear on conceptual strength, evidence of widespread third-party use of similar marks for similar goods tends to indicate a lack of commercial strength. *See Omaha Steaks*, 128 USPQ2d at 1693 (“The purpose of introducing evidence of third-party use is ‘to

⁴⁴ 22-23 TTABVIE 5 (¶ 15).

show that customers have become so conditioned by a plethora of ... similar marks that customers have been educated to distinguish between different [such] marks on the bases of minute distinctions.”); *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016) (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”) (both cases quoting *Palm Bay Imps.*, 73 USPQ2d at 1691).

Applicant provided Internet printouts from third-party producers or retailers of distilled spirits and beer that use Eagle-formative marks in connection with those goods which, as discussed above, are the particular alcoholic beverages we find relevant in this analysis. Specifically, Applicant provided evidence of the following third-party uses of the following Eagle-formative marks:

Used for Distilled Spirits:

Highland Park Wings of the Eagle scotch whiskey; Black Eagle Honey bourbon; Black Eagle Straight bourbon whiskey; War Eagle Kentucky Straight bourbon whiskey; Red Eagle bourbon; Red Eagle Rye Whiskey; Red Eagle Brandy; Red Eagle vodka; Old Eagle Vodka; and White Eagle Vodka.⁴⁵

Used for Beer:

Yuengling Traditional lager beer and Miller Genuine draft beer each use an eagle design on their packaging and/or labels as shown here:⁴⁶

⁴⁵ 32 TTABVUE 745-50, 753, 762-63, 773-85, 789-93.

⁴⁶ *Id.* at 768-70, 794-95.



As shown, there are ten Eagle-formative marks used in connection with distilled spirits, four of which are for bourbon; and there are a couple of Eagle designs that are used in connection with beer. Nevertheless, we agree with Opposer that the lack of any evidence regarding the extent of the third-party uses lessens their impact. See *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1112 (TTAB 2007). “That is to say, there are no specifics regarding the sales or promotional efforts surrounding the third-party marks. Thus, we are unable to conclude that consumers have become conditioned to recognize that several other entities use [an eagle-formative or eagle design mark] for products that may be used in the bathroom.” *Id.* at 1112. See also *Palm Bay Imps.*, 73 USPQ2d at 1693 (“As this court has previously recognized where the ‘record includes no evidence about the extent of [third-party] uses the probative value of this evidence is thus minimal.’”) (internal quotation omitted).

3. Summary on the Strength of Opposer’s Marks

We have found that Opposer’s Eagle Marks are arbitrary in connection with beer and distilled spirits, but nonetheless have some conceptual weakness due to the adoption and registration of various Eagle-formative marks for those alcoholic beverages. We have also found that Opposer’s EAGLE RARE Mark to be moderately

strong, commercially, but accord no commercial strength to Opposer’s Eagle Design mark on this record. We thus conclude the fifth *DuPont* factor slightly favors a finding of likelihood of confusion as to the EAGLE RARE mark, but is essentially neutral as to the Eagle Design mark; and the sixth *DuPont* factor is neutral as to both of Opposer’s marks.

C. Similarity or Dissimilarity of the Marks

We turn now to the first *DuPont* factor, which considers “[t]he 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*, 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), “but does not necessarily do so.” *Sure-Fit Prods. Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 117 USPQ 295, 297 (CCPA 1958) (emphasis original).

“The proper test” of the similarity between Applicant’s EAGLE PARK DISTILLING and EAGLE PARK BREWING COMPANY marks and Opposer’s



EAGLE RARE and Eagle Design () marks “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.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012). Because the goods at issue are distilled spirits (including whiskey and bourbon whiskey) and beer without any restrictions as to price point or classes of consumers, the average customer is an ordinary consumer of such goods.

We disagree with Opposer’s contention that “the presence of the common, dominant word EAGLE in the beginning of both parties’ word marks renders the marks highly similar and likely to cause confusion.”⁴⁷ Opposer’s sole basis for arguing that EAGLE is dominant in all of the word marks is that it appears first. Although the first word in a mark is often its dominant feature, that is not always the case, and, with respect to Applicant’s marks, it is not the case here. *See, e.g., In re Hearst Corp.*, 982 F.2d 493, 494, 25 USPQ2d 1238-39 (Fed. Cir. 1992) (rejecting the “first word, dominant word” guideline with respect to the mark VARGA GIRL as a whole because it was clear that the word GIRL following VARGA made a significant contribution to the connotation of the mark, distinguishing it from the mark VARGAS, even for identical goods); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d

⁴⁷ 41 TTABVUE 45 (Opposer’s Brief).

1531, 1533-34 (Fed. Cir. 1997) (affirming the Board’s finding that “DELTA,” not the disclaimed generic term “CAFE,” is the dominant portion of the mark THE DELTA CAFE); *Monster Energy*, 2023 USPQ2d 87, at *45 (While the first term in a mark “typically is the one which creates the strongest impression, ... this is not always the case”); *Sabhnani*, 2021 USPQ2d 1241, at *47-48 (“The structure of the verbal portion of Petitioner’s mark (‘ROYAL MIRAGE’) counsels against a reflexive application of the principle cited by Respondent that consumers are generally more inclined to focus on the first word, prefix o[r] syllable in any trademark or service mark.”) (internal punctuation omitted).

We have no difficulty finding the first term, EAGLE, dominant in Opposer’s EAGLE RARE mark, where EAGLE appears first. RARE has been disclaimed in Opposer’s registration of the mark, and we find that that term has a somewhat laudatory meaning. “Rare” refers to something that is “marked by unusual quality, merit, or appeal.”⁴⁸ Thus, as Applicant observes, “the combination of the EAGLE and RARE evokes the image of a unique or rare eagle or a unique or rare product (that is modified by the term ‘eagle’).”⁴⁹

In contrast, the word EAGLE is not the focus of Applicant’s EAGLE PARK DISTILLING or EAGLE PARK BREWING COMPANY marks, and therefore is not dominant. As Applicant points out, in both of its marks, EAGLE is used as an

⁴⁸ 32 TTABVUE 56 (MERRIAM-WEBSTER definition).

⁴⁹ 42 TTABVUE 27 (Applicant’s Brief).

attributive noun.⁵⁰ That is, the noun EAGLE modifies a second noun, PARK, “such that the combination of EAGLE and PARK conveys the idea of a geographic place, real or imagined where one might or might not see an eagle.”⁵¹

We find that neither EAGLE nor PARK are dominant in Applicant’s mark, but rather, since EAGLE PARK is a unitary term that has its own significance apart from the meanings of the individual terms EAGLE and PARK, those terms cannot be separated and considered in detail without running afoul of the anti-dissection rule. *See Estate of P. D. Beckwith, Inc. v. Commissioner of Patents*, 252 U.S. 538, 545-46 (1920) (“The commercial impression of a trade-mark is derived from it as a whole, not from its elements separated and considered in detail. For this reason it should be considered in its entirety”).

We agree with Opposer that the terms DISTILLING (in Applicant’s EAGLE PARK DISTILLING mark) and BREWING COMPANY (in Applicant’s EAGLE PARK BREWING COMPANY mark) have less significance in our comparisons due to their descriptiveness and, indeed, they have been disclaimed. *See Cunningham*, 55 USPQ2d at 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 749, 752 (Fed. Cir. 1985); *In re Code Consultants*, 60 USPQ2d at 1702 (disclaimed matter is often “less significant in creating the mark's commercial impression.”). This does not

⁵⁰ *Id.* at 26.

⁵¹ *Id.*

impact our finding that the terms EAGLE and EAGLE PARK have distinct connotations and commercial impressions.

Opposer's witness, Mr. Duncan, testified that "[i]t is a common practice of consumers of alcoholic products to shorten the names of products" and asserts, as an example, that "consumers often refer to bourbon whiskey sold under [Opposer's] EAGLE Marks as simply 'Eagle Whiskey' or 'Eagle Bourbon.'"⁵² For support, he points to several posts on Instagram about Opposer's EAGLE RARE bourbon uses the terms "eaglebourbon" or "eaglewhiskey" are used as hashtags, along with various other tags, such as those shown below:⁵³



⁵² 22 TTABVUE 21 (Duncan Test. Decl., ¶ 48).

⁵³ *Id.* at 288-294 (Exhibit OTX 11).

We are not persuaded by this argument. While consumers may have a penchant to shorten marks, such as where a mark includes descriptive or generic terms, *see, e.g., In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016) (finding the penchant to shorten marks “would lead many consumers to drop the highly descriptive/generic term ‘Blonde’ when calling for Applicant’s [TIME TRAVELER BLONDE beer]”), Opposer’s evidence does not support that they would do so in this case, any more than it supports that they would refer to Opposer’s whiskey by the other hashtags used in these posts (e.g., #dcbars, or #whiskeyporn). The purpose of a hashtag (or metatag) on social media is simply to allow users to “track (or attract users to) a specific topic (e.g., #movies),”⁵⁴ not to call for the goods for purchase or consumption. In each of the examples provided by Opposer, there is either a picture of the goods or mention of the entire name EAGLE RARE being discussed in the post.

More importantly, even if it is true that many customers refer to Opposer’s bourbon as Eagle Whiskey or Eagle Bourbon, there is no reason to believe that they would do so with respect to Applicant’s EAGLE PARK DISTILLING bourbon as Eagle Bourbon (and certainly not with respect to Applicant’s EAGLE PARK BREWING COMPANY for beer) based on the unitary nature of the term EAGLE PARK in Applicant’s marks as discussed above, and the different commercial impression imparted by that term.

Opposer argues that “the parties’ word marks are further similar because

⁵⁴ See the <https://www.britannica.com/topic/hashtag> (accessed August 8, 2024), from which we take judicial notice of its explanation of a “hashtag.” *See B.V.D. Licensing*, 6 USPQ2d at 1721 (judicial notice may be taken of encyclopedia entries).

Applicant's marks are in standard characters and may therefore be displayed in any font style, size, and color, including the same font style, size, and color used by Opposer" for its Eagle Marks.⁵⁵ While it is true, as a general proposition, that the owner of a registered standard character mark may use its mark in a similar style as that of another, the distinctions in connotations and commercial impressions here remain distinct.

We arrive at the same conclusion when we consider Applicant's EAGLE PARK DISTILLING and EAGLE PARK BREWING COMPANY marks and Opposer's Eagle



Design mark: . The evidence shows that Opposer's Eagle Design mark has been used on the label of Opposer's EAGLE RARE mark, which reinforces the commercial impression of the eagle as the symbol of Applicant's goods. However, even by itself, the design does not engender the same or similar connotations or commercial impressions as imparted by Applicant's marks.

In conclusion, although we acknowledge that there are visual and aural similarities arising from both parties' use of the term (or depiction of, an) EAGLE, we find that the marks in their respective entireties have distinct overall connotations and commercial impressions, and that the first *Dupont* factor strongly favors a finding of no likelihood of confusion.

⁵⁵ 41 TTABVUE 47 (Opposer's Brief).

D. Purchasing Conditions

The fourth *DuPont* considers the conditions under which sales are made, i.e., “impulse” vs. careful, sophisticated purchasing. *DuPont*, 177 USPQ at 567.

Opposer’s witness, Mr. Duncan, testified that “a 750 mL bottle of EAGLE RARE bourbon is typically sold to the end-consumer at a retail price ranging from \$41.99 to \$79.99, with an average price of about \$54.99,” and that “while the cost of individual drinks containing EAGLE RARE bourbon varies (e.g., based on the establishment, other drink ingredients, and drink size), they are often inexpensive, priced from approximately \$8.00 to \$14.00.”⁵⁶ Applicant’s president, Max Borgardt, testified further, and provided evidence showing, that Opposer’s 17-year old EAGLE RARE bourbon typically costs \$2,000 or more, and its 20-year old EAGLE RARE bourbon can cost close to \$20,000.⁵⁷ Mr. Borgardt also testified that “Applicant’s beers, when sold in bottles or cans, typically cost between \$3.00 and \$22.00, depending on the number of bottles or cans sold in the package,” and that its “Distilled Spirits typically cost between \$20.00 and \$50.00” per bottle.⁵⁸

Clearly, there is are great disparities between the cost of Opposer’s 17- and 20-year old EAGLE RARE bourbons, which can cost thousands of dollars, and Opposer’s standard EAGLE RARE bourbon, which averages around \$55 per bottle and would be more accessible to the average consumer. The cost of Opposer’s standard EAGLE RARE bourbon appears to be on par with or similar to the cost of Applicant’s distilled

⁵⁶ 22 TTABVUE 5-6 (Duncan Test. Decl., ¶ 18)

⁵⁷ 31 TTABVUE 8 (Borgardt Test. Decl., ¶¶ 64, 66).

⁵⁸ *Id.* (¶¶ 61-62).

spirits, which can cost up to an average of \$50 per bottle.

In the final analysis, however, we must look to the identification of goods in the Applications and Registrations, none of which set price points or restrict their customers to careful sophisticates. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 765 (TTAB 1986) (“evidence and/or argument relating to the fact that the particular wines sold under the marks are expensive, high quality wines sold in high-quality wine and spirits stores to discriminating, sophisticated purchasers who would likely be familiar with the vineyard naming customs in France must be disregarded since there is no restriction in the application or registration limiting the goods to particular channels of trade or classes of customers.”).

Absent such restrictions, there is no reason to infer that the parties’ customers will be particularly sophisticated, discriminating, or careful in making their purchases. *Cf. Somerset Distilling Inc. v. Speymalt Whisky Dist. Ltd.*, 14 USPQ2d 1539, 1542 (TTAB 1989) (while certain purchasers may be aficionados of certain brands, others may not be as knowledgeable, and may purchase distilled spirits as gifts, or to stock a bar for their guests). The parties’ distilled spirits, and Applicant’s beers, may be offered to a range of customers, both sophisticated and unsophisticated, and we must base our decision on the least sophisticated potential customers. *In re Bay State Brewing Co., Inc.*, 117 USPQ2d 1958, 1960 n.4 (TTAB 2016) (citing *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (recognizing Board precedent requiring consideration of the “least sophisticated consumer in the class”)).

We find the fourth *Dupont* factor neutral.

E. Opposer's Survey Evidence

Opposer introduced the testimony of marketing research expert Sara Butler, the Managing Director of National Economic Research Associates, Inc. and Chair of its Survey and Sampling Practice, who conducted a survey “[t]o evaluate the likelihood of confusion between Applicant’s EAGLE PARK BREWING COMPANY and EAGLE PARK DISTILLING marks and Opposer’s EAGLE RARE mark.”⁵⁹ According to Ms. Butler, the survey was “designed and implemented” to “evaluate the extent to which, if at all, Applicant’s use of EAGLE PARK DISTILLING as a brand name for bourbon products causes a likelihood of confusion with Opposer’s EAGLE RARE products and services[.]”⁶⁰ We accept, based on her testimony and the references she provides, that Ms. Butler qualifies as an expert in the conducting and assessment of likelihood of confusion surveys. Applicant does not dispute her qualifications in this regard.⁶¹

Historically, the results of a properly conducted survey have been considered akin 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.”); *see also* 2 MCCARTHY ON TRADEMARKS § 32:54 (2d ed. 1984) (“Survey results are generally classified as evidence of actual confusion ...”).

⁵⁹ 21 TTABVUE 12 (Butler Expert Report, ¶ 3).

⁶⁰ *Id.* at 14 (¶ 16).

⁶¹ *Id.* at 9-10, and 34-48 (Exhibit A), discussing her qualifications.

More recently, however, Professor McCarthy has opined that survey evidence is not direct evidence of actual confusion, but rather circumstantial evidence from which we may infer likelihood of confusion: “[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.” 6 MCCARTHY ON TRADEMARKS § 32:184 (5th ed.). In order to be probative, however, “consumer surveys must have been fairly prepared and its results directed to the relevant issues.” *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 29 USPQ2d 1321, 1327 (2d Cir. 1994) (internal citations omitted).

The population for Ms. Butler’s survey was limited to United States residents who were at least 21 years old; had purchased whiskey or bourbon in the previous three months or were likely to purchase whiskey or bourbon in the next three months; and typically spent between \$40 and \$49.00 on a 750 ml bottle of whiskey or bourbon.⁶² The survey “included a total of 390 respondents, 196 in the Test Group, and 194 in the Control Group.”⁶³

The main questionnaire used a “*Squirt*-style lineup.”⁶⁴ Respondents “were told ‘This is the first brand name:’ and were shown the name ‘EAGLE RARE.’”⁶⁵

⁶² *Id.* at 15 (¶ 19).

⁶³ *Id.* at 22 (¶ 37).

⁶⁴ *Id.* at 18 (¶ 28).

⁶⁵ *Id.* at 19 (¶ 30).

“Respondents were required to view the name for at least 5 seconds before they were able to continue in the survey.”⁶⁶ “On the next screen, respondents were told ‘Now you will be shown some brand names of other bourbon products,’” following which they were presented with a “randomized list” of twelve brand names that were “selected as a mix of well-known and lesser-known brands, in a similar price range to Eagle Rare, and include names with references to birds”: “BASIL HAYDEN’S, EVAN WILLIAMS, FOUR ROSES, HIGH WEST, HUDSON WHISKEY, KENTUCKY OWL, KNOB CREEK, PEACH STREET DISTILLERS, SMOOTH AMBLER, SMUGGLERS’ NOTCH DISTILLERY, WILD TURKEY, and WOODFORD RESERVE.”⁶⁷ “In the Test Group, respondents were shown these brands in addition to the at-issue EAGLE PARK DISTILLING name. Control Group respondents were shown the same list but, were shown the control name FALCON PARK DISTILLING instead of EAGLE PARK DISTILLING.”⁶⁸

The respondents were then asked a series of questions, which asked:

- “if any of the brands shown were made or put out by the same company that makes or puts out the brand shown first,” and if so, which one(s) and why;
- “if any of the brands shown were associated or affiliated with the company that makes or put out the brand shown first,” and if so, which one(s) and why; and
- “if any of the brands received authorization or approval from the company that

⁶⁶ *Id.* at 18 n. 25.

⁶⁷ *Id.* at 19-20 (¶¶ 31-32).

⁶⁸ *Id.* at 20 (¶ 32).

makes the brand they saw first,” and if so, which one(s) and why.⁶⁹

1. Made or Put Out by the Same Company?

39.8% of Test Group respondents indicated that they thought at least one of the brands in the lineup was made by the same company they saw first, as compared to 37.1% in the Control Group who believed the same thing (where FALCON PARK DISTILLING was used in place of EAGLE PARK DISTILLING in the list of other brands).⁷⁰ These respondents were then asked to indicate which particular brand(s) they thought were made by the company they saw first.⁷¹ Of that group, 24.0% selected EAGLE PARK DISTILLING, as compared to 9.3% of respondents in the Control Group who believed that FALCON PARK DISTILLING was made by the same company that made the brand they saw first.⁷²

2. Affiliated or Associated with the Same Company?

36.2% of Test Group respondents indicated that they thought at least one of the brands was associated or affiliated with the company that makes the brand they saw first, as compared to 35.1 percent in the Control Group who believed the same thing (where FALCON PARK DISTILLING was used in place of EAGLE PARK DISTILLING in the list of other brands).⁷³ These respondents were then asked to indicate which brand(s) they thought were associated with that company.⁷⁴ Of that

⁶⁹ *Id.* at 20-22 (¶¶ 33-35).

⁷⁰ *Id.* at 23-24 (¶ 38).

⁷¹ *Id.* at 24 (¶ 39).

⁷² *Id.* at 24-25 (¶¶ 39-40).

⁷³ *Id.* at 25-26 (¶ 41).

⁷⁴ *Id.* at 26 (¶ 41).

group, 24.5% selected EAGLE PARK DISTILLING, as compared to 11.3% of respondents in the Control Group who thought that FALCON PARK DISTILLING was associated or affiliated with the company that makes the brand they saw first.⁷⁵

3. Authorized or Approved by the Same Company?

31.1% of Test Group respondents indicated that they thought at least one of the brands in the list received authorization or approval from the company that makes the brand they saw first, as compared to 24.7% in the Control Group who believed the same thing (where FALCON PARK DISTILLING was used in place of EAGLE PARK DISTILLING in the list of other brands).⁷⁶ These respondents were then asked to indicate which brand(s) they thought were authorized or approved by that company. Of that group, 18.4% selected EAGLE PARK DISTILLING, as compared to 6.2% of respondents in the Control Group who thought that FALCON PARK DISTILLING received authorization or approval from the company that makes or puts out the brand they saw first.⁷⁷

4. Purported Overall Confusion

Ms. Butler then proceeded to “calculate the overall rate of confusion by counting the unique number of respondents who indicated that EAGLE PARK DISTILLING (Test Group) or FALCON PARK DISTILLING (Control Group) was associated with EAGLE RARE across the three series of questions – source, affiliation or association,

⁷⁵ *Id.* (¶ 42).

⁷⁶ *Id.* at 27 (¶ 43).

⁷⁷ *Id.* at 27-28 (¶¶ 43-44).

and authorization or approval.”⁷⁸ If a respondent in the Test Group selected EAGLE PARK DISTILLING to more than one of the questions, the respondent was only counted as “being confused” one time.⁷⁹

According to Ms. Butler’s data, 35.7% of respondents in the Test Group thought that EAGLE PARK DISTILLING was from the same company as, was affiliated or associated with, or received authorization or approval from the company that makes or puts out EAGLE RARE, as compared to 17.0% of respondents in Control Group who said FALCON PARK DISTILLING was from the same company as, was affiliated or associated with, or received authorization or approval from the company that makes or puts out EAGLE RARE.⁸⁰ Ms. Butler then subtracted the percentage of respondents purportedly confused in the Control Group from the percentage of respondents purportedly confused in the Test Group and came up with a total percentage of those purportedly confused with respect to EAGLE PARK DISTILLING: “The overall net rate of confusion, using the Control Group rate to net out ‘survey noise’ or guessing, is 18.7 percent.”⁸¹

Ms. Butler also testified that respondents who thought the brand(s) they selected is made or put out by, associated or affiliated with, or received authorization or approval from the company that makes the brand they saw first, “generally indicated that the name was the reason they thought so.” She notes that “77.1 percent of the

⁷⁸ *Id.* at 28-29 (¶ 45).

⁷⁹ *Id.* at 29 (¶45).

⁸⁰ *Id.*

⁸¹ *Id.*

confused Test Group respondents[] indicated that the name was the reason.”

5. Analysis of the Survey

As Applicant correctly observes, Ms. Butler’s survey does not test for confusion as to Applicant’s EAGLE PARK BREWING COMPANY mark. Nor does it test for confusion as to Opposer’s Eagle Design mark. The survey therefore has no probative value as to those marks.

Opposer, nevertheless, maintains that the survey is indeed probative with respect to Applicant’s EAGLE PARK BREWING COMPANY mark because it “does not *exclude* customers of beer.”⁸² According to Opposer, “[t]he fact that Opposer’s survey focused on a subset of alcoholic beverages does not make the survey results any less relevant to the issue of likelihood of confusion for Applicant’s EAGLE PARK BREWING COMPANY mark.”⁸³ These contentions are absurd and lack merit, given that Ms. Butler’s survey does not even mention Applicant’s EAGLE PARK BREWING COMPANY Mark, much less test for confusion arising from it.

As far as Applicant’s EAGLE PARK DISTILLING mark, Applicant challenges the probative value of Ms. Butler’s survey for a number of reasons, including that “the survey format and brand array displayed with the test and control stimuli create response demand and order-effect bias, which artificially inflates the affirmative survey responses”; the survey is “too narrowly designed to be relevant”; “the survey evidence does not replicate the marketplace”; and Ms. Butler’s report “does not

⁸² 44 TTABVUE 20 (Opposer’s Reply Brief).

⁸³ *Id.*

contain the survey data underlying the opinions set forth in the expert report, which diminishes its probative value.”⁸⁴ “Consequently,” concludes Applicant, “Opposer’s expert report and consumer survey is not probative of actual confusion in the marketplace....”⁸⁵

We agree with Applicant that there are a number of defects in Ms. Butler’s survey that diminish its probative value to an extent that we cannot rely on it with any confidence. This is not to say that we agree with all of Applicant’s criticisms of the survey, or that it should be excluded entirely from our consideration. *See In re Hotels.com LP*, 573 F.3d 1300, 91 USPQ2d 1532, 1536 (Fed. Cir. 2009) (“[S]urvey evidence is subject to review for its probative value, based on factors including the design of the survey, the questions asked and the experience of the surveyor.”). Rather, we have considered the survey in our likelihood of confusion analysis, with its limitations.

We begin with Applicant’s criticism of the *Squirt*-style format used by Ms. Butler for the main questionnaire portion of her survey. There are two types of surveys generally employed in likelihood of confusion cases: an *Eveready*-style format, and a *Squirt*-style format. The *Eveready* format generally involves showing participants the junior mark and asking them to name the company they think puts out the mark (and then why they think that or whether they can name any other products made

⁸⁴ 43 TTABVUE 48 (Applicant’s Brief). However, as to order, Ms. Butler states that the brands were presented in a randomized order, and that “[r]esponse options ‘Yes’ and ‘No’ were rotated to guard against order effects.” 21 TTABVUE 21-22, 57 at n. 28, 31 and 34. But the response option of “Don’t know / no opinion” appears to have always been presented last.

⁸⁵ 43 TTABVUE 48 (Applicant’s Brief).

by that brand) with the assumption that they are aware of the senior mark from prior experiences (*i.e.* the senior mark is strong). *See Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 188 USPQ 623 (7th Cir. 1976). This type of survey has often been called the “model” or “gold standard” of surveys in likelihood of confusion cases. *See e.g., GrubHub Inc. v. Relish Labs LLC*, 80 F.4th 835, 2023 USPQ2d 1062, at *28 n.8 (quoting MCCARTHY ON TRADEMARKS § 32:174 (5th Ed.) (quoting J.B. Swann, *Likelihood of Confusion Studies and the Straightened Scope of Squirt*, 98 TRADEMARK REP. 739, 746 (2008))). It is generally used in cases where the senior mark is alleged to be famous or very strong. *Id.* at 748; *see also Parks LLC v. Tyson Foods, Inc.*, 863 F.3d 220, 233 (3d Cir. 2017) (“An *Ever-Ready* survey is usually employed by owners of commercially strong marks.”).

The second format used is the *Squirt* format, and involves presenting participants with both conflicting marks, without any assumption of familiarity with any of the marks. *See SquirtCo. v. Seven-Up Co.*, 628 F.2d 1086, 207 USPQ 897 (8th Cir. 1980). “The Squirt format is the alternative for testing the likelihood of confusion between marks that are weak, but are simultaneously or sequentially accessible in the marketplace for comparison.” J.B. Swann, *Likelihood of Confusion Studies and the Straightened Scope of Squirt*, 98 TRADEMARK REP. at 746; *see also Parks v. Tyson*, 863 F.3d at 233 (“Holders of weaker marks more frequently employ a *Squirt* survey....”). As in the survey presented here, *Squirt* format respondents are shown a lineup or array of marks, in a manner purported to replicate the marketplace where they would appear, and then asked whether they believe the uses come from the same or

affiliated companies and if yes, what makes them believe that. Swann, 98 TRADEMARK REP. at 749.

As Applicant points out, the *Squirt* format has received criticism from courts and commentators to the extent that it improperly replicates market conditions because participants artificially informed about a mark that they may not necessarily know already and then asked about connections with that mark.⁸⁶ *Id.* at 752 (“Historically, ... Squirt studies have been rejected because they utilize close-ended questions, and opprobrium is likely to continue with respect to such questions that have a clearly ‘leading’ effect....”); see also *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477, 72 USPQ2d 1011, 1018 (5th Cir. 2004) (critiquing a *Squirt* survey for pushing “survey participants to search for any connection, no matter how attenuated ... instead of permitting participants to make their own associations”); *24 Hour Fitness USA, Inc. v. 24/7 Tribeca Fitness, LLC.*, 447 F. Supp. 2d 266, 279 (S.D.N.Y. 2006), *aff’d*, 247 F. App’x 232 (2d Cir. 2007) (Line-up variation of a “Squirt” survey found not persuasive to prove likely confusion concerning word marks because of criticism of the method and control question); *Promark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1248 (TTAB 2015) (A closed-ended Squirt-type question asking the person to compare two marks was improperly leading. For this and other reasons, the survey results were disregarded.); MCCARTHY ON TRADEMARKS § 32:174.50 (“A continuing challenge raised against the Squirt method is that is inherently and improperly leading because it tells the survey respondents about a senior user’s trademark they are unfamiliar

⁸⁶ *Id.* at 51-52.

with.”).⁸⁷

Given that Opposer argues that its Eagle Marks “are conceptually and commercial strong falling on the higher end of the commercial strength spectrum from very strong to very weak,”⁸⁸ we question why Ms. Butler did not follow the *Eveready* (“gold standard”) format and instead chose to use a *Squirt*-style format that is better suited where the marks are weak and not readily recognizable by the relevant public.

In addition to the problems associated with the use of a *Squirt*-style format under the circumstances here, we agree with Applicant that “the survey format and brand array displayed with the test and control stimuli create[d] response demand ... bias, which artificially inflate[d] the affirmative survey responses.”⁸⁹ Applicant points out, for example, that “[o]f the twelve brands presented with the brand array, only two of other brands (WILD TURKEY and KENTUCKY OWL) referenced a bird” and “neither of these brands included the word referring to a ‘bird’ as the first word in the

⁸⁷ Prof. McCarthy explains that “[t]he “Squirt” survey method will often produce different results from the ‘Eveready’ format for the same contesting marks. For a senior user’s mark that is not readily identified by survey respondents, a Squirt survey is more likely to produce a higher level of perception that the marks identify the same or related sources.” MCCARTHY ON TRADEMARKS § 32:174.50; *see also* Simonson, “*The Effect of Survey Method on Likelihood of Confusion Estimates: Conceptual Analysis and Empirical Test*,” 83 TRADEMARK REP. 364 (1993) (comparing the inherent bias of an Eveready format with the Squirt line-up format survey: “Indeed, the empirical study showed substantial method sensitivity, with estimates derived from one technique often two to three times greater than those generated by other techniques.”); *Nat’l Distillers Prods. Co., LLC v. Refreshment Brands, Inc.*, 198 F. Supp. 2d 474, 483–84 (S.D.N.Y. 2002) (showing a zero level of confusion with an Eveready-type survey, as compared to a Squirt-type survey that showed a 38% level of confusion of affiliation. The court rejected the Squirt survey results and found no infringement.).

⁸⁸ 41 TTABVUE 34 (Opposer’s Brief).

⁸⁹ 43 TTABVUE 48 (Applicant’s Brief).

trademark.”⁹⁰ Applicant notes further that those two bird marks “are both two-word marks containing the normal grammatical structure of an adjective followed by a noun (which is distinguishable from both the Applicant’s EAGLE PARK DISTILLING mark and Opposer’s EAGLE RARE trademark).”⁹¹

We agree with Applicant’s argument concerning the leading or suggestive nature of the questions, which likely created a demand effect,⁹² and that the other brands used in the array of the survey had relatively little in common with Applicant’s mark. As a result, Applicant’s EAGLE PARK DISTILLING mark, the only mark containing EAGLE, “stood out like a bearded man in a lineup with four clean-shaven men.” *THOIP v. Walt Disney Co.*, 99 USPQ2d 1323, 133 (S.D.N.Y. 2011). It is therefore not surprising that survey participants selected Applicant’s brand over the others. Our concerns are not allayed by Ms. Butler’s observation in her report that “77.1 percent of the confused Test Group respondents[] indicated that the name was the reason” they selected Applicant’s mark.⁹³ It is to be expected that a survey inquiring about source of the names of products would depend on the similarity of those names. Ms. Butler does not provide the other reasons indicated by survey participants.

There are also flaws in the universe of participants selected for the survey. “In scientific parlance, a ‘universe’ (sometimes also called a ‘population’) is defined as the

⁹⁰ *Id.* at 52.

⁹¹ *Id.*

⁹² Notably, while Ms. Butler provides the survey respondents with the additional choice of “Don’t know / no opinion,” nowhere does she advise respondents that it is possible that **none** of the marks presented are related in any manner as to source.

⁹³ 21 TTABVUE 47 (Butler Expert Report, ¶ 47).

totality of all individuals (or elements) possessing a particular trait or feature in common.” Jacob Jacoby and Amy H. Handlin, *Nonprobability Sampling Designs for Litigation Surveys*, 81 TRADEMARK REP. 169, 170 (1991). “Defining the proper universe is a critical step in designing any survey—including surveys used in Lanham Act cases.” Wm. G. Barber, *The Universe*, in TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS, pp. 27–56 (Shari S. Diamond and Jerre B. Swann eds.) (2d ed. ABA 2022). “Selection of the proper universe is a crucial step, for even if the proper questions are asked in a proper manner, if the wrong persons are asked, the results are likely to be irrelevant.” 5 MCCARTHY ON TRADEMARKS § 32:162. Moreover, the party offering the survey evidence bears the burden of proving that the universe is proper. *See id.* § 32:159.

We find that the universe of participants was too narrow, or underinclusive, with respect to the survey requirement that participants must have purchased whiskey or bourbon in the previous three months or be likely to purchase whiskey or bourbon in the next three months. As Professor McCarthy explains, in a case such as this, which alleges forward confusion rather than reverse confusion,⁹⁴ “the proper universe to survey is the potential buyers of the junior user’s goods or services.” *Id.* In contrast, in reverse confusion cases, which is not alleged here, “the relevant group to be

⁹⁴ “Forward confusion occurs when consumers believe that goods bearing the junior mark came from, or were sponsored by, the senior mark holder. By contrast, reverse confusion occurs when consumers dealing with the senior mark holder believe that they are doing business with the junior one. In such a case, the smaller senior user, such as seeks to protect its business identity from being overwhelmed by a larger junior user who has saturated the market with publicity.” *In re FCA US LLC*, 126 USPQ2d 1214, 1227 (TTAB 2018) (internal quotations and citations omitted).

surveyed is the senior user's customer base." *Id.*; see also *Paco Sport, Ltd. v. Paco Rabanne Parfums*, 54 USPQ2d 1205 (S.D.N.Y. 2000), *aff'd*, 234 F.3d 1262 (2d Cir. 2000) (The proper universe to survey is composed of purchasers of the junior user's goods in a case of forward (or "traditional") confusion). Here, the junior user is Applicant and the potential buyers of its goods are purchasers of "alcoholic beverages, except beer," the broadest description of goods in Applicant's EAGLE PARK DISTILLING application. Thus, the restriction to potential buyers of whiskey and bourbon was improper.

We also find that the universe was too narrow with respect to the requirement that participants typically spend only a certain amount on the relevant goods. As noted above, there are no restrictions to the channels of trade, classes of consumers, or price points in the description of goods in either the applications or Opposer's registrations. Nevertheless, Ms. Butler limited the universe of respondents to those who ordinarily spend between \$40 and \$49.00 on a 750 ml bottle of whiskey or bourbon. But as noted previously, the evidence shows that Opposer's EAGLE RARE whiskey is provided at a range of prices, with Opposer's 17-year old EAGLE RARE costing \$2,000 or more, and its 20-year old EAGLE RARE costing close to \$20,000.⁹⁵

Finally, with respect to survey confusion rate, we note that Ms. Butler's finding of 18.7% as the net rate of confusion falls closer to the lower end of the spectrum for purposes of assessing a likelihood of confusion. Professor McCarthy reports that "[g]enerally, figures in the range of 25% to 50% have been viewed [by courts] as solid

⁹⁵ 31 TTABVUE 8 (Borgardt Test. Decl., ¶¶ 64, 66).

support for a finding of likelihood of confusion.” 5 MCCARTHY ON TRADEMARKS § 32:188. In his view, “survey confusion numbers that go below 20% need to be carefully viewed against the background of other evidence weighing for and against a conclusion of likely confusion,” *id.*, which we have endeavored to do here.

Opposer points out that “although Applicant disclosed a purported rebuttal expert,” it “chose not to submit any independent market research, rebuttal expert testimony, or a consumer behavior data into the record,” and “never deposed [Ms. Butler] to address the purported deficiencies alleged,”⁹⁶ all of which is true. Nevertheless, it is Opposer—the proponent of the survey—that has the burden of establishing that it was conducted in accordance with accepted principles of survey research, including but not limited to showing that a proper universe was examined for the survey; a representative sample was drawn from the universe; the mode of questioning the respondents was correct; and the sample design, questionnaire were in accordance with generally accepted standards of procedure and statistics in the field of such surveys, and we find that the survey has been deficient in these respects. Federal Judicial Center, *MANUAL FOR COMPLEX LITIGATION*, 116 (5th ed. 1981); *see also Citizens Fin. Group, Inc. v. Citizens Nat’l Bank of Evans City*, 383 F.3d 110, 72 USPQ2d 1389, 1397 (3d Cir. 2004) (“[T]he proponent of the survey bears the burden of proving that the universe is proper.”) (citations omitted); *Hostetler v. Johnson Controls, Inc.*, 2016 U.S. Dist. LEXIS 89278, at *53 (N.D. Ind. 2016) (“As the party that bears the burden of proof and as the proponent of the expert testimony, it is

⁹⁶ 44 TTABVUE 19 (Opposer’s Reply Brief).

Plaintiffs' obligation to show that the sample is representative of the class and can be reliably extrapolated to the class as a whole.”).

For the various reasons discussed, including but not limited to our finding that (i) the *Squirt*-style survey format is more conducive where an opposer's mark is not alleged to be commercially strong; (ii) the survey has significant design flaws, including with respect to—for example—the brands chosen for the array, and the universe of participants; (iii) the low net confusion rate, and, perhaps most significantly, (iv) the survey fails to sufficiently approximate market conditions,⁹⁷ we are unable to infer that there is a likelihood of confusion between Opposer's EAGLE RARE mark and Applicant's EAGLE PARK DISTILLING mark based on the survey.

F. Conclusion

Regarding Applicant's EAGLE PARK DISTILLING Mark (Serial No. 90339247), we have found that the relatedness of the identified goods and the identity of the channels of trade and classes of customers weigh in favor of finding a likelihood of confusion with Opposer's EAGLE RARE and Eagle Design Marks (Registration Nos. 1065407 and 3254611); the purchasing conditions for the respective marks is neutral; the commercial strength of Opposer's Marks slightly favors a finding of likelihood of

⁹⁷ The main purpose of a survey is to replicate market conditions as closely as possible. Thus, “[a] survey that fails to adequately replicate market conditions is entitled to little weight, if any.” *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 452 F. Supp. 2d 772, 783 (W.D. Mich. 2006) (quoting *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734, 766 (E.D. Mich. 2003), *aff'd*, 502 F.3d 504 (6th Cir. 2007); *see also Conopco, Inc. v. Cosmair, Inc.*, 49 F. Supp. 2d 242, 254 (S.D.N.Y. 1999) (finding the plaintiff's presentation of stimuli and controls failed to properly replicate marketplace conditions in which the survey respondents would encounter the products.”). Because the survey fails in this regard, we afford minimal weight to it.

confusion based on Opposer's EAGLE RARE mark, but is neutral as to the Eagle Design mark; and the number and nature of similar marks in use on similar goods is neutral as to both of Opposer's marks. We accord little probative value to Opposer's survey evidence for the reasons discussed.

But as to the important factor of the similarities and dissimilarities of the marks, we have found that the marks have distinct overall commercial impressions notwithstanding the similarities of certain components, and that this not only weighs against a finding of likelihood of confusion, but outweighs the factors that weigh in Opposer's favor. *See, e.g., Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 119 USPQ2d 1286, 1290 (Fed. Cir. 2016) ("a single *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks") (quoting *Odom's Tenn. Pride Sausage, Inc. v. FF Acquisition, LLC*, 600 F.3d 1343, 93 USPQ2d 2030, 2032 (Fed. Cir. 2010) ("[E]ven if all other relevant *DuPont* factors were considered in [opposer's] favor, as the board stated, the dissimilarity of the marks was a sufficient basis to conclude that no confusion was likely."); *Kellogg Co. v. Pack'em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single [*DuPont*] factor may not be dispositive"). Though this presents a close case, we view the parties' marks as too dissimilar overall to warrant a finding of likelihood of confusion.

Likelihood of confusion is even more remote with respect to Applicant's EAGLE PARK BREWING COMPANY mark (Serial No. 90337630) in view of our additional

finding that relatedness of the goods has not been established.

Thus, we find that Opposer has failed to establish by a preponderance of the evidence that Applicant's EAGLE PARK DISTILLING or EAGLE PARK BREWING COMPANY marks are likely to cause confusion with Opposer's EAGLE RARE and Eagle Design marks for the identified goods.

Decision: The opposition is dismissed.