

**This Opinion is Not a
Precedent of the TTAB**

Hearing: July 1, 2014

Mailed: September 11, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Abita Brewing Company, LLC

v.

Mother Earth Brewing, LLC

—
Opposition No. 91203200
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Raymond G. Areaux, Theodore (Todd) S. Owers III, and Emily L. Gordy of Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, LLC,
for Abita Brewing Company, LLC.

David W. Sar and Rebecca Cage of Brooks, Pierce, McLendon, Humphrey & Leonard, LLP,
for Mother Earth Brewing, LLC.

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Before Zervas, Lykos and Greenbaum,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Mother Earth Brewing, LLC (“Applicant”) seeks registration on the Principal Register of the mark SUNNY HAZE (in standard characters) for

Beer; Brewed malt-based alcoholic beverage in the nature
of a beer in International Class 32.¹

¹ Application Serial No. 85294167 was filed on April 13, 2011, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Abita Brewing Company, LLC (“Opposer”) opposes registration pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when applied to Applicant’s goods, so resembles Opposer’s previously used and registered mark PURPLE HAZE (in typed form) (Registration No. 2282464) for “beer, ale, lager, malt liquor” as to be likely to cause confusion.²³

Opposer also pleaded ownership of two additional registrations, namely, Registration Nos. 3986281 and 3986282, for the mark PURPLE HAZE for “shirts, caps, headwear” and “beverageware,” respectively, and common law rights to the PURPLE HAZE mark for various promotional items such as beverage holders, neon signs, artwork and flying discs.

By its answer, Applicant denied the salient allegations of the notice of opposition.⁴

² Registration No. 2282464, issued October 5, 1999; renewed. Prior to November 2, 2003, “standard character” drawings were known as “typed” drawings. A typed mark is the legal equivalent of a standard character mark. TMEP § 807.03(i) (April 2014).

³ Opposer also raised the grounds of likelihood of dilution by blurring pursuant to Section 43(c) of the Trademark Act, 15 U.S.C. § 1052(c), and mere descriptiveness pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), but did not mention either claim in its brief. Accordingly, we deem these claims to be waived. *See Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313, 1314 n.4 (TTAB 2005).

⁴ Applicant’s “affirmative defense” of failure to state a claim was not pursued at trial, and therefore is deemed waived. *See Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc. dba Watermark Cruises*, 107 USPQ2d 1750, 1753 n.6 (TTAB 2013). Applicant’s other “affirmative defenses” that there is no likelihood of confusion and that Applicant’s mark is not merely descriptive, are merely amplifications of Applicant’s denials in its answer, and are not considered true affirmative defenses that require separate consideration.

I. Evidentiary Objections

A. Applicant's Objections – Dr. Geoffrey Fong

Applicant seeks to exclude the testimony of Dr. Geoffrey Fong, Opposer's survey expert, and accompanying report because (1) the survey did not capture the correct universe of respondents in that it did not include individuals from the limited number of markets in which Applicant sells its beer, and (2) the survey did not present the marks in the manner in which actual consumers likely would have viewed them in the marketplace. Opposer argues that the survey and report stand unrebutted by anyone qualified or educated in the field as Applicant did not retain a professional to either conduct their own survey or critique Opposer's survey.

Applicant does not challenge Dr. Fong's qualifications. Instead, Applicant's objections address the weight to be given the survey, and mimic the arguments previously rejected by the Board in *Carl Karcher Ents., Inc. v. Stars Rest. Corp.*, 35 USPQ2d 1125 (TTAB 1995). As the Board stated in *Carl Karcher*,

The federal court cases cited by applicant in support of its argument that the survey should have included the market areas of both parties are inapposite to this case. The issue here involved applicant's right to a nationwide registration, while the court cases involved an alleged infringing use. That is to say, opposer, in this proceeding, is not attempting to enjoin applicant from using the mark in Texas and Oklahoma, but, rather, opposer is objecting to applicant's attempt to obtain nationwide registrations of its marks which would presumptively cover opposer's present market area. ... Thus, there is no basis for the position that the survey should have been taken in applicant's trading area as well as opposer's. We therefore have no problem with the survey's having been taken in opposer's trading area only.

Id. at 1132-33. Similarly, because Applicant in this case seeks a nationwide, geographically unrestricted registration, the universe of respondents for Dr. Fong's survey was not overbroad. Moreover, the federal court cases on which Applicant relies in its brief are infringement actions, rather than *inter partes* proceedings before the Board, and therefore are not applicable to this proceeding.

Applicant also argues that the Fong survey is flawed because it "did not present the marks as they would have been viewed by an actual consumer in the marketplace," *i.e.*, on beer bottles or cans, and that the survey images did not include Opposer's or Applicant's house marks. However, as Opposer correctly states, in questions regarding the registrability of a mark before the USPTO, marketplace conditions are not relevant to the question of likelihood of confusion between Opposer's standard character mark PURPLE HAZE and Applicant's standard character mark SUNNY HAZE. *See, e.g., Ultracashmere House, Ltd. v. Springs Mills, Inc.*, 828 F.2d 1580, 1582, 4 USPQ2d 1252 (Fed. Cir. 1987) (rejecting appellant's argument that its use of a disclaimer in the marketplace cured any likelihood of confusion and stating that "the application before us asserts a right to register the mark ULTRACASHMERE without restriction, and registrability must be resolved in this proceeding on the basis of that application.").

Applicant's objections are therefore overruled.

B. Applicant's Objections - David A. Williams

Applicant also seeks to exclude the testimony of David A. Williams, Opposer's industry expert, and accompanying report, submitted to support Opposer's

allegation that its PURPLE HAZE mark is famous for craft beer. Applicant acknowledges that Mr. Williams is an expert in the field of beer branding, but objects to his qualifications as an expert regarding the alleged fame of Opposer's PURPLE HAZE mark because he is not a trademark expert. Applicant also objects to Mr. Williams' testimony because he purportedly did not provide context for Opposer's sales, production and advertising figures.

Applicant's objections regarding context go to the weight of the evidence rather than its admissibility, and we will not exclude the evidence on this basis. Nor will we exclude Mr. Williams' testimony or exhibits as Applicant properly made them of record. *Gen. Motors Corp. v. Aristide & Co.*, 87 USPQ2d 1179, 1183 (TTAB 2008).

Applicant's objections are therefore overruled.

C. Other Objections

Each party has interposed other evidentiary objections relating either to admissibility (hearsay), or relevance and probative value (e.g., third-party uses of "haze" and "purple haze"). To the extent we have relied on specific material against which either party has lodged an objection, we explain our reasoning below. We see no need to discuss the other objections separately, as none of them is outcome determinative. Rather, we have considered the entire record in making our decision, keeping in mind the parties' various objections, and have accorded whatever probative value the subject evidence merits.

II. The Record

Pursuant to Trademark Rule 2.122(b), the record includes Applicant's application file and the pleadings.

Opposer properly made of record its pleaded registrations with its Notice of Opposition. In addition, Opposer introduced the testimony depositions of (a) Dr. Geoffrey Fong and his report, (b) David Williams with attached exhibits, and (c) David Blossman, Opposer's President, with attached exhibits (including audio and video recordings of selected television and radio commercials of Opposer).

Opposer also filed a Notice of Reliance on Internet printouts of examples of press coverage and blog commentary on Opposer's PURPLE HAZE beer, evidence of Opposer's policing efforts, selected portions of the discovery depositions of Applicant's President, Trent Mooring, and its Chairman/CEO, Stephen Hill, Applicant's responses to Opposer's requests for admission,⁵ and selected portions of Applicant's responses to Opposer's interrogatories.

Applicant introduced the testimony deposition of its President, Trent Mooring, with attached exhibits. Applicant also submitted a Notice of Reliance on Internet printouts and USPTO TSDR reports of third-party uses or registrations for PURPLE HAZE and other HAZE-inclusive marks, dictionary definitions of the words PURPLE, SUNNY and HAZE, examples of press coverage and commentary

⁵ Each party submitted under Notice of Reliance its adversary's response to requests for admission in its entirety, even though the responses included denials. Requests that have been denied have no probative value and, in fact, the rules do not provide for submission of such denials by Notice of Reliance. See Trademark Rule 2.120(j)(3)(i); *Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1957 (TTAB 2008). Thus, we have only considered the admissions.

on Applicant's SUNNY HAZE beer, selected portions of the discovery deposition of Opposer's President, David Blossman, Opposer's responses to Applicant's requests for admission⁶, and selected portions of Opposer's responses to Applicant's interrogatories.

Opposer and Applicant filed main briefs on the case, and Opposer filed a reply brief.

III. Designation of Confidential Matter

Opposer designated the entirety of its Notice of Reliance as confidential pursuant to the Board's standard protective order. This was improper. As with any confidential information in a proceeding before this Board, only the particular portion of the submission that discloses confidential information should be filed as confidential in ESTTA, the Board's electronic database through which filings are made.⁷ **Opposer is allowed until thirty (30) days from the mailing date of this decision to submit a redacted Notice of Reliance in which only information that is truly confidential is deleted, failing which the original Notice of Reliance will become part of the public record in its entirety.** *See, e.g., Morgan Creek Productions Inc. v. Foria Int'l Inc.*, 91 USPQ2d 1134, 1136 n.9 (TTAB 2009).

⁶ For the reasons noted above, we only have considered the admissions.

⁷ This appears to be an oversight, as both parties have filed confidential and redacted versions of their briefs and supporting testimony.

IV. The Parties

Located in a suburb of New Orleans, Louisiana (Blossman Test. at 19), Opposer was the 14th largest craft brewery in the United States in 2012, and is the oldest and largest craft brewery in the southeastern United States based on the number of barrels produced annually. *Id.* at 23. Opposer continuously has sold its PURPLE HAZE brand beer since 1994, and currently produces it year-round (rather than seasonally), making PURPLE HAZE beer one of Opposer's flagship brands. *Id.* at 22. PURPLE HAZE is Opposer's best-selling brand outside the state of Louisiana, and its "number two beer overall." *Id.* at 29. Opposer sells its PURPLE HAZE beer in almost all U.S. states, Puerto Rico and the Virgin Islands. *Id.* at 21, 27-28. When Opposer enters a new market, it leads with the PURPLE HAZE brand. *Id.* at 28.

Applicant is a craft brewery located in Kinston, North Carolina. Applicant has sold its SUNNY HAZE beer since 2011 in North Carolina, and has expanded its market to include Washington, D.C. and Georgia. Mooring Test. at 29, 36; Mooring Exhibit 8.

V. Applicable Law

A. Standing and Priority

Because Opposer has made the pleaded registrations properly of record, Opposer has established its standing. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Industries, Inc., v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). Moreover, because the registrations are properly of record, priority is not in issue as to the goods identified

therein. *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Moreover, Applicant does not contest Opposer's priority.

B. Likelihood of Confusion

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). Opposer must establish that there is a likelihood of confusion by a preponderance of the evidence. *See Cunningham*, 55 USPQ2d at 1848.

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 the parties introduced evidence, and treat the remaining factors as neutral.

For purposes of this proceeding, we focus, as did the parties, on Opposer's pleaded PURPLE HAZE Registration No. 2282464 for "beer, ale, lager, malt liquor." Opposer's claim of common law rights is unnecessary, and we have not considered it in making our decision.

1. Similarity or Dissimilarity of the Goods and Channels of Trade

We begin with the *du Pont* factors of the relatedness of the goods and channels of trade. We base our evaluation on the goods as they are identified in the application and registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

Applicant's identification of goods and Opposer's identification of goods both include "beer." The goods therefore are in part identical, and Applicant does not dispute this. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). Nor does Applicant dispute the attendant presumption that the channels of trade and classes of purchasers are the same. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (absent restrictions in an application and/or registration, the identified services are "presumed to travel in the same channels of trade to the same class of purchasers."), *quoting Hewlett-Packard*, 62 USPQ2d at 1001. *See also Stone Lion*, 110 USPQ2d at 1161; *In re Linkvest*, 24 USPQ2d 1716, 1716 (TTAB 1992). Indeed, the parties agree that the channels of trade and classes of consumers actually are the same in that both Opposer and Applicant are purveyors of craft beer, their craft beers are sold at bars and restaurants, and their customers are drinkers of craft beer. Blossman Test. at 27; Mooring Test. at 15, 36, 50.

In view of the foregoing, we find that the goods are identical, and the channels of trade and classes of consumers are the same. Thus, the *du Pont* factors regarding the similarity of the goods and trade channels favor a finding of likelihood of confusion.

2. Similarities or Dissimilarities of the Marks

Next, we consider the *du Pont* factor of the similarities and dissimilarities of the marks. We must compare the marks in their entirety as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), quoting *du Pont*, 177 USPQ at 567. “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” See *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012), citing *Leading Jewelers Guild v. JLOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007). Moreover, in comparing the marks, we are mindful that where, as here, Applicant’s goods are identical to Opposer’s goods in part, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

The marks are similarly constructed, with the same number of syllables and cadence, and they end with the identical word HAZE. In addition, the first word of each mark modifies the word HAZE and connotes a color (purple or golden) or a mood (exhibiting fury or cheerfulness),⁸ resulting in marks with similar connotations.

Applicant argues that PURPLE and SUNNY are the dominant terms in each mark because those terms appear first in the marks and because they have distinct meanings. Applicant also argues that the marks are dissimilar when viewed in their entirety, that they evoke different images (“purplish or dark haze” versus “bright, golden haze” (App. Br. at 34)), and that placing more emphasis on the common word HAZE would be an impermissible dissection of the marks.

While HAZE is the second word in each mark, the placement of the term does not distinguish the marks; PURPLE and SUNNY simply modify the common element HAZE, giving the impression that Applicant’s mark SUNNY HAZE appears as a variant of Opposer’s mark PURPLE HAZE. Both connote a mood, or a color of haze. Moreover, even if, as we discuss below, HAZE has some meaning in the context of beer, it is not so weak that consumers would give greater significance to PURPLE and SUNNY and ascribe a different source to each brand of beer.⁹

⁸ *Webster’s Third New International Dictionary* (2002) (“*Webster’s*”) lists “purpling with fury” and “exhibiting happiness and gaiety” among the entries for “purple” and “sunny,” respectively. App. NOR Exh. 81, 19 TTABVUE 135-36.

⁹ The results of Dr. Fong’s survey confirm this finding. In addition to demonstrating a 30.5% “net confusion among those who cite the names of the beers as a reason for their perception of sameness or affiliation,” (Fong Report at 14, Opp. Exh. 59, 26 TTABVUE 68) the free-form responses to the question asking them to explain the reason for their decision consistently focused on the shared term HAZE (e.g., “Haze is such an unusual word that it

Applicant raises several arguments regarding the meaning of HAZE and PURPLE HAZE with respect to Opposer's beer in its efforts to distinguish Opposer's mark PURPLE HAZE from Applicant's mark SUNNY HAZE. First, Applicant argues that the term "haze" is generally descriptive of a characteristic of certain types of beer, which can cause them to appear hazy, and the beer industry uses the technical term "haze" to measure beer clarity. Applicant also argues that the terms HAZE and PURPLE HAZE have distinct meanings that describe the color and visual clarity of Opposer's PURPLE HAZE raspberry wheat beer. In addition, Applicant contends that "the term 'PURPLE HAZE' is a unitary term calling to mind the Jimi Hendrix song of the same name and psychedelic imagery associated with marijuana use and LSD" (App. Br. at 12), which Applicant's mark SUNNY HAZE does not share.

As to the technical meaning of the term "haze" with respect to certain beers, Applicant submitted an Internet printout from *The Beer Brewer* <beerbrewer.co.uk/beer/beer-clarify-beer-haze>, an "EBC Press Report" from the *Journal of the Institute of Brewing* entitled "Determination of Alcohol Chill Haze in Beer"¹⁰ and an article abstract from the *Journal of Cereal Science* (May 2007) <sciencedirect.com>. However, there is no evidence that the general beer drinking public has been exposed to any of these articles, all of which appear to have been

seems highly unlikely two different companies would use it for micro beer brewing. You'd think they were variations from one company."; "Haze seems like a common carrier word with purple and sunny as perhaps seasonal varieties."; and "I am thinking Haze if the company or line name and purple and sunny are varieties from the same 'Haze' company.").

¹⁰ Subtitled "Submitted by V. Batchvaror and V. Kellner on behalf of the Analysis Committee of European Brewery Convention." The date the article was written is unclear.

published in highly specialized journals with narrow audiences. Further, the Internet printout from *The Beer Brewer* is from a foreign website, and is of questionable probative value in determining the meaning of the term HAZE in the United States. While the Board accepts such evidence if it is written in English, the probative value of such evidence depends on the circumstances. Here, where the identified goods are beer, it is possible that U.S. consumers are viewing foreign websites on this issue, but again, the record does not show U.S. consumer exposure to this article. See *In re King Koil Licensing Co.*, 79 USPQ2d 1048, 1050 (TTAB 2006); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1265 n.9 (no basis to conclude U.S. consumers exposed to website for Australian brewery; those webpages not considered). Applicant presented no testimony to explain these exhibits or to corroborate their veracity. Accordingly, the three articles are of limited probative value.

As additional evidence of the meaning of the term “haze,” Applicant points to Mr. Blossman’s testimony that Opposer’s PURPLE HAZE beer has a “slight haze to it.” Blossman Test. at 113. Applicant’s reliance on this testimony is misplaced. According to Mr. Blossman, “haze” is a technical term that brewers use to measure the clarity of a beer, and would not be understood by ordinary beer drinkers. For example, in one response, Mr. Blossman states: “I’m not saying that’s a characteristic of [the PURPLE HAZE beer] by any stretch of the imagination. I doubt many customers even know what haze is.” *Id.* at 114. When asked whether he would “describe the body of the beer or the appearance of the beer to be hazy,” he

responded: “If I was giving a detailed description of the beer or scientifically I was judging beer like I have done before, certainly that would be part of the appearance that is something I would note. That’s really a very technical brewer type approach to things. I doubt very seriously that’s something that consumers – in their term.” *Id.* at 114. And, when asked the follow-up question “I’m not talking about the technical aspect of the haze or how you measure haze. I’m just talking about simply pouring Purple Haze into a glass, taking a look at it. It appears hazy. Right?”, Mr. Blossman responded

I will say again, that’s a term I know about because technically that’s something we measure, and that’s something we look for. I being an expert in the brewing field. You know, not to toot my own horn, but I have experience in the brewing field. That’s something I would note about it, you know, on a judging card. But I’m not saying that that resonates exactly with our consumers. That’s a big stretch to go from somebody in the know to somebody that’s a fan but not in the know of a detailed analysis of a beer.

Id. at 114-15.

However, *Webster’s* defines the word “haze” as “a cloudy appearance in a transparent liquid or solid.” App. Nor. Exh. 81, 19 TTABVUE 134. This definition appears to apply to Opposer’s PURPLE HAZE beer. As Mr. Blossman stated during his discovery deposition, he agrees with the following statement on Opposer’s website: “Purple Haze is a lager brewed with real raspberries added after filtration... The berries add a fruity aroma, tartly sweet taste and a subtle purple color and haze. You may see fruit pulp in the beer.” Blossman Discovery Dep. at 46, Exh. 5 to Blossman Discovery Dep., App. NOR Exh. 82, 19 TTABVUE 153, 157.

Thus, even if purchasers might not be aware of the technical definition of “haze” as it applies to beer, they would be aware of the dictionary meaning, especially when viewed in conjunction with the statement on Opposer’s website. We conclude that “haze” has some significance with respect to Opposer’s beer that some beer purchasers would recognize.

Next, we consider Applicant’s argument that the term PURPLE HAZE evokes the song by Jimi Hendrix titled “Purple Haze” and the counterculture prevalent in the 1960s. There is no dispute that Mr. Blossman recognizes “Purple Haze” as the name of a Jimi Hendrix song and as a slang term referring to drugs. *See* Blossman Discovery Dep. at 38, 42-43, App. NOR Exh. 82, 19 TTABVUE 147, 149-150. *See also, Urban Dictionary* (App. NOR Exh. 71, 19 TTABVUE 102-107) and 2009 blog posting on the Neshobe River Winery website <neshoberiverwinery.wordpress.com> (App. NOR Exh 43, 19 TTABVUE 32-34), which include similar references. However, while some might make this connection, this evidence does not establish that the general beer consuming public would do so. Indeed, the Neshobe River Winery blog states

I have to be honest that when ... told me that they were going to make a wine called ‘Purple Haze,’ I didn’t want to admit that I wasn’t sure which song that was. I am a bit embarrassed to admit it, because Purple Haze is one of those songs that you always hear people referring to, and until now, I just nodded along like I knew what people were talking about when they spoke about that song. In the interest of making a label that had some sort of relevance to it’s [sic] namesake, I did what people do when they are unsure about something ... I googled [sic] it.

In addition, relying again on Mr. Blossman's testimony, Applicant contends that PURPLE HAZE describes a characteristic of Opposer's beer, in that it "happens to be hazy with a slight purple hint – tint." Blossman Discovery Dep. at 45, App. NOR Exh. 82, 19 TTABVUE 152. As with the word "haze," discussed above, we find that the word "purple" is not arbitrary when applied to Opposer's beer, and that some consumers would understand, and possibly expect, Opposer's PURPLE HAZE beer to have a slight or subtle purple tint.

However, even if some consumers will perceive the slight purple color and haze (in the non-technical sense) in Opposer's PURPLE HAZE beer such that to them, the mark PURPLE HAZE describes a characteristic of the beer, and possibly other consumers will recognize the association with the song by Jimi Hendrix, there is no record evidence to demonstrate how widespread either or both meanings are among the general beer consuming public. To the extent the mark PURPLE HAZE has both meanings, at least those consumers who view the mark as having a descriptive feature and do not make the Jimi Hendrix association would see the marks PURPLE HAZE and SUNNY HAZE as more similar than they are different, as both identify a color or mood and both share the word HAZE.

Moreover, even if we accept Applicant's argument that the marks PURPLE HAZE and SUNNY HAZE connote two different types of haze, a "purplish or dark haze" and a "bright, golden haze," the connotations are similar in that they pertain to types or colors of haze. Finally, to the extent "haze" also is defined in *Webster's* as "a cloudy appearance in a transparent liquid or solid" (App. NOR Exh. 81, 19

TTABVUE 134), the same meaning may be ascribed to Opposer's PURPLE HAZE beer and Applicant's SUNNY HAZE beer.

Applicant's mark SUNNY HAZE contains no other matter by which to distinguish it from Opposer's mark PURPLE HAZE. *See In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) (Court held that the addition of "The," "Cafe" and a diamond-shaped design to registrant's DELTA mark still resulted in a likelihood of confusion).

In view of the foregoing, this *du Pont* factor regarding the similarities of the marks also favors a finding of likelihood of confusion.

3. Alleged Fame of Opposer's PURPLE HAZE Mark

The fifth *du Pont* evidentiary factor requires us to consider evidence of the fame of Opposer's mark. According to the Federal Circuit, our primary reviewing court, we must give great weight to the factor of fame, if evidence establishes the mark is famous. *See Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002); *Recot Inc. v. Becton*, 214 F.3d 1322, 54 F.2d 1894 (Fed. Cir. 2000); *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992).

Fame of an opposer's mark or marks, if it exists, plays a "dominant role in the process of balancing the *DuPont* factors," *Recot*, 214 F.3d at 1327, 54 USPQ2d at 1456 [sic – 1897], and "[f]amous marks thus enjoy a wide latitude of legal protection." *Id.* This is true as famous marks are more likely to be remembered and associated in the public mind than a weaker mark, and are thus more attractive as targets for would-be copyists. *Id.* Indeed, "[a] strong mark ... casts a long shadow which competitors must avoid." *Kenner Parker Toys*, 963 F.2d at 353, 22 USPQ2d

at 1456. A famous mark is one “with extensive public recognition and renown.” *Id.*

Bose, 63 USPQ2d at 1305. As we have stated in previous decisions, in view of the extreme deference that is accorded to a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of a plaintiff asserting that its mark is famous to clearly prove it. *See Coach Servs.*, 101 USPQ2d at 1720, *citing Leading Jewelers Guild*, 82 USPQ2d at 1904.

In support thereof, Opposer submitted the testimony and written report of its expert, David Williams, concerning the fame of Opposer’s PURPLE HAZE mark for craft beer. According to Mr. Williams, for the one-year period ending November 4, 2012, Opposer’s PURPLE HAZE beer was ranked 73rd out of approximately 2600 craft beers in the United States in terms of sales, and it enjoyed a high rate of growth in both sales revenue and case sales in the category of craft beer. Williams Test. at 234-38. Mr. Williams also testified that he considers PURPLE HAZE to be a famous craft beer brand. *Id.* at 234-38.

As additional evidence of fame, Mr. Blossman testified that the mark has been in use since 1994, that it is one of Opposer’s flagship brands and Opposer’s best-selling brand outside the state of Louisiana, and that Opposer leads with the PURPLE HAZE brand when it enters a new market. Blossman Test. at 22, 28, 29. Opposer also submitted confidential testimony from Mr. Blossman and evidence regarding dollar sales of its PURPLE HAZE beer from 2009 through April 2013, annual advertising and promotional expenditures within Louisiana for its family of brands

(including PURPLE HAZE), and dollar sales and expenditures on point-of-sale promotional items bearing the PURPLE HAZE mark from 2009 through April 2013. In addition, Opposer submitted examples of and testimony by Mr. Blossman concerning advertisements, including commercials featuring musicians Dr. John and Anders Osborne, and point-of-sale promotional materials, Opposer's presence at food and music festivals in several states, product placements of PURPLE HAZE beer in motion pictures and television shows filmed in Louisiana, unsolicited press coverage, and consumer exposure through social media, Opposer's smartphone app and website, and email marketing.

Opposer's testimony and evidence demonstrate that Opposer has enjoyed some financial success in sales of craft beer under its PURPLE HAZE mark. However, such testimony and evidence do not demonstrate the extent to which such success translates into widespread recognition of the PURPLE HAZE mark among the general beer drinking public, and therefore do not establish that Opposer's PURPLE HAZE mark is famous for beer. Opposer provided less than four years of annual sales and marketing figures and only one year of revenue figures for comparable types of craft beer. Mr. Blossman testified that Opposer generally co-markets PURPLE HAZE beer with its other brands, but he did not indicate what percentage of Opposer's estimated advertising Opposer spends on the PURPLE HAZE brand compared to the other co-marketed brands. We agree with Applicant that this testimony and evidence lack context for the purpose of establishing the fame of Opposer's PURPLE HAZE mark. *See Bose*, 63 USPQ2d at 1309 ("some

context in which to place raw statistics is reasonable. The Board suggested that one form of such context would be the substantiality of the sales or advertising figures for comparable types of products.”).

In addition, it is not clear from the record how many people outside the craft beer market are familiar with Opposer’s mark PURPLE HAZE for beer. While Opposer has appeared at several food and music festivals, there is no evidence of the number of attendees or the amount of PURPLE HAZE beer sales at those festivals. Similarly, there is no evidence of the number of viewers of the motion pictures and television shows in which PURPLE HAZE beer has appeared as a product placement. Opposer’s evidence of unsolicited press coverage is minimal, consisting of a paragraph in a 1999 article in *Food & Wine* magazine, mentions in three blogs,¹¹ and a photograph of a bottle of Opposer’s PURPLE HAZE beer under the title “6 Surprisingly Healthy Beers” in an undated article in *Men’s Fitness*. Again, there is no evidence of distribution or readership. Further, given that Opposer has sold PURPLE HAZE beer for 20 years and Applicant has sold SUNNY HAZE beer only since 2011 and only in a limited geographic market, it is not surprising that Opposer has received significantly more hits on various online beer rating sites, or that Opposer has more followers on social media such as Twitter. Blossman Test. at 80-83. Moreover, there is no record evidence regarding the number of hits or followers that other brands of beer enjoy, and thus no context

¹¹ “Beers of the World – Purple Haze,” *Drinking Disney*, January 2012; “Brew Review 28: Abita Beer’s Purple Haze,” *The Huntsville Times*, October 13, 2011; “Abita to Start Selling Beer in Cans,” *New Orleans CityBusiness*, July 25, 2011; “Food, Beverage Retailers Continue to Defy Economy,” *New Orleans CityBusiness*, March 14, 2012.

within which we can view Opposer's figures. Finally, Opposer's television and radio advertisements are limited to markets in Louisiana. Blossman Test. at 62-80 *passim*; Exhs. 19-43 to Blossman Test.

The *du Pont* factor of fame therefore is neutral. However, the testimony and evidence recounted above demonstrate that Opposer's mark PURPLE HAZE has achieved at least some degree of recognition in the market for craft beer.

4. The Number and Nature of Similar Marks in Use on Similar Goods

The sixth *du Pont* factor requires us to consider evidence regarding the number and nature of similar marks in use on similar goods. As Applicant points out, evidence of third-party use can be used to show that Opposer's mark PURPLE HAZE, or the word HAZE, is weak and thus entitled to a limited scope of protection. Applicant relies on evidence of third-party trademark registrations and websites to support its contention that the terms HAZE and PURPLE HAZE are widely used and therefore weak for beer.¹² As our primary reviewing court explains, "the probative value of third-party trademarks depends entirely upon their usage." *Palm Bay*, 73 USPQ2d at 1693.

Applicant's evidence of third-party marks is entitled to little probative weight because it does not establish that consumers have grown so accustomed to seeing the terms HAZE or PURPLE HAZE on beer that they can distinguish between such marks on the basis of minor differences. The evidence does not prove whether or

¹² To the extent Applicant has offered the third-party registrations and Internet evidence to show Opposer's lack of policing efforts, as discussed herein, there is no evidence that any of the third-party marks to which Applicant points are actually used in commerce such that Opposer would have had the opportunity to police.

how long the third-party marks have been in use, the volume of sales under those marks, the number of customers or trading areas, or the level of exposure to the relevant purchasing public. *See Couch/Braunsdorf Affinity, Inc., v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014).

More specifically, Applicant submitted copies of seven active third-party registrations comprising PURPLE HAZE or PURPLE HAZE formatives (PURPLE HAZE PRESS and PURPLE HAZE JOJOBA SPHERES), none of which are for “beer” (or, for that matter, any alcoholic beverage), and include, instead, diverse products such as automobile wax, fireworks, and ice cream. *See In re Thor Tech. Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009). Applicant submitted additional printouts of three use-based third-party registrations for the marks HOPPY DAZE, MILD DAZE and HAZED & INFUSED for beer. However, each of these marks creates a commercial impression that is quite different from Opposer’s mark PURPLE HAZE, and two of the marks do not even include the word HAZE. In any event, in addition to being limited in number, the third-party registrations are of limited value as they are not evidence of use of the marks in commerce or that the public is familiar with them. *See, e.g., In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988). Moreover, third-party registrations cannot assist Applicant in registering a mark that is likely to cause confusion with a registered mark.¹³ *See AMF Inc. v.*

¹³ The printouts of third-party applications that Applicant submitted are entitled to no weight in this analysis. Third-party applications are evidence only of the fact that they have been filed. *See Frito-Lay North America, Inc. v. Princeton Vanguard, LLC*, 109

American Leisure Products, Inc., 177 USPQ 268 (CCPA 1973). Accordingly, the third-party evidence does not show that the terms HAZE or PURPLE HAZE are weak on their face for beer. *See, e.g., Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313 (TTAB 2005) (ESSENTIALS is weak on its face for clothing), and *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066 (TTAB 2011) (ELEMENTS weak on its face for clothing).

Applicant's Internet evidence relating to third-party uses of PURPLE HAZE for red wine, wine caddies and beer, and of third-party HAZE-formative marks, such as HUMBOLDT HAZE, SUMMER HAZE, WINTER HAZE and HOP HAZE for beer, is admissible only for what it shows on its face, and does not prove the truth of any matter stated therein. *See, e.g., 7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1717 n.2 (TTAB 2007). Thus, the websites are probative evidence that the websites exist and that the public may have been exposed to them and therefore may be aware of the information contained in them, but they do not establish that the products referenced therein are being produced. *See Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1708 (TTAB 2010), *aff'd unpublished*, No. 11-1052, 11-1053 (Fed. Cir. Nov. 9 2011); *Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1956 n.5 (TTAB 2008). Applicant provided no testimony to support a different conclusion. Further, as for the third-party uses of PURPLE HAZE for red wine and wine caddies, there is no record evidence demonstrating that those products are commercially related to beer. Accordingly, this factor is neutral in our analysis.

USPQ2d 1949, 1956 n.9 (TTAB 2014) ("The applications are not evidence of anything except that they were filed.").

5. Conditions of Purchase

Next we consider the conditions under which the goods are likely to be purchased, e.g., whether on impulse or after careful consideration, as well as the degree, if any, of sophistication of the consumers. “Purchaser sophistication may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect.” *Palm Bay*, 73 USPQ2d at 1695 (citation omitted).

Applicant argues that consumers of craft beer are sophisticated, and that craft beers “are neither inexpensive nor likely to be purchased on impulse.” App. Br. at 36. Again, because we are bound by the identification of goods in the application and pleaded registration and because the identifications of goods are not restricted as to price or channels of trade, the goods at issue must include inexpensive as well as more expensive beer and all channels of trade and classes of consumers, including craft beer drinkers as well as the general beer drinking public. Thus, even if drinkers of craft beer are, in fact, sophisticated purchasers, there is no reason to assume that purchasers of ordinary, non-craft beer are sophisticated as well, and the record does not support such a finding. The standard of care for our analysis is that of the least sophisticated purchaser. *Stone Lion*, 110 USPQ2d at 1163.

Moreover, even if purchasers are sophisticated or knowledgeable in a particular field, that does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion, especially in cases like this one, involving similar marks and identical goods. *Cunningham*, 55 USPQ2d at

1846. *See also In re Cook Medical Technologies LLC*, 105 USPQ2d 1377, 1383 (TTAB 2012).

This *du Pont* factor regarding the conditions of purchase therefore is neutral.

6. Applicant's Intent

Opposer argues that the element of "bad faith" or "intent to tread on the good will of [Opposer's] PURPLE HAZE trademark" weighs in its favor because Applicant knew of Opposer's PURPLE HAZE mark. Opp. Br. at 37. To put it simply, without more, we cannot make such findings as to Applicant's intent, good or bad. This is not a record where an inference of bad faith may be made. Accordingly, we see no bad faith in Applicant's adoption of its mark, and find this factor to be neutral.

7. Extent of Concurrent Use and Actual Confusion

Finally, Opposer has acknowledged that "it is not aware of any instances of actual or suspected confusion or mistake between Applicant's use/intended use of Applicant's Mark and Opposer's PURPLE HAZE MARK." Opp. Resp. to Interrog. No. 38, App. NOR Exh. 83, 19 TTABVUE 240. And Applicant contends that there is no evidence of actual confusion other than the Fong survey, which "suffers from fatal flaws." App. Br. at 37. However, proof of actual confusion is not necessary to show a likelihood of confusion, and its absence is not dispositive. *See Herbko Int'l Inc. v. Kappa Books Inc.*, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983). A showing of actual confusion would of course be highly probative, if not conclusive, of a likelihood of confusion. Yet the opposite is not true; the lack of evidence of actual

confusion carries little weight. *See J. C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965). Thus, regardless of the probative value of the Fong survey, and despite Opposer's response to Interrogatory No. 38, the *du Pont* factor regarding the nature and extent of any actual confusion would be neutral and would not favor Applicant.

Moreover, Applicant first used the mark SUNNY HAZE in 2011. Thus, at the time of the oral hearing, the parties only had coexisted for approximately three years without evidence of actual confusion. Additionally, Applicant contends, and Opposer does not dispute, that both marks are in use only in North Carolina, Georgia and Washington D.C., limiting the opportunities for actual confusion to arise. Therefore, the *duPont* factor of the length of time during and conditions under which there has been concurrent use without evidence of actual confusion also is neutral.

VI. Conclusion

When we consider the record and the relevant likelihood of confusion factors, we conclude that because the goods are identical, the trade channels and consumers are presumed to (and actually do) overlap, and the marks are similar, confusion is likely between Applicant's mark SUNNY HAZE and Opposer's previously used and registered mark PURPLE HAZE. In view thereof, Opposer has proven its Section 2(d) claim.

Decision: The opposition is sustained under Section 2(d) of the Trademark Act.¹⁴

¹⁴ Opposer is reminded that it is allowed until thirty (30) days from the mailing date of this decision to submit a redacted Notice of Reliance in which only information that is truly confidential is deleted, failing which the original Notice of Reliance will become part of the public record in its entirety.