

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MONSTER ENERGY COMPANY,

Plaintiff,

v.

JIANGSU SITOUGUAI INDUSTRY
CO., LTD., and CHANGZHOU HAIGE
MICROFIBER TEXTILE CO., LTD.,

Defendants.

Case No.: 22cv590-LL-DDL

**ORDER GRANTING DEFENDANTS’
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT**

[ECF Nos. 44, 41]

REDACTED

In this trademark infringement case, Plaintiff Monster Energy Company (“Plaintiff” or “Monster Energy”) filed a Complaint against Defendants Jiangsu Sitouguai Industry Co., Ltd. and Changzhou Haige Microfiber Textile Co., Ltd. (“Defendants” or “4Monster”) in connection with Defendants’ sale of allegedly infringing products. ECF No. 1. The following matters are pending before the Court: (1) Plaintiff’s Motion for Summary Judgment (ECF No. 41); and (2) Defendants’ Cross-Motion for Summary Judgment (ECF No. 44). For the reasons set forth below, the Court **DENIES** Plaintiff’s Motion and **GRANTS** Defendants’ Motion.

I. BACKGROUND

a. Procedural History

Monster Energy filed this lawsuit against 4Monster on April 27, 2022 asserting the following claims related to 4Monster's alleged infringement of Plaintiff's trademarks: (1) trademark infringement, trade dress infringement, and false designation of origin under 15 U.S.C. § 1125(a); (2) trademark infringement under 15 U.S.C. § 1114; (3) trademark infringement under California Business and Professions Code § 14245; (4) unfair competition under California Business and Professions Code §§ 17200 et seq., and (5) unfair competition under California common law. ECF No. 1 (hereinafter "Compl."). 4Monster filed an answer raising thirteen affirmative defenses including: (1) failure to state a cause of action, (2) statute of limitations, (3) consent and acquiescence, (4) excuse, (5) damage not caused by defendant, (6) failure to mitigate damages, (7) estoppel, (8) no proximate cause, (9) waiver, (10) no damages, (11) no injury, (12) laches, and (13) reservation to assert additional affirmative defenses. ECF No. 10 at 8-11.

On February 16, 2024, Monster Energy filed the instant Motion for Summary Judgment. ECF No. 41 (hereinafter "Monster Energy's MSJ"). Monster Energy seeks summary judgment on all five of its claims and on Defendants' affirmative defenses. *Id.* at 18-32. Defendants filed a Cross-Motion for Summary Judgment arguing that "judgment in favor of 4Monster is compelled on each of the five claims in Monster Energy's Complaint." ECF No. 44 at 25 (hereinafter "4Monster's MSJ"). Defendants argue that "[t]he companies do not compete, they do not sell similar products, they do not sell in similar markets, and the coexistence of their marks has never confused anyone." *Id.* at 6.

Monster Energy filed a statement of undisputed facts in support of its Motion for Summary Judgment and 4Monster filed a response to the statement of undisputed facts. ECF Nos. 41-2, 47-1 (hereinafter "Monster Energy's SUF"). 4Monster filed a statement of undisputed facts in support of its Motion for Summary Judgment and Monster Energy filed a response to the statement of undisputed facts (hereinafter "4Monster's SUF"). ECF Nos. 44-2, 46-1.

b. Factual Background

Unless otherwise noted, the following facts are undisputed.¹ Monster Energy launched its original Monster Energy drink in 2002. *See* 4Monster’s SUF 14; ECF No. 41-34, Declaration of Rodney Sacks² (“Sacks Decl.”), ¶ 3. Since 2002, the Monster Energy brand has expanded to include many variations of the Monster Energy mark, such as Juice Monster® and Muscle Monster®. Monster Energy’s SUF 4. Monster Energy also produces other types of merchandise with its distinctive logo including “clothing, bags, towels, blankets and accessories” which is “sold and/or distributed.” Monster Energy’s SUF 7. 4Monster disputes the “extent to which such items are purchasable by the public” as opposed to sold or given away at special events with companies that Monster Energy has relationships with. *Id.*

Monster Energy has entered into license agreements with several manufacturers for a range of promotional goods bearing its mark. Monster Energy’s SUF 8. Monster Energy’s licensees have paid millions of dollars of royalties on licensed products that bear one or more of the Monster Energy marks and Monster Energy trade dress. *Id.* at 9. Monster Energy is the owner of twenty-five U.S. trademark registrations for Monster Energy marks as set forth in Paragraph Eleven of the operative Complaint. Monster Energy’s SUF 5; *see also* Exhs. 1-25 to Compl. Monster Energy also owns California trademark registration for the mark “Monster” for beverages including fruit juice drinks, soft drinks, soda water and seltzer. Compl. ¶ 14; *see also* Exh. 26 to Compl.; Monster Energy’s SUF 5.

¹ In this Order when the Court cites to the respective parties’ Statement of Undisputed Facts, it refers to the parties’ Joint Statement which includes both the moving party’s fact and the opposing party’s response. *See* ECF Nos. 46-1 and 47-1.

² ECF No. 41-34 is the redacted version of the Sacks Declaration. ECF No. 53 is the sealed version of the Sacks Declaration. Exhibits 7 and 8 to the Sacks Declaration are also filed under seal at ECF No. 53-1 and ECF No. 53-2. The redacted versions of those exhibits are filed at ECF Nos. 41-42, 41-43.

1 4Monster was founded by four friends in early 2017 to develop a textile-based
 2 product line for sale in the international marketplace. 4Monster’s SUF 2-4. 4Monster
 3 produces “towels, blankets, backpacks and robes” using the “4Monster” mark. *See* Monster
 4 Energy’s SUF 21. The overwhelming majority of 4Monster’s U.S. sales are via its
 5 Amazon.com store, though it also sells some products via its 4Monster.com website, at
 6 Walmart.com, and a few via China’s Alaiibaba.com’s e-commerce platform. 4Monster’s
 7 SUF 8. 4Monster does not make sales in physical retail stores in the U.S. 4Monster’s SUF
 8 9. An exhibit shown during the deposition of Wengie Zhang includes images of the
 9 4Monster products, including bags, backpacks, and towels. 4Monster’s SUFs 16³, 23⁴;
 10 ECF No. 44-6 at 92-98. The images show various colors of 4Monster’s products including
 11 green and black, blue, yellow, purple, and orange. 4Monster’s SUFs 16, 23; ECF No. 44-
 12 6 at 92-98.

13 Monster Energy brought this action against 4Monster based on claimed similarities
 14 for “sale of goods using a trademark that is confusingly similar to one or more of the
 15 Monster Energy Marks and/or the Monster Energy trade dress.” Compl. ¶ 27. Specifically,
 16 Monster Energy asserts that Defendants’ “infringing mark is comprised of the word
 17 Monster with the number 4,” and Defendants “frequently use the color combination of
 18 green and black in connection with their infringing 4Monster mark.” *Id.*

19 On August 18, 2017, Defendant Sitouguai filed U.S. Trademark Application Serial
 20 No. 87/573,926 for the 4Monster mark for bags, blankets, and towels. Sacks Decl. ¶ 236;
 21 *see also* Compl. ¶ 31. On May 24, 2019, Monster Energy filed an opposition proceeding
 22 before the U.S. Trademark Trial and Appeal Board (“TTAB”). Sacks Decl. ¶ 236; Exh. 33
 23

24
 25 ³ Monster Energy disputes 4Monster’s SUF 16, but only to the extent that the exhibit shows
 26 all of the products that have been sold by Defendants (not for the colors shown in the
 27 image).

28 ⁴ Similarly, Monster Energy disputes 4Monster’s SUF 23, but only to the extent that the
 product shown is 4Monster’s most popular product (not for the colors shown in the image).

1 to the Sacks. Decl. Eventually, on August 31, 2020, TTAB entered judgment in favor of
 2 Monster Energy because Defendants failed to retain U.S. counsel to represent them in that
 3 proceeding. Sacks Decl. ¶¶ 236, 237; Exh. 34 to the Sacks Decl. Monster Energy sent
 4 Defendants a cease-and-desist letter on the following dates: November 10, 2020, December
 5 8, 2020, and again on August 3, 2021. Sacks Decl. ¶¶ 238-239; Exh. 35 to the Sacks Decl.
 6 Defendants ultimately confirmed they would not agree to Monster Energy’s demands in
 7 the cease-and-desist letters. *Id.* As a result, Monster Energy alleges that Defendants’
 8 actions “have created a likelihood of injury to Monster’s business reputation and goodwill,
 9 caused a likelihood of consumer confusion, mistake, and deception as to the source, origin
 10 or relationship of Monster and Defendants or Monster’s and Defendants’ goods....”
 11 Compl. ¶ 41. Monster Energy seeks damages, injunctive relief and disgorgement of profits.
 12 Compl. ¶¶ 29-32.

13 The crux of the parties’ dispute is whether 4Monster’s use of its mark on its products
 14 is likely to cause consumer confusion.

15 II. LEGAL STANDARD

16 Summary judgment is appropriate if, viewing the evidence and drawing all
 17 reasonable inferences in the light most favorable to the nonmoving party, “there is no
 18 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
 19 of law.” Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986). A fact
 20 is “material” if it “might affect the outcome of the suit under the governing law,” and a
 21 dispute as to a material fact is “genuine” if there is sufficient evidence for a reasonable trier
 22 of fact to decide in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*,
 23 477 U.S. 242, 248 (1986); *Cline v. Indus. Maint. Eng’g & Contracting Co.*, 200 F.3d 1223,
 24 1229 (9th Cir. 2000). “If the evidence [opposing summary judgment] is merely colorable,
 25 or is not significantly probative, summary judgment may be granted.” *Anderson*, 477 U.S.
 26 at 249–50 (citations omitted).

27 The moving party bears the initial burden of identifying the portions of the pleadings
 28 and record that it believes demonstrate the absence of a genuine issue of material fact.

1 *Celotex*, 477 U.S. at 323. “In order to carry its burden of production, the moving party must
 2 produce either evidence negating an essential element of the nonmoving party’s claim or
 3 defense or show that the nonmoving party does not have enough evidence of an essential
 4 element to carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co.*
 5 *v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The burden then shifts to the nonmovant
 6 to show “there is a genuine issue of material fact.” *Matsushita Elec. Indus. Co. v. Zenith*
 7 *Radio Corp.*, 475 U.S. 574, 585 (1986). The nonmovant must “go beyond the pleadings
 8 and by her own affidavits, or by the depositions, answers to interrogatories, and admissions
 9 on file, [and] designate specific facts showing that there is a genuine issue for trial.”
 10 *Celotex*, 477 U.S. at 324 (internal quotation marks and citation omitted). In carrying their
 11 burdens, the parties can either cite to evidence supporting their own position or show the
 12 other side’s position is either unsupportable or devoid of any genuine dispute.
 13 Fed. R. Civ. P. 56(c)(1). In addition, “[c]redibility determinations, the weighing of the
 14 evidence, and the drawing of legitimate inferences from the facts are jury functions, not
 15 those of a judge, [when] he is ruling on a motion for summary judgment.” *Anderson*,
 16 477 U.S. at 255.

17 It is not the court’s task “to scour the record in search of a genuine issue of triable
 18 fact.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (internal citation omitted).
 19 Rather, a court is entitled to rely on the nonmoving party to “identify with reasonable
 20 particularity the evidence that precludes summary judgment.” *See id.* Finally, when parties
 21 submit cross-motions for summary judgment, “each motion must be considered on its own
 22 merits,” and “the court must review the evidence submitted in support of each cross-
 23 motion.” *Fair Hous. Council v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001)
 24 (citation omitted).

25 **III. DISCUSSION**

26 Plaintiff and Defendants each move for summary judgment. Plaintiff seeks summary
 27 judgment that it prevails on each of its claims for trademark infringement, trade dress
 28 infringement, false designation of origin, trademark infringement and unfair competition

under California Business and Professions Code §§ 14245 and 17200, and under California common law. Plaintiff argues that “[t]he undisputed facts show that all of the relevant *Sleekcraft* factors weigh in favor of finding a likelihood of confusion.” Monster Energy’s MSJ at 30. Defendants, meanwhile, seek summary judgment on the grounds that each of Plaintiff’s claims fail because consumer confusion is impossible between the Monster Energy and 4Monster marks.

For the reasons set forth below, the Court finds that no reasonable trier of fact could find a likelihood of confusion between Defendants’ 4Monster mark and Plaintiff’s Monster Energy mark. Accordingly, the Court **GRANTS** summary judgment for Defendants and **DENIES** summary judgment for Plaintiff.

a. Likelihood of Confusion

The Lanham Act defines a trademark as “any word, name, symbol, or device, or any combination thereof ... to identify and distinguish ... goods, including a unique product, from those manufactured or sold by others.” 15 U.S.C. § 1127. Trademarks thus serve as “source identifiers” in that they “‘indicate the source’ of goods, and so to ‘distinguish’ them from ones ‘manufactured or sold by others.’” *Jack Daniel’s Properties v. VIP Prods. LLC*, 599 U.S. 140, 156–57 (2023) (quoting § 1127).

To prevail on its trademark claims and unfair competition claims, Plaintiff Monster Energy needs to show: (1) that it has a valid protectable trademark, and (2) that Defendants’ use of the mark is likely to cause consumer confusion.⁵ *See Applied Info. Scis. Corp. v. eBay, Inc.*, 511 F.3d 966, 969 (9th Cir. 2007). Here, the parties do not dispute whether

⁵ The Ninth Circuit applies the same “likelihood of confusion” analysis for California common law trademark infringement claims, UCL claims, and California common law unfair competition claims. *See, e.g., Thane Int’l v. Trek Bicycle Corp.*, 305 F.3d 894, 901 n.3 (9th Cir. 2002); *Century 21 Real Estate Corp., v. Sandlin*, 846 F.2d 1175, 1178 (9th Cir. 1988). This likelihood of confusion analysis is also the same one used in analyzing section 1125(a) claims. *See Dr. Seuss Enters. v. Penguin Books, USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997). Since the likelihood of confusion analysis applies to all of Plaintiff’s claims, the Court will only conduct the analysis once.

1 Monster Energy has a valid and protectable trademark, but they dispute the likelihood of
 2 confusion issue. Monster Energy’s MSJ at 18; 4Monster’s MSJ at 10.

3 **b. The *Sleekcraft* Factors**

4 To determine whether there is a likelihood of confusion between two marks, the
 5 court weighs eight factors. *See AMF v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir.
 6 1979). The factors are: (1) strength of the mark; (2) proximity of the goods; (3) similarity
 7 of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) types of
 8 goods and the degree of care likely to be exercised by the purchaser; (7) defendant’s intent
 9 in selecting the mark; and (8) likelihood of expansion of the product lines. *Id.*; *see*
 10 *also Fortune Dynamic Inc. v. Victoria's Secret Stores Brand Management, Inc.*, 618 F.3d
 11 1025, 1030 (9th Cir. 2010). “The ‘likelihood of confusion’ inquiry generally considers
 12 whether a reasonably prudent consumer in the marketplace is likely to be confused as to
 13 the origin or source of the goods or services bearing one of the marks or names at issue in
 14 the case.” *Rearden LLC v. Rearden Com., Inc.*, 683 F.3d 1190, 1209 (9th Cir. 2012).

15 “This eight-factor analysis is pliant, illustrative rather than exhaustive, and best
 16 understood as simply providing helpful guideposts. . . . Some factors are much more
 17 important than others, and the relative importance of each individual factor will be case-
 18 specific.” *Fortune Dynamic* at 1030–31 (citations and internal quotation marks omitted).
 19 Courts should not conduct the analysis in a mechanical fashion, and the importance of each
 20 *Sleekcraft* factor will vary in each particular case. *Brookfield Commc’ns. Inc. v. W. Coast*
 21 *Entm’t Corp.*, 174 F. 3d 1036, 1055 n. 6 (9th Cir. 1999); *Dreamwerks Production Group,*
 22 *Inc. v. SKG Studio*, 142 F.3d 1127, 1129 (9th Cir. 1998) (“The factors should not be rigidly
 23 weighed; we do not count beans.”).

24 “Because of the intensely factual nature of trademark disputes, summary judgment
 25 is generally disfavored in the trademark arena.” *Fortune Dynamic Inc.*, 618 F.3d at 1031.
 26 Still, the Ninth Circuit has repeatedly affirmed summary judgment rulings where the record
 27 as a whole could not lead to a triable issue regarding the likelihood of confusion.” *See, e.g.,*
 28 *Surfvivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 634 (9th Cir. 2005) (affirming

district court grant of summary judgment against trademark holder); *Arcona, Inc. v. Farmacy Beauty, LLC*, 976 F.3d 1074, 1080 (9th Cir. 2020) (affirming summary judgment against trademark holder on likelihood of confusion issue and explaining that “court[s] should not myopically focus on only the alleged counterfeit marks to the exclusion of the entire product or even common sense”); *Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 939 (9th Cir. 2015) (affirming summary judgment against trademark holder); *One Indus., LLC v. Jim O’Neal Distrib., Inc.*, 578 F.3d 1154, 1165 (9th Cir. 2009) (“The mere fact that the two companies are direct competitors and happen to use the same letter on their products is not sufficient to show infringement. Accordingly, we conclude that there is no likelihood of confusion in this case...”).

“To prevail on the ultimate question... – the likelihood of confusion of consumers – [the plaintiff] must show sufficient evidence to permit a rational trier of fact to find that confusion is *probable*, not merely possible.” *M2 Software, Inc. v. Madacy Entm’t*, 421 F.3d 1073, 1085 (9th Cir. 2005) (citations omitted) (emphasis added) (affirming summary judgment against trademark holder). The Court addresses each *Sleekcraft* factor in turn.

c. Trademark Registrations at Issue

i. Beverage Product Trademarks

Of the twenty-five federal trademarks at issue in Monster Energy’s Complaint, seventeen are for beverages⁶ and nutritional supplements (hereinafter “beverage product

⁶ Monster Energy’s beverage product trademarks include the following types of beverages:

- “ready to drink tea, iced tea and tea based beverages,”
- “non-alcoholic beverages, namely, energy drinks,”
- “fruit juice drinks,”
- “beverages, namely, soft drinks, non-carbonated energy drinks, non-carbonated sports drinks,”
- “beverages, namely, carbonated soft drinks, carbonated soft drinks enhanced with vitamins, minerals, nutrients, amino acids and/or herbs,”
- “vitamin fortified beverages.”

See, e.g., Compl. ¶ 11.

trademarks”), which it is undisputed that 4Monster does not sell. Compl., Exhs. 9-25. Monster Energy also pleads infringement of a California trademark registration for “Monster” with the goods and services designated as “[f]ruit juice drinks, soft drinks, carbonated soft drinks and soft drinks enhanced with vitamins, mineral nutrients, amino acids and/or herbs, aerated water, soda water, and seltzer water.” Complaint ¶ 14, Exh. 26. Once again, it is undisputed that 4Monster does not sell beverage products, but mostly towels or backpacks. 4Monster’s SUF 16; *see also* Monster Energy’s SUF 21. The Court will first address Monster Energy’s claims with respect to its beverage product trademarks.

There is no likelihood of confusion as a matter of law between the 4Monster products at issue – backpacks and towels – and Monster Energy’s beverage products because the two are in entirely different industries. Unrelated goods are generally less likely than related goods to confuse the public as to the producers of the goods. *Brookfield*, 174 F.3d at 1055 (citing *Official Airlines Guides, Inc. v. Goss*, 6 F.3d 1385, 1392 (9th Cir. 1993)); *see also Sleekcraft*, 599 F.2d at 348, n.10 (internal quotation marks omitted) (“Related goods are those products which would be reasonably thought by the buying public to come from the same source if sold under the same mark.”). Indeed, the Ninth Circuit has explained that, “[e]ven where there is precise identity of a complainant’s and an alleged infringer’s mark, there may be no consumer confusion—and thus no trademark infringement—if the alleged infringer is . . . in a wholly different industry.” *Brookfield*, 174 F.3d at 1055; *see Arcona*, 976 F.3d at 1080; *see, e.g., Punchbowl, Inc. v. AJ Press LLC*, No. 2:21-cv-03010-SVW-MAR, 2024 WL 4005220, at *7 (C.D. Cal. Aug. 22, 2024) (granting summary judgment of no likelihood of confusion between “[a] platform offering tools for online party planning” and “a news publication focusing on insider news from the nation’s seat of government”); *see also, e.g., Kellogg Co. v. Toucan Golf, Inc.*, 337 F.3d 616, 622–26 (6th Cir. 2003) (finding no likelihood of confusion between Toucan Gold mark used to sell golf clubs and Kellogg’s Toucan Sam mark used to sell cereal). Here, Monster Energy’s beverage product trademarks are in a wholly different industry than the

1 towel and bag products sold by 4Monster which precludes a possibility of consumer
2 confusion.

3 The Court accepts that Monster Energy's mark is strong in the energy beverage
4 industry (as conceded by 4Monster), but the Court rejects Monster Energy's argument that
5 its mark is so strong that it "extends even to goods not closely related to Monster's
6 beverages because purchasers are likely to exercise less care when purchasing products
7 under a famous mark." Monster Energy's Oppo. at 13 (internal citation omitted) (citing
8 *Recot, Inc. v. Becton*, 214 F.3d 1322, 1327-28 (Fed. Cir. 2000)). The Sixth Circuit's
9 decision in *Kellogg Co. v. Toucon Golf, Inc.* is instructive on this issue. In *Kellogg*, the
10 Sixth Circuit explained: "[a]s opposed to a fanciful mark, an arbitrary mark is distinctive
11 only within its product market and entitled to little or no protection outside of that area."
12 337 F.3d at 626. In light of this, the *Kellogg* court found no likelihood of confusion between
13 defendant's "Toucan Gold" golf clubs and Kellogg's "Toucan Sam" mark for cereal
14 because the goods were unrelated despite the fact that Kellogg's "Toucan Sam" mark "is a
15 very strong mark." *Id.* at 624–26. Similarly, here, although Monster Energy has a strong
16 mark in the energy beverage industry, because the mark is arbitrary, *see* Monster Energy
17 Mot. at 14 (asserting that its trademarks are arbitrary), the beverage product trademarks are
18 entitled to little or no protection outside of the beverage industry. *See Kellogg*, 337 F.3d at
19 626.

20 Further, Monster Energy has not provided the Court with any evidence that its marks
21 are strong outside of the energy beverage industry. Although it is undisputed that Monster
22 Energy has spent more than \$11.2 billion marketing and promoting its brand worldwide
23 through athlete endorsements, sponsoring athletic competitions, musicians, music festivals,
24 and other events, Monster Energy provides no evidence how this applies to non-beverage
25 products. *See, e.g., Trek Bicycle Corp. v. Isaacs*, 2023 WL 7649542, *5 (Fed. Cir. 2023)
26 ("For example, the Board noted that Trek's evidence of marketing expenditures was not
27 broken down by product...Accordingly, Trek has failed to show that the Board's findings
28 on fame and commercial strength with respect to the identified good are not supported by

substantial evidence.”). Similarly, here, Monster Energy has not provided evidence on the amount (if any) it has spent on the marketing and promoting of non-beverage products.

Additionally, the similarity of the marks “has always been considered a critical question in the likelihood-of-confusion analysis.” *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000). Here, the marks themselves are so substantially different that it is implausible a consumer viewing Defendants’ 4Monster mark would be confused into thinking that the product is one of Monster Energy’s products. A more detailed analysis of the similarity of the marks is set forth in subsection (f) below.

In light of the Court’s analysis of these factors (proximity or relatedness of the goods, strength of the mark, and similarity of the marks), the Court does not find it necessary to analyze the other *Sleekcraft* factors for the beverage product trademarks. *See Brookfield*, 174 F.3d at 1054 (“[I]t is often possible to reach a conclusion with respect to likelihood of confusion after considering only a subset of the [*Sleekcraft*] factors[,] . . . [which do] not purport to be exhaustive, and non-listed variables may often be quite important.”); *see also Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1145 (9th Cir. 2011) (“The Sleekcraft factors are intended as an adaptable proxy for consumer confusion, not a rote checklist.”).

In sum, even when viewing the evidence in the light most favorable to Plaintiff, no reasonable juror could find a likelihood of confusion between 4Monster’s products and Monster Energy’s beverage product trademarks. *See Murray v. Cable Nat. Broad. Co.*, 86 F.3d 858, 861 (9th Cir. 1996), *as amended* (Aug. 6, 1996) (“If goods or services are totally unrelated, there is no infringement because confusion is unlikely.”); *see, e.g., Kellogg*, 337 F.3d at 626. Here, Monster Energy has failed to raise a material question of fact regarding whether a “reasonably prudent consumer in the marketplace” is likely to think that Defendants’ 4Monster bag and/or towel products were made by, or affiliated with, Plaintiff and its Monster Energy beverage product trademarks. *See, e.g., Survivor Media, Inc.*, 406 F.3d at 630. Accordingly, the Court **GRANTS** 4Monster’s Motion for Summary Judgment

on Plaintiff's claims to the extent they are based on Monster Energy's 18 trademark registrations (17 federal and one state) for its beverage product trademarks.

i. **Non-Beverage Product Trademarks**

Of the remaining eight federal trademarks that are not for beverage products, six are for Monster Energy's design marks which include the "M" claw logo with the words Monster Energy underneath or next to the claw logo. Compl. ¶ 11, Exhs. 1, 2, 5-8. Two different images of the Monster "M" claw logo, as taken from the exhibits to Monster Energy's Complaint, are below.



Compl. ¶ 11, Exhs. 1, 2, 5-8. Monster Energy's federal trademarks for non-beverage products containing the "M" claw logo include all-purpose sports bags (backpacks and duffle bags), clothing (t-shirts, hooded sweatshirts, pants, bandanas), stickers, sports helmets, silicone wrist bands, and lanyards. *Id.* Other than bags and backpacks, 4Monster sells none of these products. Monster Energy's SUF 21.

The remaining two trademarks at issue in Monster Energy's Complaint are for the "Monster Army" word mark for "clothing, namely, tops, shirts, t-shirts, hooded shirts, sweat shirts, and jackets" and a related "Monster Army" service mark for an athlete training and monitoring website, as well as a unique design mark for similar goods. Compl. ¶ 11, Exhs. 3, 4. The images of the Monster Army marks, as taken from exhibits to the Complaint, are set forth below.

MONSTER ARMY



Compl. ¶ 11, Exhs. 3, 4. Finally, for comparison, below is an image of the 4Monster mark and logo.



See 4Monster’s MSJ at 9; *see also* Monster Energy’s Oppo. at 8.

The Court will next address whether 4Monster’s sale of its towel and bag products are likely to cause confusion with any of Monster Energy’s eight non-beverage product trademarks when analyzed under the Ninth Circuit’s multi-factor approach delineated in *Sleekcraft*. *Sleekcraft*, 599 F.2d at 348.

d. Strength of the Mark

A mark’s strength determines the scope of its trademark protection. *JL Beverage Co. v. Jim Beam Brands Co.*, 828 F.3d 1098, 1106 (9th Cir. 2016). As the mark’s distinctiveness increases, “so too does the degree of protection.” *Id.* A mark has both conceptual and commercial strength. *Id.*

A mark’s conceptual strength “depends largely on the obviousness of its connection to the good or service to which it refers.” *Id.* at 1107 (citation omitted). Courts classify “a mark along a spectrum of five categories ranging from strongest to weakest: arbitrary, fanciful, suggestive, descriptive, and generic.” *Id.* (citing *Network Automation*, 638 F.3d at 1149). “Arbitrary and fanciful marks, which employ words and phrases with no commonly understood connection to the product, are the two strongest categories, and ‘trigger the

1 highest degree of trademark protection.” *Id.* (quoting *Survivor Media, Inc.*, 406 F.3d at
2 631). “In the middle of the spectrum are suggestive marks, which suggest a product’s
3 features and require consumers to exercise some imagination to associate the suggestive
4 mark with the product.” *JL Beverage*, 828 F.3d at 1107 (citation omitted). Descriptive and
5 generic marks are the two weakest categories. *Id.* “Descriptive marks define a particular
6 characteristic of the product in a way that does not require any imagination, while generic
7 marks describe the product in its entirety and are not entitled to trademark
8 protection.” *Id.* (citation omitted).

9 A mark’s commercial strength depends on “actual marketplace recognition.” *JL*
10 *Beverage*, 828 F.3d at 1107 (citing *Network Automation*, 638 F.3d at 1149). Advertising
11 shows commercial strength because it increases marketplace recognition and “can
12 transform a suggestive mark into a strong mark.” *Id.*

13 4Monster concedes that Monster Energy has strong marks in the context of energy
14 drinks, but argues that Monster Energy’s marks are weak outside the context of energy
15 drinks. Defendants’ MSJ at 14. 4Monster argues that “outside the context of energy drinks,
16 extensive third-party use of similar marks containing the word ‘Monster’ undercuts any
17 claim that consumers uniquely associate ‘Monster’ with Monster Energy, or that they are
18 likely to be confused by the coexistence of the parties’ marks.” *Id.* 4Monster argues that
19 “[Monster Energy] therefore, cannot claim the mark stands out to consumers outside of the
20 context of energy drinks, which supports a low level of protection for its mark in other
21 areas.” *Id.* at 15.

22 Monster Energy argues that its marks and trade dress are strong. Monster Energy’s
23 *Oppo.* to MSJ at 11. Monster Energy argues that “the voluminous, undisputed evidence
24 presented by Monster shows that the Monster marks and Monster trade dress are strong
25 and that the strength of the marks and trade dress extend beyond energy drinks.” *Id.* at 12.
26 In support thereof, Monster Energy states that “[s]ince 2002, [it] has spent more than 11.2
27 billion marketing and promoting its Monster brand worldwide” including “through athlete
28 endorsements, sponsoring athletic competitions, musicians, music festivals, and other

1 events.” *Id.* Monster Energy also points to its marketing and promotion of its marks through
 2 various social media platforms and at the retail locations in all 50 states, including gas
 3 stations, convenience and grocery stores.” *Id.* (citing Sacks Decl. ¶¶ 197, 27). Monster
 4 Energy also relies on the survey evidence from its expert Dr. Bruce Isaacson, that it claims
 5 show the “general strength” and “fame” of its marks. Monster Energy’s Oppo. to MSJ at
 6 13; *see also* ECF No. 41-29, Declaration of Dr. Bruce Isaacson (“Isaacson Decl.”). Monster
 7 Energy states that its “sale and distribution of towels, bags, clothing and blankets bearing
 8 its Monster [Energy] marks and trade dress has been substantial.” Monster Energy’s Oppo.
 9 to MSJ at 14 (citing SUF 10). Monster Energy also points to the “license agreements [it
 10 has entered into] with several manufacturers, giving them a license to produce and sell
 11 towels, bags, clothing, blankets, and other merchandise that bears one or more of the
 12 Monster [Energy] marks and Monster [Energy] trade dress” noting that its “licensees have
 13 paid Monster [Energy] millions of dollars of royalties on these licensed products.” *Id.*
 14 (citing SUF 9).

15 The Court finds that Monster Energy fails to adduce sufficient evidence of the
 16 commercial strength of the mark for its non-beverage products, i.e., any evidence of actual
 17 marketplace recognition for its products other than its beverage products. For example,
 18 although Monster Energy points to the survey results of Dr. Isaacson to show the “general
 19 strength” of its marks, in that survey, he “tested an image of a can of Monster’s Energy
 20 drink that uses the colors black and green.” Isaacson Decl. ¶¶ 16-17. In the survey,
 21 “respondents were shown a can, which they could rotate to see any side of the can, just as
 22 they could if they were holding a can in person.” ECF No. 41-29 ¶¶ 16-17. Similarly, Dr.
 23 Itamar Simonson’s survey results were also limited to Monster Energy’s mark in
 24 connection to beverages. ECF No. 41-32, Declaration of Dr. Itamar Simonson (“Simonson
 25 Decl.”), ¶ 19 (“Based on these survey results, the mark Monster has a strong secondary
 26 meaning in connection with beverages.”). Survey responses related to a can on Monster’s
 27 Energy drink says nothing about the commercial strength of Monster Energy’s marks for
 28 non-beverage products.

Further, Monster Energy has also failed to adduce evidence to support its assertion that its towel and bag products are available for sale online to the public sufficient to create a genuine issue of material fact about a likelihood of confusion between the two marks. *See, e.g., Align Activation Wear, LLC v. lululemon athletica Canada, Inc.*, 2021 WL 3117239 at *11 (C.D. Cal. June 7, 2021), *aff'd*, No. 21-55775, 2022 WL 3210698 (9th Cir. Aug. 9, 2022) (granted defendants' motion for summary judgment and denied plaintiff's where "hardly anyone" purchased the plaintiff's clothing products and no "reasonable juror could find an appreciable number of consumers are likely to be confused and believe they are buying lululemon."). Plaintiff vaguely and interchangeably states that it has "sold and/or distributed clothing, bags, towels, blankets, and other products." *See, e.g., Sacks Decl.* ¶ 32; Monster's SUF 10. The Court finds that Monster Energy's evidence in the record is vague, at best, as to what items and apparel are actually for sale online to the public versus distributed as promotional items and/or to licensees. The Court will address in more detail Monster Energy's lack of evidence regarding sales data of Monster Energy towels and bags in the proximity/relatedness of goods section.

Finally, Monster Energy's evidence of the money it has spent on marketing and promotion of its brand has little relevance given the lack of evidence introduced to show that the non-beverage products are even available for sale online to the public. *See, e.g., Stonefire Grill v. FGF Brands, Inc.*, 987 F. Supp. 2d 1023, 1043, 1048, 1057 (C.D. Cal. 2013) (fact that the plaintiff spent \$3,000,000 on advertising in Southern California did not create a genuine issue of material fact because plaintiff did not provide sufficient evidence of commercial strength in the relevant market.). In *Stonefire Grill*, the court found "that an appreciable number of reasonably prudent consumers in the marketplace [were] not likely to be confused as to the origin or source of the goods or services bearing [the marks]." *Id.* at 1057. "[T]he strongest factors favoring summary judgment [were] the lack of similarity of the marks, the distinctive marketing channels, and the weakness of Plaintiff's mark." *Id.* The court reasoned that "[o]f the eight factors, six favor the conclusion of no confusion, and two are neutral in the analysis[.]" so summary judgment was appropriate. *Id.*

Here, Plaintiff's evidence regarding marketing and promotion regarding the entire "Monster Energy" brand and the consumer market for its beverage product trademarks alone is not sufficient to establish the Monster Energy mark acquired secondary meaning in the consumer market for towels and bags. The Court finds that even viewing the evidence in the light most favorable to Monster Energy, it fails to adduce sufficient evidence to show that its mark is strong for non-beverage products. Although Monster Energy purports to rely on its promotion and marketing efforts, survey evidence of Dr. Isaacson, and the sale and/or distribution of non-beverage products in the marketplace either directly or through licensees, Monster Energy has failed to show that its marks are commercially strong for bags and towels. This factor supports the Defendants.

e. Proximity or Relatedness of the Goods

"Related goods are generally more likely than unrelated goods to confuse the public as to the producers of the goods." *Brookfield*, 174 F. 3d at 1055. In this "competitive proximity" analysis, the court asks whether "the two companies compete for the patronage of an overlapping audience." *Id.* "The proximity of the goods is measured by whether they are: (1) complementary; (2) sold to the same class of purchasers; and (3) similar in use and function." *Network Automation, Inc.*, 638 F.3d at 1150. However, "the mere fact that two products or services fall within the same general field" is not enough." *Stonefire Grill*, 987 F. Supp. 2d at 1050; *Brookfield*, 174 F.3d at 1056 (the focus is on the parties' products rather than their "principal line of business").

In connection with the towel and bag products at issue, 4Monster argues that "the parties' products, at least for the small subset of goods that could be considered potentially related, are not actually competitive, because Plaintiff's goods cannot actually be purchased." 4Monster's MSJ at 17. Monster Energy argues that the parties' goods are "identical." Monster Energy's Oppo. at 16. In support thereof, Monster Energy relies on the "uncontroverted evidence that it has entered into license agreements with several third-parties and that they have sold or distributed towels, bags, clothing, and blankets." *Id.* (citing Monster Energy's SUF 8).

1 Here, the towel and bag products are related because they are similar types of
 2 products. However, there is no proximity of the goods because Monster Energy has failed
 3 to adduce evidence that the towel/bag products are “sold to the same class of purchasers
 4 [as 4Monster].” *See, e.g., Network Automation, Inc.*, 638 F.3d at 1150. The Court cannot
 5 weigh the relatedness of the goods in isolation without considering whether Monster
 6 Energy and 4Monster actually compete for the patronage of an overlapping audience.

7 Monster Energy’s evidence is vague at best as to what items and apparel are actually
 8 for sale online to the public versus distributed as promotional items and/or to licensees. For
 9 example, Monster Energy states that “from 2003 to Q3 2021, Monster ***sold or distributed***
 10 more than 290,000 jackets, 151,000 sweaters/sweatshirts, 2.2 million t-shirts, 1.7 million
 11 backpacks, 147,000 bags, 273,000 towels and 9,400 blankets in connection with its
 12 Monster Brand.” Monster’s SUF 10 (emphasis added). Monster Energy also states that its
 13 “towels, bags, clothing, and/or blankets are also sold in retail stores and online (including
 14 on amazon.com).” Monster’s SUF 11 (citing Sacks Decl. ¶¶ 17, 34-37, 43, Exhs. 5, 13,
 15 14).⁷ Similarly, Monster Energy claims that it “licenses or has licensed its Monster marks
 16

17
 18 ⁷ Contrary to Monster Energy’s conclusory statement that its towels, bags, and blankets are
 19 sold on amazon.com, upon the Court’s review of Exhibit 5 to the Sacks Declaration, it
 20 shows only Monster Energy drinks for sale on amazon.com. The beverage product
 21 trademarks are no longer at issue in this lawsuit and this evidence is irrelevant to show
 22 whether there is a likelihood of confusion with the products sold by 4Monster.

23 Exhibits 13 and 14 show images of one towel, a few sweatshirts and two bags for sale.
 24 However, the images appear to be taken from a licensee catalogue, so it is unclear if they
 25 were available for sale online, and whether they were for sale to the “same class of
 26 purchasers” as 4Monster’s products. The products also bear multiple additional markings
 27 for the licensee including, for example, “Kyle Bush” on the towel and “Supercross” on the
 28 sweatshirt and bag. These additional markings even further reduce the probability for a
 likelihood of confusion. *See, e.g., Arcona*, 976 F.3d at 1080–81 (affirming summary
 judgment against trademark holder on likelihood of confusion issue and explaining that
 “court[s] should not myopically focus on only the alleged counterfeit marks to the
 exclusion of the entire product or even common sense”).

1 for use on clothing, bags, towels, blankets, and other accessories to companies such as
2 NASCAR, Feld Motorsports, Fox Head, Inc., [etc.]” for items that are later sold online
3 (such as on Amazon or Walmart). Sacks Decl. ¶ 34.

4 Throughout the evidentiary record and in Plaintiff’s briefing, Plaintiff vaguely and
5 interchangeably states that it has “sold and/or distributed” clothing, bags, towels, blankets,
6 and other products. *See, e.g.*, Sacks Decl. ¶¶ 5, 32, 40, 42; Monster Energy’s SUF 7, 10.
7 For example, in response to 4Monster’s interrogatory requesting information “where
8 consumers are able to currently purchase towels or blankets bearing a Monster Energy
9 trademark from Monster Energy Company or any licensee of Monster Energy Company,”
10 Monster Energy objected on various grounds including that the information sought is
11 “publicly available, equally available to Defendants and/or obtainable from other sources
12 that are more convenient and less burdensome.” ECF No. 44-6 at 76 (Response to
13 Interrogatory No. 19). Monster Energy also objected to this interrogatory as “irrelevant to
14 the parties’ claims or defenses and not proportional to the needs of the case.” *Id.* Subject
15 to the asserted objections, Monster Energy included four lines of information that was
16 redacted as confidential and then stated that the towels can be found ***sold and/or marketed***
17 on third party sites and lists one web address at “racingrox.com.” *Id.* at 77 (Response to
18 Interrogatory No. 19) (emphasis added). It is unclear from Monster Energy’s response
19 whether the towels and/or blankets are actually sold on these sites or just marketed on these
20 sites.

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23 In the Court’s own review of the record, the Court notes that Exhibit 9 to the Sacks
24 Declaration includes one image of a Monster Energy bag purportedly sold on
25 Walmart.com. However, it is unclear when this item was for sale and whether that time
26 frame overlaps with 4Monster sale of its bags and towels. In addition, the Monster Energy
27 backpack purportedly for sale includes the distinctive “M” claw logo and also includes an
28 additional “Pro Circuit” logo. This further reduces the probability of a likelihood of
confusion because it even further distinguishes the mark from the 4Monster mark. *See, e.g.,*
Arcona, 976 F.3d at 1080-81.

1 Similarly, in response to 4Monster’s interrogatory requesting information “where
 2 consumers are able to currently purchase bags and backpacks bearing a Monster Energy
 3 trademark from Monster Energy Company or any licensee of Monster Energy Company,”
 4 Monster Energy objected again and then included three lines of redacted confidential
 5 information. *Id.* at 77-78 (Response to Interrogatory No. 20). Finally, Monster Energy
 6 responded that “consumers *can purchase* or *previously could* purchase these backpacks
 7 and bags at the links shown below.” *Id.* Monster Energy included two links to a
 8 www.procircuit.com website. *Id.* (emphasis added). Monster Energy further states that it is
 9 “aware” of the following websites that *sell* or *have sold* backpacks and bags bearing the
 10 Monster marks and/or Monster trade dress” and includes two links to a “Walmart.com”
 11 website and a few other websites. *Id.* (emphasis added). There is little indication of when
 12 Monster Energy and/or its licensees sold its backpack and/or towel products in light of
 13 Monster Energy’s vague response that consumers “can or *previously could* purchase” these
 14 items. Response to Interrogatory 20 (*emphasis added*). Monster Energy has not adduced
 15 sufficient facts to show that these products were available for purchase online, at the same
 16 time as 4Monster’s products, and to the same class of purchasers.

17 Similarly, in response to 4Monster’s interrogatory requesting information on the
 18 “total sales to consumers, excluding giveaways or promotional items, of towels, bag[s],
 19 blankets, and backpacks bearing a Monster Energy trademark for each year since 2019”,
 20 Monster Energy objected both on the grounds of confidentiality and as irrelevant. ECF No.
 21 44-6 at 82-83 (Response to Interrogatory No. 20). Monster Energy then responded in four
 22 lines of redacted text that was for attorneys-only. Once again, although the Court
 23 appreciates Monster Energy’s concerns about confidentiality, Monster Energy’s sales data
 24 is critical for Monster Energy to show what goods it actually sells and where in order to
 25 analyze this likelihood of confusion factor.

26 Monster Energy also relies on certain exhibits attached to the Sacks Declaration to
 27 support the purported sale and/or distribution of the backpack and/or towel products. *See*,
 28 *e.g.*, Sacks. Decl. ¶ 32. One of them is Monster Energy’s inventory transaction reports from

2002-2009 showing “distribution and/or sales data” of various items including hats, t-shirts, patches, bar and golf towels. ECF 41-34 at Exh. 7. This purported sales data is from 2002-2009, which far predates the existence of 4Monster. Also, the inventory transaction reports are, at best, vague as to what was distributed versus sold [REDACTED]

[REDACTED] *Id.* Sacks also relies on another exhibit, which he states is a “true and correct copy of Monster’s report from 2010 to Q3 2023 showing distribution and sales figures that include Monster’s bags, clothing, towels, and/or blankets bearing the Monster Marks.” Sacks. Decl. ¶ 32. This document appears to be an internal document maintained by Monster Energy and lists various types of products such as t-shirts, helmets, etc. Sacks Decl., Exh. 8. Once again, it is unclear whether any of these items were actually sold to the public or distributed as promotional items. The document explicitly states [REDACTED]

[REDACTED] *Id.* Although the Court appreciates that this is “commercially sensitive information,” Monster Energy has not adequately adduced evidence as to whether and where the non-beverage products at issue were ever sold online to the general public, i.e., to the same class of purchasers to whom 4Monster sells its products.

Monster Energy’s conclusory statements in support of this factor and other *Sleekcraft* factors are often not supported by the evidentiary record. It is not the Court's job to search these exhibits to find support for the assertions that Plaintiff makes in its summary judgment motion. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (“Judges are not like pigs, hunting for truffles buried in briefs.”). In conclusion, this factor supports the Defendants because it weighs against a likelihood of confusion.

f. Similarity of the Marks

The third factor considers the similarity of the marks. Similarity of the marks “has always been considered a critical question in the likelihood-of-confusion analysis.” *See GoTo.com, Inc.*, 202 F.3d at 1205 (citing *Brookfield*, 174 F.3d at 1054). No matter how similar the goods and marketing channels, if the marks are not very similar, there is little

1 risk of confusion. *See Playmakers, LLC v. ESPN, Inc.*, 297 F. Supp. 2d 1277, 1282 (W.D.
2 Wash. 2003) (“The most important factor in any likelihood of confusion analysis is the
3 similarity of the marks. Without similarity, there can be no confusion.”). Courts “should
4 not myopically focus on only the alleged counterfeit marks to the exclusion of the entire
5 product or even common sense.” *Arcona*, 976 F.3d at 1080. Marks should be “considered
6 in their entirety and as they appear in the marketplace.” *Brookfield*, 174 F.3d at 1055
7 (internal quotation marks omitted).

8 The parties’ marks, as they appear in the marketplace for some of the towel and bag
9 products, are pictured below.

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1 4Monster argues:

2 Even without taking marketplace conditions into consideration, the parties'
3 marks are entirely dissimilar [because] Monster's Energy's trademarks that
4 relate to physical goods as opposed to energy drinks almost all comprise
5 stylized design [marks] containing the distinctive Monster 'M' claw logo and
6 unique font spelling out 'Monster Energy.' The Court cannot abstract away
7 from these designs to invent some generic 'Monster' mark that is somehow
8 similar to defendants' 4Monster mark.

9 4Monster's MSJ at 18. In response, Monster Energy argues that "the Monster mark does
10 not always appear in the same stylized form and is not always positioned next to the Claw
11 Icon mark." Monster Energy's Oppo. at 19. Monster Energy further argues that "the term
12 'Monster' is a prominent and dominant part of the Monster Marks" and that consumers are
13 "likely to give significant weight to that term because it is the literal part of the mark." *Id.*
14 (internal citation omitted). Monster Energy also argues that "Defendants are making wide-
15 spread use of the colors green and black with their 4Monster mark, both on Defendants'
16 websites and social media to promote all of their goods as well as on some of those goods,
17 which are the same colors that form part of the Monster Trade Dress." *Id.* at 20.

18 Considering the marks in their entirety, and despite both having the name "Monster"
19 the Court concludes that they are not similar. First, both products have a prominent logo.
20 Plaintiff's Monster Energy has the distinctive "M" claw logo, while Defendants' product
21 has the 4-eyed monster logo.⁸ Second, the shape and the packaging of the products are
22 different: Monster Energy's towels are always pictured open-face as is typical of a bar or
23 golf towel, whereas Defendants' towel is rolled up or in a distinctive carrying case. Also,

24 ⁸ Monster Energy disputes that 4Monster's four-headed monster logo typically or always
25 appears next to the 4Monster mark citing ECF No. 46-3. However, the exhibit Monster
26 Energy relies on to support this is an image of the back of a robe that does not have the
27 logo next to the 4Monster mark, but the front of the robe has the logo and the robe comes
28 in a bag that bears the 4Monster mark with the four-headed logo next to it. This evidence
actually supports – rather than detracts from – the assertion that all or almost all of
4Monster's products bear the four-headed monster logo in addition to the word mark.

1 4Monster’s backpack is less structured than Monster Energy’s backpack and also has a
2 carrying case. Third, unlike Plaintiff’s mark, Defendants’ mark has no claw mark, is in a
3 completely different font, always has the number “4” before the word “monster,” and has
4 no slash through the letter “O.” The Court does find that in the images above, which were
5 taken from Monster Energy’s Motion for Summary Judgment, the packaging for the
6 products is a similar color. However, it is undisputed that Defendants sell their products in
7 different colors including green and black, blue, yellow, purple, and orange. 4Monster’s
8 SUFs 16, 23; ECF No. 44-6 at 92-98. Because multiple colors appear in the marketplace,
9 that one of the colors is similar does not change the Court’s conclusion that the marks, as
10 considered in their entirety, are not similar.

11 The Ninth Circuit recently compared the marks for two skincare products – both
12 called EYE DEW – and concluded that the marks were not similar and therefore there was
13 no likelihood of confusion. *See Arcona*, 976 F.3d at 1076-80. Plaintiff Arcona’s EYE DEW
14 product is an eye cream packaged in a “tall, cylindrical, silver bottle.” *Id.* at 1076. The
15 product featured the phrase “EYE DEW” and the Arcona housemark on the bottle and the
16 packaging. *Id.* The defendant, Farmacy Beauty, also sold an eye cream called “EYE
17 DEW.” *Id.* It came in a “short, wide, white jar, along with a squarish outer box.” *Id.*
18 Defendant’s product also featured the phrase “EYE DEW” and its housemark on both the
19 jar and the packaging. *Id.*

20 Despite both products being eye creams and having the same “EYE DEW” name,
21 the Ninth Circuit held that “no reasonable consumer would be confused by these two
22 products because the packaging, size, color, shape, and all other attributes – other than the
23 term “EYE DEW” – are not remotely similar.” *Id.* at 1080-81. The court also noted that it
24 would be “implausible that a consumer would be deceived because the products had their
25 respective housemarks...prominently on the packaging.” *Id.*

26 The Court concludes that the parties’ products have entirely dissimilar marks. The
27 Court also concludes that the parties’ products appear differently in the marketplace, in
28 light of the different packaging, different colors used in 4Monster’s products, and the

1 inclusion of the parties' respective logos. This factor weighs strongly in the Defendants'
 2 favor. *See Brookfield*, 174 F.3d at 1054 ("[W]here [] two marks are entirely dissimilar,
 3 there is no likelihood of confusion."); *Arcona*, 976 F.3d at 1081 (affirming the district
 4 court's grant of summary judgment that there was no likelihood of consumer confusion
 5 because the marks were dissimilar); *Playmakers*, 297 F. Supp. 2d at 1282-84 (marks were
 6 "PLAY MAKERS" and "PLAYMAKERS," but there was no likelihood of confusion, in
 7 large part because plaintiff's mark included stars, had royal blue letters of different sizes
 8 with a khaki green A on a white background, and defendant's mark contained "no stars or
 9 other designs," and had letters of the same size in white and blue on a dark blue or black
 10 background).

11 Accordingly, this factor strongly supports Defendants because it weighs against
 12 likelihood of confusion.

13 **g. Evidence of Actual Confusion**

14 "Evidence that use of the two marks has already led to confusion is persuasive proof
 15 that future confusion is likely." *Sleekcraft*, 599 F.2d at 352. On the flip side, the Ninth
 16 Circuit has stated that it "cannot think of more persuasive evidence that there is no
 17 likelihood of confusion" between two marks than that "they have been simultaneously used
 18 for [several] years without causing any consumers to be confused as to who makes what."
 19 *Brookfield*, 174 F.3d at 1050.

20 Plaintiff provides no evidence that customers were confused about the source of
 21 Defendants' 4Monster towel and bag products since they have been sold in the online
 22 marketplace (primarily Amazon) for the past five years. Plaintiff does, however, submit
 23 evidence of confusion from Monster Energy's expert Dr. Kenneth Hollander. *See* ECF No.
 24 41-27, Declaration of Dr. Kenneth A. Hollander ("Hollander Decl."). Plaintiff's expert
 25 found that three out of five (60.4%) of the respondents in the survey who were shown
 26 pictures of a 4Monster microfiber towel believed that "Monster" makes or puts out the
 27 microfiber towel and carrying case. *Id.* ¶ 14. In addition, a net of 8.7% believed that the
 28 company putting out the towels also put out energy drinks. *Id.* Also, a net of 5.8% believed

1 that there was a business connection between Monster and Defendants or that permission
2 or approval had been granted by Monster to Defendants. *Id.*

3 The question, then, is whether Plaintiff's survey evidence is sufficient evidence of
4 actual confusion to preclude summary judgment for Defendants. *See Thane Int'l., Inc.*, 305
5 F.3d at 903; *Clicks Billiards, Inc. v. Sixshooters*, 251 F.3d 1252, 1263-64 (9th Cir. 2001)
6 (noting that the presence of survey evidence will not always preclude summary judgment).

7 Defendants argue that this survey evidence is "not relevant to the issue of consumer
8 confusion." 4Monster's MSJ at 19. Defendants argue that because Dr. Hollander counted
9 survey respondents who identified the potential source of a product bearing a large
10 "4Monster" mark as "Monster" as constituting examples of consumer confusion with
11 Plaintiff's asserted marks, it is unreliable because the survey did not evaluate whether the
12 potential source was "Monster Energy." *Id.* 4Monster argues that "in light of its misleading
13 and unreliable methodology, Dr. Hollander's expert report should be disregarded." *Id.*
14 Defendants do not rebut Dr. Hollander's expert report.

15 Plaintiff argues that "[c]ourts found that far lower rates of confusion support a
16 finding of likelihood of confusion, especially where, as here, the market consists of a large
17 number of consumers." Monster's Energy's Oppo. at 27 (citing *Thane Int'l., Inc.*, 305 F.3d
18 at 903 (27.7% consumer confusion sufficient to support actual confusion); *Warner Bros.*
19 *Entm't v. Global Asylum, Inc.*, 2012 WL 6951315, at *9 (C.D. Cal. Dec. 10, 2012), *aff'd*,
20 544 F. App'x 63 (9th Cir. 2013) ("Generally, confusion levels of 25 to 50 percent provide
21 'solid support' for a finding of likelihood of confusion. . . .") (additional internal citations
22 omitted)). Additionally, Plaintiff argues that "unrebutted survey evidence is clear evidence
23 of actual confusion for purposes of summary judgment." Monster Energy's Oppo. at 27
24 (internal citations omitted).

25 The Court overrules Defendants' request to exclude Dr. Hollander's report, and will
26 consider the report in its likelihood of confusion analysis. "[A] survey can be highly
27 probative on the issues of secondary meaning and likelihood of confusion. The survey
28 must, however, have been fairly prepared and its results directed to the relevant

1 issues.” *Nat’l Football League Properties, Inc. v. Wichita Falls Sportswear, Inc.*, 532 F.
 2 Supp. 651, 657 (W.D. Wash. 1982); *see also Calista Enterprises Ltd. v. Tenza Trading*
 3 *Ltd.*, 43 F. Supp. 3d 1099, 1124 (D. Or. 2014) (“In order for a consumer survey to be
 4 helpful, it must be ‘directed at the issue of consumer perception as to the significance and
 5 meaning of the designation in issue.’”).

6 Dr. Hollander conducted an online survey in which he screened a range of online
 7 survey takers with various questions and then presented them with two images, one of a
 8 “test” 4Monster towel product and carrying case and another of a “control” case with the
 9 mark “4Mammoth.” ECF No. 41-28, Hollander Expert Report ¶¶ 19, 20. Dr. Hollander’s
 10 survey revealed that “three out of five (60.4%) of the respondents exposed to the test
 11 4Monster images believed that “Monster Energy Drinks/Monster/Energy drinks/Etc.”
 12 makes or puts out the microfiber towel and carrying case, while none of those (0.0%)
 13 exposed to the control images thought so.” *Id.* ¶ 43.

14 Even considering the survey evidence, however, this factor is still mixed. While Dr.
 15 Hollander concludes that 60.4% of the respondents were confused about the relationship
 16 between Plaintiff and Defendants products, he counted instances of confusion as those
 17 where respondents indicated the source of the test case as any one of the following entities:
 18 “Monster Energy Drinks/Monster/Energy drinks/etc.” Hollander Expert Report ¶ 43. There
 19 is no entity “Monster” in this case, and the registered trademarks for the non-beverage
 20 products either have the distinctive “M” claw logo with the words Monster Energy next to
 21 or underneath the claw logo or are for “Monster Army” marks. The fact that Dr.
 22 Hollander’s survey question combined the responses for the three terms: “Monster Energy
 23 drinks, Monster, [and] energy drinks” makes it difficult to rely on this data. The Court finds
 24 that even considering the survey evidence introduced by Monster Energy, it does not
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confirm actual confusion because its results are not directed to the meaning of the trademark designations at issue in this case (“Monster Energy” and “Monster Army”).⁹

Considering this evidence in the light most favorable to the Plaintiff, the Court finds that this factor is neutral.

h. Marketing Channels Used

“Convergent marketing channels increases the likelihood of confusion.” *Sleekcraft*, 599 F.2d at 535. Selling two products at the same location weighs in favor of confusion. *See id.* To assess convergence, “courts consider whether the parties’ customer bases overlap and how the parties advertise and market their products.” *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1130 (9th Cir. 2014).

4Monster argues:

The parties here sell their goods through different trade channels. 4Monster’s goods are sold almost entirely via its Amazon store. Plaintiff’s energy drinks are primarily sold in retail outlets, such as convenience stores, and plaintiff’s other goods are apparently sold somewhere, but, as discussed above, it’s not actually clear where.

4Monster’s MSJ at 20. Monster Energy argues that “[g]oods do not need to be sold through identical trade channels in order for likelihood of confusion to exist.” Monster Energy’s *Oppo.* at 23 (internal quotation and citation omitted). Monster Energy further argues “[r]egardless, here both parties’ goods are available for purchase on the internet.” *Id.* Finally, Monster Energy argues that “Monster’s products are also available for purchase on Amazon, which is where Defendants assert that 99% of their products are sold.” *Id.*

Here, a comparison of distribution channels leads the Court to conclude that no reasonable juror could find that this factor weighs in Monster Energy’s favor. 4Monster exclusively sells its products online, via its Amazon.com store, though it also sells some

⁹ The Court makes clear that it is not weighing the evidence here. Rather, the Court is simply concluding that the evidence is unhelpful to the likelihood of confusion analysis because Monster Energy’s expert included the term “Monster” in his survey results.

1 products via its 4Monster.com website, at Walmart.com, and a few via China's
 2 Alaiibaba.com e-commerce platform. The fact that Monster Energy sells its beverage
 3 product trademarks on Amazon is not relevant because 4Monster does not sell beverage
 4 products. Also, courts in this circuit have held "[s]ome use of the Internet for marketing
 5 ...does not alone as a matter of law constitute overlapping marketing channels.
 6 *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1151 (9th Cir. 2002); *see also Playboy*,
 7 354 F.3d at 1028 ("Given the broad use of the internet today...this factor merits little
 8 weight."). Rather, the inquiry is whether the parties' marketing channels "overlap to any
 9 significant degree." *Id.* As discussed above, Monster Energy presents no facts regarding
 10 the type of marketing channel it employs for the sale of its bags and towel products nor
 11 whether these products are even available for purchase online to the public, particularly
 12 through websites such as Amazon.com, Walmart.com, or Alaiibaba.com.

13 Accordingly, this factor supports Defendants because it weighs against likelihood of
 14 confusion.

15 **i. Type of Goods and the Degree of Care Likely to be Exercised by**
 16 **the Purchaser**

17 "In assessing the likelihood of confusion to the public, the standard used by the
 18 courts is the typical buyer exercising ordinary caution." *Sleekcraft*, 599 F.2d at 353
 19 (citation omitted). "When the buyer has expertise in the field, a higher standard is proper
 20 though it will not preclude a finding that confusion is likely. Similarly, when the goods are
 21 expensive, the buyer can be expected to exercise greater care in his purchases; again,
 22 though, confusion may still be likely." *Id.* (citations omitted). "Consumer care for
 23 inexpensive products is expected to be quite low." *Playboy*, 354 F.3d at 1028. Thus, "[l]ow
 24 consumer care ... increases the likelihood of confusion." *Network Automation*, 638 F.3d at
 25 1152 (citing *Playboy*, 354 F.3d at 1028).

26 4Monster argues that although their products are "relatively low cost, they operate
 27 in a highly competitive market, and consumers are discerning about the quality of goods
 28 they purchase." 4Monster's MSJ at 21. "For example, for 4Monster's top selling microfiber

1 camping towels in a case, there are over 16,000 customer ratings, over 1,900 written
 2 reviews, and 79 answered questions available on the Amazon.com page.” *Id.* Monster
 3 Energy opposes and argues that the “ratings and reviews say nothing about the degree of
 4 care Defendants’ customers use when purchasing Defendants’ goods.” Monster Energy’s
 5 Oppo. at 23. Monster Energy cites a few cases where courts have found goods similar to
 6 those at issue here to not be purchased with great care. *Id.* at 24 (citing *Grooms v. Legge*,
 7 No. 09-cv-489-IEG-POR, 2009 WL 704644, at *8 (S.D. Cal. Mar. 17, 2009); *Power*
 8 *Balance LLC v. Power Force LLC*, Case No. SACV 10-1726 AG (MLGx), 2010 WL
 9 5174957, at *6 (C.D. Cal. Dec. 14, 2010)).

10 It is undisputed that the products at issue (towels/bags) are low-cost goods. Indeed,
 11 Defendants admit that they are “relatively low cost.” 4Monster’s MSJ at 21. Defendants
 12 nevertheless argue that consumers would still exercise a high degree of care in purchasing
 13 these products because there are product reviews online. This argument is unsupported by
 14 any authority, and Defendants fail to counter the cases provided by Monster Energy where
 15 courts have found that consumers do not typically a high degree of care in purchasing low-
 16 cost goods. Accordingly, this factor weighs in favor of finding a likelihood of confusion
 17 and favors Monster Energy.

18 **j. The Defendants’ Intent in Selecting the Mark**

19 “When the alleged infringer knowingly adopts a mark similar to another’s, reviewing
 20 courts presume that the defendant can accomplish his purpose: that is, that the public will
 21 be deceived.” *Sleekcraft*, 559 F.2d at 354. The intent factor generally carries minimal
 22 weight because “an intent to confuse customers is not required for a finding of trademark
 23 infringement.” *Brookfield*, 174 F.3d at 1059.

24 4Monster argues that “Monster Energy has offered no evidence that 4Monster had
 25 any awareness of, or even exposure to, Monster Energy or any of its marks prior to adopting
 26 its own mark.” 4Monster’s MSJ at 22. Monster Energy argues that “Defendants’ founders
 27 selected the mark 4Monster during or shortly after a series of road trips in the U.S. where
 28 Defendants stopped at gas stations, grocery stores, and convenience stores – locations

1 where Monster heavily advertises and sells its Monster drinks.” Monster Energy’s Oppo.
 2 at 25 (citing Rosenbaum Decl. at ECF No. 41-3 and Sacks Decl. ¶ 27). Monster Energy
 3 argues that “Defendants almost certainly knew of Monster when they selected the
 4 4Monster mark and their contention that they had never seen a can of Monster Energy is
 5 not credible.” *Id.*

6 The Court agrees with Defendants that Monster Energy’s argument has no
 7 evidentiary support and is speculative, at best. The fact that some of 4Monster’s founders
 8 took a trip to the U.S. to attend a trade show before founding 4Monster and “went into gas
 9 stations on the road trips” does not suffice to show that 4Monster had any awareness of or
 10 intent to infringe upon Monster Energy’s mark. *See, e.g.,* Rosenbaum Decl., Exh. 2, at
 11 157:7-158:17; Sacks Decl. ¶ 27. Even though this factor is minimally important, this factor
 12 supports Defendants because it weighs against likelihood of confusion.

13 **k. The Likelihood of the Expansion of the Product Line**

14 “Inasmuch as a trademark owner is afforded greater protection against competing
 15 goods, a ‘strong possibility’ that either party may expand his business to compete with the
 16 other will weigh in favor of finding that the present use is infringing.” *Sleekcraft*, 599 F.2d
 17 at 354. “When goods are closely related, any expansion is likely to result in direct
 18 competition.” *Id.* This factor is “relatively unimportant where two companies already
 19 compete to a significant extent.” *Brookfield*, 174 F.3d at 1060.

20 4Monster argues that this factor favors Defendants because “it has no intent to
 21 expand into Monster Energy’s primary market, energy drinks and other beverages.”
 22 4Monster’s MSJ at 23. Monster Energy opposes and argues that “Defendants ignore that
 23 Monster and its licensees also sell and distribute towels, bags, clothing, and blankets.”
 24 Monster Energy’s Oppo. at 25. Monster Energy further argues that “the parties sell
 25 identical goods and this factor favors a finding of likelihood of confusion.” *Id.*

26 The Court agrees with Defendants. There is no evidence that 4Monster intends to
 27 expand into the beverage industry. Also, even assuming the goods at issue are related (bags
 28 and towels), Monster Energy has failed to adduce evidence that Monster Energy’s towel

1 and bag products compete with 4Monster's products because there is de minimus evidence
2 to show that Monster Energy's towels and bags are available for purchase online by the
3 general public. Accordingly, this factor favors Defendants.

4 **I. Totality of the Factors**

5 With the exception of one factor (degree of care likely to be exercised by
6 purchasers), all of the *Sleekcraft* factors either favor Defendants or are neutral. The Court
7 concludes that, when viewing the evidence in the light most favorable to Plaintiff, no
8 reasonable juror could find a likelihood of confusion between Defendants' use of its
9 4Monster mark and Plaintiff's Monster Energy mark. The "record taken as a whole" could
10 only lead a rational trier of fact to one conclusion: consumers purchasing 4Monster's
11 products know the products were created by 4Monster and not Monster Energy.
12 *Matsushita*, 475 U.S. at 587 ("Where the record taken as a whole could not lead a rational
13 trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'") (internal
14 quotation omitted). In *Multi Time Machine*, the Ninth Circuit explained that "[t]he
15 likelihood of confusion is often a question of fact, but not always. In a case such as this,
16 where a court can conclude that the consumer confusion alleged by the trademark holder
17 is highly unlikely...summary judgment is appropriate." 804 F.3d at 939.

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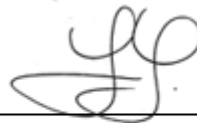
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1 Because no reasonable juror could find a likelihood of confusion, Defendants are
2 entitled to summary judgment on all five of Plaintiff's claims. For the foregoing reasons,
3 4Monster's Motion for Summary Judgment on each of the five claims in Monster Energy's
4 Complaint is **GRANTED**.¹⁰ Monster Energy's Motion for Summary Judgment is
5 **DENIED**.

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7 **IT IS SO ORDERED.**

8 Dated: September 23, 2024



10 Honorable Linda Lopez
11 United States District Judge
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28 ¹⁰ The Court **DENIES** 4Monster's request to find this case exceptional under 15 U.S.C. §
1117 and **DENIES** 4Monster's request for an award of its attorneys' fees.