

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 BBK Tobacco & Foods LLP,

10 Plaintiff,

11 v.

12 Central Coast Agriculture Incorporated, et
13 al.,

14 Defendants.

No. CV-19-05216-PHX-MTL

ORDER

15 This action involves a trademark dispute between Plaintiff BBK Tobacco &
16 Foods, LLP (“BBK”) and Defendant Central Coast Agriculture Incorporated (“CCA”).
17 Before the Court are numerous motions filed by the parties, including cross motions for
18 summary judgment (Docs. 203, 218, 293), and motions to exclude expert testimony
19 (Docs. 298, 302, 304, 305, 306, 307, 308, 311, 314, 317, 433). The motions are fully
20 briefed, oral argument was held on June 16, 2022. (Doc. 416.) The Court rules as follows.

21 **I. BACKGROUND**

22 BBK manufactures, distributes, and sells smoking-related products bearing its
23 trademarked “RAW” branding.¹ BBK’s RAW branded products include cigarette rolling
24 papers; smoking accessories; merchandise such as hats, t-shirts, and hoodies; and
25 information services regarding these and other products.² BBK has sold RAW branded

26 ¹ BBK’s marks include: “RAW,” “RAW ORGANIC,” “RAW ARTESANO,”
27 “SUPERNATURAL RAW,” “RAW CONNOISSEUR,” and “RAW BLACK.”

28 ² BBK maintains multiple internet domains incorporating the RAW designation, including
www.rawthentic.com, www.rawsmoke.com, and www.rawfoundation.com. It also uses
the Instagram handles @rawkandroll and @rawlife247.com and the Facebook page
entitled “RAW Rolling Paper.”

1 products for almost two decades and such products are now sold in retail locations in all
2 50 states.

3 CCA's predecessors were formed around 2008, when Thomas Martin and Khalid
4 Al-Naser began growing and trading cannabis with cannabis patients under California's
5 Compassionate Use Act. In 2012, Martin developed a process for using carbon dioxide
6 to extract cannabis-infused oil to use in making medical cannabis concentrates. At that
7 time, most cannabis concentrate brands were using a high-heat extraction process that
8 "cooked" their concentrates. Thus, Martin's process, by comparison, yielded "raw"
9 concentrate. In late 2013, Martin and Al-Naser began delivering packaged, finished
10 cannabis concentrates branded "RawCo2" to collectives.³ Shortly thereafter, Al-Naser's
11 nonprofit, GSS, began selling RawCo2 to California dispensaries. GSS also sold
12 concentrate products branded "Raw Hashish," "RawSin," and "Raw Gold." In 2014,
13 Martin and Al-Naser, along with some third-party dispensaries, began marketing their
14 concentrate products on social media. Then, in or around November 2014, Martin began
15 using the term "Raw Gardener" to delineate his products and he and Al-Naser began
16 referring to their social media followers as the "RawTribe."

17 Approximately two years later, around October 2016, CCA was formed and
18 acquired GSS's assets, including the rights to the RawCo2, Raw Hashish, RawSin, and
19 Raw Gold brands.⁴ Upon CCA's formation, Martin transitioned from using "Raw
20 Gardener" to "Raw Garden" to identify his products. In March 2016, CCA sold its first
21 Raw Garden branded concentrate products.⁵ CCA now markets and sells its cannabis
22 products exclusively under the Raw Garden brand and exclusively through California-
23 licensed dispensaries and mobile delivery services.

24 BBK and CCA (or its predecessors) have in the past attended many of the same

25 _____
26 ³ BBK asserts that RawCo2 was an extraction process, not a product. (*See* Doc. 246 at 8
n.2; Doc. 229-5).

27 ⁴ BBK claims that CCA did not acquire GSS's assets and accordingly is not a legal
successor to GSS. (Doc. 246 at 8; Doc. 229-3 at 3.)

28 ⁵ BBK again objects to CCA's assertion. It contends that, prior to 2018, CCA provided
only "consulting services" to a few collectives. (Doc. 246 at 9.) The undisputed evidence,
however, supports CCA's position. (Doc. 230-10; Doc. 238-1.)

1 trade shows and competitions, including the “Chalice Cup”⁶ festivals in California. At
2 the 2016 Chalice Cup, BBK representatives visited CCA’s Raw Garden booth and spoke
3 with CCA employees who were promoting the Raw Garden brand. One BBK
4 representative, Michael D’Aquiusto, “traded some [of BBK’s] RAW [rolling] papers for
5 two hats with the ‘Raw Garden’ name on them.” (Doc. 203 at 12.) D’Aquiusto gave his
6 business card to CCA’s representatives and discussed a potential partnership through
7 which Raw Garden cannabis could be packaged using RAW cones. Another BBK
8 representative, Rodney Peters, later posted an image of a Raw Garden-branded hat
9 alongside RAW rolling papers, cannabis, and a RAW tray to an Instagram account used to
10 advertise BBK products. A screenshot of the Instagram post was later sent to BBK’s
11 general counsel, Brendan Mahoney.

12 BBK claims CCA has infringed its RAW trademarks by producing, using,
13 advertising, distributing, selling, and offering to sell its products under the Raw Garden
14 brand. BBK initiated the instant action on September 18, 2019. BBK’s Amended
15 Complaint (the operative complaint) alleges seven claims: trademark infringement, false
16 designation of origin, and anti-cybersquatting under the Lanham Act; trademark
17 infringement and unfair competition under Arizona’s common law; a petition to void
18 several trademark applications due to a lack of bona fide intent to use the relevant
19 trademark in commerce in violation of the Lanham Act; and false advertising under the
20 Lanham Act. (Doc. 60 at 40–47.) On May 4, 2021, the Court granted CCA’s motion to
21 dismiss the false advertising claim but declined to dismiss the petition to void CCA’s
22 trademark applications for a lack of bona fide intent to use. (Doc. 151.) CCA now moves
23 for summary judgment on BBK’s infringement, false designation of origin, anti-
24 cybersquatting, and unfair competition claims. (Doc. 203.)

25 In addition to contesting the merits of BBK’s claims, CCA raises a number of
26 affirmative defenses, including laches, waiver, estoppel, acquiescence, statute of
27 limitations, and unclean hands. (Doc. 169 at 24–25.) CCA also alleges two counterclaims:

28 ⁶ Chalice Cup was a cannabis festival held annually in southern California. (Doc. 203-17
at 8; Doc. 203-26 at 5.)

1 a petition to cancel several BBK trademark registrations for fraud on the United States
2 Patent and Trademark Office (“PTO”), and a petition to cancel the same registrations for
3 unlawful use. (Doc. 169 at 57–59.)

4 In its cross-motion for summary judgment (Doc. 293), BBK seeks summary
5 judgment on all of CCA’s affirmative defenses, each of CCA’s counterclaims, and its
6 petition to void CCA’s trademark applications for a lack of bona fide intent to use. The
7 parties have also filed numerous motions to exclude each other’s expert witnesses.

8 **II. LEGAL STANDARDS**

9 **A. *Daubert***

10 A party offering expert testimony must establish that the testimony satisfies Rule
11 702 of the Federal Rules of Evidence. Rule 702 provides:

12 A witness who is qualified as an expert by knowledge, skill,
13 experience, training, or education may testify in the form of an
opinion or otherwise if:

14 (a) the expert’s scientific, technical, or other specialized
15 knowledge will help the trier of fact to understand the evidence
or to determine a fact in issue;

16 (b) the testimony is based on sufficient facts or data;

17 (c) the testimony is the product of reliable principles and
18 methods; and

19 (d) the expert has reliably applied the principles and methods
20 to the facts of the case.

21 Fed. R. Evid. 702.

22 As gatekeepers, trial judges make a preliminary assessment as to whether expert
23 testimony is admissible. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589, 597
24 (1993). Specifically, “the trial judge must ensure that any and all scientific testimony or
25 evidence admitted is not only relevant, but reliable.” *Id.* at 589. To meet the requirements
26 of Rule 702, an expert must be qualified, the expert’s opinion must be reliable in that it
27 is based on sufficient facts or data and is the product of reliable principles and methods,
28 and the expert’s testimony must fit the case such that the expert’s opinion is relevant. *Id.*

1 at 589–95.

2 The Rule 702 inquiry is “flexible.” *Id.* at 594. The focus “must be solely on
3 principles and methodology, not on the conclusions that they generate.” *Id.* at 595.
4 Because the requirements of Rule 702 are conditions for determining whether expert
5 testimony is admissible, a party offering expert testimony must show by a preponderance
6 of the evidence that the expert’s testimony satisfies Rule 702. Fed. R. Evid. 104(a); *see*
7 *also Lust v. Merrell Dow Pharms. Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

8 **B. Summary Judgment**

9 Summary judgment is appropriate when the evidence, viewed in the light most
10 favorable to the non-moving party, demonstrates “that there is no genuine dispute as to
11 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.
12 P. 56(a). A genuine issue of material fact exists when “the evidence is such that a
13 reasonable jury could return a verdict for the nonmoving party,” and material facts are
14 those “that might affect the outcome of the suit under the governing law.” *Anderson v.*
15 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). At the summary judgment stage, “[t]he
16 evidence of the non-movant is to be believed, and all justifiable inferences are to be
17 drawn in his favor.” *Id.* at 255 (citations omitted); *see also Jesinger v. Nev. Fed. Credit*
18 *Union*, 24 F.3d 1127, 1131 (9th Cir. 1994) (holding that the court determines whether
19 there is a genuine issue for trial but does not weigh the evidence or determine the truth
20 of matters asserted).

21 Where, as here, the “parties submit cross-motions for summary judgment, each
22 motion must be considered on its own merits.” *Fair Hous. Council of Riverside Cnty. v.*
23 *Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (citations and internal quotations
24 omitted). The summary judgment standard operates differently depending on whether
25 the moving or non-moving party has the burden of proof. *See Celotex Corp. v. Catrett*,
26 477 U.S. 317, 322–23 (1986). When the movant bears the burden of proof on a claim at
27 trial, the movant “must establish beyond controversy every essential element” of the
28 claim based on the undisputed material facts to be entitled to summary judgment. *S. Cal.*

1 *Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003). If the movant fails to
2 make this showing, summary judgment is inappropriate, even if the non-moving party has
3 not introduced contradictory evidence in response. When, on the other hand, the non-
4 movant bears the burden of proof on a claim at trial, the movant may prevail either by
5 citing evidence negating an essential element of the non-movant’s claim or by showing
6 that the non-movant’s proffered evidence is insufficient to establish an essential element
7 of the non-movant’s claim. *See Celotex*, 477 U.S. at 322–23; 10A Charles Alan Wright
8 & Arthur R. Miller, *Federal Practice and Procedure* § 2727.1 (4th ed. 2022).

9 **III. DISCUSSION**

10 **A. *Daubert* Motions**

11 Both parties have moved to exclude one another’s experts. Because the experts’
12 opinions are material to the Court’s evaluation of the parties’ motions for summary
13 judgment, the Court will first address the parties’ motions to exclude.

14 BBK moves to exclude or limit the opinions of five CCA experts: Dr. David
15 Blackburn, Dr. Tülim Erdem, Dr. Elisabeth Honka, Khurshid Kohja, and Thomas
16 Tiderington. CCA opposes each motion. CCA, in turn, moves to exclude or limit
17 the opinions of six BBK experts: Lance Ott, Ian Kobe, Dr. On Amir, Francis Burns, Dr.
18 Jeffrey Stec, and Louis Maiellano. Like CCA, BBK opposes each motion. Because the
19 Court will grant CCA summary judgment on BBK’s trademark infringement claims, the
20 Court will not reach the parties’ arguments regarding BBK’s disgorgement claim.
21 Accordingly, the Court will not address the motions to exclude damages experts
22 Francis Burns (Doc. 311) and Dr. David Blackburn (Doc. 298).

23 **1. Dr. Jeffrey Stec**

24 BBK retained Dr. Jeffrey Stec, a consumer survey expert, to opine regarding the
25 likelihood of consumer confusion. CCA moves to exclude both Dr. Stec’s testimony and
26 the survey evidence upon which he relies. (Doc. 314.) CCA gives three reasons: First,
27 Dr. Stec improperly employed the Squirt survey methodology, *see SquirtCo. v. Seven-Up*
28 *Co.*, 628 F.2d 1086, 1089 (8th Cir. 1980), rather than the Eveready methodology, *see*

1 *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366, 387 (7th Cir. 1976).⁷ Second, he
2 surveyed the wrong population because he did not limit survey respondents to only
3 cannabis *concentrate* consumers. And finally, his survey is “unreliable” evidence of
4 confusion because it returned a low net confusion rate.

5 In the Ninth Circuit, survey evidence should be admitted “as long as [it is]
6 conducted according to accepted principles and [is] relevant.” *Fortune Dynamic, Inc. v.*
7 *Victoria’s Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1036 (9th Cir. 2010)
8 (alteration in original) (quoting *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 814 (9th Cir.
9 1997)). “Admissibility of a survey is a threshold question that must be resolved by a
10 judge.” *M2 Software, Inc., v. Madacy Ent.*, 421 F.3d 1073, 1087 (9th Cir. 2005).
11 “Once the survey is admitted, however, follow-on issues of methodology, survey design,
12 reliability, the experience and reputation of the expert, critique of conclusions, and the
13 like go to the weight of the survey rather than its admissibility.” *Clicks Billiards, Inc. v.*
14 *Sixshooters, Inc.*, 251 F.3d 1252, 1263 (9th Cir. 2001).

15 CCA claims Dr. Stec’s testimony should be excluded because he employed the
16 Squirt survey format, rather than the Eveready format. Under the Squirt format,
17 respondents are shown both the senior and junior marks⁸ and then asked whether the
18 products associated with the mark come from the same or a different source. A Squirt
19 survey does not assume that respondents are familiar with the senior mark. 6 McCarthy on
20 Trademarks and Unfair Competition § 32:174.50 (5th ed.). Thus, the Squirt format is
21 appropriate principally where a case involves “marks that are weak, but are simultaneously
22 or sequentially accessible in the marketplace for comparison.” Jerre B. Swann, *Likelihood*
23 *of Confusion Studies and the Straightened Scope of Squirt*, 98 Trademark Rep. 739, 755–
24 56 (2008).

25 Under the Eveready format, on the other hand, the survey does not inform

26
27 ⁷ While the title of the case from which “Eveready” derives its name is in fact “*Ever-*
Ready,” courts and commentators generally omit the hyphen. *See, e.g.*, 6 McCarthy
§ 32:174.

28 ⁸ In the instant case, BBK’s RAW mark is the senior mark and CCA’s Raw Garden mark
the junior mark.

1 respondents what the senior mark is, but instead assumes they know of the mark from
2 their prior experience. 6 McCarthy § 32:174. Respondents are shown only the junior,
3 allegedly infringing mark, and are then asked open-ended questions about whether they
4 associate it with another mark. *See Pinnacle Advert. & Mktg. Grp., Inc. v. Pinnacle Advert.*
5 *& Mktg. Grp., LLC*, No. 18-cv-81606, 2019 WL 7376782, at *3 (S.D. Fla. Sept. 26, 2019).
6 The Eveready format, therefore, is especially useful when the senior mark is “top of
7 mind”—readily recognized by consumers in the relevant universe. Jerre B. Swann,
8 *Eveready and Squirt—Cognitively Updated*, 106 Trademark Rep. 727, 733–34 (2016)
9 (“‘Top-of-mind’ refers to marks that are readily accessible in memory. . . . The Eveready
10 format is thus the gold standard for assessing confusion as to (readily recalled) top-of-
11 mind marks; but not all commercially strong marks are cognitively stored top-of-mind;
12 and the Eveready format is thus not appropriate for all strong marks.”). CCA claims Dr.
13 Stec should have used the Eveready format in this case because “there is no evidence
14 showing the Raw Garden and RAW marks exist in physical or temporal proximity in the
15 marketplace” and because “BBK’s own claims and evidence [purport to show] that its
16 RAW mark is widely recognized in the market.” (Doc. 314 at 13–14.)

17 While CCA may disagree with Dr. Stec’s decision to use the Squirt format, he
18 adequately explained his decision and conducted his survey according to generally
19 accepted principles. Squirt surveys are broadly accepted by courts in the Ninth Circuit,
20 particularly where (as here⁹), the senior user’s and junior user’s brands overlap in the
21 marketplace. *See Fortune Dynamic*, 618 F.3d at 1037–38; *see also* Swann, *Eveready and*
22 *Squirt—Cognitively Updated*, at 742 (the Squirt methodology is “appropriate in assessing
23 the likelihood of whether brands that, in the real world, are frequently encountered in
24 physical or temporal proximity will be seen as so physically or conceptually similar or
25 related that they are deemed to go or belong together”). Thus, while CCA is right that Squirt
26 surveys generally return higher net confusion rates than Eveready surveys, *see* 6 McCarthy

27 ⁹ CCA’s contention that “there is no evidence showing the [parties’] marks exist in physical
28 or temporal proximity in the marketplace” is belied by the undisputed evidence that the
parties’ goods are sold in “hundreds of the same dispensaries in California.” (Doc. 246 at
30.)

1 § 32:174.50, that fact alone does not render such surveys inadmissible. Rather, CCA may
2 readily illustrate the inadequacies in Dr. Stec’s survey through vigorous questioning on
3 cross examination and through its own likelihood of confusion expert.

4 CCA next argues Dr. Stec’s opinions should be excluded because he surveyed the
5 wrong universe: *all* users of cannabis products, rather than users of cannabis concentrate
6 products. “In a traditional case claiming ‘forward’ confusion . . . the proper universe to
7 survey is composed of the *potential* buyers of the junior user’s goods or services.” 6
8 McCarthy § 32:161 (emphasis added). Dr. Stec reasonably determined that all cannabis
9 consumers were potential consumers of CCA’s concentrate and vape products. And he
10 adequately explained the reasons for that determination in his report. (Doc. 314-1 at 13.)
11 Further, CCA itself appears to have made the same determination when designing some
12 of its own business surveys. (See Doc. 439 at 13; Doc. 439-1.) Thus, insofar as CCA
13 disagrees with Dr. Stec’s chosen universe, its concern goes to weight rather than
14 admissibility, and can be borne out through cross examination at trial.

15 CCA’s finally argues Dr. Stec’s survey is not “reliable” evidence of consumer
16 confusion because the survey returned only a low net confusion rate. This argument is
17 easily dismissed. “The focus [of the Rule 702 inquiry], of course, must be solely
18 on principles and methodology, not on the conclusions that they generate.” See *Daubert*,
19 509 U.S. at 595. The net confusion results returned by Dr. Stec’s consumer confusion
20 survey go to the survey’s weight, not its admissibility. CCA’s motion (Doc. 314) will
21 therefore be denied.

22 2. Dr. Tülim Erdem

23 CCA engaged Dr. Tülim Erdem to respond to the opinion of BBK’s consumer
24 confusion expert, Dr. Stec. BBK moves to exclude Dr. Erdem’s opinions because, in its
25 view, she played no part in designing or conducting the survey on which those opinions
26 are based. Instead, the survey “was designed by CCA’s litigation counsel and conducted
27 at counsel’s direction by CCA’s regular marketing-research firm, MFour, whose
28 employees have *no* training or experience in conducting trademark consumer confusion

1 surveys.” (Doc. 302 at 6.)

2 As mentioned above, survey evidence should be admitted “as long as [it is]
3 conducted according to accepted principles and [is] relevant.” *Fortune Dynamic*, 618
4 F.3d at 1036 (alteration in original). BBK offers several reasons why the challenged
5 survey was not “conducted according to accepted principles.” First, the survey’s creator
6 “did not qualify as an expert on designing or analyzing consumer surveys,” *M2 Software*,
7 421 F.3d at 1087, since the survey was designed either by litigation counsel or by MFour
8 personnel with no training or experience in designing consumer confusion surveys.
9 Second, the survey did not focus on the proper universe. And third, the survey asked
10 “leading introductory questions” and “confidence-challenging follow-up questions” that
11 were impermissibly suggestive and distorted responses.

12 To begin, the evidence does not support BBK’s assertion that the survey was
13 “actually designed and implemented” by CCA’s counsel. (Doc. 302 at 7.) Although
14 counsel identified the survey’s objectives and target population, MFour employees,
15 including Allyson Wehn, designed and administered the survey. (*See* Doc. 302-2 at 5, 20,
16 74.) Further, while CCA did provide MFour several of the survey questions, that alone
17 does not render the entire survey subject to exclusion. *See, e.g., Quidel Corp. v. Siemens*
18 *Med. Sols. USA, Inc.*, No. 16-cv-03059, 2019 WL 5328730, at *5 n.4 (S.D. Cal. Oct. 21,
19 2019) (“[T]he fact that one portion of the survey was drafted by Plaintiff’s counsel does
20 not mean the entire survey should be excluded under Ninth Circuit precedent.”).

21 Counsel’s assistance in designing and creating a survey does not generally
22 warrant exclusion. *See* 6 McCarthy § 32:166 (“While some authority indicates that a
23 survey is flawed if an attorney is involved in designing the questions to be asked, this
24 cannot be a correct criticism.”). Indeed, although “it is improper for an attorney to single
25 handedly design and conduct a survey without the assistance of a professional,” the
26 attorney’s “cooperation with the survey professional in designing the survey is *essential*
27 to produce relevant and usable data.” *Id.* (emphasis added). This is only logical; survey
28 experts are not legal experts. In a case such as this, involving complex questions of

1 federal trademark law, counsel’s guidance is needed to frame survey parameters and
2 ensure relevance. In general, then, counsel’s involvement draws a survey’s admissibility
3 into question only when the survey is designed *exclusively* by counsel without the
4 assistance of a survey professional,¹⁰ *Elliot v. Google Inc.*, 45 F. Supp. 3d 1156, 1167–
5 68 (D. Ariz. Sept. 11, 2014), or when counsel administers the survey directly, 6 McCarthy
6 § 32:166 (“The only relevant limitation is that the attorneys do not *conduct* the survey.”).
7 Neither occurred here. Thus, CCA’s counsel’s involvement will not preclude admission of
8 either the survey or of Dr. Erdem’s related testimony.

9 BBK next claims that Dr. Erdem’s testimony and the survey are inadmissible
10 because “the conclusions in Dr. Erdem’s report do not match the conditions” of the
11 MFour survey. Whereas the survey focused only on “consumers who’ve purchased
12 Cannabis concentrate products at least 1x in the past 12 months,” and “exclude[d]
13 purchasers of vape products entirely,” Dr. Erdem’s opinions were based on “people who
14 prefer vapes and concentrates.” (Doc. 302 at 14–15.) The MFour survey was indeed
15 underinclusive. The undisputed evidence shows that CCA sells vape products, in addition
16 to concentrate products. Thus, in assessing forward confusion, vape consumers, like
17 concentrate consumers, should have been surveyed. While the survey did list “Cannabis
18 Vape Oil Product” as an option respondents could select as their “preferred way of
19 consuming Cannabis” (*see* Doc. 434-8 at 7–8), those who selected that option were
20 excluded from the survey results.¹¹ (Doc. 302-1 at 6.) *See* 6 McCarthy § 32:161 (“In
21 a traditional case claiming ‘forward’ confusion . . . the proper universe to survey is
22 composed of the potential buyers of the junior user’s goods or services.”).

23
24 ¹⁰ Despite BBK’s arguments to the contrary, Ms. Wehn was qualified to design and conduct
25 the survey. Indeed, she testified in her deposition that she has been designing and
26 administering consumer surveys for more than 20 years. (Doc. 302-2 at 78.) She easily
27 satisfies the requisite standard. *See Elliott v. Google, Inc.*, 860 F.3d 1151, 1160 (9th Cir.
28 2017) (“[V]alid survey design typically requires graduate training *or professional*
experience in survey research.” (emphasis added) (quoting Federal Judicial Center,
Reference Manual on Scientific Evidence 364 (3d ed. 2011))).

¹¹ Although Dr. Erdem testified at deposition that the term “concentrate” often implicitly
includes vape products (*see* Doc. 302-3 at 26–27), because the MFour survey listed
“Cannabis Vape Oil Product” and “Cannabis Concentrate Product” separately (*see* Doc.
302-1 at 5), such inclusivity was clearly not implied here.

1 Even having concluded the survey was underinclusive, the question remains
2 whether it should be excluded from evidence. The Court concludes that it should not.
3 Although the universe surveyed was plainly not the optimal one, it was also not so
4 “significantly skewed away from the proper group of people whose perception is at
5 issue” as to render it inadmissible. 6 McCarthy § 32:159. The survey is therefore
6 admissible and BBK’s objection affects only its weight. *See Daubert*, 509 U.S. at 596
7 (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction
8 on the burden of proof are the traditional and appropriate means of attacking shaky but
9 admissible evidence.”).

10 Third, BBK argues that the survey and Dr. Erdem’s opinions are inadmissible
11 because the survey asked impermissibly suggestive “leading introductory questions” and
12 “confidence-challenging follow-up questions” (Doc. 302 at 18), in addition to the
13 traditional Eveready questions.¹² Ms. Wehn testified at deposition that the introductory
14 questions were intended to assess the degree of care exercised by cannabis consumers.
15 (Doc. 302-2 at 7, 16–17.) BBK claims that these questions created distorting “demand
16 effects.”¹³ Even if true, though, BBK’s objection again goes to weight, not admissibility:
17 “[T]echnical inadequacies’ in a survey, ‘including the format of the questions or the
18 manner in which it was taken, bear on the weight of the evidence, not its admissibility.”
19 *Fortune Dynamic*, 618 F.3d at 1036 (quoting *Keith v. Volpe*, 858 F.2d 467, 480 (9th Cir.
20 1988)).

21 The survey’s follow-up questions are also not grounds for exclusion. These
22 questions were intended to assess consumers’ confidence and ensure that their responses
23 were more than mere guesswork. (*See* Doc. 434-9 at 20.) While such questions may not
24 ordinarily be included in an Eveready survey, their inclusion does not so distort the

25 _____
26 ¹² As described above, in an Eveready survey, respondents are shown the junior user’s
27 product and are asked to identify the company that (a) puts out, (b) sponsors or approves,
28 or (c) has a business affiliation or connection to the product. *See Ever-Ready Inc.*, 531 F.2d
366.

¹³ “‘Demand Effects’ in a survey are produced when respondents use cues from the survey
procedures and questions to infer the purpose of the survey and identity the ‘correct’
answers.” 6 McCarthy § 32:172.

1 survey's results as to render them wholly inadmissible. Indeed, there is literature
2 suggesting that such questions *enhance* survey reliability. *See* Barton Beebe, Roy
3 Germano, Christopher Jon Sprigman & Joel Steckel, *The Role of Consumer Uncertainty*
4 *in Trademark Law: An Experimental and Theoretical Investigation* 49 (NYU Law &
5 Econ. Working Paper No. 21-13, 2021) (“[W]e believe that testing for consumer belief
6 strength will significantly improve the utility of trademark survey evidence.”). To the
7 extent BBK believes that these confidence-gauging questions introduced bias, it may
8 produce its own evidence and ask probing questions on cross-examination to that effect
9 at trial.

10 BBK finally contends that even if the survey was conducted in accordance with
11 accepted principles, CCA cannot *show* that it was, because neither Dr. Erdem nor Dr.
12 Honka have the requisite knowledge regarding the survey's design or implementation.
13 Relatedly, BBK argues that because Drs. Erdem and Honka lack such knowledge, their
14 testimony cannot be adequately tested on cross examination. (Doc. 304 at 8.) The Court
15 is again unpersuaded. Both experts will be subject to cross examination and, should such
16 examination demonstrate their lack of knowledge regarding the survey on which they
17 relied in forming their opinions, the jury will have ample opportunity and reason to
18 discount those opinions. In addition, since BBK's counsel was able to depose MFour
19 personnel, including Ms. Wehn, during discovery regarding the survey, BBK has any
20 information that may undermine the survey's reliability at trial. Indeed, as CCA notes,
21 BBK may even play relevant portions of the deposition at trial, if necessary. (Doc. 434 at
22 16 (citing Fed. R. Civ. P. 32(a)(4)(b)).) BBK's motion (Doc. 302) will accordingly be
23 denied.

24 3. Dr. On Amir

25 Dr. On Amir was retained by BBK to opine regarding the “degree of care likely
26 to be exercised” by consumers of CCA's goods. *See AMF, Inc. v. Sleekcraft Boats*, 599
27 F.2d 341, 353 (9th Cir. 1979). Dr. Amir is a professor of marketing at the University of
28 California at San Diego. Dr. Amir seeks to opine that CCA's consumers exercise a

1 low degree of care in making their purchasing decisions. CCA moves to exclude Dr.
2 Amir's testimony in its entirety. CCA makes several arguments. First, Dr. Amir is not
3 qualified to offer an opinion on the degree of care exercised by cannabis consumers,
4 because he is not an expert on the cannabis industry. Second, Dr. Amir's opinions are not
5 based on reliable methodology. Third, Dr. Amir's conclusions are unsupported by the
6 data on which he relies. And fourth, some of Dr. Amir's opinions are not helpful to the
7 trier of fact.

8 CCA's first contention is easily dismissed. Dr. Amir is clearly qualified to opine
9 regarding the degree of care consumers exercise in making purchasing decisions. Dr.
10 Amir has extensive education and experience in the field of marketing and consumer
11 behavior. (*See* Doc. 433-1 at 2.) Although Dr. Amir does not have experience in the
12 cannabis industry, he explained in his deposition that the same consumer behavior
13 principles at issue in this case apply broadly across industries. (*See* Doc. 439-1 at 6
14 ("Marketing is marketing. The same principles apply everywhere.")) Further, a lack of
15 specialization generally goes to the weight of an expert's testimony, rather than its
16 admissibility. *See In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 318 F. Supp.
17 2d 879, 899 (C.D. Cal. 2004) ("A court abuses its discretion when it excludes expert
18 testimony solely on the ground that the witness's qualifications are not sufficiently
19 specific if the witness is generally qualified. A lack of specialization affects the weight of
20 the expert's testimony, not its admissibility.").

21 Dr. Amir bases his opinions primarily on a series of surveys conducted by
22 MFour for CCA's business use. The surveys were designed to assess the behavior of
23 CCA's actual and potential customers and are used by CCA to inform its business
24 decisions. CCA objects to Dr. Amir basing his opinions on these surveys. Its objections,
25 however, are unpersuasive. Many of CCA's supposed objections to Dr. Amir's
26 "methodology" in fact are objections to his conclusions. For example, much of CCA's
27 motion is devoted to its contention that the survey results do not in fact mean what Dr.
28 Amir says they mean. (*See* Doc. 433 at 11–14.) Disagreements with an expert's

1 conclusions, however, cannot form the basis of a motion to exclude under *Daubert*. *See*
2 *Daubert*, 509 U.S. at 589 (the Rule 702 inquiry must focus “solely on principles and
3 methodology, not on the conclusions that they generate.”). Dr. Amir’s conclusions may
4 instead be challenged on cross examination and through the testimony of CCA’s own
5 witnesses. *See In re Nw. Airlines Corp. Antitrust Litig.*, 197 F. Supp. 2d 908, 927 (E.D.
6 Mich. 2002) (“Plainly, to the extent that Defendants and their experts have applied a
7 similar methodology and merely reached a different conclusion, such a ‘battle of the
8 experts’ must be resolved by the trier of fact.”).

9 CCA further objects that the surveys do not focus on the proper universe:
10 “consumers of cannabis concentrate and/or vape oils products.” (Doc. 433 at 12.) As
11 BBK notes, however, MFour elected, in consultation with CCA itself, to survey a
12 broader population of cannabis users. (Doc. 439 at 13.) This choice reflects CCA’s
13 apparent belief that all cannabis users are potential purchasers of its Raw Garden
14 products. (*Cf.* Doc. 439-1 at 13 (“[I]t’s very easy to argue that it’s likely that people who
15 are cannabis buyers are potential customers.”).) Thus, because the degree of care exercised
16 by both current and potential CCA consumers is relevant, the surveyed universe does not
17 provide grounds for exclusion. *See M2 Software*, 421 F.3d at 1089 (“The district court’s
18 instructions also properly and explicitly directed the jury to consider the degree of care of
19 ‘potential buyers.’”).

20 CCA does not contend that the surveys relied on by Dr. Amir are themselves
21 unreliable. Such an argument would in fact be dubious, given that the surveys were
22 conducted for CCA’s own business use. *See Chase Fed. Sav. & Loan Ass’n v. Chase*
23 *Manhattan Fin. Servs. Inc.*, 681 F. Supp. 771, 780 (S.D. Fla. 1987). Indeed, CCA’s
24 knowledge of the surveys’ background, design, and implementation helps ameliorate
25 concerns regarding the admissibility of Dr. Amir’s opinions. To the extent CCA believes
26 the surveys do not support Dr. Amir’s conclusions, it is uniquely positioned—having
27 commissioned and helped design the surveys—to expose any inadequacies or
28 inconsistencies in Dr. Amir’s opinions. There is no reason to believe a jury would not

1 understand or give weight to CCA’s arguments.¹⁴ See *Southland Sod Farms v. Stover*
2 *Seed Co.*, 108 F.3d 1134, 1143 (9th Cir. 1997) (“[A]s long as they are conducted
3 according to accepted principles . . . survey evidence should ordinarily be found
4 sufficiently reliable under *Daubert*. Unlike novel scientific theories, a jury should be able
5 to determine whether asserted technical deficiencies undermine a survey’s probative
6 value.”).

7 **4. Dr. Elisabeth Honka**

8 CCA retained Dr. Elisabeth Honka to respond to Dr. Amir’s conclusions and to
9 give her opinion regarding the degree of care exercised by consumers. BBK now moves
10 to exclude her testimony in full. (Doc. 304.) BBK advances two arguments. First, Dr.
11 Honka cannot establish that the MFour survey is the product of reliable principles and
12 methods. Thus, both the survey and Dr. Honka’s opinions based on it are accordingly
13 inadmissible. (*Id.* at 6–8.) The Court rejected this argument in the forgoing section and
14 need not do so again here. See *infra* Subsection III.A.3. Second, the survey does not
15 support Dr. Honka’s opinions because it fails to assess whether reasonable consumers
16 would take sufficient time to distinguish between the parties’ product lines, and instead
17 assesses only consumers’ brand sensitivity and the importance of brand to consumers’
18 purchasing decisions. (Doc. 304 at 9–11.) The Court also rejects this argument and will
19 allow Dr. Honka to testify.

20 Brand sensitivity is relevant in assessing the degree of consumer care. Brand
21 sensitive consumers are likelier to exercise a high degree of care in making purchases
22 than are consumers who are not brand sensitive. See *Glow Indus., Inc. v. Lopez*, 252 F.
23 Supp. 2d 962, 1001 (C.D. Cal. 2002). Thus, the survey provides relevant, if not
24 dispositive, evidence of the degree of care exercised by CCA’s consumers. Such
25 evidence directly supports Dr. Honka’s opinions. The Court will therefore deny BBK’s

26
27 ¹⁴ CCA also contends that Dr. Amir should be precluded from testifying regarding the
28 likelihood of consumer confusion. Because BBK’s response assures that “Dr. Amir will
not be asked to, nor will he, offer any opinions at trial on any aspect of consumer confusion,
except the consumer degree of care factor” (Doc. 439 at 16), the Court need not address
CCA’s argument.

1 motion to exclude.

2 **5. Lance Ott**

3 CCA moves to exclude BBK’s expert Lance Ott, who was retained to testify
4 regarding issues related to the California cannabis market. (Doc. 307.) Mr. Ott has been
5 involved in the cannabis industry for more than two decades, during which he
6 has provided various strategic, financial, and banking services to cannabis companies.
7 (Doc. 307-1 at 2.) He was directed by BBK to offer his opinion regarding the following
8 questions:

9 A. Was there a for-profit commercial cannabis market operating
10 in compliance with California state and local laws and
11 regulations in 2016? If not:

12 1. When did a for-profit commercial cannabis market emerge
13 under state and local laws and regulations in California?

14 2. What were the characteristics of transactions in cannabis
15 products allowed in California under its state and local laws
16 and regulations before the emergence of a commercial, for-
17 profit cannabis market in California?

18 B. When could a for-profit entity in California first participate in
19 for-profit, commercial sales of cannabis products allowed
20 under California state and local laws and regulations?

21 C. What kinds of customer experiences occurred at cannabis
22 dispensaries in California in 2016 and how, if at all, did those
23 experiences change between 2016 and present?

24 (*Id.* at 3–4.) CCA contends that Mr. Ott’s responses to questions A, A.1., A.2, and B
25 consist of legal conclusions and are therefore inadmissible. (Doc. 307 at 2, 7–8.) In
26 response, BBK contends that Mr. Ott’s testimony is admissible because he merely
27 references the law as a necessary backdrop to his testimony regarding the California
28 cannabis market. (Doc. 332 at 13–16.)

Mr. Ott’s opinions must be excluded. Despite BBK’s insistence to the contrary, his
opinions are essentially legal. For example, the section of his report entitled “Basis for

1 Opinions” provides a four-page overview of the scope and effect of various laws,
2 including the Compassionate Use Act (“CUA”), the Medical Marijuana Program Act
3 (“MMPA”), Proposition 64, and the Medicinal and Adult-Use Cannabis Regulation and
4 Safety Act. (Doc. 307-1 at 4–7.) His opinions, in turn, are no more than his subjective
5 interpretations of those laws. For example, in opining “there was not a for-profit,
6 commercial cannabis market operating in compliance with California state and local
7 laws” in 2016, Mr. Ott’s report provides:

8 Before 2018, the early CUA did not permit any sales of
9 cannabis and the subsequent MMPA, while permitting more
10 transactions, expressly stated that it did not permit any for-
11 profit cultivation or distribution of cannabis. Therefore, in my
12 opinion, any commercial for-profit cannabis sales in California
13 prior to 2018 were outside of what was permitted even under
14 California law, making them illegal ‘black market’
15 transactions.

16 (*Id.* at 8.) This is an impermissible legal conclusion. Mr. Ott, however, has no legal
17 training or experience. (*See* Doc. 307-3 at 4–5, 27–28.) Accordingly, he is plainly
18 unqualified to render such an opinion. *See* Fed. R. Evid. 702; *JIPC Mgmt., Inc. v.*
19 *Incredible Pizza Co.*, No. 08-cv-04310, 2009 WL 8591607, at *5 (C.D. Cal. July 14,
20 2009).

21 Even if Mr. Ott qualified as a legal professional, his opinion would yet be
22 inadmissible, since “resolving doubtful questions of law is the distinct and exclusive
23 province of the trial judge.” *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051,
24 1058 (9th Cir. 2008) (quoting *United States v. Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir.
25 1993)); *see also* *Arista Networks, Inc. v. Cisco Sys. Inc.*, 2018 WL 8949299, at *5 (N.D.
26 Cal. June 15, 2018) (“An expert’s testimony may not interpret the law for the court or
27 advise the court about how the law should apply to the facts of a particular case.”
28 (cleaned up)); *Pinal Creek Grp. v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042
(D. Ariz. 2005) (“The principle that legal opinion evidence concerning the law is
inadmissible is so well-established that it is often deemed a basi[c] premise or

1 assumption of evidence law—a kind of axiomatic principle.”). The Court will therefore
2 grant CCA’s motion to exclude.

3 **6. Khurshid Kohja**

4 BBK moves to exclude the opinions of Khurshid Kohja. (Doc. 305.) Kohja, a
5 California attorney, was retained by CCA to respond to the testimony of Lance Ott. His
6 testimony, like Mr. Ott’s, consists of impermissible legal conclusions and seeks to
7 improperly usurp the Court’s role. The Court will therefore grant BBK’s motion to
8 exclude.

9 **7. Ian Kobe**

10 CCA moves to exclude the testimony of Ian Kobe. (Doc. 308.) Mr. Kobe is
11 BBK’s “creative director and head of product development” and has been with BBK
12 since 2010. (Doc. 308-1 at 2.) BBK plans to elicit both lay and expert testimony from Mr.
13 Kobe at trial. (*See* Doc. 333 at 5.) CCA moves to exclude both aspects of Mr. Kobe’s
14 testimony in full. The Court, however, declines to address Mr. Kobe’s lay testimony at
15 this juncture.¹⁵ The admissibility of such testimony is better reserved for a motion in
16 limine prior to trial. The Court will therefore address CCA’s motion to exclude only
17 insofar as it challenges Mr. Kobe’s expert opinions.

18 BBK seeks to elicit expert testimony from Mr. Kobe regarding the “similarity of the
19 marks” likelihood of confusion factor. *Sleekcraft*, 599 F.2d at 349. As the name suggests,
20 that factor assesses the similarity of the defendant’s mark to the plaintiff’s mark. The
21 greater the similarity between the two marks, the greater the likelihood of confusion. *See*
22 *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1206 (9th Cir. 2000). Mr. Kobe
23 intends to refute CCA’s contention that the parties’ marks are dissimilar. In particular,
24 he plans to opine that, although the RAW mark is principally red, and the Raw Garden
25 mark principally green, companies frequently use different colors on product packaging
26 even within the same product and brand lines. (Doc. 333 at 5–6.) In the words of his

27 _____
28 ¹⁵ The Court notes that because BBK has retained another expert, Dr. Jeffrey Stec, to opine
regarding the commercial strength of the RAW mark, CCA is correct that Mr. Kobe may
not offer expert opinion to that effect. (*See* Doc. 31 at 4.)

1 expert report, “a change in color is often used to signify different product types in a single
2 line or brand of products.” (Doc. 308-1 at 4.) In addition, Mr. Kobe plans to opine that
3 “the color green is commonly used in product packaging to identify products made from
4 or associated with cannabis.” (Doc. 308-1 at 4, 5.)

5 CCA moves to exclude both of these opinions for three reasons. First, Mr.
6 Kobe’s opinion about companies’ use of different colors is plainly not “beyond the
7 common knowledge of the average layperson.” *Moses v. Payne*, 555 F.3d 742, 756 (9th
8 Cir. 2009). Thus, that opinion will not be “helpful” to the factfinder under Rule 702.
9 Second, Kobe is not qualified to opine about the use of the color green by cannabis
10 companies. Third, Kobe’s opinion about cannabis marketing strategy is founded on
11 unreliable methodology.

12 Rule 702 requires that expert testimony “help the trier of fact to understand the
13 evidence or to determine a fact in issue.” Fed. R. Evid. 702(a). This means, among other
14 things, that “the subject matter at issue must be beyond the common knowledge of the
15 average layman.” *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002). This is
16 not an especially exacting inquiry. Indeed, the Ninth Circuit has counseled that courts
17 “must be cautious not to overstate the scope of the average juror’s common
18 understanding and knowledge.” *Id.* at 1013; *see also Lawson v. Trowbridge*, 153 F.3d
19 368, 376 (7th Cir. 1998) (“A trial court ‘is not compelled to exclude [an] expert just
20 because the testimony may, to a greater or lesser degree, cover matters that are within the
21 average juror’s comprehension.’”). Nevertheless, courts in this circuit “continue[] to
22 guard . . . from expert elucidation, areas believed to be within the jurors’ common
23 understanding.” *United States v. Rahm*, 993 F.2d 1405, 1413 (9th Cir. 1993).

24 As mentioned above, Mr. Kobe plans to opine that “a change in color is often used
25 to signify different product types in a single line or brand of products.” (Doc. 308-1 at
26 4.) This opinion embraces an issue within the average juror’s understanding. The fact
27 that companies use different colors to identify different products, even within a single
28 brand, is well understood. Indeed, Mr. Kobe’s own examples illustrate how commonplace

1 this practice is. (*See, e.g.*, Doc. 308-1 at 5 (explaining that Coca Cola uses a red can for
2 regular Coke, a silver can for Diet Coke, and a black can for Coke Zero).) His testimony,
3 therefore, will not be “helpful” to the jury within the meaning of Rule 702 and Ninth
4 Circuit precedent.

5 Mr. Kobe also seeks to offer the following opinions regarding the use of the color
6 green by cannabis companies: (1) “the color green is commonly used in product
7 packaging to identify products made from or associated with cannabis, both marijuana
8 and hemp” (Doc. 308-1 at 5); (2) “the cannabis market is so saturated with product
9 packaging and store signage using the color green that the color green is commonplace
10 in the cannabis market” (*id.* at 6); and (3) “the use of the color green on the Raw Garden
11 packaging for cannabis products does not . . . serve to identify the source of the Raw
12 Garden products but serves only as some identification that the Raw Garden products
13 are cannabis products or otherwise associated with cannabis” (*id.* at 21).

14 These opinions are admissible. First, despite CCA’s assertions to the contrary, Mr.
15 Kobe is qualified to opine regarding cannabis packaging design based on his 28 years of
16 professional experience in graphic and packaging design and his considerable experience
17 working alongside cannabis companies on design-related issues. (Doc. 333 at 11.) *See*
18 *Sundby v. Marquee Funding Grp., Inc.*, No. 19-cv-00390, 2020 WL 5535357, at *6 (S.D.
19 Cal. Sept. 15, 2020) (allowing expert to testify based on work experience); *see also*
20 *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1018 (9th Cir. 2004) (“Rule
21 702 contemplates a *broad conception* of expert qualifications.”).

22 Second, Mr. Kobe’s methodology, though based primarily on experience, rather
23 than formulaic processes, is sufficiently reliable to permit his testimony. “In certain
24 fields, experience is the predominant, if not sole, basis for a great deal of reliable expert
25 testimony.” *Lucido v. Nestle Purina Petcare Co.*, 217 F. Supp. 3d 1098, 1102 (N.D. Cal.
26 2016). As BBK notes in its opposition: “Here, Mr. Kobe’s reliance on his professional
27 experience with packaging design and on articles discussing packaging design within the
28 cannabis industry is rationally related to his ultimate conclusions and is an acceptable

1 methodology.” (Doc. 333 at 13.) CCA’s motion to exclude will be granted in part and
2 denied in part.

3 **8. Thomas Tiderington**

4 As discussed above, CCA brings two counterclaims against BBK, which seek to
5 invalidate a number of BBK’s trademark registrations. The counterclaims allege that
6 BBK’s products are unlawful “drug paraphernalia” under the CSA and that BBK obtained
7 the PTO registrations by fraud. (Doc. 71 at 49–51.) CCA hired Thomas Tiderington, the
8 Chief of Police in Plymouth, Michigan, to give his opinion on whether BBK’s rolling
9 papers and other products constitute illegal “drug paraphernalia” under the CSA. BBK
10 moves to exclude Chief Tiderington’s testimony on three grounds: First, his opinions are
11 irrelevant because they do not address the correct provisions of the CSA. Second, his
12 opinions are unreliable because they are not based on any actual application of the CSA.
13 And third, because Tiderington serves as a police chief, the jury will give undue weight to
14 his testimony, and thereby prejudice BBK. (*See* Doc. 306 at 6.)

15 BBK’s concern that the jury will give undue weight to Chief Tiderington’s
16 testimony is puzzling, since the parties agree CCA’s counterclaims will be tried to the
17 bench. (*See, e.g.*, Doc. 406.) *See United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir.
18 2018) (“When the district court sits as the finder of fact, there is less need for the
19 gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.”).
20 The Court, of course, will not give undue weight to Chief Tiderington’s opinions simply
21 because he is a police chief.

22 Nevertheless, the Court agrees with BBK that Tiderington’s testimony is
23 irrelevant because, as discussed in additional detail below, *see infra* Subsection III.C.3.ii,
24 his opinions are focused principally on the factors set forth in 21 U.S.C. § 863(a) and (e),
25 which factors are inapplicable where the “tobacco exemption” applies. *See Lifted Ltd.,*
26 *LLC v. Novelty, Inc.*, No. 16-cv-03135, 2021 WL 4480566, at *3 (D. Colo. September 30,
27 2021) (“[T]he tobacco exemption removes from Section 863’s purview any item that is
28 traditionally intended for use with tobacco, regardless of any of the other factors in the

1 statute. Section 863(f)(2) states that “[t]his section *shall not apply*’ to products
2 traditionally intended for use with tobacco.” (alteration and emphasis in original)); *see*
3 *also* 21 U.S.C. § 863(f) (“This section *shall not apply* to . . . any item that, in the normal
4 lawful course of business, is . . . traditionally intended for use with tobacco products,
5 including any pipe, paper, or accessory.” (emphasis added)). In addition, to the extent Chief
6 Tiderington does give opinions regarding the tobacco exemption, he straightforwardly
7 concedes that he is not qualified do so. (Doc. 293-24 at 4.) Accordingly, the Court
8 concludes his testimony is inadmissible and BBK’s motion will be granted.

9 **9. Louis Maiellano**

10 BBK intends to offer at trial expert opinion testimony from Louis Maiellano
11 regarding the tobacco exemption. In particular, Mr. Maiellano will opine that BBK’s
12 products are traditionally intended for use with tobacco and therefore come within the
13 tobacco exemption. (Doc. 317-1 at 2.) CCA moves to exclude, because his opinions are
14 not based on scientific, technical, or other specialized knowledge; his methodology is
15 unreliable, since he fails to analyze key objective factors informing traditional intended
16 use; and he improperly offers an opinion on the ultimate issue. (Doc. 317.)

17 Mr. Maiellano is well qualified to opine on the roll-your-own segment of the
18 tobacco industry and the question whether BBK’s products are traditionally intended for
19 use with tobacco. *See Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 814
20 (9th Cir. 2014) (holding that trial court abused its discretion in determining witness with
21 38 years of experience in property damage repair was not qualified as an expert); His
22 qualifications are set forth in detail in both his report (Doc. 317-1 at 3–4) and BBK’s
23 opposition (Doc. 331 at 10–11) and will not be belabored here. This “specialized
24 knowledge” he gained through extensive experience obviously informed his opinions in
25 this case.

26 He also based his opinions on adequate facts and data. Though much of his research
27 was conducted online and is publicly accessible, that fact has no bearing on whether his
28 opinions are reliable and admissible. Publicly available information, no less than

1 proprietary information, may serve as the basis for expert testimony. Indeed, though the
2 information on which Mr. Maiellano relied may be public, the application of such
3 information in order to reach a conclusion in this case required his expertise. And
4 Maiellano made that fact clear during his deposition. (Doc. 331-1 at 3–4.)

5 CCA’s next argues Maiellano’s methodology was unreliable because he ignored
6 “objective factors” in formulating his opinions. (Doc. 317 at 10.) The Court is not
7 persuaded. CCA’s argument is based on the following language: “An item can only be
8 ‘traditionally intended for use with’ tobacco by reference to history, past practice, and
9 other objective factors.” *United States v. Dyer*, 750 F. Supp. 1278, 1287 (E.D. Va. 1990).
10 As an initial matter, this language comes from a decision of a district court outside this
11 circuit and is therefore not binding on this Court. Even if it were, however, it would not
12 require Mr. Maiellano’s opinions to be excluded. The language does not set forth a
13 formulaic test for assessing whether an item is traditionally intended for use with tobacco.
14 Instead, it expresses the simple notion that to determine what an item is “traditionally
15 intended” for, one must look to objective historical factors. The language’s surrounding
16 context makes this clear. In the immediately preceding sentences, the court stated: “In a
17 1988 amendment to the [CSA] Congress substituted the phrase ‘traditionally intended for
18 use with’ for the then existing phrase ‘primarily intended for use with.’ Congress’ choice
19 of the modifier ‘traditionally’ confirms the statute’s objective standard.” *Id.* Thus, the
20 court’s mention of “history, past practice, and other objective factors” was offered to
21 distinguish between the relevant, objective evidence a court may consider and the
22 irrelevant, subjective evidence a court may not, such as evidence of what the defendant
23 “primarily intended” its goods to be used for. Maiellano’s opinions are consistent with
24 this approach, as they are founded on the basis of objective, historical evidence.

25 Maiellano also does not impermissibly opine on the ultimate issue. Instead, he
26 opines principally that rolling papers, rolling machines, cigarette tubes, rolling trays,
27 shredders, and various other products, are traditionally intended for use with tobacco.
28 These opinions do not constitute improper legal testimony. *See Hangarter v. Provident*

1 *Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004) (“[A] witness may refer to the
2 law in expressing an opinion without that reference rendering the testimony
3 inadmissible.” (quoting *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988)). CCA’s
4 motion will be denied.

5 **B. CCA’s Motion for Partial Summary Judgment**

6 The Court will now address CCA’s motion for partial summary judgment (Doc.
7 203.) As mentioned above, CCA seeks summary judgment on Counts I–V of BBK’s
8 Amended Complaint. For the reasons given below, the Court will grant CCA’s motion.
9 Because the Court finds that there is no likelihood of consumer confusion, the Court
10 declines to address CCA’s assertions that BBK’s claims are barred by laches and that
11 BBK’s disgorgement claim fails because CCA’s profits were accrued in violation of the
12 Controlled Substances Act.

13 **1. Likelihood of Consumer Confusion**

14 CCA contends that, even accepting BBK’s version of the facts, there is no
15 likelihood of consumer confusion. CCA is right. “The core element of trademark
16 infringement is the likelihood of confusion.” *Brookfield Commc’ns, Inc. v. W. Coast Ent.*
17 *Corp.*, 174 F.3d 1036, 1053 (9th Cir. 1999). “The test for likelihood of confusion is
18 whether a ‘reasonably prudent consumer’ in the marketplace is likely to be confused as
19 to the origin of the good or service bearing one of the marks.” *Entrepreneur Media, Inc.*
20 *v. Smith*, 279 F.3d 1135, 1140 (9th Cir. 2002). The Ninth Circuit uses the eight *Sleekcraft*
21 factors to guide the likelihood of confusion analysis: (1) strength of the mark; (2) the
22 proximity or relatedness of the companies’ goods; (3) the similarity of the marks; (4)
23 evidence of actual confusion; (5) the marketing channels used; (6) type of goods and the
24 degree of care likely to be exercised by the purchaser; (7) defendant’s intent in selecting its
25 mark; and (8) the likelihood of expansion into other markets. *Sleekcraft*, 599 F.2d at 348–
26 49.

27 This same eight-factor analysis governs BBK’s trademark infringement and unfair
28 competition claims under Arizona common law. See *Taylor v. Quebedeaux*, 126 Ariz.

1 515, 516 (1980) (“[T]he essence of unfair competition is confusion of the public.”);
2 *Moab Indus., LLC v. FCA US, LLC*, No. 3:12-cv-08247-HRH, 2016 WL 5859700, at *7
3 (D. Ariz. Oct. 6, 2016) (“Under Arizona law, the universal test for unfair competition is
4 whether the public is likely to be confused.” (cleaned up)).

5 **i. Similarity of the Marks**

6 “The first *Sleekcraft* factor—the similarity of the marks—has always been
7 considered a critical question in the likelihood-of-confusion analysis.” *GoTo.com.*, 202
8 F.3d at 1205; *see also Brookfield Commc’ns*, 174 F.3d at 1054 (“The similarity of the
9 marks will always be an important factor.”). “Obviously, the greater the similarity between
10 the two marks at issue, the greater the likelihood of confusion.” *GoTo.com*, 202 F.3d at
11 1206. Three axioms guide the Court’s analysis on this factor. First, “the court is to view
12 the marks as a whole, as they appear in the marketplace,” *E. & J. Gallo Winery v. Gallo*
13 *Cattle Co.*, 967 F.2d 1280, 1291 (9th Cir. 1992), rather than taking a “deconstructionist
14 view of the different components of the marks,” *Active Network, Inc. v. Elec. Arts Inc.*,
15 No. 10-cv-01158, 2010 WL3463378, at *3 (S.D. Cal. Aug. 31, 2010); *see also Exxon*
16 *Corp. v. Texas Motor Exch., Inc.*, 628 F.2d 500, 505 (5th Cir. 1980) (“[S]imilarity of design
17 is determined by considering the overall impression created by the mark as a whole rather
18 than simply comparing individual features.”). Second, because similarities may be more
19 than merely visual, the marks must be compared “in terms of appearance, sound, and
20 meaning.” *GoTo.com*, 202 F.3d at 1206. Third, “similarities are weighed more heavily
21 than differences.” *Id.*

22 The marks are vaguely similar in sound and meaning. The word “raw” appears
23 in both, in all capital letters, with the same spelling.¹⁶ *See Ultimate Creations, Inc. v. THQ*
24 *Inc.*, No. 05-cv-01134, 2008 WL 215827, at *3 (D. Ariz. Jan. 24, 2008) (“[B]ecause
25 Defendant uses the exact word as Plaintiff’s registered mark, there is a greater likelihood

26 _____
27 ¹⁶ The Court is unpersuaded by BBK’s conclusory claim that because it owns a “family”
28 of RAW marks, CCA’s use of the word “garden” suggests Raw Garden is “just another
member of the family of marks” (Doc. 246 at 28–29). “Simply using a series of similar
marks does not of itself establish the existence of a family.” *J & J Snack Foods Corp. v.*
McDonald’s Corp., 932 F.2d 1460, 1463 (Fed. Cir. 1991).

1 of confusion.”). The word “raw” also conveys the same meaning in connection with both
2 marks: both companies use the word to evoke the impression that their goods are natural
3 or unprocessed. The marks also sound somewhat similar, since both incorporate the
4 identical word “raw.” On the other hand, however, because the word “raw” is always
5 accompanied by “garden” when used in connection with CCA’s goods, the marks do not
6 sound identical. The marks’ aural similarity, moreover, is less significant here than in
7 cases involving products purchased primarily by verbal order. *See* 4 McCarthy § 23:22.
8 Also, because the marks’ supposed aural and semantic similarity hinges exclusively on
9 their shared use of an exceptionally common word,¹⁷ such similarity is highly dubious.
10 *See Alpha Indus., Inc. v. Alpha Steel Tube & Shapes, Inc.*, 616 F.2d 440, 445 (9th Cir.
11 1980) (“[S]election of a mark with a common word . . . ‘naturally entails a risk of some
12 uncertainty and the law will not assure absolute protection.’” (quoting *Scott Paper Co. v.*
13 *Scott’s Liquid Gold, Inc.*, 589 F.2d 1225, 1229 (3d Cir. 1978))).

14 Visually, the marks are not similar. In CCA’s case, the words “Raw Garden”
15 generally appear in green on a white background (or, occasionally, in white on a green
16 background), in a moderately sized, sans serif font with irregular outlines. The words are
17 of equal significance in the mark, in the sense that neither “Raw” nor “Garden”
18 predominates. The words are also accompanied by a large, two-leaf sprout that features
19 prominently in the mark. In BBK’s mark, in contrast, “RAW” generally appears in
20 capitalized and bolded red letters, in a large serif font, on a tan background. “RAW,”
21 unlike “Raw Garden,” usually appears alone, unaccompanied by other words or symbols.
22 And, even when combined with other elements, the word “RAW” predominates. This
23 visual dissimilarity weighs strongly against a likelihood of confusion. *See Heartsprings,*
24 *Inc. v. Heartspring, Inc.*, 143 F.3d 550, 554 (10th Cir. 1998) (“Even if the trade names
25 are similar, the likelihood of confusion is reduced if the two trademarks, taken as a
26 whole, are visually distinct.”).

27
28

¹⁷ For example, there are more than 1,000 live, third-party trademark registrations using
the term “raw.”

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



The companies' RAW and Raw Garden branded packaging is also visually dissimilar. *See Stone Brewing Co. v. MillerCoors LLC*, 445 F. Supp. 3d 1113, 1132 (S.D. Cal. 2020) (“Packaging is certainly a factor in the overall appearance of a mark in the marketplace.”); *see also Packman v. Chi. Trib. Co.*, 267 F.3d 628, 644 (7th Cir. 2001) (“Different packaging, coloring, and labeling can be significant factors in determining whether there is a likelihood of confusion.”). Whereas CCA’s products are ordinarily packaged in cubic, white boxes with the Raw Garden logo appearing in only moderate size, BBK’s products (e.g., its rolling papers) are packaged in rectangular, tan boxes on which “RAW” appears in large, prominent lettering. The presentation of the marks on the boxes in which the companies’ products are placed is quite distinct, and reduces the likelihood that consumers would be confused. *See Glow Indus., Inc. v. Lopez*, 252 F. Supp. 2d 962, 997 (C.D. Cal. 2002) (“The manner in which the products are presented in the marketplace accordingly minimizes the likelihood that consumers will conclude they emanate from the same source.”).



The Court holds that the marks create significantly different commercial impressions, such that consumers could readily distinguish between the parties’ products as they appear in the marketplace. *See Lindy Pen Co. v. Bic Pen Corp.*, 725 F.2d 1240,

1 1245 (9th Cir. 1984) (“The pens’ dissimilar appearance, the dominance of the company
2 marks and logos on the pens themselves and on all packaging and promotional material,
3 and the dissimilar and distinctive packaging and advertisement designs overcome the
4 similarity of the marks considered in isolation. Insofar as the marks are encountered in a
5 marketplace permitting visual examination of the pens themselves or their packaging or
6 promotional material . . . the marks are readily distinguishable.”). Even weighing
7 similarities more heavily than differences, as the Court must, the visual dissimilarity
8 between the companies’ marks and product packaging renders consumer confusion
9 unlikely. *See Glow Indus.*, 252 F. Supp. 2d at 997 (“[T]he packaging used by plaintiff and
10 defendants for their fragrance products is quite different, and tends to minimize any
11 confusion generated by the similarity in the sound and meaning of the trademarks.”). This
12 factor heavily favors CCA and, indeed, militates strongly in favor of summary judgment
13 on BBK’s infringement claims. *See Brookfield Commc’ns*, 174 F.3d at 1054 (“Where the
14 two marks are entirely dissimilar, there is no likelihood of confusion. . . . Nothing further
15 need be said.”).

16 **ii. Proximity of the Parties’ Goods**

17 On the next factor, the Court assesses the relatedness of the parties’ products.
18 Related goods are, of course, likelier than unrelated goods to confuse consumers. *See*
19 *Brookfield Commc’ns*, 174 F.3d at 1055. “To determine whether goods are related,
20 courts may consider whether the goods are complementary, whether the products are
21 sold to the same class of purchasers, and whether the goods are similar in use and
22 function.” *Pinder v. 4716 Inc.*, 494 F. Supp. 3d 618, 639 (D. Ariz. 2020) (quotation
23 omitted). The ultimate question is whether the products “would be reasonably thought
24 by the buying public to come from the same source if sold under the same mark.”
25 *Sleekcraft*, 599 F.2d at 348 n.10; *see also Fleischmann Distilling Corp. v. Maier Brewing*
26 *Co.*, 314 F.2d 149, 159 (9th Cir. 1963) (“The use need not be the same as, nor one in
27 competition with the original use. The question is, are the uses related so that they are
28 likely to be connected in the mind of a prospective purchaser?”); *Brookfield Commc’ns*,

1 174 F.3d at 1056 (“[T]he focus is on whether the consuming public is likely somehow
2 to associate [the junior user’s] products with [the senior user].” (quoting *Dreamwerks*
3 *Prod. Grp. v. SKG Studio*, 142 F.3d 1127, 1130–32 (9th Cir. 1998)).

4 BBK offers evidence suggesting consumers could mistakenly associate the
5 companies’ products. First, there is evidence indicating the parties’ goods can be used
6 together. Specifically, CCA’s co-founder, Thomas Martin, stated in his deposition that
7 CCA’s concentrate products could be applied to cannabis flower and smoked in BBK
8 rolling paper (Doc. 246 at 28), as did CCA’s former employee, Samantha Brown
9 (Doc. 246 at 28). In addition, CCA recently began selling a new, Raw Garden branded
10 “pre-roll” product, which combines marijuana flower with “refined live resin crushed
11 diamonds” (a marijuana concentrate) in rolling paper. (Doc. 397.) This product
12 demonstrates that, despite CCA’s earlier arguments (*see* Doc. 203 at 22), some of the
13 parties’ goods are, in fact, complementary.¹⁸

14 On the other hand, the relationship between the parties’ products is somewhat
15 attenuated. CCA does not, for example, sell cannabis flower, which could easily be
16 combined with BBK’s rolling papers. Instead, CCA’s products must first be applied to
17 cannabis flower, and only then can they be combined with BBK’s rolling papers. Thus,
18 BBK’s products are perhaps more closely related to recreational cannabis products
19 generally than to CCA’s oil and resin products specifically. *See Sunenblick v. Harrell*,
20 895 F. Supp. 616, 629 (S.D.N.Y. 1995) (finding the goods unrelated where “[the
21 defendant’s] products are addressed to a somewhat esoteric market”).

22 Second, record evidence shows the parties’ products are sold “in hundreds of the
23 same dispensaries in California,” which suggests the goods are in some sense related.
24 (Doc. 246 at 28.) While the fact that the companies’ products are sold under the same
25 roof does not compel a finding that they are related, *see, e.g., Woodstock Ventures LC v.*

26
27 ¹⁸ BBK moves to further supplement the summary judgment record (Doc. 400). Because
28 record evidence already demonstrates that the parties’ products are sold in many of the
same retail locations, and because leave to supplement the record with evidence of CCA’s
new pre-roll product was previously granted (Doc. 395), the Court will deny BBK’s
motion.

1 *Woodstock Roots, LLC*, 387 F. Supp. 3d 306, 318 (S.D.N.Y. 2019), *aff'd*, 837 F. App'x
2 837 (2d Cir. 2021) (“The different nature of Plaintiffs’ and Defendants’ products tempers
3 any findings of competitive proximity.” (cleaned up)), it nevertheless weighs in favor of
4 confusion, *see* 4 McCarthy § 24:45. This is especially true where, as here, the
5 retail location is insular or specialized and sells only a narrow range of products. *Cf.*
6 *Recot, Inc. v. Becton*, 214 F.3d 1322, 1330 (Fed. Cir. 2000).

7 On the other hand, the companies’ products do not directly compete or overlap.¹⁹
8 CCA sells “cannabis concentrate products” whereas BBK sells “tobacco and related
9 products, including cigarette rolling papers and smoking accessories.” (Doc. 203 at 22.)
10 *See* 4 McCarthy § 24:23 (“[C]ompetitive’ goods . . . are goods that are reasonably
11 interchangeable by buyers for the same purposes.”). While direct competition between
12 the parties’ goods is of course not required, *see Brookfield Commc’ns*, 174 F.3d at 1056,
13 its absence does make consumer confusion somewhat less likely, 4 McCarthy § 24:22
14 (“Where the goods . . . are directly competitive, the degree of similarity of marks needed
15 to cause likely confusion is less than in the case of dissimilar goods.”). In addition, the
16 goods are not sold at similar prices. For example, CCA’s .5-gram “Refined Live Resin
17 PAX ERA Pod” product sells for roughly \$46, and its 1.0-gram Raw Garden live resin
18 concentrate for roughly \$63, while BBK’s RAW products range in price from \$4.30 for
19 300 rolling papers to \$26.99 for 100 cones. (Doc. 203 at 29.) This price disparity suggests
20 that distinct groups of consumers purchase the parties’ products and, accordingly, that
21 confusion is less likely to occur. That said, companies often sell products with differing
22 prices under a single brand.

23 On balance, the Court holds that the evidence is sufficient for a factfinder to
24 conclude that the parties’ goods are proximate. The tobacco and cannabis industries,
25 though distinct, are adjacent, and consumers could reasonably conclude that BBK
26 expanded into the cannabis concentrate market. Thus, while there is some evidence

27 ¹⁹ While both companies sell nearly identical branded merchandise (e.g., hats, T-shirts, and
28 water bottles), such merchandise is sold only for promotional purposes, and is merely
incidental to the companies’ core cannabis and smoking-accessory products. *See Pinkette
Clothing*, 894 F.3d at 1028.

1 pointing in both directions, this factor weighs slightly in BBK’s favor and in favor of a
2 likelihood of confusion.

3 **iii. Strength the Mark**

4 “The scope of the trademark protection that we give marks depends upon the
5 strength of the mark, with stronger marks receiving greater protection than weak ones.”
6 *Entrepreneur Media*, 279 F.3d at 1141. Although BBK argues its marks are incontestable
7 (*see* Doc. 246 at 8), a claim CCA does not dispute (*see* Doc. 203 at 20), “the incontestable
8 status of [a] mark does *not* require a finding that the mark is strong.” *Entrepreneur Media*,
9 279 F.3d at 1142 n.3; *see also* 6 McCarthy § 32:155 (“The status of incontestability
10 relates solely to the *validity* of the registered mark. The . . . commercial and marketplace
11 strength of the mark relates solely to the separate issue of *infringement* of the mark.”).
12 Rather, a strong mark is one that is likely to be “remembered and associated in the public
13 mind with the mark’s owner.” *Brookfield Commc’ns*, 174 F.3d at 1058. Thus, regardless
14 of whether a mark has obtained incontestable status, the strength of a mark is assessed
15 based on the mark’s conceptual strength and commercial strength. *See Stone Creek, Inc.*
16 *v. Omnia Italian Design, Inc.*, 875 F.3d 426, 432 (9th Cir. 2017) (“The strength of the
17 mark is a key factor with two components: the mark’s recognition in the market (*i.e.*, its
18 commercial strength) and the mark’s inherent distinctiveness (*i.e.*, its conceptual
19 strength.”), *abrogated on other grounds by Romag Fasteners, Inc. v. Fossil, Inc.*, 590
20 U.S. —, 140 S. Ct. 1492 (2020).

21 **a. Conceptual Strength**

22 The conceptual strength of a mark “is determined by its placement on a continuum
23 of marks.” *Entrepreneur Media*, 279 F.3d at 1141 (quoting *E. & J. Gallo Winery*, 967
24 F.2d at 1291). “The strongest marks—that is, those which receive the maximum
25 trademark protection—are ‘arbitrary’ or ‘fanciful.’ The weakest marks, entitled to no
26 trademark protection, are ‘generic.’ In between lie ‘suggestive’ and ‘descriptive’ marks;
27 suggestive marks have the greater strength of the two.” *Id.* A “descriptive” mark is just
28 that: descriptive. It “define[s] qualities or characteristics of a product in a straightforward

1 way that requires no exercise of the imagination to be understood.” *Kendall-Jackson*
2 *Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1047 n.8 (9th Cir. 1998); *see also*
3 *Brookfield Commc’ns*, 174 F.3d at 1058 n.19 (“Descriptive terms directly describe the
4 quality or features of the product.”). A mark is “suggestive,” on the other hand, when “a
5 consumer must use imagination or any type of multistage reasoning to understand the
6 mark’s significance.” *Kendall-Jackson Winery*, 150 F.3d at 1047 n.8. Thus, a suggestive
7 mark, as the name implies, “does not *describe* the product’s features, but *suggests* them.”
8 *Id.* The strongest marks are “arbitrary” and “fanciful” marks. *Entrepreneur Media*, 279
9 F.3d at 1141. These marks “have no intrinsic connection to the product with which the
10 mark is used.” *Brookfield Commc’ns*, 174 F.3d at 1058 n.19.

11 Because the dividing line between these categories of marks, and particularly
12 descriptive and suggestive marks, is rather murky, the categorizing decision frequently
13 is “made on an intuitive basis rather than as the result of a logical analysis susceptible of
14 articulation.” *Ever-Ready Inc.*, 531 F.2d at 379; *see also Fortune Dynamic*, 618 F.3d at
15 1033 (“Categorizing trademarks is necessarily an imperfect science. Far from being
16 neatly distinct and discrete, trademark categories often ‘blur at the edges and merge
17 together.’” (quoting *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 790
18 (5th Cir. 1983))).

19 Courts have developed two “tests” to help distinguish between suggestive and
20 descriptive marks. One is the “imagination test,” which asks whether, and how much, a
21 consumer must use her imagination to understand the message conveyed by the mark
22 about the quality or characteristics of the product. 2 McCarthy § 11:67. Another is the
23 “competitors’ need test,” which asks whether the message conveyed by the mark about
24 the product is so direct that it is likely to be needed by competitive sellers to describe
25 their own products. *Id.* § 11:68. These tests go hand in hand, since “the more imagination
26 that is required to associate a mark with a product or service, the less likely the words
27 used will be needed by competitors to describe their products or services.” *Zobmondo*
28 *Ent., LLC v. Falls Media, LLC*, 602 F.3d 1108, 1117 (9th Cir. 2010).

1 BBK’s “RAW” mark is either descriptive or suggestive. “Raw” has several
2 dictionary definitions including: “being in or nearly in the natural state: not processed or
3 purified,” “unprepared or imperfectly prepared for use,” and “not being in polished,
4 finished, or processed form.” *Raw*, Merriam-Webster.com, [https://www.merriam-](https://www.merriam-webster.com/dictionary/raw)
5 [webster.com/dictionary/raw](https://www.merriam-webster.com/dictionary/raw) (last visited June 23, 2022). At least with regard to BBK’s
6 rolling papers (BBK’s flagship product), “RAW” is used in this descriptive sense.
7 According to BBK’s website, its rolling papers are “pure and RAW,” “produced with no
8 genetically modified organisms or animal-based products,” “vegan friendly and natural,”
9 and contain “[a] blend of naturally unbleached plant fibers and are finished with the
10 purest natural gumline to match.” (Doc. 205-2.) Thus employed, RAW obviously
11 describes a feature of BBK’s rolling papers: their natural, unmodified quality. On the
12 other hand, understanding the connection between the term RAW and BBK’s rolling
13 papers arguably requires a leap in logic indicative of a suggestive mark. *See Brookfield*
14 *Commc’ns*, 174 F.3d at 1058. The connection is not so obvious, for example, as the one
15 between the mark “Honey Baked Ham” and the product it describes. *See Schmidt v.*
16 *Quigg*, 609 F. Supp. 227 (E.D. Mich. 1985). Nevertheless, “merely descriptive marks need
17 not describe the essential nature of a product; it is enough that the mark describe
18 *some aspect* of the product.” *See Zobmondo Ent.*, 602 F.3d at 1116 (emphasis added).

19 The evidence is inconclusive regarding whether BBK’s competitors are likely to
20 need to use the term “raw” to describe their products. BBK avers that several of its
21 competitors sell rolling papers and other smoking accessories and none use the term
22 “raw” to do so. (*See* Doc. 229-2 at 5–6.) CCA, in contrast, has evidence suggesting that
23 tobacco and tobacco accessory companies often employ the term “raw” in describing
24 their products. (*See, e.g.*, Docs. 204-2, 204-3, 204-4, 204-14.) The competitors’ need
25 test thus offers only limited utility in this instance.

26 On balance, the Court holds that BBK’s RAW mark is likely descriptive and at
27 most suggestive. In either case, the mark’s conceptual strength weighs against finding a
28 likelihood of consumer confusion. *See Brookfield Commc’ns*, 174 F.3d at 1058.

1 could be extraordinary for a company in the tobacco accessories industry, thereby
2 indicating the success and strength of the RAW brand, or they could be merely typical
3 for such a company, suggesting that the RAW brand is not especially strong. Absent
4 additional context, the Court simply cannot tell. Thus, while BBK's raw sales and
5 advertising expenditures are substantial, and serve as some evidence of commercial
6 strength, the figures are perhaps less probative than they might otherwise be.

7 Second, the evidence (especially the survey evidence) fails to establish that the
8 RAW mark is well recognized among *CCA's* consumers. Yet that is the ultimate question
9 in a case involving forward confusion: whether consumers of the junior user's products
10 will mistakenly believe those products are associated with the senior user. 4 *McCarthy*
11 § 23:10. Indeed, evidence that only 30% of consumers in BBK's *own* principal market
12 recognize its RAW mark militates against the conclusion that the mark is so strong as
13 to render confusion likely in other, adjacent markets. *See* 2 *McCarthy* § 11:77 ("Some
14 cases decide a trademark conflict for the junior user by saying that while plaintiff's mark
15 is strong in its own market, it is weak in defendant-junior user's market. Of course, this is
16 a euphemism for saying that plaintiff's mark is not strong enough to do the job of
17 preventing this use in another market.").

18 In sum, BBK has not shown, even accepting its version of the facts, that it has
19 so strengthened its inherently weak mark through commercial success as to suggest a
20 likelihood of confusion. *See Brookfield Commc'ns*, 174 F.3d at 1058; *Entrepreneur*
21 *Media*, 279 F.3d at 1144. This factor weighs in *CCA's* favor.

22 **iv. Evidence of Actual Confusion**

23 The next factor accounts for evidence of actual confusion. Evidence of actual
24 confusion is evidence "that use of the two marks has already led to confusion" among
25 consumers. *Sleekcraft*, 599 F.2d at 352. Evidence of past confusion is, obviously,
26 "persuasive proof that future confusion is likely." *Id.* Because such evidence can be
27 difficult to obtain, however, "actual confusion is not necessary to a finding of likelihood
28 of confusion under the Lanham Act." *Acad. of Motion Picture Arts & Scis. v. Creative*

1 *House Promotions, Inc.*, 944 F.2d 1446, 1456 (9th Cir. 1991); *see also Brookfield*
2 *Commc'ns*, 174 F.3d at 1050 (“[A]ctual confusion is hard to prove; difficulties in
3 gathering evidence of actual confusion make its absence generally unnoteworthy.”).
4 Nevertheless, a lack of evidence of actual confusion, especially when the marks have
5 coexisted for a significant period of time, can serve as evidence that future confusion is
6 unlikely. *See, e.g., Cohn v. Petsmart, Inc.*, 281 F.3d 837, 842 (9th Cir. 2002); *Starbucks*
7 *Corp. v. Wolfe’s Borough Coffee, Inc.*, 588 F.3d 97, 117 (2d Cir. 2009); *see also*
8 Restatement (Third) of Unfair Competition § 23 cmt. d (Am. L. Inst. 1995) (“[W]hen the
9 parties have made significant use of their respective designations in the same geographic
10 market for a substantial period of time, the absence of any evidence of actual confusion
11 may in some cases justify an inference that the actor’s use does not create a likelihood of
12 confusion.”). Two sorts of evidence are probative of actual confusion: evidence of actual
13 instances of confusion and survey evidence. *See Fortune Dynamic*, 618 F.3d at 1035–36;
14 4 McCarthy § 23:17.

15 The record contains no evidence of actual instances of confusion. Although BBK
16 asserts that statements made by its founder and CEO Brad Kesselman in his
17 deposition create a genuine dispute of fact on this issue, that is not the case. While Mr.
18 Kesselman testified at deposition “that he is aware of several persons who have
19 purchased Raw Garden branded cannabis products believing that the product is related
20 to . . . the RAW brand” (Doc. 203-16 at 17), he was unable to identify even a single
21 individual who expressed such confusion (Doc. 203-20 at 19–20, 22–24). Even at the
22 summary judgment stage, Mr. Kesselman’s self-serving deposition testimony, without
23 more, fails to create a triable issue of fact regarding evidence of actual instances of
24 confusion. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002)
25 (“[T]his court has refused to find a ‘genuine issue’ where the only evidence presented is
26 ‘uncorroborated and self-serving’ testimony.” (quoting *Kennedy v. Applause, Inc.*, 90
27 F.3d 1477, 1481 (9th Cir. 1996))). This is especially true because BBK’s 30(b)(6) witness
28

1 stated he was unaware of any actual confusion.²⁰ (Doc. 203-18 at 23.)

2 Indeed, the dearth of evidence of actual confusion in this case, though usually
3 innocuous, may weigh in CCA’s favor. Since RAW and Raw Garden products have
4 coexisted in the marketplace for several years,²¹ including in “hundreds of the same
5 dispensaries in California” (*see* Doc. 246 at 28), one might expect BBK to have
6 *some* evidence of actual confusion. *See Cohn*, 281 F.3d at 842. It does not. Thus, while
7 the absence of such evidence is of course not dispositive, it counsels in CCA’s favor.

8 Survey evidence, though not indeed evidence of “actual” confusion, is also
9 probative under this factor. *See Fortune Dynamic*, 618 F.3d at 1035 (“Survey evidence
10 may establish actual confusion.” (quoting *Thane Int’l, Inc. v. Trek Bicycle Corp.*, 305
11 F.3d 894, 902 (9th Cir. 2002))); *see also* 4 McCarthy § 23:17 (“Most surveys do not
12 measure actual confusion. Surveys only give us information about a controlled and
13 artificial world from which we are asked to draw inferences about the real world.”). BBK
14 provides evidence from two surveys conducted by Dr. Jeffrey Stec²²: one presenting the
15 products as they would appear in cannabis dispensaries and the other presenting the
16 products as they would appear in an online store.²³ (Doc. 314-1 at 13.) The surveys
17 employed a “modified Squirt” approach in which respondents were first shown an image
18 of RAW rolling papers and were then shown an image of Raw Garden products in a
19 “product array” with products of other cannabis brands.²⁴ Respondents were then asked
20 whether they thought any of the products were “put out by,” “sponsored or approved by,”
21 or “affiliated or connected to” the company that sold the rolling papers. (*Id.* at 21–24.) If

22
23 ²⁰ In addition, Mr. Kesselman’s testimony is almost certainly inadmissible hearsay, as the
24 out-of-court statements of BBK customers he references are being offered to prove that
25 consumers were, in fact, confused. Fed. R. Evid. 801(c); *see also* Fed. R. Civ. P. 56(c)(2).

26 ²¹ While the parties disagree over when Raw Garden products began being sold in the
27 marketplace, sales were occurring by no later than 2016.

28 ²² As described above, this evidence is admissible notwithstanding the technical
deficiencies outlined by CCA. *See supra* Subsection III.A.1; *see also Fortune Dynamic*,
618 F.3d at 1037–38. That the evidence is admissible, however, has no bearing on whether
it can establish a likelihood of consumer confusion.

²³ The two versions of the survey were identical except for the images used.

²⁴ Both surveys also used a control group. The survey questions were the same for the
control and test groups, except that “Raw Garden” was changed to “Red Garden”
throughout. (Doc. 314-1 at 31–33.)

1 respondents answered in the affirmative, they were asked to identify which product
2 or products in particular they believed were associated with RAW rolling papers. (*Id.* at
3 24.) For each product selected, the respondents were asked “[w]hat specifically makes
4 [them] believe” the product was associated with RAW rolling papers.²⁵ (*Id.* at 25.)

5 The surveys revealed that, after controlling for respondents’ “pre-existing beliefs,
6 guesses, and other background noise,” 12.4% of respondents who participated in the in-
7 store version of the survey, and 11.4% of respondents who participated in the online
8 version of the survey, identified Raw Garden cannabis products as being sponsored or
9 approved by, or affiliated or connected with, RAW rolling papers.²⁶ (*Id.* at 6–7.) While
10 these net confusion rates are not so low as to constitute strong evidence *against* a
11 likelihood of confusion, *see* 6 McCarthy § 32:189, nor are they so high as to constitute
12 persuasive evidence in *favor* of confusion. *See Newport Pac. Corp. v. Moe’s Sw. Grill,*
13 *LLC*, No. 05-cv-00995, 2006 WL 2811905, at *14 (D. Or. Sept. 28, 2006). In fact,
14 “survey confusion numbers that go below 20% need to be carefully viewed against the
15 background of other evidence weighing for and against a conclusion of likely confusion.”
16 6 McCarthy § 32:188. Given the marks’ visual dissimilarity and the relative paucity of
17 other evidence weighing in favor of confusion, Dr. Stec’s survey evidence fails to create
18 a triable issue of fact regarding a likelihood of consumer confusion. “Likelihood of
19 confusion requires that confusion is ‘probable, not simply a possibility.’” *Newport Pac.*
20 *Corp.*, 2006 WL 2811905, at *17 (quoting *Cohn*, 281 F.3d at 842).

21 v. Marketing Channels Used

22 “Convergent marketing channels increase the likelihood of confusion.” *Sleekcraft*,
23 599 F.2d at 353. In assessing this factor, the critical question is whether “the general
24 class . . . of purchasers exposed to the products overlap.” *Id.*; *see also Pom Wonderful*
25 *LLC v. Hubbard*, 775 F.3d 1118, 1130 (9th Cir. 2014) (“In assessing marketing channel

26 ²⁵ Both surveys were limited to respondents who indicated they were 21 years or older,
27 were California residents, and had shopped for cannabis in the last six months. (Doc. 314-
1 at 14–15.)

28 ²⁶ CCA contends that after the methodological flaws in Dr. Stec’s survey are corrected, the
real net confusion rate is between 3.7% and 8.3%. Percentages in this range are evidence
that confusion is *not* likely. 6 McCarthy § 32:189.

1 convergence, courts consider whether the parties' customer bases overlap and how the
2 parties advertise and market their products.”).

3 RAW and Raw Garden branded products are sold in “hundreds of the same
4 dispensaries in California.” (See Doc. 246 at 30.) BBK and CCA also regularly attend
5 the same trade shows, where they market RAW and Raw Garden branded products to
6 consumers. (Doc. 231-8 at 6.) The fact that the parties use these same marketing and
7 distribution channels serves as some evidence of overlapping consumer bases. Consumers
8 are more likely to associate CCA's products with BBK's brand when both companies'
9 products are sold in the same retail locations, especially where those locations are
10 relatively small and specialized.²⁷ See 4 McCarthy § 24:45 (“If both plaintiff's and
11 defendant's goods are sold in the same stores, especially if available nearby each
12 other within a store, this tends to increase the likelihood that buyers will think the goods
13 come from the same source, even though they are not competitive products.”).

14 On the other hand, BBK's own founder, Mr. Kesselman, has emphasized that the
15 parties operate in distinct markets and serve distinct consumers. When asked in his
16 deposition about BBK's connection to the cannabis industry, Mr. Kesselman stated
17 succinctly that “we don't live in that world.” (Doc. 203-20 at 37.) Furthermore, the fact
18 that only a fraction of BBK's RAW-branded rolling papers are sold in cannabis
19 dispensaries, whereas CCA sells Raw Garden-branded products exclusively through
20 licensed cannabis dispensaries, cuts against BBK. (Doc. 203 at 27.) See, e.g., *Fortune*
21 *Dynamic*, 618 F.3d at 1038. So too does the evidence suggesting CCA markets its
22 products to a distinct and sophisticated subclass of cannabis consumers. (See, e.g., Doc.
23 206-34 at 4–5.)

24 Nevertheless, because the undisputed evidence shows that “the general class of

25 _____
26 ²⁷ The fact that both companies market their products extensively on the internet
27 and social media “merits little weight,” since “the same could be said of countless
28 companies.” *Playboy Enterprises, Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020,
1028 (9th Cir. 2004); see also *Network Automation, Inc. v. Advanced Sys. Concepts,*
Inc., 638 F.3d 1137, 1151 (9th Cir. 2011) (“Today, it would be the rare commercial
retailer that did not advertise online, and the shared use of a ubiquitous marketing
channel does not shed much light on the likelihood of consumer confusion.”).

1 purchasers” exposed to the parties’ products overlap at least somewhat, this factor
2 favors BBK. *Pom Wonderful*, 775 F.3d at 1130.

3 **vi. Degree of Consumer Care**

4 The next *Sleekcraft* factor assesses the degree of care likely to be exercised by
5 consumers of the junior user’s goods. 599 F.2d at 353. “The reference point for this
6 factor ‘is the typical buyer exercising ordinary caution.’” *Fortune Dynamic*, 618 F.3d at
7 1038 (quoting *Sleekcraft*, 599 F.2d at 353). When consumers exercise a high degree of
8 care, they are less likely to be confused. *See Brookfield Commc’ns*, 174 F.3d at 1060
9 (“We expect [a consumer] to be more discerning—and less easily confused—when he is
10 purchasing expensive items and when the products being sold are marketed primarily to
11 expert buyers.”). Conversely, when consumers exercise a low degree of care, they are
12 more likely to be confused. *Id.*

13 On the one hand, CCA’s products are fairly inexpensive. For instance, a .5-
14 gram refined live resin pod product retails for \$46, while a 1.0-gram Raw Garden live
15 resin concentrate retails for \$63. Even assuming these products are costly relative to
16 CCA’s competitors’ products, they are not so costly that a reasonable buyer would
17 inherently exercise substantial care in purchasing them. Contrast the cost of CCA’s
18 products, for example, with that of a car, a boat, or a diamond ring. *See Matrix Motor Co.*
19 *v. Toyota Jidosha Kabushiki Kaisha*, 290 F. Supp. 2d 1083, 1095 (C.D. Cal. 2003) (car);
20 *Sleekcraft*, 599 F.2d 341 (boat); *Tiffany & Co. v. Costco Wholesale Corp.*, 971 F.3d 74,
21 91 (2d Cir. 2020) (diamond ring).

22 On the other hand, certain consumers exercise a high degree of care even when
23 purchasing products that are not “extravagantly priced.” *Glow Indus.*, 252 F. Supp. 2d at
24 1001–02; *see also* 4 McCarthy § 23:99. This often occurs, for example, when something
25 about the nature of the product leads consumers to be more discriminating. *See Glow*
26 *Indus.*, 252 F. Supp. 2d at 1001–02. One court, for instance, has held that consumers
27 exercise a high degree of care when purchasing ingestible health products. *Reeves v.*
28 *Gen. Nutrition Ctrs., Inc.*, No. 10-cv-01653, 2012 WL 13018362, at *7 (C.D. Cal. Apr. 2,

1 2012). In so holding, the court reasoned that “[a]lthough the goods at issue here are not
2 particularly expensive, which is often the basis for finding a higher degree of care, they are
3 specialty goods targeted at ‘particular’ and discerning consumers.” *Id.* So too here. While
4 CCA’s concentrate products are inexpensive, they are specialty goods aimed at
5 sophisticated and experienced cannabis users. (Doc. 203 at 28.) *See* Ninth Circuit Manual
6 of Model Civil Jury Instructions § 15.18 (“The more sophisticated the potential buyers
7 of the goods or the more costly the goods, the more careful and discriminating the
8 reasonably prudent purchaser exercising ordinary caution may be.”). Further, the fact that
9 CCA’s Raw Garden products all include THC, a psychoactive ingredient, suggests that
10 consumers would exercise care in making their purchasing decisions. As one judge in this
11 circuit has opined, “it stands to reason that consumers intending to ingest cannabis would
12 exercise a higher degree of care in selecting their product, and that customers might study
13 a product’s label to determine how potent they wish their confection to be.” *Kiva Health*
14 *Brands LLC v. Kiva Brands Inc.*, 402 F. Supp. 3d 877, 894 n.13 (N.D. Cal. 2019).

15 The parties also introduce competing expert and survey evidence regarding the
16 degree of care exercised by CCA’s consumers. Dr. Amir, BBK’s degree-of-care expert,
17 opines that CCA’s own surveys show that consumers do not exercise substantial care in
18 purchasing CCA’s products. (*See* Doc. 433-1 at 8.) Dr. Honka, in contrast, opines that
19 CCA’s consumers are uniquely brand sensitive and do exercise a high degree of care.
20 (Doc. 434-11 at 15, 21–22.) The Court cannot resolve this factual dispute on summary
21 judgment. Even accepting Dr. Amir’s opinions as correct, however, this factor does not
22 weigh obviously in BBK’s favor, given the unique, psychoactive nature of cannabis
23 products and the aforementioned (and generally undisputed) evidence that CCA’s
24 consumers tend to be sophisticated, experienced cannabis users. Accordingly, this factor
25 does not favor either party.

26 **vii. Defendant’s Intent**

27 This factor is of “minimal importance” in assessing a likelihood of consumer
28 confusion, *GoTo.com*, 202 F.3d at 1208, since “an intent to confuse customers is not

1 required for a finding of trademark infringement.” *Brookfield Commc’ns*, 174 F.3d at
2 1059. The Court will therefore note only that there is no evidence in the record that
3 CCA acted with the principal intent of confusing consumers. *See Brookfield*
4 *Commc’ns*, 174 F.3d at 1059.

5 **viii. Likelihood of Expansion**

6 “Inasmuch as a trademark owner is afforded greater protection against competing
7 goods, a ‘strong possibility’ that either party may expand his business to compete with
8 the other will weigh in favor of finding that the present use is infringing.” *Sleekcraft*, 599
9 F.2d at 354. Here, the evidence fails to establish a “strong possibility” that BBK will
10 expand. Although BBK claims it “has plans to enter into the legal cannabis market
11 when that market becomes fully legal under federal law,” there is no evidence in the
12 record of concrete expansion plans. Nor is there any way of knowing when the cannabis
13 market might be federally legalized. Thus, BBK’s “evidence” consists of nothing more
14 than a mere interest in expanding into the cannabis market at some unknown future date.
15 *See Newport Pac. Corp.*, 2006 WL 2811905, at *16. Accordingly, this factor weighs
16 against a likelihood of confusion.

17 **ix. Summary of Factors**

18 On summary judgment, when the nonmovant bears the burden of proof on a claim
19 at trial, the movant may prevail by showing that the nonmovant’s proffered evidence is
20 insufficient to establish an essential element of the nonmovant’s claim. *See Celotex*, 477
21 U.S. at 322–23. While summary judgment is generally disfavored in trademark cases,
22 *Interstellar Starship Servs., Ltd. v. Epix Inc.*, 184 F.3d 1107, 1109 (9th Cir. 1999), it is
23 nevertheless warranted “where the parties do not seriously dispute the underlying material
24 facts and where the court is able to conclude as a matter of law that there is no likelihood
25 of confusion,” *Reeves*, 2012 WL 13018362, at *8.

26 In the instant case, five factors favor CCA, including the weighty similarity of the
27 marks, strength of the mark, and evidence of actual confusion factors. One factor, the
28 degree of care exercised by consumers, is neutral, while only two factors, the proximity

1 of the parties' goods and marketing channels used, favor BBK. *See Survivor Media, Inc.*
2 *v. Survivor Prods.*, 406 F.3d 625, 634 (9th Cir. 2005) (concluding that "[t]he distribution
3 of the *Sleekcraft* factors does not raise a material issue of fact regarding likelihood of
4 confusion" where only two factors weighed in plaintiff's favor); *see also M2 Software*,
5 421 F.3d at 1081–83, 1085 (affirming grant of summary judgment when strength of the
6 mark, similarity of the mark, and proximity of the goods factors all favored plaintiff
7 because the others favored defendant). Given the obvious and significant differences
8 between the parties' marks, the absence of actual confusion, and the low net confusion
9 rates generated by the parties' surveys, the Court concludes that no reasonable jury could
10 find for BBK on the likelihood of confusion issue. *See Cohn*, 281 F.3d at 842 (affirming
11 grant of summary judgment where plaintiff's "evidence fail[ed] to create a genuine issue
12 that confusion is probable, not simply a possibility"); *see also Brookfield Commc'ns*, 174
13 F.3d at 1054 ("Where the two marks are entirely dissimilar, there is no likelihood of
14 confusion."); *Collins v. U.S. Dep't of Veterans Affs.*, 497 F. Supp. 3d 885, 900 (S.D. Cal.
15 2020) ("Plaintiffs have failed to demonstrate a triable issue of material fact as to a
16 necessary element of their trademark infringement claims.").

17 Because the Court will grant summary judgment on BBK's infringement claims,
18 including Counts I, II, III, IV, and V of the Amended Complaint (Doc. 60), the Court
19 need not address BBK's claim for disgorgement or CCA's laches or other affirmative
20 defenses.

21 **C. BBK's Motion for Partial Summary Judgment**

22 BBK seeks summary judgment on CCA's affirmative defenses, including laches,
23 waiver, acquiescence, estoppel, and unclean hands. (Doc. 293 at 8–19.) BBK also seeks
24 summary judgment on its lack of bona fide intent to use claim (*id.* at 30–32), and on
25 CCA's two counterclaims (*id.* at 10, 20–30). Because the Court will grant CCA summary
26 judgment on BBK's infringement claims, the Court will deny as moot BBK's request
27 for summary judgment on CCA's affirmative defenses.

28

1 **1. Bona Fide Intent to Use Claim**

2 The Lanham Act sets forth two avenues through which an individual or business
3 can apply to register a trademark. “First, under § 1(a), trademark owners can apply for
4 protection of marks already being ‘used in commerce.’ Second, under § 1(b), a ‘person
5 who has a bona fide intention, under circumstances showing the good faith of such
6 person, to use a trademark in commerce may request registration of its trademark.” *Kelly*
7 *Servs., Inc. v. Creative Harbor, LLC*, 846 F.3d 857, 863 (6th Cir. 2017). The latter
8 provision allows an individual or business with a bona fide intent to use a mark in
9 commerce to file an application, often called an “intent-to-use” (“ITU”) application,
10 before the mark is actually used in commerce. This permits, upon registration, for the
11 mark to be granted priority based on the ITU application date. *See* 2 McCarthy § 16:2
12 (“This procedure enables a company to ‘reserve a mark’ before actually using it in
13 trade.”). Because “[a] bona fide intent is a statutory requirement of a valid trademark
14 application under § 1(b),” the absence of such intent is a ground on which an interested
15 individual or business may oppose an application. *Aktieselskabet AF 21. Nov. 2001 v.*
16 *Fame Jeans Inc.*, 525 F.3d 8, 21 (D.C. Cir. 2008).

17 For a trademark applicant’s intent to be “bona fide,” such intent “must be
18 demonstrable and more than a mere subjective belief.” *M.Z. Berger & Co. v. Swatch AG*,
19 787 F.3d 1368, 1375 (Fed. Cir. 2015). Thus, the applicant must show “both actual intent to
20 use a mark in commerce and evidence, contemporary with the application, that objectively
21 demonstrate such an intent.” *Aktieselskabet*, 525 F.3d at 21; *see also M.Z. Berger*, 787
22 F.3d at 1376 (“[W]hether an applicant had a ‘bona fide intent’ to use the mark in
23 commerce at the time of the application requires objective evidence of intent.”). “Although
24 the evidentiary bar is not high, the circumstances must indicate that the applicant’s intent
25 to use the mark was firm and not merely intent to reserve a right in the mark.” *M.Z.*
26 *Berger*, 787 F.3d at 1376.

27 On a motion for summary judgment challenging an ITU application for lack of
28 bona fide intent, the challenger “has the initial burden of demonstrating by a

1 preponderance of the evidence that [the] applicant lacked a bona fide intent to use the
2 mark on the identified goods.” *Kelly Servs.*, 846 F.3d at 865 (quoting *Bos. Red Sox*
3 *Baseball Club Ltd. v. Sherman*, 88 U.S.P.Q.2d 1581, 2008 WL 4149008, at *6 (T.T.A.B.
4 2008)). “Once this showing is made, the applicant must either come forward with
5 objective documentary evidence demonstrating bona fide intent, or else provide ‘other
6 facts . . . which adequately explain or outweigh [the] applicant’s failure to provide such
7 documentary evidence.’” *Id.* (quoting *Honda Motor Co. v. Winkelmann*, 90 U.S.P.Q.2d
8 1660, 2009 WL 962810, at *2 (T.T.A.B. 2009)) (alterations in original). “As a general
9 rule, the factual question of intent is particularly unsuited to disposition on summary
10 judgment.” *Id.* at 864 (quoting *Honda Motor*, 2009 WL 962810, at *2).

11 Here, BBK seeks to void four ITU applications filed by CCA for lack of bona fide
12 intent to use.²⁸ (Doc. 60 at 46.) In support of its claim, BBK asserts that during discovery,
13 “CCA produced no document concerning any of the goods listed in the ITU Applications,
14 much less documents showing CCA’s alleged intent, as of the dates CCA filed each ITU
15 Application . . . to use in commerce the [Raw Garden] marks on the products covered in
16 the ITU Applications.” (Doc. 293 at 31 (emphasis omitted).) In addition, BBK points to
17 CCA’s own interrogatory responses, which indicated that, with respect to the goods in the
18 challenged ITU applications, CCA had “no specific date range of planned use, or specific
19 date of intended first use.” (Doc. 230-10 at 10.) Finally, BBK cites numerous deposition
20 excerpts indicating that CCA has not taken, and has no immediate plans to take, concrete
21 steps to bring to market any of the identified products to market. (Doc. 293 at 32.)

22 That CCA has no concrete plans to bring the identified products to market even
23 years after the applications were initially filed, while non-dispositive, suggests that it
24 lacked the bona fide intent to use the mark in connection with the goods at the time of
25 filing. The Court therefore concludes that BBK has satisfied its initial burden of showing

26 ²⁸ The relevant application numbers are: 87/324,212, 88/266,152, 88/328,474, and
27 88/488,733. (Doc. 293 at 30.) BBK also initially asserted a claim against application
28 87/324, 208, but CCA abandoned that application, such that BBK’s claim is moot as to that
application. (*Id.*) After filing its initial ITU applications, CCA divided the ‘474 and ‘733
applications to create forty-two child applications. (*See* Doc. 293-27.) BBK’s claim
regarding the parent applications applies equally to each of the child applications.

1 CCA lacked a bona fide intent to use in commerce the Raw Garden mark in connection
2 with the identified goods. *See Kelly Servs.*, 846 F.3d at 867 (holding that challenger
3 carried its initial burden where statements made by applicant’s CEO demonstrated the
4 lack of a “firm intent[ion]” to the use the mark in connection with certain identified
5 goods); *see also Bos. Red Sox*, 2008 WL 4149008, at *6 (holding that challenger carried
6 its initial burden where applicant claimed the mark for a wide array of products and
7 produced no discovery evidence that it had a genuine commercial capacity to produce all
8 of those products). The burden therefore shifts to CCA to bring forward documentary
9 evidence demonstrating its bona fide intent. CCA has not met its burden.

10 As evidence of its bona fide intent, CCA directs the Court only to statements made
11 by its COO and CEO, Thomas Martin and John De Friel, during their depositions in this
12 case, and three emails sent by De Friel in 2016. (Doc. 364 at 30–31.) The testimonial
13 evidence is unavailing because it is neither objective nor contemporaneous. *See*
14 *Aktieselskabet*, 525 F.3d at 21 (a valid ITU application requires “both actual intent to use
15 a mark in commerce and evidence, *contemporary with the application*, that *objectively*
16 demonstrate such an intent.” (emphasis added)); *see also* 3 McCarthy § 19:14 (“Congress
17 did not intend the issue to be resolved simply by an officer of the applicant later testifying,
18 ‘Yes, indeed, at the time we filed that application, I did truly intend to use the mark at
19 some time in the future.’”). The cited emails are similarly unconvincing, for two reasons.
20 First, the emails involve only CCA’s interest in growing hemp or entering the hemp
21 market. (*See* Docs. 366-4, 366-5, 366-6.) As such, they have no bearing on CCA’s intent
22 to use the non-hemp products identified in the challenged applications. Thus, CCA has
23 no admissible evidence of its intent to use the Raw Garden mark in connection with the
24 identified non-hemp products. Second, the cited emails fail to give rise to a triable issue
25 of fact even with regard to CCA’s ITU applications involving hemp products, because
26 the emails do not evidence CCA’s bona fide intent to use the Raw Garden mark with the
27 *particular* products identified in the challenged applications. *See* 3 McCarthy § 19:48.
28 The emails contain only vague discussions regarding De Friel’s (and, by extension, CCA’s)

1 general interest entering the hemp market at some unknown future date; they say nothing
2 about dried herbs, candy, bakery products, essential oils, electronic cigarette liquid, or
3 any other products identified in the challenged applications. Such isolated, generalized
4 discussions do not evince a bona fide intent to use the Raw Garden mark in connection
5 with the identified goods. On this evidence, no reasonable jury could find for CCA on
6 BBK's claim. *See L.C. Licensing, Inc. v. Cary Berman*, 86 U.S.P.Q.2d 1883, 2008 WL
7 835278, at *10 (T.T.A.B. 2008) ("The mere assertion of an intent to use the mark without
8 corroboration of any sort, whether documentary or otherwise, is not likely to provide
9 credible evidence to establish a bona fide intention to use the mark."). BBK's motion
10 will thus be granted, and the Court will order summary judgment in BBK's favor on
11 Count VI of the Amended Complaint (Doc. 60 at 46).

12 **2. CCA's Standing to Assert Counterclaims**

13 BBK next requests summary judgment on CCA's counterclaims because CCA
14 lacks standing to assert claims for cancellation of trademark. (*See* Doc. 293 at 10.) To
15 have standing to seek cancellation of an allegedly invalid trademark registration, a
16 litigant must show that it has a "real interest" in the proceeding. *Coach Servs., Inc. v.*
17 *Triumph Learning LLC*, 668 F.3d 1356, 1376 (Fed. Cir. 2012). "This means that the
18 petitioner 'must show a real and rational basis for his belief that he would be damaged
19 by the registration sought to be cancelled, stemming from an actual commercial or
20 pecuniary interest in his own mark.'" *WM Int'l, Inc. v. Golden Lyon Inv. Co.*, No. 20-cv-
21 00995, 2020 WL 6826485, at *2 (C.D. Cal. Nov. 5, 2020) (quoting *Star-Kist Foods, Inc.*
22 *v. P.J. Rhodes & Co.*, 735 F.2d 346, 349 (9th Cir. 1984)). Put differently, "a real interest
23 in the proceeding" means "a legitimate personal interest" in the trademark's cancellation.
24 *Coach Servs.*, 668 F.3d at 1376.

25 BBK claims that CCA has no *legitimate* interest in cancelling BBK's trademark
26 registrations because CCA's business is illegal, and all its commercial interests are
27 therefore illegitimate. (Doc. 293 at 10.) This argument has previously been squarely
28 rejected by a district court in this circuit: "While it is a concern that plaintiff could

1 flagrantly violate federal laws and simultaneously seek the assistance of a federal court of
2 equity to cancel trademarks, nevertheless, defendants began this controversy . . . [and]
3 forc[ed] plaintiff to defend itself. . . . Given that defendants seek relief for alleged
4 trademark infringement arising from registrations which could be invalid, it would be
5 wrong to deny plaintiff the opportunity to defend itself.” *Purple Heart Patient Ctr. Inc.*
6 *v. Mil. Ord. of the Purple Heart*, No. 13-cv-00902, 2014 WL 572366, at *3 (N.D. Cal.
7 Feb. 11, 2014). The court’s reasoning applies with equal force in this case. BBK initiated
8 this action and forced CCA to defend itself. It would be manifestly unjust to preclude
9 CCA from challenging the validity of the marks upon which BBK’s claims are based.

10 Denying CCA standing based on the illegality of its business would also be
11 inconsistent with the purpose of the standing requirement. “The purpose in requiring
12 standing is to prevent litigation where there is no real controversy between the parties,
13 where a plaintiff is no more than an intermeddler.” *Kleven v. Hereford*, No. 13-cv-02783,
14 2015 WL 4977185, at *20 (C.D. Cal. Aug. 21, 2015) (quoting *Lipton Indus., Inc. v.*
15 *Ralston Purina Co.*, 670 F.2d 1024, 1028–29 (C.C.P.A. 1982)). But that is plainly not
16 the case here. “Indeed, the fact that [BBK is] seeking to use the trademarks against [CCA]
17 as a sword shows that [CCA] has a real interest in testing the validity of those trademarks.
18 [CCA] is not just an intermeddler, but rather faces a real risk of liability in this case if
19 the trademarks are not cancelled.” *WM Int’l*, 2020 WL 6826485, at *2. Thus, CCA has
20 standing to challenge the validity of BBK’s trademark registrations. *See id.* (“[N]umerous
21 courts have concluded that being sued for trademark infringement is sufficient injury
22 to confer standing to seek cancellation of a mark.”).

23 3. CCA’s Counterclaims

24 CCA seeks cancellation of eleven of BBK’s trademark registrations for fraud on
25 the PTO and for unlawful use.²⁹ (Doc. 169 at 57–59.) BBK moves for summary judgment
26 on CCA’s fraud counterclaim because the evidence does not support a finding that BBK

27
28 ²⁹ The relevant Registration Numbers are 2,989,221; 3,422,929; 4,041,076; 4,074,036;
4,325,822; 4,412,202; 4,647,824; 4,766,952; 4,675,473; 4,921,168; and 5,046,495. (Doc.
169 at 39.)

1 made material misrepresentations to the PTO with knowledge or intent to deceive. (Doc.
2 293 at 20–29.) BBK also seeks summary judgment on CCA’s unlawful use counterclaim
3 because BBK’s challenged goods qualify for the tobacco exemption from the CSA and
4 because the alleged unlawful use has not been previously determined by a court or
5 government agency. (Doc. 293 at 29–30.)

6 **i. Cancellation for Fraud**

7 “A party who believes he has been harmed by a trademark’s registration may seek
8 the cancellation of that trademark’s registration on certain specified grounds, including
9 that the trademark was obtained by the commission of fraud on the [PTO].” *Hokto*
10 *Kinoko Co. v. Concord Farms, Inc.*, 738 F.3d 1085, 1097 (9th Cir. 2013); *see also* 15
11 U.S.C. § 1064 (petition to cancel registration of a mark may be filed at any time if the
12 registered mark “was obtained fraudulently or contrary to the provisions of section 1054
13 of this title or of subsection (a), (b), or (c) of section 1052 of this title”). Fraud in
14 procuring a trademark occurs only “when an applicant knowingly makes false, material
15 representations of fact in connection with [the] application.” *Anhing Corp. v. Thuan*
16 *Phong Co.*, 215 F. Supp. 3d 919, 933 (C.D. Cal. 2015) (quoting *Torres v. Cantine*
17 *Torresella S.r.l.*, 808 F.2d 46, 48 (Fed. Cir. 1986)). To prevail on a claim for cancellation
18 based on fraud, therefore, a claimant must have evidence of “(1) a false representation
19 regarding a material fact; (2) the registrant’s knowledge or belief that the representation
20 is false; (3) the registrant’s intent to induce reliance upon the misrepresentation; (4)
21 actual, reasonable reliance on the misrepresentation; and (5) damages proximately
22 caused by that reliance.” *Hokto Kinoko*, 738 F.3d at 1097. The party alleging fraud bears
23 the heavy burden of proving fraud “‘to the hilt’ with clear and convincing evidence, and
24 ‘any doubt must be resolved against the charging party.’” *Anhing Corp.*, 215 F. Supp. 3d
25 at 934 (quoting *In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009)).

26 With respect to ten of the eleven challenged registrations, CCA claims that BBK
27 made false representations in its “use in commerce” declaration submitted with the
28 trademark application. (Doc. 169 at 38–39.) In essence, CCA argues that because many

1 of BBK's goods are in fact "drug paraphernalia" under § 863 of the CSA, BBK
2 knowingly and intentionally made false statements when indicating in its use in
3 commerce declarations that it was a tobacco company whose products were intended for
4 use with tobacco and were, therefore, in lawful use in commerce. (Doc. 364 at 25–26.)

5 The undisputed evidence demonstrates that BBK's products have legal uses, and
6 that BBK's representations indicating the marks were used with products "in [lawful]
7 commerce" was (and remains) true. The fact that BBK's products are also used for
8 unlawful purposes does not render its use-in-commerce statement false. Trademark
9 registrants, moreover, are not statutorily required to identify all existing or potential
10 unlawful uses of products that also have legitimate and lawful uses. *See Bart Schwartz*
11 *Int'l Textiles, Ltd. v. FTC*, 289 F.2d 665, 669 (C.C.P.A. 1961) ("Any 'duty' owed by an
12 applicant for trademark registration must arise out of the statutory requirements of the
13 Lanham Act."). And courts have generally declined to read affirmative disclosure
14 requirements into the Lanham Act. *See, e.g., Veliz v. Veliz*, No. 6:19-cv-00094, 2021 WL
15 4538489, at *5 (S.D. Tex. Aug. 12, 2021) ("A trademark applicant does not have an
16 'affirmative duty to disclose all other uses of the mark.' In fact, 'a senior user of a mark is
17 entitled to claim exclusive rights and seek a federal registration even though there may
18 exist and it knows of a junior user of the mark.'" (quoting *San Juan Prods, Inc. v. San*
19 *Juan Pools of Kan., Inc.*, 849 F.2d 468, 474 (10th Cir. 1988); *Pebble Beach Co. v. Tour*
20 *18 I, Ltd.*, 942 F. Supp. 1513, 1538 (S.D. Tex. 1996)); *Anhing Corp.*, 215 F. Supp. 3d at
21 936 (finding trademark applicant had no affirmative duty to disclose geographic
22 reference implied by mark when asked only for a translation). Thus, while misleading
23 omissions can of course form the basis of a fraud claim, *see P. Lorillard Co. v. FTC*, 186
24 F.2d 52, 58 (4th Cir. 1950) ("To tell less than the whole truth is a well known method of
25 deception; and he who deceives by resorting to such method cannot excuse the deception
26 by relying upon the truthfulness per se of the partial truth by which it has been
27 accomplished."), BBK's omissions in this instance do not. Summary judgment will
28 therefore be granted on CCA's fraud counterclaim with regard to the registrations

1 challenged based on statements made by BBK in its “use in commerce” declarations.

2 With respect to the final registration at issue, Registration 5,046,495, CCA claims
3 that BBK made false representations in a declaration submitted in response to a request
4 from the PTO directing BBK to address whether the services identified in the application
5 complied with the CSA. (Doc. 169 at 55.) In particular, CCA asserts that the following
6 paragraph contains false statements:

7 BBK . . . is a large company that has manufactured tobacco
8 rolling papers, tubes and other related tobacco accessories for
9 nearly 20 years. Because of inquiries, BBK determined it
10 should present consumer information about the status of
11 medical marijuana on its website, although it has not done so
12 yet. This information will include the current legal status in
13 various jurisdictions as well any potential changes in federal
14 law. The website will contain links to information in support
15 and opposition of medical marijuana as well as references to
16 medical journals and studies. The website will also provide
17 customers an opportunity to comment. The services described
18 do not involve in any way the sale, provision, and/or
19 possession of marijuana, marijuana-based preparations, or
20 marijuana extracts or derivatives, synthetic marijuana, or any
21 other illegal controlled substances. All the services described
22 above comply fully with the Controlled Substances Act.

23 (Doc. 169 at 55.) Again, the undisputed evidence shows these statements were (and are)
24 true. At the time the statement was made, BBK had manufactured tobacco rolling papers,
25 tubes, and other accessories for almost two decades. And the services provided by its
26 website did not involve the sale, provision, or possession of marijuana. Indeed, CCA
27 does not argue otherwise, let alone introduce admissible evidence to support its position.
28 Again, BBK had no affirmative duty to disclose more than was requested by the PTO.
See Anhing Corp., 215 F. Supp. 3d at 936. Thus, CCA has failed to discharge its heavy
burden of proving fraud “‘to the hilt’ with clear and convincing evidence.” *In re Bose*
Corp., 580 F.3d at 1243. BBK will be granted summary judgment on CCA’s first
counterclaim.³⁰

29 **ii. Cancellation for Unlawful Use**

30 To register a trademark, an applicant must show that the mark “is in use in

³⁰ This conclusion is entirely consistent with the Court’s earlier order denying BBK’s
motion to dismiss (Doc. 151), which held only that additional factual development was
necessary in order to adequately assess BBK’s arguments.

1 commerce” or that the applicant has a “bona fide intention to use the mark in commerce”
2 in the future. 15 U.S.C. §§ 1051(a)(3)(C), (b)(3)(B). “It has long been the policy of the
3 [PTO]’s Trademark Trial and Appeal Board that use in commerce only creates trademark
4 rights when the use is *lawful*.” *CreAgri, Inc. v. USANA Health Scis., Inc.*, 474 F.3d 626,
5 630 (9th Cir. 2007).³¹ Controlled substances and drug paraphernalia, therefore, are not
6 entitled to trademark protection. Drug paraphernalia is defined in the CSA as any
7 “equipment, product, or material of any kind which is primarily intended or designed for
8 use” in conjunction with a controlled substance. 21 U.S.C. § 863(d). The CSA outlines
9 several factors to be considered in determining whether an item constitutes drug
10 paraphernalia, including “instructions, oral or written, provided with the item concerning
11 its use,” “national and local advertising concerning its use,” “the manner in which the item
12 is displayed for sale,” and “expert testimony concerning its use.” *Id.* § 863(e). The CSA,
13 however, blanketly exempts from the definition of drug paraphernalia “any item that, in
14 the normal lawful course of business, is . . . traditionally intended for use with tobacco
15 products, including any pipe, paper, or accessory.” *Id.* § 863(f)(2). This is commonly
16 called the “tobacco exemption.”

17 In deciding whether an item is “traditionally intended for use with tobacco
18 products,” and thus falls within the exemption, courts must employ an objective
19 approach, because “[a]n item’s ‘traditional’ use is not based on the subjective intent of a
20 particular defendant.” *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 520–21
21 (1994). This means that even when a company *intends* for its products to be used in
22 connection with illicit drugs—and advertises its products in accordance with that
23 intention—such products are yet exempt from the CSA if they were “traditionally
24 intended for use with tobacco products.” As Justice Scalia explained in his concurrence
25 in *Posters*:

26 Unless unlawful intent could have produced liability, there
27 would have been no *need* for the exception. Tobacco pipes are

28 ³¹ This lawful use requirement applies to a claim for cancellation of a registered mark. *See GoClear LLC v. Target Corp.*, No. C 08-2134 MMC, 2009 WL 160624, at *3 (N.D. Cal. Jan. 22, 2009).

1 tobacco pipes, and cigarette paper is cigarette paper; neither
2 could possibly meet the Court’s test of being “items . . . likely
3 to be used with illegal drugs.” Only the criminalizing effect of
4 an unlawful *intent* to sell for drug use puts tobacconists at risk.
5 Because of the ready (though not ordinary) use of items such
6 as cigarette paper and tobacco pipes for drug purposes,
7 tobacconists would have been in constant danger of being
8 accused of having an unlawful intent in their sales—so
9 Congress gave them what amounts to a career exception.

6 *Id.* at 529 (Scalia, J., concurring) (citations omitted); *see also Lifted Ltd.*, 2021 WL
7 4480566, at *3 (“[T]he tobacco exemption removes from Section 863’s purview any
8 item that is ‘traditionally intended’ for use with tobacco, regardless of any of the other
9 factors in the statute. Section 863(f)(2) states that ‘[t]his section *shall not apply*’ to
10 products traditionally intended for use with tobacco.” (alteration and emphasis in
11 original)).

12 Accordingly, the Court concludes that, as a matter of law, the goods listed in
13 connection with the challenged registrations fall within the tobacco exemption,
14 § 863(f)(2), because such goods are either rolling papers expressly exempted, or
15 accessories used in connection with rolling papers, such as rolling trays, cigarette tubes,
16 rolling machines, and shredders and grinders for tobacco and other smokeable herbs.³²
17 (Doc. 169 at 28–30.) While the evidence unmistakably shows that BBK advertises such
18 products for use with cannabis (*see, e.g.*, Doc. 364-3; Doc. 364-22),³³ that evidence
19 is simply irrelevant for purposes of the exemption. *Lifted Ltd.*, 2021 WL 4480566, at *3
20 (“Since a lighter holder, a tamper, and a poker are all products traditionally intended for
21

22 ³² Many of the goods listed in the challenged registrations, including cigarette rolling
23 papers, cigarette papers, cigarette filters, cigarette tubes, cigarette-rolling machines, and
24 smokers’ rolling trays, appear in the PTO’s Acceptable Identification of Goods Manual in
25 Class 34. *See* <https://idm-tmng.uspto.gov/id-master-list-public.html> (last visited July 7,
2022). This evidence, though alone non-dispositive, suggests that such products are
traditionally intended for use with tobacco, since Class 34 includes mainly tobacco and
articles used for smoking tobacco.

26 ³³ CCA moves for leave to file a DVD exhibit in support of its counterclaims and in
27 opposition to BBK’s motion for partial summary judgment. (Doc. 368.) The motion will
28 be denied. First, the evidence is irrelevant because BBK’s subjective intent has no bearing
on CCA’s counterclaims and because the shredder featured in the video is not one of the
goods identified in the challenged registrations. (Doc. 373.) Second, CCA has not
demonstrated the need for the Court to view video footage rather than still photographs and
a certified transcript.

1 tobacco use, regardless of any other uses they might have, plaintiff’s marketing does not
2 change a traditional use to a non-traditional one.”).

3 Further, CCA has no evidence suggesting the challenged products are not
4 traditionally intended for use with tobacco.³⁴ As BBK notes, even Chief Tiderington,
5 whose opinion was excluded, *see supra* Subsection III.A.8, frankly acknowledged that
6 he does not consider himself an expert on tobacco products, much less an expert on
7 whether certain products have traditionally been used with tobacco.³⁵ (Doc. 293 at 27–28;
8 Doc. 293-24 at 4.) Thus, even assuming BBK has the burden of proving the tobacco
9 exemption applies, *see* 21 U.S.C. § 885(a)(1) (“[T]he burden of going forward with the
10 evidence with respect to any such exemption or exception shall be upon the
11 person claiming its benefit.”), CCA has no admissible evidence to controvert BBK’s
12 evidence. In short, the record evidence does not give rise to a genuine dispute of fact
13 regarding the applicability of the tobacco exemption. *See S. Cal. Gas Co.*, 336 F.3d at
14 888; *Wright & Miller* § 2727.1. The Court will therefore grant BBK summary judgment
15 on CCA’s unlawful use counterclaim.

16 **IV. CONCLUSION**

17 Accordingly,

18 **IT IS ORDERED granting** CCA’s Motion for Partial Summary Judgment
19 (Docs. 203, 218).

20 **IT IS FURTHER ORDERED granting in part and denying in part as moot**
21 BBK’s Motion for Partial Summary Judgment (Docs. 293, 418), as described herein.

22 **IT IS FURTHER ORDERED denying as moot** BBK’s Motion to Exclude or
23

24 ³⁴ While CCA asserts that BBK’s RAW Black Organic Hemp rolling papers are obviously
25 not intended for use with tobacco, because their packaging includes the disclaimer “Not
26 For Use With Tobacco,” its argument is unavailing, because CCA does not seek to cancel
27 the trademark registration—Registration 6,469,902—for such papers. (Doc. 442 at 9–10.)
28 CCA’s evidence and arguments regarding RAW cones are likewise inapposite, because
BBK does not have a registered trademark for cones. *Republic Techs. (NA), LLC v. BBK
Tobacco & Foods, LLC*, 262 F. Supp. 3d 605, 608 (N.D. Ill. 2017).

³⁵ Chief Tiderington’s opinions primarily address whether BBK’s products constitute “drug
paraphernalia” under the factors listed in § 863(e). As mentioned above, however, “these
factors are irrelevant if one of two exceptions apply.” *Lifted Ltd.*, 2021 WL 4480566, at
*2.

1 Limit the Opinions of Dr. Blackburn (Docs. 298, 420).

2 **IT IS FURTHER ORDERED denying** BBK's Motion to Exclude Opinions and
3 Testimony of Dr. Tülim Erdem (Docs. 302, 421).

4 **IT IS FURTHER ORDERED denying** BBK's Motion to Exclude or Limit the
5 Opinions of Dr. Elisabeth Honka (Doc. 304).

6 **IT IS FURTHER ORDERED granting** BBK's Motion to Exclude or Limit the
7 Opinions of Khurshid Kohja (Doc. 305).

8 **IT IS FURTHER ORDERED granting** BBK's Motion to Exclude Testimony
9 and Opinions of Thomas Tiderington (Doc. 306).

10 **IT IS FURTHER ORDERED granting** CCA's Motion to Exclude the Testimony
11 of Lance Ott (Doc. 307).

12 **IT IS FURTHER ORDERED granting in part and denying in part** CCA's
13 Motion to Exclude the Testimony of Ian Kobe (Doc. 308), as described herein.

14 **IT IS FURTHER ORDERED denying** CCA's Motion to Exclude the Testimony
15 of Dr. On Amir (Docs. 310, 433).

16 **IT IS FURTHER ORDERED denying as moot** CCA's Motion to Exclude the
17 Testimony of Francis Burns (Docs. 311, 312).

18 **IT IS FURTHER ORDERED denying** CCA's Motion to Exclude the Testimony
19 of Dr. Jeffrey Stec (Doc. 314).

20 **IT IS FURTHER ORDERED denying** CCA's Motion to Exclude the Testimony
21 of Louis Maiellano (Doc. 317).

22 **IT IS FURTHER ORDERED denying** CCA's Motion for Leave to File DVD
23 Copies of Exhibit 29 to CCA's Opposition to BBK's Motion for Partial Summary
24 Judgment (Doc. 368).

25 **IT IS FURTHER ORDERED denying** BBK's Motion to Further Supplement
26 the Record (Doc. 400).

27 **IT IS FURTHER ORDERED denying as moot** BBK's Motion to Bifurcate
28 Trial (Doc. 406).

