This Opinion is Not a
Precedent of the TTAB

Mailed: May 4, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re HC Vineyards LLC

Serial No. 98579854

HC Vineyards LLC, pro se (by Del Hanson, Owner/Manager of Applicant).

Lisa McCrary, Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.

Before Larkin, Stanley, and O'Connor,
Administrative Trademark Judges.

Opinion by O'Connor, Administrative Trademark Judge:

HC Vineyards LLC ("Applicant"), appearing pro se, seeks to register the standard-character mark HORSETHIEF CANYON VINEYARDS (VINEYARDS disclaimed) on the Supplemental Register for "wine," in International Class 33.[1]

[1] Application Serial No. 98579854 was filed on June 1, 2024 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming first use anywhere and in commerce at least as early as May 25, 2024.

Applicant originally sought registration on the Principal Register, but amended the Application to seek registration on the Supplemental Register in response to a refusal to register the mark as primarily geographically descriptive under Section 2(e)(2) of the Trademark Act, 15 U.S.C. § 1052(e)(2), a ground for refusal that is not at issue in this appeal.

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), due to a likelihood of confusion with the mark HORSE THIEF HOLLOW, also in standard characters, registered on the Principal Register for

> "Beer," in International Class 32[2] and
>
> "Fast casual restaurants featuring sandwiches and beverages; Providing food and beverages; Restaurant and bar services; Restaurant and bar services, including restaurant carryout services; Restaurant services featuring sandwiches; Restaurant services, including sit-down service of food and take-out restaurant services; Restaurant services, namely, providing of food and beverages for consumption on and off the premises; Taproom services featuring Beer Brewed on Premises; Taproom services featuring Beer Cocktails; Taproom services featuring Craft Beer; Providing food and drink in restaurants and bars; Providing information in the field of recipes for alcoholic beverages and cocktails via a website; Providing information in the field of recipes via a website," in International Class 43.[3]

The appeal has been fully briefed and is ready for decision.[4] We affirm the refusal to register.

Citations to the prosecution file are to entries in the USPTO's Trademark Status & Document Retrieval ("TSDR") system in .pdf format. Citations to the appeal record are to TTABVUE, the Board's online docketing system, also in .pdf format.

[2] Registration No. 7489122 issued on August 27, 2024 (the "'122 Registration").

[3] Registration No. 7489124 also issued on August 27, 2024 to the same owner (together with the '122 Registration, the "Cited Registrations").

[4] Applicant twice sought reconsideration. The first time was after the Examining Attorney made final the refusals based on geographic descriptiveness and likelihood of confusion in view of the Cited Registrations and another registration owned by the same registrant. *See* April 14, 2025 Request for Reconsideration. The Examining Attorney withdrew the Section 2(d) refusal based on the other registration, but otherwise maintained the refusal. *See* May 15, 2025 Denial of Request for Reconsideration. Applicant then amended its application to seek registration on the Supplemental Register, obviating the Section 2(e)(2) refusal but not the Section 2(d) refusal. Applicant also filed this appeal and sought reconsideration again

I. Evidentiary Issue

Before turning to the merits of the appeal, we address an evidentiary issue. Applicant includes internet screenshots in its brief, to which the Examining Attorney objects as being provided for the first time on appeal.[5] "The record in the application should be complete prior to the filing of an appeal" and "[e]vidence should not be filed with the Board after the filing of a notice of appeal." *In re Weiss*, No. 88621608, 2024 TTAB LEXIS 277, at *4 (quoting Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d)). Inasmuch as the screenshots on page 6 of Applicant's brief were not provided during prosecution, the objection is sustained as to those screenshots, and we do not consider them. *See In re Inn at St. John's, LLC*, No. 87075988, 2018 TTAB LEXIS 170, at *4-5, *aff'd per curiam*, 777 F. App'x 516 (Fed. Cir. 2019). The screenshots on page 9 of Applicant's brief, however, contain the same photos as those contained in screenshots made of record by Applicant during prosecution.[6] We overrule the objection to the screenshots on page 9 of Applicant's brief to the extent they reflect content made of record during prosecution, and we consider the photos in those screenshots for whatever they are worth.

---

with respect to the likelihood of confusion refusal. *See* May 19, 2025 Request for Reconsideration. The appeal was suspended pending Applicant's second reconsideration request and was resumed when that request was denied. *See* June 19, 2025 Denial of Request for Reconsideration; 5 TTABVUE.

[5] *See* 8 TTABVUE 2.

[6] The Examining Attorney's brief appears to mistakenly identify these screenshots as appearing at page 8 of Applicant's brief. The page numbered 8 in Applicant's brief, 6 TTABVUE 9, does not contain any screenshots, but the following page does, and as noted by the Examining Attorney, those screenshots are similar to the ones found in Applicant's Response to the Nonfinal Office Action. *Compare* 6 TTABVUE 10 *with* January 28, 2025 Response to Nonfinal Office Action, TSDR 51, 55.

II. Likelihood of Confusion

"The Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or to deceive." *In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023) (cleaned up). Our determination of the issue of likelihood of confusion is based on analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (the "*DuPont* factors"), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 145 (2015). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

Varying weight may be assigned to each *DuPont* factor depending on the evidence presented. *See Charger Ventures*, 64 F.4th at 1381 ("In any given case, different *DuPont* factors may play a dominant role and some factors may not be relevant to the analysis.") (citation omitted). In determining likelihood of confusion, two key considerations are the similarity or dissimilarity of the marks and the similarity or dissimilarity of the goods or services. *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

A. The Goods

Under the second *DuPont* factor, we consider "[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration." *DuPont*, 476 F.2d at 1361. Our determination is based on the identification of goods in the Application and Cited Registrations. *See, e.g.*, *In re Detroit Athletic Co.*, 903 F.3d 1297, 1308 (Fed. Cir. 2018).

"[I]t is not necessary that the products of the parties be similar or even competitive to support a finding of likelihood of confusion." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012) (quoting *7-Eleven, Inc. v. Wechsler*, No. 91117739, 2007 TTAB LEXIS 58, at *28). A likelihood of confusion can be found if the goods "are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source." *Id. See also Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000) ("[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.").

We begin by comparing the goods identified in the Application, "wine," to the goods identified in the '122 Registration, "beer." If we find a likelihood of confusion between the marks as to these goods, we need not find a likelihood of confusion between the marks as to the services identified in the other Cited Registration for the identical standard-character mark HORSE THIEF HOLLOW in order to affirm the refusal to register. *Cf. In re Max Cap. Grp. Ltd.*, No. 77186166, 2010 TTAB LEXIS 1, at *20.

Although both wine and beer are alcoholic beverages, "[t]here is no per se rule that holds that all alcoholic beverages are related." *In re White Rock Distilleries Inc.*, No. 77093221, 2009 TTAB LEXIS 601, at *8-9 (citing *G. H. Mumm & Cie v. Desnoes & Geddes Ltd.*, 917 F.2d 1292 (Fed. Cir. 1990) and *Nat'l Distillers and Chem. Corp. v. William Grant & Sons, Inc.*, 505 F.2d 719 (CCPA 1974)). We therefore must decide this issue on the record before us.

The Examining Attorney provided the following evidence in support of relatedness of wine and beer:

Entities offering the goods under the same mark or variations thereof

- Valley Vineyards Winery Brewery
- Fenton Winery & Brewery / FWB
- Wagner Vineyards / Wagner Valley Brewing Co.
- Machinaw Trail Winery & Brewery[7]
- Barrel Oak Winery & Brewery
- Lake Wedowee Winery and Brewery
- Bear Creek Winery & Brewery
- Newport Vineyards
- Schilling Bridge Winery / Schilling Bridge Brewing Company[8]
- Hudsonville Brewing Co. Pike 51 / Hudsonville Winery
- Round Barn Winery Brewery Distillery
- The Brewery at Hershey / The Vineyard at Hershey
- Von Jakob Winery & Brewery[9]
- Mountain View Vineyard / Mountain View Brewery
- Three Fox Vineyards & Brewery

[7] January 13, 2025 Nonfinal Office Action, TSDR 66-92 (screenshots from valleyvineyards.com, fentonbrewery.com, wagnervineyards.com and wagnerbrewing.com), 113-33 (screenshots from mackinawtrailwinery.com).

[8] April 8, 2025 Final Office Action 27-73 (screenshots from barreloak.com, lakewedoweewinery.com, bearcreekwinecompany.com and newportvineyards.com), 108-16 (screenshots from schillingbridgewinery.com).

[9] May 15, 2025 Denial of Request for Reconsideration, TSDR 5-14 (screenshots from hudsonvillewinery.com), 38-61 (screenshots from roundbarn.com, vineyardathershey.com, and vonjakobvineyard.com).

- Old House[10]

Use-based registrations owned by third parties covering both beer and wine

- REMLINGER BREWING, Reg. No. 7164772
- BEAT CULTURE, Reg. No. 5662013
- TANGLED ROOTS BREWING COMPANY, Reg. No. 6583932
- MASTRY'S, Reg. No. 7677453
- HAZY BARBEQUE, Reg. No. 6670132
- RYE KNOT, Reg. No. 6795441
- BOX OFFICE BREWERY, Reg. No. 6008580[11]
- SPRINGGATE, Reg. No. 5973378
- SHOTS FIRED, Reg. No. 7263554
- MAZALOT and design, Reg. No. 5957365
- PACKSADDLE, Reg. No. 7367703
- GROWN FOLKS, Reg. No. 7638855
- NORTEX, Reg. No. 7345766
- LAKE LIFE, Reg. No. 5603137
- FIVE SHORES, Reg. No. 5891000
- OLFACTORY, Reg. No. 6994985
- MURA, Reg. No. 6694636
- CHOICE, Reg. No. 7283593
- CHIEF O'NEILL'S, Reg. No. 7626818
- CLASS 100, Reg. No. 7032380[12]

The Examining Attorney also made of record an article in *Wine Enthusiast* titled "'Give 'Em What They Want': These Craft Breweries Make Wine Now, Too" which discusses several breweries that have entered the wine space as well as a winery that plans to expand to open a brewery on the premises.[13]

In response to this evidence, Applicant argues

[10] June 19, 2025 Denial of Request for Reconsideration, TSDR 13-36 (screenshots from mountainviewvineyard.com, threefoxvineyards.com and oldhousetoday.com).

[11] April 8, 2025 Final Office Action, TSDR 76-89 (copies of Registration Nos. 7164772, 5662013, 6583932, 7677453, 6670132, 6795441, and 6008580).

[12] May 15, 2025 Denial of Request for Reconsideration, TSDR 170-97 (copies of Registration Nos. 5973378, 7263554, 5957365, 7367703, 7638855, 7345766, 5603137, 5891000, 6994985, 6694636, 7283593, 7626818 and 7032380).

[13] April 8, 2025 Final Office Action, TSDR 13-16.

> The Examining Attorney relies on a small number of third-party registrations where a single entity produces both beer and wine. However, these few examples are **not representative of the industry standard**. It is **unusual for a winery to brew its own beer**, just as it is even more **rare for a brewery or restaurant/bar to produce and brand its own wine**. The vast majority of breweries and wineries operate in separate markets, using distinct supply chains, licensing, and marketing strategies.[14]

These arguments are not persuasive. At the outset, Applicant did not provide any supporting evidence for its factual contentions. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (assertions of fact in briefs are "not evidence under any of the relevant rules") (citing *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005)). In addition, Applicant mischaracterizes the Examining Attorney's evidence. The Examining Attorney provided a number of third-party registrations (20 in total) for the same mark covering both wine and beer. These registrations that cover goods identified in both the Application and the '122 Registration "are relevant to show that the goods [ ] are of a type that may emanate from a single source under one mark." *In re Country Oven, Inc.*, No. 87354443, 2019 TTAB LEXIS 381, at *9-10 (citing, inter alia, *Detroit Athletic*, 903 F.3d at 1306); *see also In re Albert Trostel & Sons Co.*, No. 74186695, 1993 TTAB LEXIS 36, at *7 ("Although third-party registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, nevertheless third-party registrations which individually cover a number of different items and which

[14] 6 TTABVUE 5 (emphasis supplied by Applicant).

are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods and/or services are of a type which may emanate from a single source.").

Applicant seeks to diminish the marketplace evidence provided by the Examining Attorney as reflecting "isolated or destination-based business models rather than the ordinary manner in which wine and beer are encountered in commerce,"[15] again without supporting evidence. We find that the evidence of record, screenshots from the websites of 16 third parties offering both wine and beer under the same mark or variations of the same mark, supports a finding that consumers encounter wine and beer offered by the same parties, under the same or similar marks, and that the goods are related. *See, e.g., Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (evidence that "a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis"); *In re C.H. Hanson Co.*, No. 77983232, 2015 TTAB LEXIS 357, at *17 (six websites offering both goods under the same mark, coupled with five marks registered for the goods, supported relatedness).[16]

The second *DuPont* factor supports a likelihood of confusion.

---

[15] 9 TTABVUE 3.

[16] Applicant also argues that "there is no evidence that Horse Thief Hollow offers wine under its mark or has any intent to do so" such that "[g]ranting them de facto rights in Class 033 based solely on speculative overlap would improperly expand their trademark protection to goods they neither produce nor sell…." 6 TTABVUE 5. But this is counter to our precedent. "There is no requirement that either applicant or registrant also be the source of the other's goods before the goods can be held to be related." *In re G.B.I. Tile & Stone, Inc.*, No. 77369073, 2009 TTAB LEXIS 647, at *16.

B. The Channels of Trade and Classes of Consumers

We next consider the third *DuPont* factor, "[t]he similarity or dissimilarity of established, likely-to-continue trade channels." *DuPont*, 476 F.2d at 1361. As under the second factor, our determination is based on the identification of goods in the Application and Cited Registrations. Because there are no limitations in the identifications in either the Application or the '122 Registration, we must presume Applicant's identified "wine" and Registrant's "beer" travel through all usual trade channels and are offered and sold to all of the usual purchasers of such goods. *See, e.g., Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1361 (Fed. Cir. 2000) ("When the registration does not contain limitations describing a particular channel of trade or class of customer, the goods or services are assumed to travel in all normal channels of trade."); *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, No. 91194148, 2015 TTAB LEXIS 260, at *32 ("[A]bsent any explicit restriction in the application or registration, we must presume the parties' identified goods to travel through all normal channels of trade for goods of the type identified, and we must consider them to be offered and sold to all of the usual customers for such goods.") (citing inter alia *Coach Servs.*, 668 F.3d at 1370).

The third-party website evidence discussed above shows that the goods of both Applicant and Registrant are offered in at least one common channel of trade, combination wineries and breweries. *Cf. In re Toshiba Med. Sys. Corp.*, No. 79046106, 2009 TTAB LEXIS 447, at *21 (website evidence showed same or overlapping channels of trade and classes of customers). Other evidence in the record supports a

finding that at least to this extent consumers of wine and beer overlap. The *Wine Enthusiast* article discusses a trend of beer producers also making wine, and vice versa, stating that "[t]asting room customers want choice. Not everyone drinks just beer or wine or spirits, and business owners want customers to feel comfortable. Offering a variety of products, especially when house-made, keeps people around longer and contributes more to the bottom line."[17] Consistent with the *Wine Enthusiast* article, the Lake Wedowee Winery and Brewery website, for example, states "[w]e are excited to announce that we are now brewing and serving our own Lake Wedowee Winery and Brewery beer! Wine will always be our passion and main product but many of you have asked for some variety and this is for you!"[18]

The evidence supports a finding that the trade channels and classes of consumers overlap to at least some degree. The third *DuPont* factor supports a likelihood of confusion.

C. The Marks

The first *DuPont* factor compares the marks "in their entireties as to appearance, sound, connotation, and commercial impression." *Detroit Athletic*, 903 F.3d at 1303 (quoting *DuPont,* 476 F.3d at 1361). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *Inn at St. John's*, 2018 TTAB LEXIS 170, at *13.

[17] April 8, 2025 Final Office Action, TSDR 14.

[18] *Id.*, TSDR 43.

The proper test regarding similarity "is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *Cai*, 901 F.3d at 1373 (internal quotation marks and citation omitted). Our analysis cannot be predicated on dissecting the marks into their various components; that is, our finding must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985); *see also In re Electrolyte Labs. Inc.*, 929 F.2d 645, 647 (Fed. Cir. 1990) ("No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone."). Nonetheless, "in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." *Detroit Athletic*, 903 F.3d at 1305 (quoting *Nat'l Data*, 753 F.2d at 1058). "The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks." *In re St. Julian Wine Co.*, No. 87834973, 2020 TTAB LEXIS 196, at *13.

The Examining Attorney argues that the marks HORSETHIEF CANYON VINEYARDS and HORSE THIEF HOLLOW are similar in appearance and sound due to the use of nearly identical initial, dominant words.[19] Applicant argues that the Examining Attorney failed to consider the marks in their entireties, placing too much

[19] 8 TTABVUE 4-5.

emphasis on the initial terms HORSETHIEF/HORSE THIEF while improperly discounting the remainder of Applicant's mark and the cited mark.[20]

Although the marks each have some different words, we find that, visually and phonetically, HORSETHIEF CANYON VINEYARDS and HORSE THIEF HOLLOW are similar due to the nearly identical first word(s) HORSETHIEF and HORSE THIEF. The identity of the marks' initial words "is particularly significant because consumers typically notice those words first." *Detroit Athletic*, 903 F.3d at 1303. *See also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1372 (Fed. Cir. 2005) (finding similarity between VEUVE ROYALE and two VEUVE CLICQUOT marks in part because "VEUVE nevertheless remains a 'prominent feature' as the first word in the mark and the first word to appear on the label"); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 876 (Fed Cir. 1992) (finding similarity between CENTURY 21 and CENTURY LIFE OF AMERICA in part because "consumers must first notice th[e] identical lead word"). The absence of a space between HORSE and THIEF in Applicant's mark does not detract from the marks' similarity because the terms remain very similar in appearance and identical in sound. *See, e.g.*, *Chutter, Inc. v. Great Mgmt. Grp., LLC*, No. 91223018, 2021 TTAB LEXIS 365, at *48 ("The presence or absence of a space between two terms is usually an inconsequential difference that even if noticed by consumers would not serve to distinguish these marks."), *rev'd on other grounds*, 90 F.4th 1333 (Fed. Cir. 2024); *see also Seaguard Corp. v. Seaward Int'l, Inc.*, No.

[20] 6 TTABVUE 4; 9 TTABVUE 2-3.

92013589, 1984 TTAB LEXIS 75, at *10-11 (SEA GUARD and SEAGUARD are "essentially identical").

The Examining Attorney argues that the words CANYON and HOLLOW, though different in appearance and sound, evoke "the same idea of a valley-like place or area."[21] According to the Examining Attorney, "[b]oth terms describe a topographical feature with similar characteristics, and when used in combination with the identical wording HORSETHIEF/HORSE THIEF present a mental image that would be confusing to consumers (namely that of a hidden area where a thief of horses might take refuge)."[22] The Examining Attorney also argues that VINEYARDS does not distinguish Applicant's mark from the cited mark because the term is generic as evidenced by Applicant's disclaimer and dictionary evidence defining VINEYARDS as "an area of land where grape vines are grown in order to produce wine."[23]

According to Applicant, the words after HORSETHIEF/HORSE THIEF in the marks HORSETHIEF CANYON VINEYARDS and HORSE THIEF HOLLOW not only create visual and phonetic distinctions but most importantly give the marks different commercial impressions. In particular, Applicant argues that its mark "invok[es] a specific geographic location and winemaking identity"[24] as seen in the

[21] 8 TTABVUE 5; *see also* January 13, 2025 Nonfinal Office Action, TSDR at 4, 17 (MERRIAM-WEBSTER DICTIONARY defining "canyon" as "a deep narrow valley with steep sides and often with a stream flowing through it"), 23 (THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE defining "hollow" to include "[a] small valley between hills or mountains").

[22] 8 TTABVUE 5.

[23] *Id.* at 6 (citing COLLINS DICTIONARY, January 13, 2025 Nonfinal Office Action, TSDR 60).

[24] 6 TTABVUE 4; *see also* 9 TTABVUE 3.

Examining Attorney's evidence showing that Applicant is located near the Horsethief Canyon trailhead in California.[25] Applicant argues that the cited mark conveys a rustic, hospitality-oriented impression deriving from "the name of a specific historical feature at its location—a hollow characterized by dense woods and elevated terrain that no longer exists—and functions today as the proper name of a hospitality venue."[26]

We do not find that consumers would perceive such subtle different impressions from the two marks when used with their respective goods. The "marks must be considered ... in light of the fallibility of memory and not on the basis of side-by-side comparison." *In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014) (internal quotation marks and citation omitted). The words HORSETHIEF/HORSE THIEF have no inherent significance with respect to wine or beer, and are memorable. As Applicant conceded during prosecution, "both marks share the term 'HORSETHIEF,' [which] is suggestive or descriptive of a rustic or outlaw theme."[27] Even though the marks pair HORSETHIEF/HORSE THIEF with the non-identical topographical terms CANYON and HOLLOW, respectively, the overall marks engender similar impressions because they both convey the idea of a depressed area of land where

[25] January 13, 2025 Nonfinal Office Action, TSDR 25-58 (printouts from AllTrails and other websites regarding Horsethief Canyon Trail located near Alpine, California).

[26] 9 TTABVUE 3; *see* January 28, 2025 Response to Nonfinal Office Action, TSDR 9, 45-47 (section of Registrant's website titled "Behind the Name" explains that in the 1850's the area was known as "Horse Thief Hollow" because bandits hid there with horses stolen from Missouri and brought to market in Chicago).

[27] April 14, 2025 Request for Reconsideration, TSDR 4 (emphasis omitted).

thieves hide their stolen horses.[28] *See, e.g., Procter & Gamble Co. v. Conway*, 419 F.2d 1332, 1336 (CCPA 1970) (aural and visual dissimilarity between "stain" and "clean" in MISTER STAIN and MR. CLEAN was not controlling because a designation may be likely to cause confusion where it conveys "the same idea, or stimulates the same mental reaction, or in the ultimate has the same meaning"); *Ralston Purina Co. v. Old Ranchers Canning Co.*, 1978 TTAB LEXIS 31, at *8-9 (TUNA O'THE FARM for ready-to-eat boned chicken considered a "colorable imitation" of CHICKEN OF THE SEA for canned tuna fish because both conveyed same incongruous connotation).

Although Applicant's mark has the additional word VINEYARDS, we do not find that this detracts from the similarity of the marks when considered in their entireties. Applicant disclaimed VINEYARDS as generic, and it is reasonable to accord VINEYARDS less source-indicating significance than the words HORSETHIEF CANYON. Disclaimed matter is not removed from the mark and must be considered when comparing the marks in their entireties, but "[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark." *Nat'l Data*, 753 F.2d at 1058. *See also In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407 (Fed. Cir. 1997) (Board properly found that DELTA was dominant in THE DELTA CAFE and design, which disclaimed the generic word CAFE); *In re Binion*, No. 76590702, 2009 TTAB LEXIS

[28] *See* April 8, 2025 Final Office Action, TSDR 126 (article from *San Diego Reader* states that Horsethief Canyon has a trail "that was once used by thieves to corral their stolen horses"); January 28, 2025 Response to Nonfinal Office Action, TSDR 47 (Registrant's website explaining that horse thieves used to hide stolen horses in the area once known as Horse Thief Hollow).

701, at *7-8 (concluding that confusion was likely between BINION'S for "hotel and bar services" and BINION'S ROADHOUSE for "restaurant services" where descriptive word ROADHOUSE received less weight than BINION'S when comparing the marks as a whole).

"[S]imilarity is not a binary factor but is a matter of degree," *St. Helena Hosp.*, 774 F.3d at 752, and may be found even where there are some differences in the marks. *See, e.g., Coca-Cola Bottling Co. v. Joseph E. Seagram & Sons, Inc.*, 526 F.2d 556, 557 (CCPA 1975) (BENGAL and BENGAL LANCER, considered as a whole, were substantially similar). Here, the marks HORSETHIEF CANYON VINEYARDS and HORSE THIEF HOLLOW overall are very similar due to their nearly identical initial, dominant terms and second terms having similar topographical significance. The generic word VINEYARDS has less commercial import and does not render the marks dissimilar. *See In re Chatam Int'l*, 380 F.3d 1340, 1342-43 (affirming conclusion that JOSE GASPAR GOLD for tequila and GASPAR'S ALE for beer and ale were confusingly similar; Board properly accorded generic term ALE less weight when comparing the marks).

The first *DuPont* factor also weighs in favor of a likelihood of confusion.

D. Purchasing Conditions and Sophistication of Consumers

Applicant argues that the respective consumers are sophisticated and exercise care in purchasing, such that the likelihood of confusion is reduced.[29] These arguments implicate the fourth *DuPont* factor, "[t]he conditions under which and

[29] 6 TTABVUE 8.

buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing." *DuPont*, 476 F.2d at 1361. "Purchaser sophistication may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect." *Palm Bay Imps.,* 396 F.3d at 1376.

Applicant again does not point to evidence, but only makes unsupported contentions. We do not find that use of VINEYARDS in Applicant's mark conveys qualities that "resonate with discerning wine buyers"[30] to the exclusion of other consumers. There is no evidence that Applicant and Registrant "offer specialty products within their respective industries" that "attract significantly more knowledgeable and selective consumers."[31] Moreover, neither identification contains any limitations on the quality or price of the goods, which must therefore be presumed to include goods of all quality levels and price points. *See In re Aquitaine Wine USA, LLC*, No. 86928469, 2018 TTAB LEXIS 108, at *29 ("Wine purchasers are not necessarily sophisticated or careful in making their purchasing decisions, and where, as here, the goods are identified without any limitations as to trade channels, classes of consumers or conditions of sale, we must presume that Applicant's and Registrant's wine encompasses inexpensive or moderately-priced wine."). The record evidence shows beer offered at moderate prices, and wine offered at a range that is somewhat

[30] *Id*. Indeed, the record includes several entities with "vineyard" or "vineyards" in their trade names that also sell beer, such as Valley Vineyards Winery Brewery, Newport Vineyards and Three Fox Vineyards & Brewery.

Applicant's related argument about the type of consumer that comes to a winery, *id*., is not relevant because the Application simply identifies "wine," with no limitation on the channels of trade for the goods.

[31] *Id*.

higher than beer but still includes moderately priced offerings,[32] such that the goods are likely to appeal to average consumers. Our decision must "be based on the least sophisticated potential purchasers." *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1325 (Fed. Cir. 2014) (internal quotation marks and citation omitted). Here, the least sophisticated purchasers of beer and wine are unlikely to be particularly discerning or exercise a high degree of care in making their purchase decisions. And even if some consumers of the goods are more sophisticated or discerning than others, even "careful or sophisticated consumers are not immune from source confusion." *Charger Ventures*, 64 F.4th at 1383.

The fourth *DuPont* factor is neutral.

E. Other Factors

Applicant argues that the involved marks have coexisted through use and/or registration with apparel goods "without incident for over two years" as reflected by its ownership of a prior registration for HORSETHIEF CANYON VINEYARDS in Class 25 and screenshots from Registrant's website offering HORSE THIEF HOLLOW-branded shirts and hats.[33] From this, Applicant argues that the *DuPont* factors of concurrent use without evidence of actual confusion (eighth factor) and

[32] *See, e.g.,* January 13, 2025 Nonfinal Office Action, TSDR 66-69 (wine bottles priced between $14 and $40); 87 (beer flights starting at $8 and wine flights starting at $9), 120-33 (wine bottles priced between $15 and $100); June 19, 2025 Denial of Request for Reconsideration, TSDR 14, 19 (beer growler sale priced at $8.00 and wine starting at $17.99 per bottle).

[33] 6 TTABVUE 8-10 (referencing U.S. Reg. No. 90319378, issued February 15, 2022, and showing images from Registrant's website). Applicant did not provide a copy of this registration, so we again have no evidence, only unsupported factual contentions.

market interface between applicant and the prior mark owner (tenth factor) support a conclusion that there is no likelihood of confusion.

These arguments fail for multiple reasons. There is no evidence regarding the extent of any purported concurrent use in the marketplace for the apparel goods without confusion. "Uncorroborated statements of no known instances of actual confusion ... are of little evidentiary value," especially in ex parte examination, where the owner of the cited registration is not a party. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1317 (Fed. Cir. 2003); *see also In re Embiid*, No. 88202890, 2021 TTAB LEXIS 168, at *53-54. And even if there were, this would not show that confusion is unlikely for the involved goods, wine and beer. Further, "a showing of actual confusion is not necessary to establish a likelihood of confusion." *i.am.symbolic*, 866 F.3d at 1322 (quoting *Herbko*, 308 F.3d at 1164-65). "[T]he relevant test is **likelihood** of confusion, not **actual** confusion." *Detroit Athletic*, 903 F.3d at 1309 (italics in original shown here in bold). The eighth and tenth *DuPont* factors are neutral.

Applicant argues that because the asserted coexistence of these marks without apparent objection reflects a lack of marketplace confusion, the "USPTO should avoid creating conflict where none exists."[34] This appears to allude to the twelfth *DuPont* factor, the "extent of potential confusion, i.e., whether de minimis or substantial," *DuPont*, 476 F.2d at 1361, and possibly the thirteenth factor, "[a]ny other established fact probative of the effect of use." *Id.* Applicant's arguments "essentially repeat arguments under the other *DuPont* factors, and have been duly considered." *Heil Co.*,

[34] 6 TTABVUE 11.

2024 TTAB LEXIS 494, at *94. The twelfth and thirteenth *DuPont* factors are also neutral.

As to Applicant's argument that the USPTO should "avoid unreasonable or arbitrary action,"[35] the Examining Attorney's refusal cited statutory authority, provided supporting evidence and articulated the reasons for the refusal, which we find to be well-taken. *See* TRADEMARK MANUAL OF EXAMINING PROCEDURE § 701 et seq. (Nov. 2025) (citing 15 U.S.C. § 1062). Applicant's disagreement with the refusal to register does not render it arbitrary or capricious. *See Japanese Found. for Cancer Rsch. v. Lee*, 773 F.3d 1300, 1304 (Fed. Circ. 2014) ("[A]n agency acts arbitrarily or capriciously only if the decision was not based on the relevant factors or it fails to 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'") (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)).[36]

[35] *Id.*

[36] During prosecution Applicant made other arguments that are not addressed in its appeal briefs. *See, e.g.*, May 19, 2025 Request for Reconsideration, TSDR 12 (conceptual weakness of cited mark); 13 (coexistence of similar wine and beer marks owned by different parties). We deem these arguments waived or forfeited due to Applicant's failure to pursue them on appeal. *See, e.g., In re Princeton Equity Grp. LLC*, No. 97397212, 2025 TTAB LEXIS 242, at *8; *In re Katch, LLC*, No. 86301765, 2019 TTAB LEXIS 154, at *3-4. *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 1203.02(g) (2025) ("If an applicant, in its appeal brief, does not assert an argument made during prosecution, it may be deemed waived by the Board.").

III. Conclusion—Summarizing the *DuPont* Factors

The final step in analyzing likelihood of confusion is to assess our findings under the *DuPont* factors and determine whether confusion is likely. *See Charger Ventures*, 64 F.4th at 1384. Applicant's wine is related to the beer identified in the '122 Registration, and there is evidence of an overlapping channel of trade and class of consumers, with the second and third *DuPont* factors weighing in favor of likelihood of confusion. The marks HORSETHIEF CANYON VINEYARDS and HORSE THIEF HOLLOW are very similar due to their dominant initial terms and additional words with similar topographical significance, with the generic word VINEYARDS unlikely to alter the overall commercial impression of Applicant's mark on consumers. The first *DuPont* factor therefore weighs somewhat heavily in favor of likelihood of confusion. The fourth, eighth, tenth, twelfth and thirteenth *DuPont* factors are neutral in our analysis, and no factor weighs against likelihood of confusion.

We thus conclude that confusion is likely between Applicant's mark and the mark in the '122 Registration, when used with their respective identified goods.

Decision:

The refusal to register Applicant's mark under Trademark Act Section 2(d) is affirmed.