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PRECEDENT OF THE TTAB

Mailed: October 7, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Zen Cafe Corp[1]

Serial No. 99185689

Michael Barrows of Barrows Levy PLLC,
for Zen Cafe Corp.

Mackenzie Olson, Trademark Examining Attorney, Law Office 112,
Matthew Cuccias, Managing Attorney.

Before Lykos, Elgin, and Stanley, Administrative Trademark Judges.

Opinion by Elgin, Administrative Trademark Judge:

Applicant Zen Cafe Corp seeks registration on the Principal Register of the standard-character mark ZEN WAFFLES (WAFFLES disclaimed) for goods ultimately identified as "Waffles; Filled waffles; Frozen waffles; Waffle mixes; Protien [sic]-enriched waffles" in International Class 30.[2]

[1] Applicant is listed in the application and TTABVUE as "Zen Cafe Corp"; but Applicant is identified in the appeal brief as "Zen Café Corp." We refer to Applicant by the name stated in the application.

[2] Serial No. 99185689 was filed on May 14, 2025 under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), based on Applicant's claimed first use of the mark and first use of the mark in commerce at least as early as November 15, 2024. We presume the word "protein" has been misspelled in the amended identification.

The Trademark Examining Attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used in connection with the identified goods, so resembles the registered marks 

(BAKERY disclaimed) for "muffins, cookies, rolls, pastry" in International Class 30[3] and ZEN BAKERY (BAKERY disclaimed) in standard characters for "bakery goods; muffins, cookies, rolls, pastry; bakery goods for retail and wholesale distribution and consumption on or off the premises" in International Class 30[4] that it is likely to cause confusion, to cause mistake, or to deceive.

After the refusal was made final, Applicant appealed. The Examining Attorney and Applicant have filed briefs.[5] For the reasons set forth below, we **affirm** the refusal to register.

I. Evidentiary Issues

Before proceeding with an analysis of the refusal, we address several evidentiary objections made by the Examining Attorney.

First, Applicant referred to third-party ZEN-formative marks in a response to an Office Action, as well as in its brief.[6] Applicant did not refer to any registration or

[3] Registration No. 1529901 issued on the Principal Register on March 14, 1989; renewed.

[4] Registration No. 4104964 issued on the Principal Register on February 28, 2012; renewed.

[5] Applicant's brief is at 4 TTABVUE. The Examining Attorney's brief is at 6 TTABVUE. Citations to the prosecution record refer to the USPTO Trademark Status and Document Retrieval system (TSDR) in the downloadable .pdf format by page number. References to the briefs on appeal refer to the Board's TTABVUE docket system. *In re Integra Biosciences Corp.*, No. 87484450, 2022 TTAB LEXIS 17, at *6.

[6] *See* December 21, 2025 Response to Office Action at TSDR 6-7; 4 TTABVUE 8-9.

application numbers in its response, and copies of the TSDR records were not properly introduced into the record. *See In re ZeroSix, LLC*, No. 88981832, 2023 TTAB LEXIS 209, at *1 ("[M]erely listing third-party registrations does not make them of record."); *In re Jump Designs, LLC*, No. 76393986, 2006 TTAB LEXIS 209, at *6 ("To make a third-party registration of record, a copy of the registration, either a copy of the paper USPTO record, or a copy taken from the electronic records of the Office, should be submitted.").

The Examining Attorney notified Applicant in the Final Office Action that the applications and registrations were not of record and objected to the arguments based on the missing evidence.[7] The Examining Attorney maintained the objection in the Examining Attorney's brief.[8] *Cf. In re City of Houston*, No. 77660948, 2012 TTAB LEXIS 1, at *3 (considering a list of registrations because the examining attorney failed to advise applicant of the insufficiency of the list of registrations when it was proffered during examination and therefore waived the objection). The Board does not take judicial notice of the files of applications or registrations residing in the Office. *In re House Beer, LLC*, No. 85684754, 2015 TTAB LEXIS 66, at *3.[9]

[7] February 2, 2026 Final Office Action at TSDR 5.

[8] 6 TTABVUE 3-4. Applicant added application serial numbers relating to the underlying applications in its appeal brief (e.g. "ZEN (Class 30 supplements, Serial Number 98397412)"). 4 TTABVUE 8.

[9] In addition, because Applicant only offered serial numbers and abbreviated goods in its brief, we would not be able to tell from the limited information provided whether the cited marks are registered, the full breadth of the goods or services, and whether they are owned by related parties.

Accordingly, the Examining Attorney's objection to Applicant's reliance on third-party ZEN-formative marks is **sustained**.

Similarly, the Examining Attorney objects to Applicant's argument reciting "numeric summaries of applicant's search queries entered into the USPTO database, without supporting evidence properly made of record."[10] Applicant's statements regarding the results of a search of USPTO records is purely attorney argument, and it was submitted for the first time during this appeal with no supporting evidence. *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005) ("Attorney argument is not evidence."). This objection to the results of the search queries also is **sustained**.

Finally, the Examining Attorney argues that Applicant did not re-assert an argument presented during the prosecution phase regarding a prior nonprecedential decision where the Board found that the marks ZEN BAKERY (including the cited mark) and ZEN DELITES for "cookies" were not sufficiently similar to be likely to cause confusion.[11] The Examining Attorney requests that we find the argument waived.[12] We agree that the argument has been waived. *See, e.g., In re Black Card LLC*, No. 90641690, 2023 TTAB LEXIS 478, at *29 (applicant that did not address identification of services issue in its appeal brief waived ability to contest the refusal based on that ground). In any event, each case presents different facts and must be

[10] 6 TTABVUE 4 (citing to 4 TTABVUE 7).

[11] *Id.* at 5; *See* December 21, 2025 Response to Office Action at TSDR 14, 20-34 (discussing *Drake Revocable Trust v. Defuria*, No. 92059646, 2016 TTAB LEXIS 191, at *1).

[12] 6 TTABVUE 5.

decided on its own merits. *See In re Davey Prods. Pty*, No. 77029776, 2009 TTAB LEXIS 524, at *28; *see also In re Nett Designs, Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court.").

II. Likelihood of Confusion Analysis

Section 2(d) of 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 deception. 15 U.S.C. § 1052(d); *see also In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023). Our determination under Section 2(d) is based on an analysis of all the probative evidence of record bearing on a likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) ("*DuPont*"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003).

In any likelihood of confusion analysis, different *DuPont* factors may play a dominant role, and some factors may not be relevant. *Naterra Int'l, Inc. v. Bensalem*, 92 F.4th 1113, 1116 (Fed. Cir. 2024) (citing *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1362 (Fed. Cir. 2022)). Although we consider each *DuPont* factor for which there is evidence and argument, *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019), two key considerations are the similarities between the marks and the similarities between the goods. *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (citing *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65 (Fed.

Cir. 2002)). In addition, varying weight may be assigned to each factor depending on the evidence presented, and "any one of the factors may control a particular case." *Id.*; *see also Charger Ventures*, 64 F.4th at 1381. In cases where we find some factor or factors relatively more important, we weigh or balance them more heavily in the final step of assessing the factors to determine whether confusion is likely.

For purposes of our likelihood of confusion analysis, we focus on Registration No. 4104964 for the standard-character mark ZEN BAKERY, for "bakery goods; muffins, cookies, rolls, pastry; bakery goods for retail and wholesale distribution and consumption on or off the premises." That registration is closest to Applicant's mark and goods because standard character registrations cover any typeface, *see, e.g., SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 1041 (Fed. Cir. 1983), and because it identifies a broader set of goods. If confusion is likely between Applicant's mark and this mark, there is no need for us to consider likelihood of confusion with the stylized mark for narrower goods in Registration No. 1529901. *See In re Max Cap. Grp.*, No. 77186166, 2010 TTAB LEXIS 1, at *4-5. Conversely, if there is no likelihood of confusion between Applicant's mark and the standard-character mark, then there would be no likelihood of confusion with the other cited mark. Accordingly, we refer to Registration No. 4104964 as the "cited registration" or "cited mark" in this decision.

We address the *DuPont* factors in the order set forth by Applicant in its brief, as that seems to emphasize the importance Applicant placed on each factor.

A. Weakness of the Cited Mark

We begin with an analysis of the sixth *DuPont* factor, which "allows Applicant to contract th[e] scope of protection by adducing evidence of '[t]he number and nature of similar marks in use on similar goods.'" *Made in Nature, LLC v. Pharmavite LLC*, No. 91223352, 2022 TTAB LEXIS 251, at *24 (quoting *DuPont*, 476 F.2d at 1361). A determination of the strength or weakness of the cited marks helps inform us as to their scope of protection. *See In re Morinaga Nyugyo K.K.*, No. 86338392, 2016 TTAB LEXIS 448, at *17-18 ("[T]he strength of the cited mark is – as always – relevant to assessing the likelihood of confusion under the *du Pont* framework.").[13]

When evaluating the strength or weakness of a mark, we look at the mark's inherent conceptual strength based on the nature of the term itself and its commercial strength in the marketplace. *See Spireon, Inc. v. Flex LTD*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) ("There are two prongs of analysis for a mark's strength under the sixth factor: conceptual strength and commercial strength."); *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (measuring both conceptual and marketplace strength); *Made in Nature*, 2022 TTAB LEXIS 251, at *24.

Conceptual strength is a measure of the cited mark's distinctiveness. A mark may be placed "in categories of generally increasing distinctiveness: … (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992). The last three categories are considered

[13] Fame of the cited mark under the fifth factor is considered neutral in an ex parte appeal. *See In re Thomas*, No. 78334625, 2006 TTAB LEXIS 135, at *18 n.11.

inherently distinctive. "Where, as here, [a] mark is registered without a Section 2(f) claim of acquired distinctiveness, the mark is presumed to be inherently distinctive," that is, at least suggestive. *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129, 146 (Fed. Cir. 2021); *see also Heil Co. v. Tripleye GmbH*, No. 91277359, 2024 TTAB LEXIS 494, at *48-49 (where a mark "is registered on the Principal Register, with no claim of acquired distinctiveness under Section 2(f), we presume it is inherently distinctive, i.e., that it is at worst suggestive of the goods") (citing Trademark Act Section 7(b), 15 U.S.C. § 1057(b)). This means that the cited mark ZEN BAKERY (BAKERY disclaimed), in its entirety, is presumptively entitled to at least "the normal scope of protection to which inherently distinctive marks are entitled." *Sage Therapeutics, Inc. v. Sageforth Psych. Servs., LLC*, No. 91270181, 2024 TTAB LEXIS 139, at *27 (quoting *Bell's Brewery, Inc. v. Innovation Brewing*, No. 91215896, 2017 TTAB LEXIS 452, at *20).

Nonetheless, we may consider whether components of the cited mark lack distinctiveness or are weak. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 947 (Fed. Cir. 2000) (a "descriptive component of a mark may be given little weight in reaching a conclusion on likelihood of confusion.") (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985)). BAKERY is disclaimed as highly descriptive or generic of the bakery goods identified in the registrations. Applicant asserts that the term ZEN in the cited mark is conceptually weak, such that the applied-for marks may co-exist on the register.[14] Applicant states that "[d]ictionary definitions establish

[14] 4 TTABVUE 9 (Applicant's Brief).

that the term refers to calmness, mindfulness, and wellness, concepts that are routinely used in food and lifestyle branding. Terms that merely convey a desirable quality or lifestyle association are inherently weak as trademarks."[15]

But (as the Examining Attorney points out),[16] Applicant did not offer any dictionary evidence to support this argument, and attorney argument is not evidence. *Enzo Biochem*, 424 F.3d at 1284. In any event, ZEN is not descriptive of the bakery goods identified in the cited registration. As the Examining Attorney argues, "[p]eople do not tend to seek out waffles and baked goods in a search for peace or calmness; consumers seek out waffles and baked goods because they are hungry."[17]

Applicant also argues the cited mark is commercially weak because: "The marketplace is saturated with ZEN-formative marks for tea, matcha, spices, noodles, packaged foods, beverages, cafes, and restaurants," and "[t]he term ZEN is also used in connection with many other food and wellness-themed products."[18] But as we found above, Applicant did not support this argument with any admissible evidence.[19]

[15] *Id.* (citing *In re FabFitFun, Inc.*, No. 86847381, 2018 TTAB LEXIS 297).

[16] 6 TTABVUE 12 (Examiner's Brief).

[17] *Id.* at 12.

[18] 4 TTABVUE 8 (Applicant's Brief).

[19] *See supra* Section I.

The record also is devoid of any evidence showing third-party marketplace use of the term ZEN as a mark or an element of a mark.

Accordingly, the sixth *DuPont* factor is neutral, and we accord the mark the scope of protection due an inherently distinctive mark.

B. The Marks

We next compare the marks. Under the first *DuPont* factor, "we consider the 'similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.'" *In re Ye Mystic Krewe of Gasparilla*, No. 90522364, 2025 TTAB LEXIS 412, at *9 (quoting *DuPont*, 476 F.2d at 1361). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's LLC*, No. 87075988, 2018 TTAB LEXIS 170, at *13 (citation omitted), *aff'd per curiam*, 777 F. App'x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 732 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.") (citation omitted).

"[S]imilarity is not a binary factor but is a matter of degree." *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 1344 (Fed. Cir. 2003)). 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 v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373 (Fed. Cir. 2018) (quoting *Coach Servs. v. Triumph Learning*

LLC, 668 F.3d 1356, 1368 (Fed. Cir. 2012)). "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.

Applicant's mark is ZEN WAFFLES, and the cited mark is ZEN BAKERY, both in standard characters. Applicant rests on its rejected argument above that the "shared term is weak" and argues that "it is the additional wording [WAFFLES and BAKERY] that dominates the commercial impression of the mark."[20] In particular, Applicant contends WAFFLES "identifies a specific, discrete food product, typically understood as a breakfast item. In contrast, 'BAKERY' refers to a broad category of goods or a retail establishment offering a variety of baked items such as pastries, muffins, and breads."[21] Thus, argues Applicant, "differences in meaning and connotation can outweigh similarities in sound or appearance."[22] In addition, Applicant maintains that "ZEN WAFFLES conveys a modern, product-specific brand focused on a particular type of food, while ZEN BAKERY conveys a traditional bakery business offering a range of baked goods. The marks therefore create distinct commercial impressions that consumers would not confuse."[23]

[20] 4 TTABVUE 10 (Applicant's Brief).

[21] *Id.*

[22] *Id.* (citing *Blue Man Prods., Inc. v. Tarmann,* No. 91154055, 2005 TTAB LEXIS 338 (subsequent history omitted); *In re Sears, Roebuck & Co.,* No. 502919, 1987 TTAB LEXIS 84)).

[23] *Id.* at 10-11.

The Examining Attorney counters that both marks share the leading and dominant term ZEN, followed by disclaimed wording which contributes less to the commercial impression of the marks.[24] In response to Applicant's connotation argument, the Examining Attorney argues "a waffle is a baked good, and the connotations of the words are rather similar."[25] Further, unlike the caselaw relied upon by Applicant concerning different goods, "consumers are likely to think they can get ZEN WAFFLES from the same source that sells ZEN BAKERY baked goods."[26] The Examining Attorney also points to the fact that both marks are in standard characters and may be displayed similarly.[27]

Both the cited mark ZEN BAKERY and Applicant's mark ZEN WAFFLES begin with ZEN, creating strong visual and aural similarities between the marks. The marks differ in appearance and sound only by virtue of their other descriptive, if not generic, terms, which are BAKERY and WAFFLES, respectively. But because consumers are generally pre-conditioned to focus on the first word in any trademark, the shared term is particularly meaningful. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018) ("The identity of the marks' initial two words is particularly significant because consumers typically notice those words first."); *Palm*

[24] 6 TTABVUE 8, 9-10 (Examining Attorney's Brief).

[25] *Id.*

[26] *Id.* at 9.

[27] *Id.* at 10-11.

Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772, 396 F.3d 1369, 1372-73 (Fed. Cir. 2005).

This is especially true where, as here, the additional terms in both marks have little source-identifying significance. *In re Chatam Int'l*, 380 F.3d 1340, 1343 (Fed. Cir. 2004) ("Because ALE has nominal commercial significance, the Board properly accorded the term less weight in assessing the similarity of the marks under *DuPont*"); *In re Dixie Rests.*, 105 F.3d 1405, 1407 (Fed. Cir. 1997) (disclaimed or descriptive terms are generally considered less significant features of a mark).

Moreover, the Board has acknowledged the "penchant of consumers to shorten marks." *Iron Balls Int'l Ltd. v. Bull Creek Brewing, LLC,* No. 92079099, 2024 TTAB LEXIS 205, at *65 (citation omitted); *see also In re Abcor Dev. Corp.*, 588 F.2d 811, 815 (CCPA 1978) (Rich, J., concurring) ("the users of language have a universal habit of shortening full names from haste or laziness or just economy of words."). The shared distinctive term ZEN, therefore, is the dominant element in both marks and results in similar appearance and sound.

Also, with respect to appearance, both marks are in standard characters, and thus both "may be presented in any font style, size or color, including the same font, size and color," including "one that minimizes the differences or emphasizes the similarities between the marks." *Sabhnani v. Mirage Brands, LLC,* No. 92068086, 2021 TTAB LEXIS 464, *43-44 (cleaned up; citations omitted); *see also Citigroup Inc. v. Cap. City Bank Grp.*, 637 F.3d 1344, 1353 (Fed. Cir. 2011) (the "registrant is entitled to depictions of the standard character mark regardless of font style, size, or

color, not merely 'reasonable manners' of depicting its standard character mark.").

As to connotation, Applicant's arguments that consumers would view ZEN WAFFLES as a relating to a "specific, discrete" food item and "modern," as opposed to a ZEN BAKERY as relating to a "range" of foods and more "traditional" are not well taken or supported by evidence. The far more dominant term is the distinctive ZEN, and waffles and bakery products and pastries are not so different that they impart starkly different connotations to consumers.

We find that the marks ZEN BAKERY and ZEN WAFFLES, considered in their entireties, are similar in sight, sound, meaning, and overall commercial impression. Accordingly, the first *DuPont* factor favors a finding of likelihood of confusion.

C. The Goods

The second *DuPont* factor "considers the similarity or dissimilarity and nature of the goods as described in the involved application and cited registration … and contemplates whether the consuming public may perceive the respective goods as related enough to cause confusion about their source or origin." *In re Samsung Display Co.*, No. 90502617, 2024 TTAB LEXIS 258, at *6 (citations omitted).

"We begin with the identifications of … [goods] in the registration and application under consideration" which may, in some cases, show on their face that they are literally or legally identical, or otherwise intrinsically related. *In re OSF Healthcare Sys.*, No. 88706809, 2023 TTAB LEXIS 353, at *9-10 (citation omitted). Applicant's goods are "Waffles; Filled waffles; Frozen waffles; Waffle mixes; Protien [sic]-enriched waffles" and the goods in the cited registration are "bakery goods; muffins, cookies,

rolls, pastry; bakery goods for retail and wholesale distribution and consumption on or off the premises."

The Examining Attorney argues that the goods are legally identical by virtue of the identifications themselves – that is, that "bakery goods" and "pastry" encompass all goods of the type described, including applicant's more narrow identification for waffles.[28] But we find little evidence in the record that waffles, which are made in a waffle iron, are commonly considered a "bakery product" or a "pastry."[29]

However, it is well-settled that the goods do not have to be identical or even competitive to find a likelihood of confusion. *On-line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1086 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000). The goods of the applicant and the registrant need only be related in some manner and/or the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source. *Coach Servs.*, 668 F.3d at 1369. It also is sufficient for likelihood of confusion if relatedness is established for any item encompassed by the recitation of goods or services within a particular class in the application. *See, e.g., Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981).

[28] *See* 6 TTABVUE 13.

[29] *See, e.g.,* MERRIAM-WEBSTER DICTIONARY (defining pastry as: "a dough that is used to make pies and other baked goods and typically has a high fat content" and "usually sweet baked goods made of dough having a high fat content") (www.merriam-webster.com/dictionary/pastry, accessed October 7, 2026); *Id.* (defining "waffle" as "a crisp cake of batter baked in a waffle iron") (www.merriam-webster.com/dictionary/waffle, accessed October 7, 2026). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or regular fixed editions. *In re Leathernecks Motorcycle Club Int'l, Inc.*, No. 90498154, 2024 TTAB LEXIS 208, at *14 n.6.

The Examining Attorney offered two categories of third-party evidence to demonstrate that the goods in the application and cited registration (e.g. bakery products, pastries, waffles, waffle mixes) are related.

First, the record contains evidence of twelve third-party use-based registrations that identify goods in both the cited registration and application, including:[30]

- **BOWL & BASKET** (Reg. No. 705556) for bakery goods and waffles;
- **G4G GRAIN4GRAIN** (Reg. No. 5825134) bread and pastry, cookies, muffins, pastries; and waffles, frozen flour-free foods (namely waffles which are protein-enriched);
- **PASTA ZING** (Reg. No. 6630017) for pastry, pastries with fruit, rolls, bakery goods and dessert items (namely cakes, cookies, pastries); frozen flour-free foods (namely waffles which are protein-enriched);
- **9 SISTERS GOORMÁ** (Reg. No. 7031289) for bakery goods, baked goods (namely cookies, pastries, muffins, cinnamon rolls), bakery desserts; and waffles.
- **OUTER LIMIT DOUGHNUTS** (Reg. No. 6222802) for bakery goods and dessert items (namely cookies, pastries); and waffles, frozen flour-free foods (namely waffles which are protein-enriched).
- **BIRCH BENDERS** (Reg. No. 7170174) for baked goods (namely cookies, muffins), pastries; and waffles, frozen waffles, waffle mixes;
- **QUIKCAKES** (Reg. No. 7324170) for muffins, cookies, pastries; and frozen waffles, waffles;
- **WINTER PLUM CAKERY** (Reg. No. 7980592) for cookies, muffins, pastries, bakery goods and dessert items, rolls; and frozen flour-free foods (namely waffles which are protein-enriched);
- **TRADER JOE'S** (Reg. No. 2156879) for bakery goods, bread rolls, cookies, danish pastries, muffins, pastries; and waffles
- **KOJEL** (Reg. No. 5003772) for bakery products; bakery goods; pastry; cinnamon rolls, cookies, pastries; and dough mixes for waffles.

[30] February 2, 2026 Final Office Action at TSDR 41-70.

- **APLA and design** (Reg. No. 6471209) for bakery goods, pastries, cookies, muffins, cinnamon rolls, danish pastries, bakery goods, baked bakery desserts, frozen pastries; and waffles; and
- **B & CO. EST. 2021 and design** (Reg. No. 8079300) for bakery goods, muffins, cookies, pastries, cinnamon rolls; and waffles.

These third-party registrations covering goods from both the cited registration and Applicant's application are relevant to show that the goods are of a type that may emanate from a single source under one mark. *See In re Country Oven, Inc.*, No. 87354443, 2019 TTAB LEXIS 381, at *9-10.

Second, the record evidence confirms that third parties sell the goods of both Registrant and Applicant under the same mark:[31]

- **St. Pierre** – croissants, buns and rolls, and waffles;
- **Bedrock Bakers** – bagels, English muffins, and waffles;
- **Wolferman's Bakery** – pastries and baked goods (including muffins, cookies, rolls), and waffles;
- **Oakmont Bakery** – pastries (including muffins), bakery rolls, and waffles;
- **Thoms Bread** – bakery products (including muffins) and waffles; and
- **Blue Moon Bakery** – gluten free bakery products (including cookies, muffins); and waffle mix.

Evidence showing goods emanating from the same source under the same mark is relevant evidence of relatedness. *See, e.g., Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) ("[W]hether single company sells the goods and services of both parties … is relevant to a relatedness analysis[.]"); *In re Embiid*, No.

[31] *Id.* at TSDR 9-40.

88202890, 2021 TTAB LEXIS 168, at *39 (evidence of third parties offering goods of both applicant and registrant pertinent to relatedness of the goods).

Applicant does not address the Examining Attorney's evidence, instead arguing that the Board should consider actual differences between the goods:

> The record establishes that Applicant and Registrant operate in fundamentally different market segments. Applicant offers protein-enriched waffles that are marketed as functional, health-oriented breakfast products. These goods are packaged, nutritionally formulated, and sold primarily through direct-to-consumer e-commerce channels targeting fitness-conscious consumers.
>
> By contrast, Registrant operates as a traditional bakery offering fresh baked goods, muffins, cookies, and pastries, distributed through wholesale grocery channels. Registrant does not offer waffles of any kind.
>
> These differences extend beyond product type to include formulation, purpose, storage, packaging, and consumer expectations. A consumer seeking a high-protein, packaged waffle product would not perceive that product as emanating from the same source as a traditional bakery offering fresh pastries.[32]

Applicant's argument based on actual products (i.e. pre-packaged, health-oriented versus traditional bakery offering fresh pastries) is not persuasive because we analyze the *DuPont* factors based on the identifications present in the application and registration. We cannot read limitations into identifications of goods based on either argument or evidence of actual use. *See, e.g., Embiid*, 2021 TTAB LEXIS 168, at *37-38 (Board may not import restrictions into identification based on real-world conditions); *In re Bercut-Vandervoort & Co.*, No. 73448806, 1986 TTAB LEXIS

[32] 4 TTABVUE 11 (Applicant's Brief).

124, at *5-6 (applicant may not restrict the scope of the goods identified in the application or cited registration by argument or extrinsic evidence showing what those goods are). The identifications in the application and cited registration are not limited; thus, we must consider all types of the identified goods, including all waffles, and both fresh and pre-packaged bakery products and pastries.

The Examining Attorney's third-party registration and use evidence is persuasive and uncontroverted. In view of the foregoing, we find that the goods identified in the application are related to the goods identified in the cited registration. *See, e.g., In re C.H. Hanson Co.*, No. 77983232, 2015 TTAB LEXIS 357, at *17 (six websites showing sale of the subject goods, coupled with five third-party registrations of marks for them, "support the conclusion that the goods are related"). The second *DuPont* factor favors a finding of likelihood of confusion.

D. Channels of Trade and Conditions of Purchase

The third *DuPont* factor concerns the "similarity or dissimilarity of established, likely-to-continue trade channels." *Samsung Display*, 2024 TTAB LEXIS 258, at *17 (quoting *DuPont*, 476 F.2d at 1361). The fourth *DuPont* factor concerns the conditions under which the goods are likely to be purchased, e.g., whether on impulse or after careful consideration. *DuPont*, 476 F.2d at 1361.

The Examining Attorney argues that the same record evidence relied upon to show relatedness of the goods above (i.e., third-party registrations and use) also demonstrates "that the general type of goods identified in the application and registrations are … marketed/sold to the same consumers through the same trade

channels."[33] In addition, the record evidence shows that goods are "low-cost, every-day consumer items [which] are generally more likely to be confused as to the source of the goods."[34]

Applicant responds that its goods are "marketed through modern e-commerce platforms and wellness-focused channels, while Registrant's goods are encountered in bakery sections of grocery stores."[35] Further, Applicant contends its products are "marketed to health-conscious consumers who are attentive to nutritional content and willing to pay premium prices. Such consumers exercise a higher degree of care in their purchasing decisions, further reducing any likelihood of confusion."[36]

Neither the cited registration nor the application contains any limitations on the channels of trade or classes of purchasers. As such, Applicant's and Registrant's goods presumptively move in all normal trade channels and to all consumers that purchase such goods. *See Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1373 (Fed. Cir. 2013). For this reason, the evidence of real-world trade channels and consumers relied on by Applicant are irrelevant. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014) ("An application with 'no restriction on trade channels' cannot be 'narrowed by testimony that the applicant's use is, in fact, restricted to a particular class of purchasers.'") (citation omitted).

[33] 6 TTABVUE 17.

[34] *Id.* at 17-18.

[35] 4 TTABVUE 12.

[36] *Id.*

We instead look to the record to ascertain the normal trade channels and consumers for bakery goods, pastries, and waffles. The record shows that these are general consumer goods sold through the same online and brick and mortar retail stores.[37] The Examining Attorney also made of record evidence showing that, despite Applicant's arguments to the contrary, "some of registrant's good [sic] are ALSO packaged and sold as wellness foods that appeal to health conscious consumers."[38] Additionally, the evidence shows that bakery goods and pastries may be pre-packaged and sold via the Internet,[39] and waffles may be sold fresh.[40] The goods may be encountered in the same retail outlets by the same consumers, and thus the channels of trade overlap.

Further, the record shows that bakery goods, pastries, and waffles are low-cost food items.[41] "When products are relatively low-priced and subject to impulse buying, the likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care." *Recot*, 214 F.3d at 1329; *accord Palm Bay*, 396 F.3d at 1376.

We find that the third and fourth *DuPont* factors favor a finding of likelihood of confusion.

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[37] February 2, 2026 Final Office Action at TSDR 9-36.

[38] 6 TTABVUE 16 (citing February 2, 2026 Final Office Action at TSDR 71-74) ("Zen Bakery Blueberry Oat Energy Bar" and "Zen Bakery Apple Cranberry Fiber Cake").

[39] February 2, 2026 Final Office Action at TSDR 17-18 (Bedrock Bakers), 19-22 (Wolferman's Bakery), 71-74 (Zen Bakery).

[40] *Id.* at TSDR 35-36 (Oakmont Bakery).

[41] *Id.* at TSDR 15-28, 35-40 (Bedrock Bakers, Wolferman's Bakery, Oakmont Bakery, Blue Moon Bakery).

E. Lack of Actual Confusion

Applicant argues, relevant to the seventh and eighth *DuPont* factors, that "the absence of actual confusion, despite concurrent marketplace presence, provides further support for reversal. Both parties' marks have been used in commerce, including through online channels, providing ample opportunity for confusion to arise if it were likely. Yet there is no evidence of any actual confusion."[42]

The seventh *DuPont* factor requires us to consider evidence pertaining to "the nature and extent of any actual confusion," while the eighth factor requires us to consider evidence pertaining to "the length of time during and conditions under which there has been concurrent use without evidence of actual confusion." *DuPont*, 476 F.2d at 1361.

An appeal of a refusal to register a mark is an ex parte proceeding. That means the owner of the cited registration is not a party and we simply cannot know whether the Registrant has evidence of actual confusion. *Majestic Distilling*, 315 F.3d at 1317 ("uncorroborated statements of no known instances of actual confusion are of little evidentiary value" in an ex parte appeal). In addition, Applicant failed to make any evidence of record to show there has been a significant opportunity for actual confusion to have occurred; that is, the kind of marketplace circumstances that can lead to actual confusion. *Cf. Guild Mortg.*, 912 F.3d at 1380-81 (suggesting that evidence of concurrent use of the two marks for a particularly long period of time (40

[42] 4 TTABVUE 12.

years) in the same geographic market without any evidence of actual confusion may be probative under the eighth *DuPont* factor, even in an ex parte appeal).

For these reasons, we find the seventh and eighth *DuPont* factors neutral.

III. Balancing the Factors on Likelihood of Confusion

Finally, we must weigh and balance the findings we have made on the *DuPont* factors for which there has been evidence and argument in this appeal. *Charger Ventures*, 64 F.4th at 1381 ("[I]t is important ... that the Board ... weigh the *DuPont* factors used in its analysis *and* explain the results of that weighing.").

In this case, the first and second *DuPont* factors – which we consider most important – weigh in favor of likelihood of confusion given the similarity of the marks and similarity of the goods. *i.am.symbolic*, 866 F.3d at 1322. The third and fourth factors also weigh in favor of likelihood of confusion. The fifth, sixth, seventh, and eighth factors are neutral on this record. No factors weigh against likelihood of confusion. We conclude that confusion is likely.

Decision

The refusal to register application Serial No. 99185689 is **affirmed** under Trademark Act Section 2(d).