

This Opinion is Not a  
Precedent of the TTAB

Mailed: October 3, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*Flowers Bakeries Brands, LLC*

*v.*

*OWN Your Hunger Inc.*

—  
Opposition No. 91278157

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Theodore H. Davis Jr. of Kilpatrick Townsend & Stockton LLP,  
for Opposer Flowers Bakeries Brands, LLC.

Brittany Faye Meyer-Belnap, for Applicant OWN Your Hunger Inc.

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Before Johnson, Allard, and Brock,  
Administrative Trademark Judges.

Opinion by Johnson, Administrative Trademark Judge:<sup>1</sup>



OWN Your Hunger Inc. (“Applicant”) seeks to register the standard character mark WONDERSPREAD (“Applicant’s Mark”) on the Principal Register for “Nut butters” (“Applicant’s Goods”) in International Class (“Class”) 29.<sup>2</sup>

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<sup>1</sup> The citation form in this opinion is in a form provided in the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion employs citation to the Westlaw (WL) database unless noted otherwise. Practitioners should adhere to the guidance set forth in TBMP § 101.03.

<sup>2</sup> Application Serial No. 90805804 was filed on July 1, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C § 1051(a), based upon Applicant’s claim of first use of the mark anywhere and in

In its Notice of Opposition,<sup>3</sup> Flowers Bakeries Brands, LLC (“Opposer” or “Flowers”) pleads prior use and registration of the following WONDER marks (collectively, the “WONDER Marks”):

- (1) Registration No. 215188 (“188 Registration”) for the typed<sup>4</sup> mark WONDER, for “bread,” in Class 30;<sup>5</sup>
- (2) Registration No. 1665998 for the composite mark , for “bread, rolls, and buns,” in Class 30;<sup>6</sup>
- (3) Registration No. 1874079 for the composite mark , for “bakery products,” in Class 30;<sup>7</sup> and
- (4) Registration No. 4185108 (“108 Registration”) for the standard character mark WONDER, for “bakery goods,” in Class 30.<sup>8</sup>

As grounds for the opposition, Opposer alleges that use of Applicant’s Mark would be likely to cause confusion with Opposer’s WONDER Marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). In its answer, Applicant denies the salient allegations of the Notice of Opposition.

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commerce at least as early as April 1, 2021.

<sup>3</sup> Notice of Opposition, 1 TTABVUE. Citations to the record are to the publicly available documents in TTABVUE, the Board’s electronic docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 2014 WL 343270, at \*2 n.6 (TTAB 2014). The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry, if applicable. Opposer’s Corrected Trial Brief is located at 30 TTABVUE and Opposer’s Corrected Confidential Trial Brief is located at 31 TTABVUE.

Opposer’s Reply Brief is located at 33 TTABVUE, “Applicant’s Answer To Notice of Opposition” is located at 4 TTABVUE, and Applicant’s Trial Brief is located at 32 TTABVUE.

<sup>4</sup> A “typed mark” is the legal equivalent of a standard character mark. *See In re Vitterra Inc.*, 671 F.3d 1358, 1363 n.2 (Fed. Cir. 2014). We use “word mark” or “standard character mark” to refer to typed marks.

<sup>5</sup> Registered July 13, 1926; renewed.

<sup>6</sup> Registered Nov. 26, 1991; renewed.

<sup>7</sup> Registered Jan. 17, 1995; renewed.

<sup>8</sup> Registered Aug. 7, 2012; renewed.

To prevail on its Trademark Act Section 2(d) claim, Opposer must prove, by a preponderance of the evidence, its entitlement to a statutory cause of action, priority, and likelihood of confusion. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945-46, 951 (Fed. Cir. 2000).

**Focus on Registration Numbers 215188 and 4185108**

We focus our likelihood of confusion analysis on the '188 Registration for the typed mark, WONDER, for "bread" in Class 30, and on the '108 Registration for the standard character mark WONDER, for "bakery goods" in Class 30, because these marks are subsumed by Applicant's Mark, which is in standard characters. If we find a likelihood of confusion between Applicant's Mark and the marks of Opposer's '188 and '108 Registrations (collectively, "Opposer's Mark"), we need not find it as to Opposer's other pleaded registrations. Conversely, if we do not find a likelihood of confusion between Applicant's Mark and the Opposer's Mark, we would not find it as to Opposer's other pleaded registrations. *See New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 WL 2853282, at \*11 (TTAB 2020) (confining Section 2(d) analysis to most similar pleaded mark); *In re Max Cap. Grp. Ltd.*, 2010 WL 22358, at \*2 (TTAB 2010) (same).

The case is fully briefed. Having considered the evidentiary record, Opposer's arguments, and applicable authorities, we find that Opposer has carried its burden with respect to its likelihood of confusion claim. For the reasons set forth below, we sustain the opposition.

**I. The Evidentiary Record**

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's involved application. Additional evidence

introduced into the record is listed below.

### **A. Opposer's Evidence**

1. Testimonial Declaration of Ashley Smith (15 TTABVUE — marked confidential), the Wonder Brand Manager of Opposer's parent corporation, Flowers Bakeries, LLC;
2. Exhibits A-B to the Testimonial Declaration of Ashley Smith (16 TTABVUE);
3. Exhibit C (Part 1) to the Testimonial Declaration of Ashley Smith (17 TTABVUE);
4. Exhibit C (Part 2) and Exhibit D to the Testimonial Declaration of Ashley Smith (20 TTABVUE);
5. Exhibit E to the Testimonial Declaration of Ashley Smith (18 TTABVUE);
6. Exhibits F-J to the Testimonial Declaration of Ashley Smith (19 TTABVUE — marked confidential);
7. Opposer's First Notice of Reliance (Official Records) (21 TTABVUE);
8. Opposer's Second Notice of Reliance (Printed Publications) (14 TTABVUE);
9. Opposer's Third Notice of Reliance (Printed Publications), Exhibits 1-30 (11 TTABVUE);
10. Opposer's Fourth Notice of Reliance (printouts from Applicant's Website and Instagram posts) (13 TTABVUE); and
11. Opposer's Fifth Notice of Reliance (Applicant's Discovery Responses) (12 TTABVUE).

### **B. Applicant's Evidence<sup>9</sup>**

1. Affidavit of Ruz Safai (with Exhibits A-C) (23 TTABVUE), Applicant's Founder and Chief Executive Officer; and
2. Notice of Reliance (with Exhibits 1-2, consisting of Opposer's Responses to First Set of Interrogatories and Opposer's Responses to First Set of Admission) (22 TTABVUE).

### **C. Opposer's Rebuttal Testimony**

1. Rebuttal Declaration of Ashley Smith (25 TTABVUE; 26 TTABVUE — marked confidential).

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<sup>9</sup> Applicant, in its trial brief, incorrectly lists the “[f]iling of Opposition 91277665 by ‘The Wonderful Company,’ co-opposer for U.S. Trademark Application Serial No. 9080580 [sic] for the WONDERSPREAD mark,” as evidence that is automatically of record pursuant to Trademark Rule 2.122(b)(1). (32 TTABVUE 6, Section II.B.2). Trademark Rule 2.122(b)(1) states, in relevant part, “[t]he file ... **of the application against which a notice of opposition is filed** ... forms part of the record of the proceeding without any action by the parties and reference may be made to the file for any relevant and competent purpose in accordance with paragraph (b)(2) of this section.” (emphasis added). To be clear, the file of Opposition No. 91277665 is **not** of record here.

## II. The Parties and Their Marks

### A. Opposer

Opposer Flowers Bakeries Brands, LLC is a Delaware limited liability company with a business address in Thomasville, Georgia that owns and licenses a variety of trademarks, including the WONDER Marks, for use in connection with food items, including “bread” and “bakery goods” (“Opposer’s Goods”). (1 TTABVUE 1, 4; 15 TTABVUE 6 ¶ 6).

In 1921, Opposer’s predecessor began offering for sale and selling bread and other bakery goods under the WONDER mark nationally. (1 TTABVUE 4 ¶ 3). In 2013, Opposer acquired the WONDER Marks. (15 TTABVUE 6 ¶ 7). Since that time, Opposer has engaged in much widespread, extensive advertising and marketing activities to promote the goods sold under its WONDER Marks. (*See generally* 15 TTABVUE 7-68). Opposer alleges that as a result, the WONDER Marks have “acquired a high degree of recognition, fame, and distinctiveness” and have become “famous as a symbol of the quality of goods” offered thereunder. (1 TTABVUE 6 ¶ 8).



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<sup>10</sup> 14 TTABVUE 14.

## B. Applicant

Applicant OWN Your Hunger Inc. owns Application Serial Number 90805804, WONDERSPREAD, for “Nut butters” in Class 29, in which it identifies itself as a Canadian corporation with a business address in Calgary, Alberta, Canada. Applicant has sold its nut butters bearing the WONDERSPREAD mark in the United States since April 1, 2021. (12 TTABVUE 6 ¶ 4).



11

## III. Entitlement to a Statutory Cause of Action<sup>12</sup>

Entitlement to a statutory cause of action is a requirement in every inter partes case.

*Austl. Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1373-74

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<sup>11</sup> Safai Aff., 23 TTABVUE 8.

<sup>12</sup> Opposer makes an argument about “Article III standing” in its brief. See 30 TTABVUE 35. Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063 and 1064, under the rubric of “standing.” We now refer to this inquiry as “entitlement to a statutory cause of action.” Despite the change in nomenclature, our prior decisions and those of the U.S. Court of Appeals for the Federal Circuit interpreting “standing” under Sections 13 and 14 of the Trademark Act remain applicable. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021); *Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 WL 6938378, at \*1 (TTAB 2020).

(Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (2021) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A party in the position of plaintiff may oppose registration of a mark when doing so is within its zone of interests and it has a reasonable belief in damage that is proximately caused by registration of the mark. *Corcamore*, 978 F.3d at 1303 (holding that the test in *Lexmark* is met by demonstrating: (1) a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement; and (2) a reasonable belief in damage proximately caused by registration of the mark).

Here, Opposer's ownership of pleaded registrations for its WONDER Marks and its submission, during trial, of USPTO Trademark Status & Document Retrieval ("TSDR") printouts showing the current status and title of the pleaded registrations,<sup>13</sup> support Opposer's plausible likelihood of confusion claim against the involved application, demonstrate Opposer's real interest in this proceeding, and a reasonable basis for its belief of damage, which Applicant does not challenge. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1377 (Fed. Cir. 2012). Opposer has thus established its statutory entitlement to bring this opposition proceeding.

#### **IV. Priority**

Because Opposer has established ownership and validity of its pleaded registrations and Applicant did not file a counterclaim to cancel the pleaded registrations, priority is not at issue with respect to Opposer's registered marks and the goods identified therein. *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 2016 WL 3915987, at \*4 (TTAB 2016) (citing

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<sup>13</sup> 21 TTABVUE 9-47.

*King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1402 (CCPA 1974)).

## V. Likelihood of Confusion

Section 2(d) of the Trademark Act provides that a mark must be refused registration if it “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive ... .” 15 U.S.C. § 1052(d).

To determine whether there is a likelihood of confusion between the marks under Section 2(d), we analyze the evidence and arguments under the *DuPont* factors. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361-62 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument, *In re Guild Mortg. Co.*, 912 F.3d 1376, 1378-81 (Fed. Cir. 2019), but “[n]ot all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 998 (Fed. Cir. 2020); *see also In re Shell Oil Co.*, 992 F.2d 1204, 1206 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). “[E]ach case must be determined on the basis of its own particular facts.” *Finn v. Cooper’s Inc.*, 292 F.2d 555, 557 (CCPA 1961) (citation omitted).

Two key considerations are the similarity of the marks and the relatedness of the goods. *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164 (Fed. Cir. 2002) (citations omitted). The proper “focus is on the recollection of the average purchaser, who normally retains a general, rather than a specific impression of trademarks.” *L’Oreal S.A.*



*v. Marcon*, 2012 WL 1267956, at \*5 (TTAB 2012) (citation omitted); *see also Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 1007 (CCPA 1971) (The court is required to consider, “among other things, the fallibility of memory over a period of time, not merely whether one can distinguish the marks at a given moment.”).

#### **A. The Similarity or Dissimilarity of the Marks**

First we address the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. 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*, 2018 WL 2734893, at \*5 (TTAB 2018) (quoting *In re Davia*, 2014 WL 2531200, at \*2 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732 (CCPA 1968). “The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373 (Fed. Cir. 2018).

We focus on the recollection of the average consumer; here, an ordinary consumer who normally retains a general rather than a specific impression of trademarks, and who purchases “bread,” “bakery goods,” and “nut butters.” *Geigy Chem.*, 438 F.2d at 1007; *L’Oreal*, 2012 WL 1267956, at \*5.

Opposer’s Mark is WONDER, and Applicant’s Mark begins with “WONDER-.” In appearance, the parties’ marks are identical in-part because Opposer’s Mark is entirely subsumed by Applicant’s Mark. “Likelihood of confusion has often been found where the

entirety of one mark is incorporated within another.” *Hunter Indus., Inc. v. Toro Corp.*, 2014 WL 1649332, at \*11 (TTAB 2014); *see also In re Mighty Leaf Tea*, 601 F.3d 1342, 1347-48 (Fed. Cir. 2010) (applicant’s mark ML found similar to opposer’s mark ML MARK LEES both for personal care and skin products); *In re U.S. Shoe Corp.*, 1985 WL 72046, at \*3 (TTAB 1985) (CAREER IMAGE for women’s clothing stores and women’s clothing likely to cause confusion with CREST CAREER IMAGES for uniforms including items of women’s clothing).

We consider “WONDER” to be the dominant element of Applicant’s Mark because it is “most likely to be impressed upon the mind of a purchaser and remembered.” *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 1988 WL 252340, at \*3 (TTAB 1988). *See also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005) (consumers are generally more inclined to focus on the first word, prefix, or syllable in a trademark); *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985) (“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”). As to the suffix “-SPREAD,” Applicant describes it as “the descriptive and suggestive portion of the mark that it [sic] symbolizes a spreadable product.” (32 TTABVUE 11). We agree.

Applicant argues that the marks differ when spoken, since the six letters that comprise the suffix “-SPREAD” produce a different sound in its two syllable mark, WONDERSPREAD. (32 TTABVUE 11). We acknowledge Applicant’s arguments. Even though there is no truly correct pronunciation of an entire mark since consumers may pronounce a mark differently than intended by the mark owner, *see In re Viterra*, 671 F.3d

at 1367 (citation omitted), the single element of Opposer's Mark and the dominant element of Applicant's Mark are identical. Given the propensity of consumers to shorten marks, we find that the marks at issue here are similar in sound. *See, e.g., Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1571 (Fed. Cir. 1983) ("Although the record does not indicate that applicant's business is commonly referred to as 'Giant,' it does indicate that people have called it by that name, omitting the word 'Hamburgers.' Thus, in a conversation between two consumers in opposer's area about a place of business called 'Giant,' there likely would be confusion about which 'Giant' they were talking about."); *Sabhnani v. Mirage Brands, LLC*, 2021 WL 6072822, at \*18 (TTAB 2021) ("The similarity in sound will be greater if consumers engage in 'the penchant of consumers to shorten marks ... .") (quoting *In re Bay State Brewing Co.*, 2016 WL 1045677, at \*4 (TTAB 2016)); *Big M Inc. v. U. S. Shoe Co.*, 1985 WL 71976, at \*3 (TTAB 1985) ("[W]e cannot ignore the propensity of consumers to often shorten trademarks ... .").

As to connotation, "WONDER" is defined as "exciting amazement or admiration."<sup>14</sup> Applicant describes the "WONDER" element in WONDERSPREAD similarly, as conveying "a sense of awe regarding the product's qualities ... ." (32 TTABVUE 11). And, as mentioned above, we agree that "-SPREAD" is descriptive of, if not generic for, Applicant's Goods: "SPREAD" is defined as "something spread on or over a surface: such

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<sup>14</sup> MERRIAM-WEBSTER DICTIONARY (2024) (<https://www.merriam-webster.com/dictionary/wonder>) (last accessed Sept. 26, 2024). The Board may take judicial notice of dictionary definitions, including definitions from online dictionaries which exist in printed format or have fixed regular editions. *In re Cordua Rests. LP*, 2014 WL 1390504, at \*2 n.4 (TTAB 2014) (citations omitted), *aff'd*, 823 F.3d 594 (Fed. Cir. 2016).

as a food to be spread (as on bread or crackers),”<sup>15</sup> and “butter” is defined as “a creamy food spread *especially*: one made of ground roasted nuts.”<sup>16</sup>

When discussing the first *DuPont* factor, Applicant cites a nonprecedential Board decision in support of its argument that the shared “WONDER” element of both parties’ marks is “significantly diluted and blurred,”<sup>17</sup> making confusion unlikely. ((See 32 TTABVUE 11-12) (citing generally *Sunkist Growers, Inc. v. Intrastate Distribs., Inc.*, 2023 WL 6442602 (TTAB 2023))). Nonprecedential decisions are not binding on the Board, but they may be cited and considered for whatever persuasive value they may have. *In re tapio GmbH*, 2020 WL 6938377, at \*9 n.30. (TTAB 2020). Despite such designation, Applicant’s analogy to *Sunkist Growers* is inapposite; in that decision, the Board focused on two marks different from those at issue here and found “the commercial impression engendered by [applicant’s mark] KIST is **significantly different** from the commercial impression created by [opposer’s mark] SUNKIST, and the appearance, sound and connotation are only superficially similar.” 2023 WL 6442602, at \*12 (emphasis added). In addition, the Board found a lack of actual confusion between the parties’ marks over a 23 year time period that weighed against finding a likelihood of confusion. *Id.* at \*14.

We find that in their entirety, WONDER and WONDERSPREAD are in-part identical in appearance; similar in sound, because they share the element “WONDER”;

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<sup>15</sup> MERRIAM-WEBSTER DICTIONARY (2024) (<https://www.merriam-webster.com/dictionary/spread>) (last accessed Sept. 26, 2024). We take judicial notice of this definition.

<sup>16</sup> MERRIAM-WEBSTER DICTIONARY (2024) (<https://www.merriam-webster.com/dictionary/butter>) (last accessed Sept. 26, 2024). We take judicial notice of this definition.

<sup>17</sup> Opposer did not plead a claim for dilution. It is not an issue in this proceeding. To the extent Applicant is asserting weakness of the element “WONDER,” we will address that argument later in this opinion.

and, considering the aforementioned definition of “WONDER,” along with Applicant’s explanation of the laudatory meaning of “WONDER-” in WONDERSPREAD, we also find that the marks are very similar in connotation. As a result, we find that the overall commercial impression of the WONDER and WONDERSPREAD marks is very similar.

**B. The Similarity or Dissimilarity and Nature of the Goods**

When analyzing the second *DuPont* factor regarding the similarity (or relatedness) of the goods, 476 F.2d at 1361, we look to the identifications in the application and the pertinent registrations, i.e., the ’188 Registration and the ’108 Registration. *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014). It is sufficient that the goods are related in some manner, or that conditions and activities surrounding the marketing of these goods are such that they would, or could, be encountered by same persons under circumstances that could, because of similarities of the marks used with them, give rise to the mistaken belief that the goods originate from, or are in some way associated with, the same source. *See Coach Servs.*, 668 F.3d at 1369 (citing *7-Eleven, Inc. v. Wechsler*, 2007 WL 1431084, at \*10 (TTAB 2007)); *Edwards Lifesciences v. VigiLanz Corp.*, 2010 WL 1514315, at \*11 (TTAB 2010). Where, as here, the marks are in-part identical, the relationship between the goods need not be as close to support a finding of likelihood of confusion as would be required if there were more meaningful differences between the marks. *See, e.g., In re Concordia Int’l Forwarding Corp.*, 1983 WL 51828, at \*2 (TTAB 1983) (“[T]he greater the degree of similarity in the marks, the lesser the degree of similarity that is required of the products or services on which they are being used in order to support a holding of likelihood of confusion.” The marks at issue were the CONCORDIA composite mark and CONCORDIA LINE.).

For ease of reference, Applicant's Goods are identified as "Nut butters." Opposer's '188 Registration identifies "bread," and Opposer's '108 Registration identifies "bakery goods."


To demonstrate relatedness, Opposer offered the confidential declaration testimony of Ms. Ashley Smith, the Wonder Brand Manager of Opposer's parent corporation.<sup>18</sup> She testified that one of the primary reasons consumers purchase Applicant's WONDER bread is to affix spreads to them. (15 TTABVUE 40 ¶ 32). In support of her testimony, Ms. Smith cited marketing studies that "consistently confirm that nut butter sandwiches are among the top uses to which consumers put bread such as that sold under the WONDER mark." (*Id.*; see Ex. J, 19 TTABVUE 230-31, 233, 235-36, 249, 251-52, 270, 274, 290, 293). Ms. Smith also testified that as part of a partnership, Opposer "teamed up with the producer of SKIPPY peanut butter to donate enough WONDER-branded bread and peanut butter to make 25,000 sandwiches for a food bank." (15 TTABVUE 62 ¶ 45).


Evidence of relatedness may also include active, use-based third-party registrations of the same mark for the respective types of goods and Internet printouts showing the respective goods offered by third parties under the same mark. See *In re Country Oven, Inc.*, 2019 WL 6170483, at \*2 (TTAB 2019).

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<sup>18</sup> Ms. Smith's entire declaration at 15 TTABVUE is designated as "confidential." However, not all of her testimony is truly "confidential." "Board proceedings are designed to be publicly available and the improper designation of materials as confidential thwarts that intention. It is more difficult to make findings of fact, apply the facts to the law, and write decisions that make sense when the facts may not be discussed. The Board needs to be able to discuss the evidence of record, unless there is an overriding need for confidentiality, so that the parties and a reviewing court will know the basis of the Board's decisions." *Edwards Lifesciences*, 2010 WL 1514315, at \*2. Because of this overdesignation, we will not be bound by Opposer's "confidential" designation in rendering our decision; we will treat only testimony and evidence that is truly confidential, commercially sensitive, or not publicly available as confidential.

Applicant’s website and Instagram account feature photographs of Applicant’s spreads affixed to breads such as those sold by Applicant under the WONDER mark. (15 TTABVUE 71 ¶ 62). Representative photos are displayed below:

Link	<a href="#">WONDERSPREAD Hazelnut Spread – OWN Your Hunger</a>
Screenshot	 <p>Made with 33% Hazelnuts. Premium Callebaut® Cocoa. Experience the unbelievable flavor and texture, with only half the calories of leading brands (actual photo of spread shown). <b>100 calories, 1g Sugar /2tbsp</b></p>

Link	<a href="#">OWN Your Hunger (@ownyourhunger) • Instagram photos and videos</a>
Screenshot	 <p>A message to all our wonderful fans: We are coming back March 21, 2021</p>

19

Link	<a href="#">OWN Your Hunger (@ownyourhunger) • Instagram photos and videos</a>
Screenshot	 <p>tell us why you love peanut butter. two random commenters will win something fun.</p>

20

<sup>19</sup> Smith Decl., 15 TTABVUE 69; *see also* 13 TTABVUE 20, 28 (pages from Applicant’s Instagram account).

<sup>20</sup> Smith Decl., 15 TTABVUE 70; *see also* 13 TTABVUE 20 (from Applicant’s Instagram account).

To further establish relatedness of the parties' goods, Opposer submitted evidence displaying recipes from *The Wonder Bread Cookbook*, which call for use of Applicant's WONDER bread with, inter alia, peanut butter,<sup>21</sup> and photos from its social media accounts displaying WONDER bread being used with nut butter spreads, as shown below:



22

<sup>21</sup> 14 TTABVUE 57-59 (recipe for "Grilled Peanut Butter, Jelly, and Wonder"); 14 TTABVUE 65 (recipe for "Wonder Trail Mix Sandwich").

<sup>22</sup> Smith Decl., 15 TTABVUE 46 (from Applicant's Instagram account).





23

Opposer also adduced twenty-six TSDR records of active, third-party registrations identifying bread and/or bakery goods, and nut butters such as peanut butter and

<sup>23</sup> *Id.* at 44 ¶ 33 (from Opposer’s Facebook account).

hazelnut spread.<sup>24</sup> The mere fact that these registrations exist, by itself, is insufficient to show marketplace use of the marks or consumers' familiarity with them, because "consumers are generally unaware of what resides on the register." *In re Packaged Ice Inc.*, 1999 WL 248957, at \*3 (TTAB 1999). *See also Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 1005 (CCPA 1973) ("in the absence of any evidence showing the extent of use of any of such marks or whether any of them are now in use, they [the third-party registrations] provide no basis for saying that the marks so registered have had, or may have, any effect at all on the public mind ...") (brackets in original). But they do "have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark." *Made in Nature v. Pharmavite*, 2022 WL 2188890, at \*24 (TTAB 2022).

In turn, Applicant posits that the parties' goods are not related for a variety of reasons, such as their being in "distinctly different categories of IC 029 and IC 030,"<sup>25</sup> (32 TTABVUE 12), and the conjoint use of its nut butters not being "reasonably

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<sup>24</sup> *See* 21 TTABVUE 89-478 (Ex. 2): BEST CHOICE, Reg. No. 1640147; HANNAFORD, Reg. No. 2010939; HANNAFORD (composite mark), Reg. No. 2218522; GIANT EAGLE, Reg. No. 2630539; WILD OATS, Reg. No. 2990840; design mark, Reg. No. 4183451; ROLAND (composite mark), Reg. No. 4801912; MEIJER, Reg. No. 5058081; design mark, Reg. No. 5653029; LUCKY EATS, Reg. No. 5765692; design mark, Reg. No. 5814574; HANNAFORD (composite mark), Reg. No. 5907222; FORTALEZA, Reg. No. 5915380; BRAUM'S, Reg. No. 5917747; ROLAND, Reg. No. 5936359; LOVE REGARDLESS (composite mark), Reg. No. 5962349; ADD FLAVOR TO LIFE FOOD CLUB SINCE 1945 (composite mark), Reg. No. 6025448; GREAT VALUE (composite mark), Reg. No. 6050843; THAT'S SMART (composite mark), Reg. No. 6128204; THAT'S SMART!, Reg. No. 6128206; FRESH THYME FARMERS MARKET (composite mark), Reg. No. 6245721; 365, Reg. No. 6576897; IMPERFECT FOODS (composite mark), Reg. No. 6868751; 365 WHOLE FOODS MARKET, Reg. No. 6895867; 365 (stylized), Reg. No. 6969384; NATURE'S PROMISE ORGANIC, Reg. No. 7010170.

<sup>25</sup> Applicant proffered, at Exhibit B to the Safai Affidavit, TSDR records displaying marks registered for nuts, nut butters, and processed nuts, to show that these goods are, allegedly, identified in "distinct product categories." *See Safai Aff.*, 23 TTABVUE 4 ¶ 12. Nuts and processed nuts are irrelevant here. We have not considered the registrations.

considered with a product that has the ubiquities [sic] nature of bread that can, and is, commonly used with almost [sic] ingredient imaginable.” (*Id.*).

First, “[t]he authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.” *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990). And the question of proper classification of goods is procedural, not substantive, in nature, for the convenience of the USPTO, and has no bearing on the relatedness of the goods or on the question of likelihood of confusion. *In re Detroit Athletic Co.*, 903 F.3d 1297, 1307 (Fed. Cir. 2018); *see also* 15 U.S.C. § 1112.

Opposer’s Goods are “bread” and “bakery goods.” As discussed above, Opposer submitted copies of twenty-six active USPTO records of nut butters and bread and/or bakery goods identified in the same trademark registration. Ms. Smith, the Wonder Brand Manager, testified that one of the primary reasons consumers purchase Applicant’s WONDER bread is to affix spreads such as peanut butter or hazelnut spread to them, and she corroborated her testimony with results of marketing studies. Ms. Smith also submitted photographs, from Applicant’s website and Instagram account, of Applicant’s spreads affixed to breads such as Applicant’s WONDER bread. Applicant also admits that the photos displayed on its Instagram page show WONDERSPREAD being used on bread. (12 TTABVUE 13 ¶ 5). And, Opposer submitted other evidence displaying complementary use of bread and nut butters as well. Consequently, we find that the parties’ goods are related. *See, e.g., In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567-68

(Fed. Cir. 1984) (“bread” and “cheese” found to be complementary, and thus, related; record showed both were used on sandwiches, traveled in same channels of trade, and were offered to the same purchasers).<sup>26</sup>

### **C. The Channels of Trade; Purchasing Conditions and Standard of Care**

Next, we consider the third *DuPont* factor, “the similarity or dissimilarity of established, likely-to-continue trade channels,” 476 F.2d at 1361, and the fourth *DuPont* factor, “[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *Id.* When analyzing the third *DuPont* factor, we consider whether the identifications of goods for either party contain any restrictions as to channels of trade or classes of purchasers. *See Coach Servs.*, 668 F.3d at 1370. Here, there are none, so we must presume that the respective goods identified in Opposer’s registrations and Applicant’s application travel in the ordinary channels of trade for the parties’ respective goods and that they are available to all usual purchasers for these goods. *Id.* (citing *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1360-61 (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.”)).

Ms. Smith testified that Opposer’s Goods bearing the WONDER mark are sold across United States in Opposer’s proprietary thrift stores, Walmart, Costco, Sam’s Club, in

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<sup>26</sup> *See also In re Am. Blanching Co.*, 2008 WL 2817085, at \*4 (TTAB 2008) (nonprecedential) (“it is common knowledge that peanut butter spread on bread is often eaten as a snack”; Board found that peanut butter and bread are complementary goods). “An opinion designated as not precedential is not binding upon the Board, but may be cited for whatever persuasive value it might have.” *In re Seminole Tribe of Fla.*, 2023 WL 3751113, at \*6 n.16 (TTAB 2023), *citing* TBMP §§ 101.03 and 1203.02(f).

supermarkets and on their websites, at Amazon Fresh (online),<sup>27</sup> and on Instacart. (Smith Decl., 15 TTABVUE 63-64 ¶¶ 51, 52). According to her, Opposer’s WONDER bread “typically sells at retail for \$3.00 or less a loaf.” (Smith Decl., 15 TTABVUE 64 ¶ 53).

Mr. Safai, Applicant’s CEO, testified that Applicant’s nut butters bearing the WONDERSPREAD mark are offered for sale in the United States on Amazon.com and through Applicant’s website, ownyourhunger.com. (Safai Aff., 23 TTABVUE 3 ¶ 6). He characterizes the purchasers of Applicant’s Goods as “generally highly sophisticated in the areas of nutrition and caloric management and have a general understanding of reasons behind the brand’s premium \$15 price tag for a 12 oz jar [of Applicant’s Goods].” (Safai Aff., 23 TTABVUE 3 ¶ 9).

The presumed overlap in trade channels is confirmed by Ms. Smith and Mr. Safai, who testified that the parties’ goods are being offered for sale online at Amazon.com and Amazon Fresh (which is located at the Amazon.com website), and that these goods are directed the same classes of consumers, i.e., members of the public seeking to purchase bread, bakery goods, and nut butters. We therefore find that the trade channels and classes of consumers for the parties’ respective goods are the same.

With respect to purchasing conditions, Ms. Smith testified that Opposer’s WONDER bread typically sells for three dollars or less per loaf. In contrast, Mr. Safai categorizes the fifteen dollar price point for a twelve ounce jar of Applicant’s nut butters as “premium.” As mentioned above, he characterizes Applicant’s customers as “generally

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<sup>27</sup> Amazon Fresh is a subsidiary of Amazon.com. Amazon Fresh offers groceries for sale online and in Amazon Fresh brick and mortar stores. ENCYCLOPÆDIA BRITANICA (2024) (<https://www.britannica.com/money/Amazoncom>) (last accessed Sept. 26, 2024). The Board may take judicial notice of encyclopedia entries. *In re White Jasmine LLC*, 2013 WL 2951788, at \*7 n.24 (TTAB 2013) (judicial notice taken of entry for “tea” from Encyclopædia Britannica).

highly sophisticated in the areas of nutrition and caloric management,” and as having a general understanding of the economics driving the 15 dollar price point.

Since the identifications in Opposer’s registrations and the challenged application are unrestricted as to price, we must presume that the parties’ goods include ones that are inexpensive. *L’Oreal*, 2012 WL 1267956, at \*9. Also, we find it unlikely that Applicant’s Goods, at fifteen dollars a jar, would be considered “expensive,” or would be purchased with much care. *See Gen. Mills, Inc. v. Fage Dairy Processing Indus. S.A.*, 2011 WL 6001095, at \*13 (TTAB 2011) (purchasers would exercise less care in deciding to purchase cereal and yogurt, which are relatively low-cost, casual food items); *see also* J. Thomas McCarthy, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:95 & n.4 (5th ed. 2023) (May 2024 Update). “When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” *Recot Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000). And while purchasers of Applicant’s Goods may be sophisticated in the areas of nutrition and caloric management, that would not necessarily mean that those same purchasers would be sophisticated or knowledgeable in the field of trademarks, or immune from source confusion. *In re Shell Oil*, 992 F.2d at 1208 (“even sophisticated purchasers can be confused by very similar marks”); *Top Tobacco, LP v. N. Atl. Operating Co.*, 2011 WL 6099691, at \*7 (TTAB 2011) (“[W]e have often noted that even consumers who exercise a higher degree of care are not necessarily knowledgeable regarding the trademarks at issue, and therefore immune from source confusion.”) (citations omitted). Thus, the standard of care for purchasing the goods at

issue here is that of the least sophisticated potential purchaser. *In re FCA US LLC*, 2018 WL 1756431, at \*11 (TTAB 2018) (citing *Stone Lion*, 746 3d at 1325).

#### **D. The Fame of the Prior Mark**

Next, we turn to Opposer's assertion that the WONDER mark has achieved fame as a result of its widespread use, recognition, and strength. (31 TTABVUE 36-42). The fifth *DuPont* factor, the "fame of the prior mark," 476 F.2d at 1361, "varies along a spectrum from very strong to very weak." *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 1325 (Fed. Cir. 2017) (citing *Palm Bay*, 396 F.3d at 1374-75) (cleaned up).

"A famous mark is one 'with extensive public recognition and renown.'" *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 1371 (Fed. Cir. 2002) (quoting *Kenner Parker Toys, Inc. v. Rose Art Indus.*, 963 F.2d 350, 353 (Fed. Cir. 1992)). Accordingly, for likelihood of confusion purposes, fame may be measured indirectly by the volume of sales and advertising expenditures of the goods sold under the mark, as well as by other factors such as length of time of use of the mark, widespread critical assessments, parodies, notice by independent sources of the products identified by the marks, and the general reputation of the goods or services. *Bose Corp.*, 293 F.3d at 1371; *In re Serial Podcast, LLC*, 2018 WL 1522217, at \*15 (TTAB 2018) ("a mark has to be well known in the first place to be parodied"). "Because of the wide latitude of legal protection accorded a famous mark and the dominant role fame plays in the likelihood of confusion analysis, the party asserting fame must clearly prove it." *Weider Publ'ns, LLC v. D & D Beauty Care Co.*, 2014 WL 343269, at \*6 (TTAB 2014).

The Taggart Baking Company began selling bread under the WONDER mark over 100 years ago, in 1921. (Smith Decl., 15 TTABVUE 4 ¶ 2). From 1921 until its 2017 acquisition by Opposer, the WONDER mark (and eventually, the WONDER Marks) was heavily promoted by the former owners of the WONDER marks<sup>28</sup> for bread and bakery goods. (See generally *id.* at 7-34). Since 2017, Opposer has engaged in extensive marketing of the WONDER Marks on in-store and point-of-sale displays; through print, television, and radio advertising, and “Freddy the Fresh Guy,” an anthropomorphic loaf of bread with the WONDER mark emblazoned on his chest; on Opposer’s website and its social media accounts (Facebook, Instagram, and X (formerly Twitter));<sup>29</sup> through sweepstakes, online contests, and promotional giveaways; licensing and product placement in motion pictures; the WONDER-branded hot air balloon; sponsorships such as the Macy’s Thanksgiving Day Parade; and partnerships with NASCAR, the USO, and other organizations. (*Id.* at 20, 34-65; see also 31 TTABVUE 38). Overall, Opposer has spent a substantial sum, by anyone’s measure, in the promotion of WONDER bread and bakery goods in the United States since 2018. (See Smith Decl., 15 TTABVUE at 65 ¶ 49; see also 31 TTABVUE 37).

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<sup>28</sup> The former owners of the standard character and composite WONDER marks, at various periods of time, include the Taggart Baking Company, Continental Baking Company, Interstate Brands Corporation, and Hostess Brands, Inc. See generally 15 TTABVUE 7-34.

<sup>29</sup> Ms. Smith testified that Opposer’s wonderbread.com website had over 225,000 visitors in 2022. Smith Decl., 15 TTABVUE 34 ¶ 27. She also testified that Opposer’s Facebook page has over 126,000 followers and 126,000 likes, Opposer’s X account has over 24,000 followers, and Opposer’s Instagram account has over 44,600 followers. See *id.* at 37-41. Opposer does not provide specific breakdowns of the visits to its website from consumers in the United States, or a specific country breakdown of its Facebook, Instagram, and X followers and Facebook “likes,” so we do not know how many of the visits, “follows,” and “likes” are from U.S. consumers. Furthermore, it is highly likely that there is overlap among the Facebook “likes,” Instagram followers, and X followers. These shortcomings somewhat diminish the probative value of Opposer’s overall sales, advertising, marketing, and social media evidence. See *Performance Open Wheel Racing, Inc. v. U.S. Auto Club Inc.*, 2019 WL 2404075, at \*12 (TTAB 2019).



Opposer's WONDER Marks have received unsolicited publicity as well. The WONDER composite mark is prominently featured on a loaf of bread in the music video for "Telephone" by Lady Gaga featuring Beyoncé. (Smith Decl., 15 TTABVUE 54 ¶ 39). The video has been viewed over 446 million times on YouTube. (*Id.*). The WONDER Marks have also been the subject of artwork and parodies. (*See* 11 TTABVUE 153, 156-57, 160, 185, 190, 197, 220, 222). Use of a mark in parodies is a sign of its strength. *See In re Serial Podcast*, 2018 WL 1522217, at \*15.

Regarding sales, Opposer sold a substantial amount of WONDER-branded bread and baked goods from 2017 through the end of July 2023; over ninety-nine percent of those sales were made to consumers in the United States. (*Id.* at 67 ¶ 53; *see also* 31 TTABVUE 38).

We accept Ms. Smith's declaration testimony (and the exhibits thereto) as evidence of the widespread use and recognition of Opposer's Mark. We therefore find it famous for likelihood of confusion purposes, having achieved widespread consumer exposure in the United States for over 100 years.

#### **E. Alleged Weakness of Opposer's Mark**

Next, we turn to Applicant's arguments that Opposer's Mark is allegedly "diluted and blurred" due to its widespread use, (32 TTABVUE 10-11), and that there is no likelihood of confusion in this case because of the alleged existence of "a substantial number of third-party registrations that include the word 'WONDER' across various categories." (32 TTABVUE 17). Applicant does not argue, explicitly, that the Opposer's Mark is weak, but we construe both of Applicant's arguments as ones attacking the strength of Opposer's Mark, even though "Applicant readily acknowledges Opposer's mark having fame, albeit

for its specific category of baked goods.” (32 TTABVue 18). Again, we consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg.*, 912 F.3d at 1378-81.

Evidence of third-party use and registration typically falls under the sixth *DuPont* factor, “the number and nature of similar marks in use on similar goods.” 476 F.2d at 1361. Under the sixth *DuPont* factor, we take into account both conceptual strength, based on the nature of the mark itself, and commercial strength, based on marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010); *see also Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023). Whereas the “fifth *DuPont* factor enables Opposer to prove that its pleaded marks are entitled to an expanded scope of protection by adducing evidence of ‘[t]he fame of the prior mark (sales, advertising, length of use),’” “the sixth *DuPont* factor allows Applicant to contract that scope of protection by adducing evidence of ‘[t]he number and nature of similar marks in use on similar goods.’” *Made in Nature*, 2022 WL 2188890, at \*11 (quoting *DuPont*, 476 F.2d at 1361).

“The purpose of introducing evidence of third-party use is ‘to show that customers have become so conditioned by a plethora of such similar marks that customers ‘have been educated to distinguish between different [such] marks on the bases of minute distinctions.’” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1324 (Fed. Cir. 2018) (quoting *Palm Bay*, 396 F.3d at 1374 (internal citation omitted)). This type of evidence pertains to the commercial strength of the mark. “Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Id.* (quoting *Palm Bay*, 396 F.3d

at 1373). Evidence of actual third-party use of similar marks can be “powerful on its face” and can “show that customers ... have been educated to distinguish between different ... marks on the basis of minute distinctions,” *Juice Generation, Inc. v. GS Enters., LLC*, 794 F.3d 1334, 1338 (Fed. Cir. 2015) (citation and internal citation omitted), particularly if such evidence is “extensive.” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1373-74 (Fed. Cir. 2015) (citing *Juice Generation*, 794 F.3d at 1339).

In contrast, conceptual strength is a measure of a mark’s distinctiveness and may be placed “in categories of generally increasing distinctiveness[:] ... (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful.” *Spireon*, 71 F.4th at 1362 (quoting *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992)). Third-party registrations of record “may bear on conceptual weakness if a term is commonly registered for similar goods or services.” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 2017 WL 6336243, at \*14 (TTAB 2017); *see also In re Mighty Leaf Tea*, 601 F.3d at 1346-47.

Applicant contends that the holding of *Spireon* is applicable here, arguing that “once an applicant introduces similar third party registrations as evidence that the opposer’s mark is commercially weak, the burden to prove non-use of those marks is on the opposer.” (32 TTABVUE 17). To the Federal Circuit, however, the facts of *Spireon* presented “the far narrower question of whether the burden of showing non-use of **identical marks for identical goods** rests with the opposer. We think it necessarily does.” 71 F.4th at 1365 (emphasis added).

As to the conceptual strength or weakness of common elements, the court in *Spireon* opined that:

The existence of third-party registrations on similar goods can bear on a mark's conceptual strength. *Juice Generation*, 794 F.3d at 1339. Specifically, third-party registrations containing an element that is common to both the opposer's and the applicant's marks can show that that element has "a normally understood and well-recognized descriptive or suggestive meaning." *Jack Wolfskin*, 797 F.3d at 1374 (quoting *Juice Generation*, 794 F.3d at 1339). Accordingly, we have considered the existence of third-party registrations under the sixth *DuPont* factor. *See id.*

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Where marks share a common segment, "[t]hird party registrations are relevant to prove that [the shared] segment of the composite marks ... has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak." [2 J. Thomas McCarthy, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 11:90 (5th ed. 2023).] Evidence of composite third-party registrations is also relevant because:

"Such registrations could ... show that the PTO, by registering several marks with such a common segment, recognizes that portions of such composite marks other than the common segment are sufficient to distinguish the marks as a whole and to make confusion unlikely. That is, the presence of such a descriptive or suggestive weak segment in conflicting composite marks is not per se sufficient to make confusion likely." *Id.*

71 F.4th at 1363-64.

Applicant appended to Mr. Safai's affidavit eighteen USPTO records for WONDER-formative marks it describes are registered for "food-related categories sold in the same channels of trade as Opposer's mark ... ." (23 TTABVUE 4-5 ¶ 14; *see* 23 TTABVUE 80-97). One registration is owned by Opposer,<sup>30</sup> and one registration is cancelled.<sup>31</sup> None of

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<sup>30</sup> WONDER, Reg. No. 0215188, for "bread" in Class 30. We have not considered this registration. By definition, Opposer's own registration is not that of a third party's.

<sup>31</sup> WUNDER, Reg. No. 6198393. A cancelled or expired registration has no probative value other than to show that it once issued; it is not entitled to any of the statutory presumptions of Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b). *Action Temp. Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 1566 (Fed. Cir. 1989) ("[A] canceled registration does not provide constructive notice of anything.").

the registrations are for goods identical to Opposer's "bread" and "bakery goods," and only one registration identifies, arguably, goods that are relevant to Opposer's.<sup>32</sup> Presumably, to demonstrate commercial use, Applicant also submitted photos of the actual goods bearing these registered marks, (*see* 23 TTABVUE 4-5, 71-79), but we have no testimony corroborating the current, actual use of the marks on these goods, so this evidence is less probative. In rebuttal, Opposer submitted a second declaration from Ms. Smith in which she testified that four of the registered marks proffered by Applicant are not in actual use. (*See* Smith Rebuttal Decl., 25 TTABVUE 2-8; 26 TTABVUE 2-8 (confidential)). The ten remaining marks, for which evidence of non-use has not been submitted, are registered for goods that are unrelated to Opposer's Goods and Applicant's Goods.<sup>33</sup>

Overall, the third-party registration and use evidence offered by Applicant is "a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant' in *Juice Generation* (26 third-party uses or registrations)." *Sabhnani*, 2021 WL 6072822, at \*25-26 (quoting *In re Inn at St. John's*, 2018 WL 2734893, at \*13). Opposer's Mark, however, is registered on the Principal Register without a claim of acquired distinctiveness. Considering the record as a whole (i.e., general sales, marketing, and advertising evidence discussed above; scant third-party use for similar

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<sup>32</sup> Only one WONDER-formative registration submitted by Applicant, WONDER WRAPS, Reg. No. 6078191, for "Gluten free sandwich wraps made out of eggs, pea protein, agave, and glycerin" in Class 30, is, arguably, relevant to Opposer's Mark. None of the registrations submitted by Applicant are for "nut butters," either. Only one registration, THE WONDERFUL NUT, Reg. No. 5429601, for "Processed nuts" in Class 29, is relevant to the challenged application for "nut butters."

<sup>33</sup> The registered marks are: WONDERMILK, Reg. No. 6740767; WONDER FALAFEL, Reg. No. 6580590; WONDER LEMON, Reg. No. 6464100; WONDER GRANOLA, Reg. No. 5937379; WONDER VALLEY, Reg. No. 5887398; WONDERMEATS, Reg. No. 6552085; WONDERFARM, Reg. No. 6334874; WONDER HEART, Reg. No. 6497513; WUNDER, Reg. No. 6198392; WONDERVITES, Reg. No. 6146891.

goods, the fame of the WONDER marks), we find that Opposer's Mark is suggestive and commercially strong. Applicant has failed in its attempt to diminish the strength of Opposer's WONDER marks.

#### **F. Lack of Actual Confusion**

Finally, we turn to Applicant's argument that the Board should consider Opposer's admission that it is not aware of any actual confusion. (22 TTABVUE 9; 32 TTABVUE 8, 15). Applicant states that it too is unaware of any actual confusion. (32 TTABVUE 8). Under the eighth *DuPont* factor, we consider "the length of time during and conditions under which there has been concurrent use without evidence of actual confusion." 476 F.2d at 1361.

The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use, by Applicant, of its mark for a significant period of time in the same markets as those served by Opposer under its mark. *See Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 2010 WL 595586, at \*22 (TTAB 2010), *aff'd*, 637 F.3d 1344 (Fed. Cir. 2011); *Gillette Canada Inc. v. Ranir Corp.*, 1992 WL 215312, at \*6 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must have been a significant opportunity for actual confusion to have occurred. *Barbara's Bakery, Inc. v. Landesman*, 2007 WL 196406, at \*5 (TTAB 2007).

Applicant has offered its nut butters in the United States only since April 1, 2021 (12 TTABVUE 6 ¶ 4), and only through its website and Amazon. (Safai Aff., 23 TTABVUE 3 ¶ 6). An uncorroborated statement of no known instances of actual confusion — even by the opposing party — is of little evidentiary value, particularly when, as here, there has not been a significant opportunity for confusion to occur. Under such circumstances, the

lack of actual confusion carries little weight. *See J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 986 (CCPA 1965).

## **VI. Conclusion**

Weighing the applicable *DuPont* factors based on the arguments and evidence presented, *In re Charger Ventures LLC*, 64 F.4th 1375, 1383 (Fed. Cir. 2023), we find that: the marks are in-part identical in appearance, similar in sound, and very similar in connotation and overall commercial impression; the respective goods are complementary, and therefore, related; the parties' goods travel through the same channels of trade to the same class of purchasers; the purchasers do not exercise more than ordinary care in their purchasing decisions due to the modest price of the parties' goods; Opposer's Mark, WONDER, is famous and at least conceptually suggestive; and there has not been a significant opportunity for confusion to occur in the marketplace, since Applicant has offered its WONDERSPREAD nut butters only since April 2021. Taking these *DuPont* factors together, we find that Opposer has carried its burden, and a likelihood of confusion exists.

**Decision:** The opposition to registration of the WONDERSPREAD mark, Application Serial Number 90805804, is sustained under Trademark Act Section 2(d).