

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: October 26, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Arreola Francisco Andres and Daniel Torres
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Serial No. 97174704
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Ian Bezpalko of The Bezpalko Law Firm,
for Arreola Francisco Andres and Daniel Torres.

Christopher M. Law, Acting Senior Attorney, Law Office 107,
Leslie Bishop, Managing Attorney.

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Before Zervas, Wellington, and Elgin,
Administrative Trademark Judges.

Opinion by Elgin, Administrative Trademark Judge:

Applicants Arreola Francisco Andres and Daniel Torres seek registration on the Principal Register of the mark DRYLANDS BREWING COMPANY & design (“BREWING COMPANY” disclaimed), shown below:



for “Beer” in International Class 32 and “Restaurant services, including sit-down service of food and take-out restaurant services; Taproom services featuring beer brewed on premises” in International Class 43.¹

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicants’ mark, as applied to the goods and services identified in the application, so resembles the prior-registered mark DRYLANDS in typed format for “wine” in International Class 33 on the Principal Register² as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicants appealed and requested reconsideration. The appeal was resumed after the Examining Attorney denied the request for reconsideration. We affirm the refusal to register.

¹ Application Serial No. 97174704 was filed on December 16, 2021 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicants’ claim of first use anywhere and use in commerce since at least as early as July 1, 2016. The mark is described as consisting of “a partial Zia symbol. The space in the center consists of a three-quarter circle. The word DRYLANDS begins on the left arm of the Zia symbol and continues to the edge of the right arm. The words BREWING COMPANY are centered underneath the Zia symbol. The color black represents background, and/or transparent areas and is not part of the mark.”

² Registration No. 2794762 issued December 16, 2003; second renewal. A mark depicted as a typed drawing is the legal equivalent of a standard character mark. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012); *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 807.03(i) (July 2022).

I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. Applicants, in their reply brief, included a list of nine pairs of third party registrations to show that beer and wine are not related.³

The record in any application, however, should be complete prior to appeal. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); *see also In re ZeroSix, LLC*, 2023 USPQ2d 705, at *1 (TTAB 2023) (quoting Trademark Rule 2.142(d) and excluding evidence in the applicant's appeal brief); *In re ADCO Indus. - Techs., L.P.*, 2020 USPQ2d 53786, at *2 (TTAB 2020) (same); *see also* TMEP §§ 710.01(c), 1501.02(b); TRADEMARK BOARD MANUAL OF PROCEDURE (TBMP) § 1207.01 (June 2023).

In view thereof, we have not considered this evidence or the arguments relating thereto.

II. Likelihood of Confusion

Section 2(d) 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, or to cause mistake, or to deceive. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA

³ *See* Applicants' Reply Br. at 8-9 (9 TTABVUE 9-10). Citations to the briefs in the appeal record refer to the TTABVUE docket system. Citations to the prosecution record refer to the .pdf version of the TSDR system. *See In re Integra Biosciences Corp.*, 2022 USPQ2d 93, at *7 (TTAB 2022).

1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *2 (TTAB 2019). In any likelihood of confusion analysis, however, two key factors are the similarity or dissimilarity of the marks and the goods or services. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). These factors, and others, are discussed below.⁴

A. Strength/Weakness of Cited Mark DRYLANDS for “Wine”

Before comparing the marks, we turn to Applicants’ argument that the term “drylands” is conceptually and commercially weak for wine and, therefore, the cited mark DRYLANDS for such goods should be afforded a limited scope of protection.⁵

⁴ We note that, in a multiple-class application such as is presented here, each class stands on its own as it would if it were in a separate application. *See In re Bonni Keller Collections Ltd.*, 6 USPQ2d 1224, 1226 (TTAB 1987) (a multiple-class application is, actually, two separate applications combined for the convenience of applicant and the Office). Accordingly, we must make determinations for each separate class.

⁵ Applicants’ Appeal Br. at 20-21 (6 TTABVUE 21-22).

“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).” *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010); *see also New Era Cap. Co. v. Pro Era LLC*, 2020 USPQ2d 10596, at *10 (TTAB 2020); *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength). In tandem, if there is evidence in the record, we consider whether the mark has commercial weakness in the marketplace. *DuPont*, 177 USPQ at 567 (the sixth *DuPont* factor considers “the number and nature of similar marks in use on similar goods.”). *But see In re Thomas*, 79 USPQ2d 1021, 1027, n.11 (TTAB 2006) (“Because this is an ex parte proceeding, we would not expect the examining attorney to submit evidence of fame of the cited mark.”).

1. Conceptual Strength

“In order to determine the conceptual strength of the cited mark, we evaluate its intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary (or fanciful) continuum of words.” *In re Davia*, 110 USPQ2d 1810, 1814 (TTAB 2014). Because the cited DRYLANDS mark registered on the Principal Register without a claim of acquired distinctiveness, it is presumed to be inherently distinctive. *See Trademark Act Section 7(b)*, 15 U.S.C. 1057(b); *New Era Cap Co.*, 2020 USPQ2d 10596, at *10 (“Opposer’s mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act.”); *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) (a “mark that is registered

on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim [of acquired distinctiveness] in the registration, that the mark is inherently distinctive for the goods.”). In other words, the cited DRYLANDS mark must be at least suggestive for Registrant’s goods. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017) (“marks that are suggestive are ‘inherently distinctive’ and can be registered.”).

Applicants appear to argue that Registrant’s mark DRYLANDS is conceptually weak and therefore entitled to a narrow scope of protection.⁶ Applicants argue, “[t]he term ‘dry land’ has the obvious meaning of an arid land,” and submitted evidence they contend demonstrates “[i]t is also a term of art referring to a method of growing crops with minimal or no water.”⁷ The Examining Attorney argues that DRYLANDS is “arbitrary and strong.”⁸

The evidence indicates that “dryland farming, or dry farming, means that irrigation isn’t used. It’s agriculture that relies on soil moisture, ground water, and the occasional rainfall,” by, for example, preventing evaporation out of the soil and reducing rainfall runoff.⁹ However, it has not been shown how the term “drylands”

⁶ See also December 17, 2022 Response to Office Action at TSDR 106 (arguing that “drylands” is inherently weak because it suggests that the “beverage was produced in a dry land or by dry farming.”).

⁷ Applicants’ Appeal Br. at 16 (6 TTABVUE 17). See December 17, 2022 Response to Office Action at TSDR 47-55 (Exh. F) (“Dryland Farming: What It Is and Why It’s Important”); *id.* at TSDR 56-80 (Exh. G) (“Dry Farming Grapes; A Best Management Practice Guide for California Growers”).

⁸ See Examining Attorney’s Br. at 12-13 (8 TTABVUE 12-13).

⁹ December 17, 2022 Response to Office Action at TSDR 47-48, 50.

would have any possible meaning or suggestive connotation in connection with Registrant's goods, i.e., wine.¹⁰ Accordingly, based on the record, we find the term DRYLANDS to be arbitrary for wine.

2. Commercial Strength

Evidence of third-party use of similar marks, or portions of marks, for the same or similar services is relevant to a cited mark's commercial strength or weakness. *In re i.am.symbolic*, 123 USPQ2d at 1751 ("third-party use bears on strength or weakness" of mark) (citation omitted); *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 2020 USPQ2d 10914, at *17 (TTAB 2020) (six local Brooklyn-formative named establishments' use of the term "Brooklyn" in connection with beer sales have significant probative value as to commercial weakness) (subsequent history omitted); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1674 (TTAB 2018) (internet website evidence demonstrated that third parties provide goods and services under the same marks); *Tao Licensing LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (considering United States third-party use (webpages) of "TAO-formative names" in connection with restaurant services and alcoholic beverages as

¹⁰ Applicants concede, moreover, that they are unaware of the reason DRYLANDS was selected as Registrant's mark:

Drylands Brewing would be recognized as brewing beer in a dry land. Registrant has no such description in its application nor does it have a website or advertising, as noted in Applicants' Request for Reconsideration, p. 6, that describe the reason for the name. "Drylands Brewing" when applied to Applicants' restaurant has a specific connotation while the same cannot be said for Registrant.

Applicants' Appeal Br. at 16 (6 TTABVUE 17).

evidence of commercial weakness of TAO under the sixth *DuPont* factor); *see also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (“the purpose of a defendant introducing third-party uses 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.’”) (internal citation omitted).

Applicants points to evidence of use by five third-parties “in several countries including the United States, that sell wine, liquor, or mead under the brand name Drylands, or who have a business name that includes the word Drylands,” and asserts that “[a]ll of the companies have webpages and offer Dryland wines or mead for sale in the United States”:¹¹

- The Dry Land Collection for wine (Kenya);¹²
- Drylands Juniper-Pine mead (Washington, USA);¹³
- Dry Land Distillers craft distillery for whiskeys and spirits (Colorado, USA);¹⁴
- Winery Drylands (CL) for wines (Chile);¹⁵ and
- Perderburg’s Dry Land Collection wines (South Africa).¹⁶

¹¹ Applicants’ Appeal Br. at 20 (6 TTABVUE 21).

¹² December 17, 2022 Response to Office Action at TSDR 2-5 (www.drinksvine.ke/product/dry-land-collection-pinot-noir-chardonnay) (Exh. A).

¹³ *Id.* at TSDR 6-11 (https://shopmeads.com/melchemy_craft_mead/drylands_juniper-pine_46598).

¹⁴ *Id.* at TSDR 12-21 (www.drylanddistillers.com).

¹⁵ *Id.* at TSDR 22-30 (<https://en.winedexer.com/wine/domaine-drylands-cl> and www.vivino.com/US/en/auco-drylands-merlot/w/9056405).

¹⁶ *Id.* at TSDR 31-37 (<https://perdeberg.co.za>).

Applicants argue that “[c]o-existence of third-party uses here specifically evidences that consumers can and do distinguish among vineyard, brewery, and meadery products named ‘Drylands’.”¹⁷

The Examining Attorney counters there is no evidence of record that the three products emanating from Kenya, Chile, or South Africa are available in the United States, and the other uses are in connection with mead and distilled spirits which are “not the subject of this case.”¹⁸ He contends, therefore, that this evidence is entitled to little weight in evaluating strength of the cited mark.¹⁹

Applicants respond that “all the companies identified have webpages and the ability to fill orders anywhere in the world, including the United States,” and “the name Drylands appears in the alcohol marketplace, does not originate with Registrant, and customers can clearly differentiate among the various sources.”²⁰

Based on their URLs and on their face, at least two of the five examples attached to Applicants’ response appear to be from foreign wineries (The Dry Land Collection from Kenya and Pederburg’s Dry Land Collection wines from South Africa); Applicants do not contend otherwise, but point to links on the websites to show they have “the ability to fill orders anywhere in the world, including the United States.”²¹ There is no evidence, however, that consumers in the United States have ordered

¹⁷ Applicants’ Appeal Br. at 21 (6 TTABVUE 22).

¹⁸ Examining Attorney’s Br. at 12-13 (8 TTABVUE 12-13).

¹⁹ *Id.* at 13 (8 TTABVUE 13).

²⁰ Applicants’ Reply Br. at 10 (9 TTABVUE 11).

²¹ *Id.* at 9 (9 TTABVUE 10).

products through these websites. If U.S. consumers have been exposed to either of these products, there is no evidence to determine whether they have had a measurable impact on U.S. consumer perception of the term DRYLANDS. *See, e.g., In re i.am.symbolic*, 127 USPQ2d at 1634 n.8 (prices in Euros indicated online store not U.S.-based; no evidence of “whether U.S. consumers were likely exposed to the website or can purchase clothing from the website,” reducing its probative value); *In re Florists’ Transworld Delivery Inc.*, 106 USPQ2d 1784, 1786 (TTAB 2013) (a website located outside the United States may have probative value depending on the circumstances, including whether the consuming public in the United States is likely to have been exposed to the foreign website); *see also* TBMP § 1208.03. The examples of the Chilean wines (Winery Drylands) are taken from the websites Winedexer and Vivino, neither of which displays a seller or method to order these products. This leaves only two uses in the United States (Drylands Juniper-Pine mead and Dry Lands Distillers), and the probative value of these is diminished because the goods are mead, whiskey, and distilled spirits, and not “wine.” *See, e.g., In re i.am.symbolic*, 123 USPQ2d at 1751-52 (“Symbolic has not pointed to any record evidence to support a finding that multiple third parties use the mark I AM for the listed goods in its class 3 and 9 applications.”). This leaves no relevant third-party uses.

In any case, only five third-party uses would fall well short of the volume of evidence found convincing in *Juice Generation, Inc. v. GS Enter., LLC*, 794 F.2d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) and *Jack Wolfskin Ausrüstung Fur Draussen, GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363,

116 USPQ2d 1129, 1136 (Fed. Cir. 2015), and is insufficient to diminish the scope of protection to which the cited mark is entitled.²² Thus, Applicants have failed to demonstrate any weakness of the cited mark based on third party use.

3. Summary

In short, Applicants' evidence does not diminish the conceptual or commercial strength of Registrant's inherently distinctive mark DRYLANDS.

B. Similarity or Dissimilarity of the Marks.

We next turn to the first *DuPont* factor focusing on "the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression." *Palm Bay Imports*, 73 USPQ2d at 1691 (quoting *DuPont*, 177 USPQ at 567). "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." *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quotation omitted).

²² We note that Applicants rely on several cases in their Reply Brief in which courts denied injunctive relief in trademark infringement cases discussing third party use. *See* Applicants' Reply Br. at 9-10 (9 TTABVUE 10-11). These cases are distinguishable, as courts apply a different standard in infringement cases—particularly in the context of preliminary relief—than is applied by the Board in an *ex parte* appeal. *Levy v. Kosher Overseers Assoc. of Am. Inc.*, 104 F.3d 38, 41 USPQ2d 1456, 1459 (2d Cir. 1997) (the standards governing likelihood of confusion in Board proceedings are different than the standard applicable in trademark infringement actions in a district court). Moreover, *Armstrong Cork Co. v. World Carpets, Inc.*, 597 F.2d 496, 505 (5th Cir. 1979), cited by Applicants, concerned a vastly larger number of third party uses (85) than Applicants have offered here. *Am. Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3 (5th Cir. 1974), also cited by Applicants, concerned whether the term HERITAGE had acquired distinctiveness. In *Holiday Inns, Inc. v. Holiday Out in Am.*, 481 F.2d 445, 448 (5th Cir. 1973), the plaintiff admitted that the term HOLIDAY was of weak trademark significance as applied to motels and restaurants due to third party use.

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, 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 a consideration of the marks in their entireties. *In re Nat'l Data*, 224 USPQ at 751.

Applicants’ mark is DRYLANDS BREWING COMPANY & design:



The cited mark is DRYLANDS in typed characters.

Applicants argue, in essence, that the Examining Attorney erred by focusing only on the shared term DRYLANDS and discounting the remainder of Applicants’ mark including the additional wording and background design. They contend, rather, that

the marks considered as a whole significantly differ visually, aurally, and in commercial impression.²³

We find that the dominant portion of Applicants' mark is the word DRYLANDS. Although it appears superimposed on a design element, "the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed." *Jack Wolfskin*, 116 USPQ2d at 1134 (citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)). Greater weight often is given to the wording because it what purchasers would use to refer to or request the goods or services. *See, e.g., In re Viterra*, 101 USPQ2d at 1911. This is particularly significant in view of the sale beer and wine in the noisy and chaotic atmosphere of a bar or restaurant, where alcoholic drinks frequently often are ordered by name without seeing a menu or label. *See In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016) ("Many consumers ordering these goods from a bartender or waiter/waitress will not have the opportunity to see a label when they order the product.").

We disagree with Applicants' argument that the design component of Applicants' mark, described as a "partial Zia symbol," significantly distinguishes the marks. Neither Applicants nor the Examining Attorney provided evidence regarding the significance of the design or explain what a "Zia symbol" is; Applicants assert, without support, that it is "a colorful and most certainly recognizable symbol of the state of New Mexico."²⁴ *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797,

²³ Applicants' Appeal Br. at 10-14 (6 TTABVUE 11-15).

²⁴ *Id.* at 12 (6 TTABVUE 13); *see also* Applicants' Reply Br. at 6 (8 TTABVUE 7) ("[T]he applied-for mark does not materially obscure the Zia symbol which is noticeably rendered so

1799 (Fed. Cir. 2018) (citing *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005) (“Attorney argument is no substitute for evidence.”)). Applicants have not submitted any evidence indicating that consumers (particularly those outside of New Mexico) would recognize the background design as a “partial” Zia symbol or understand its significance.²⁵ Thus, the design component in Applicants’ composite mark fails to mitigate the similarities in connotation and commercial impression with the cited mark DRYLANDS.

We also find the additional wording BREWING COMPANY in Applicants’ mark to be less significant. It is much smaller font than the predominantly displayed DRYLANDS. Moreover, BREWING COMPANY is descriptive and/or generic of Applicants’ identified goods and services and appropriately has been disclaimed. *See, e.g., In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (“the non-source identifying nature of the words ‘Co.’ and ‘Club’ and the disclaimers thereof constitute rational reasons for giving those terms less weight in the analysis.”); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (“DELTA,” not the disclaimed generic term “CAFE,” is the dominant portion of the mark THE DELTA CAFE); *In re Code Consultants, Inc.*, 60 USPQ2d

as to catch the eye and create a prominent impression”). We note that the applied-for mark, however, does not contain a claim of color.

²⁵ It would be improper, as Applicants seem to urge, for us to focus only on residents of New Mexico in our analysis, as their identification of goods and services is unlimited as to geographic extent; accordingly, no particular area of use can be imposed. Applicants are free to expand use of their proposed mark in the entire United States; likelihood of confusion must be determined on that basis.

1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”).

Further, the presence of additional terms in Applicants’ mark does not necessarily eliminate the likelihood of confusion if the dominant term, here, DRYLANDS, is the same term which is the entirety of the cited mark. *See, e.g., In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (citing *China Healthways Inst, Inc. v. Wang*, 491 F.3d 1337, 1341 (Fed. Cir. 2007) (the common word in CHI and CHI PLUS is likely to cause confusion despite differences in the marks’ designs)); *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 201 (CCPA 1972) (WEST POINT PEPPERELL likely to cause confusion with WEST POINT for similar goods); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *6-7 (TTAB 2019) (respondent’s mark ROAD WARRIOR is similar to petitioner’s mark WARRIOR); *Broadcasting Network Inc. v. ABS-CBN Int’l*, 84 USPQ2d 1560, 1568 (TTAB 2007) (respondent’s mark ABS-CBN is similar to petitioner’s mark CBN both for television broadcasting services).

The cases relied upon by Applicants – discussed below – are distinguishable.²⁶ In *In re White Rock Distilleries, Inc.*, 92 USPQ2d 1282, 1284 (TTAB 2009), the Board held there was no likelihood of confusion between VOLTA in standard characters and



the cited design mark

TERZA
VOLTA

for wines, in part because “[t]he term TERZA clearly

²⁶ *See* Applicants’ Reply Br. at 7 (9 TTABVUE 8).

dominates over the term VOLTA in the registered mark” and the design was prominent. Unlike the design in *White Rock Distilleries*, the shared DRYLANDS term in Applicants’ mark dominates the mark as a whole and the design is a background element. In *Knight Textile Corp. v. Jones Inv. Co.*, 75 USPQ2d 1313 (TTAB 2005), cited by Applicants, the Board found that NORTON MCNAUGHTON ESSENTIALS in standard characters was not likely to cause confusion with the mark ESSENTIALS in standard characters in part because ESSENTIALS is highly suggestive, and “applicant's addition of its house mark therefore suffices to distinguish the two marks when they are viewed in their entireties.” Here, the shared term has not been shown to be “highly suggestive” and is not preceded by a dominant house mark. In *Steve’s Ice Cream v. Steve’s Famous Hot Dogs*, 3 USPQ2d 1477, 1478-79 (TTAB 1987), the



Board held there was no likelihood of confusion between the applied-for mark for restaurant services and STEVE’S for ice cream in part because “[t]he design portion of applicant’s mark is extremely suggestive of the fact that applicant’s restaurants feature hot dogs” and created a “distinctive commercial impression,” and the shared term STEVE’S had a narrow ambit of protection due to third party use. *Id.* at 1478-79. Again, that is not the case here, where Applicants’ design does not dominate its mark but is a background element and the shared term is not commercially weak.

We also disagree with Applicants’ argument that DRYLANDS BREWING COMPANY is a unitary mark that has a “distinct commercial impression that is

independent of the constituent elements.”²⁷ The test for unitariness is whether the elements of a mark are so integrated or merged together that they cannot be regarded as separable. *See Dena Corp. v. Belvedere Int’l, Inc.*, 950 F.2d 1555, 1561, 21 USPQ2d 1047, 1052 (Fed. Cir. 1991) (EUROPEAN FORMULA and design not unitary); *In re EBS Data Processing*, 212 USPQ 964, 966 (TTAB 1981) (PHACTS POCKET PROFILE not unitary); *cf. In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983) (LIGHT N’ LIVELY is unitary as together the terms are suggestive). The issue of whether a mark is unitary is a question of fact, not an issue of law, *In re Slokevage*, 441 F.3d 957, 960 (Fed. Cir. 2006), and focuses on “how the average purchaser would encounter the mark under normal marketing of such goods and also . . . what the reaction of the average purchaser would be to this display of the mark.” *Dena Corp.*, 21 USPQ2d at 1052 (quoting *In re Magic Muffler Serv., Inc.*, 184 USPQ 125, 126 (TTAB 1974)). Applicants have not shown their mark to be unitary in nature. *See Cai*, 127 USPQ2d at 1800 (attorney argument is not evidence).

Applicants’ argument that their mark consists of “three words and seven (7) syllables [and] Registrant’s Mark, on the other hand, is comprised of a single, two (2) syllable-word” also is not persuasive.²⁸ Consumers do not focus on minutia but rather overall impressions. *See In re John Scarne Games, Inc.*, 120 USPQ 315, 315-16 (TTAB 1959) (“Purchasers of game boards do not engage in trademark syllable counting — they are governed by general impressions made by appearance or sound, or both.”).

²⁷ *Id.* at 14 (6 TTABVUE 15).

²⁸ *Id.* at 13 (6 TTABVUE 14).

We also are not swayed by Applicants' argument that the marks have different commercial impressions as applied to Applicants' and Registrant's goods and services:

Drylands Brewing brings to mind beer. The commercial impression is of fermented beverages of some sort, brewed onsite. In contrast, Registrant's Mark presents no commercial impression, certainly not one of a liquid. More to the point, a brewer produces beer. A vintner produces wine. Someone selecting a bottle of Drylands wine would search the label for the vintner as there is no indication of source in the mark. Applicants' customer, remembering a bottle of Drylands wine, would not expect this Brewing Company to have produced that wine.²⁹

Although it is true that BREWING COMPANY brings to mind beer or a location that brews beer, Registrant's cited mark DRYLANDS is subsumed entirely within Applicants' mark. Therefore, it "would appear to prospective purchasers to be a shortened form" of such mark. *In re Mighty Leaf Tea*, 94 USPQ2d at 1260 (citation omitted).

Similarly, Applicants argue that the commercial impressions of the marks differ due to the locations of their proprietors and how the marks are used:

Applicant's restaurant is in a dry land compared to Registrant's vineyard. Drylands Brewing would be recognized as brewing beer in a dry land. Registrant has no such description in its application nor does it have a website or advertising, as noted in Applicant's Request for Reconsideration, p. 6, that describe the reason for the name. "Drylands Brewing" when applied to Applicant's restaurant has a specific connotation while the same cannot be said for Registrant.³⁰

²⁹ *Id.* at 15 (6 TTABVUE 16).

³⁰ *Id.* at 16 (6 TTABVUE 17).

For purposes of our Section 2(d) analysis, however, we are constrained to make our determination based on the mark and cited mark for the identified goods, and not based on extrinsic evidence of how the marks are used or where they are from, such as labels, websites, or specific locations or climates. *See In re Shell Oil Co.*, 922 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993) (“Although Shell argues that its use of RIGHT-A-WAY would be in association with other Shell trademarks, the proposed registration is not so limited. Registrability is determined based on the description in the application, and restrictions on how the mark is used will not be inferred.”).

Accordingly, we find that, taken in their entirety, the similarities between Applicants’ mark DRYLANDS BREWING COMPANY and design and the cited mark DRYLANDS outweigh any differences for likelihood of confusion purposes.

The first *DuPont* factor weighs in favor of finding that confusion is likely.

C. Similarity of the Goods and Services and Channels of Trade

The second *DuPont* factor “considers ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *In re Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting *DuPont*, 177 USPQ at 567), whereas the third *DuPont* factor considers “the similarity or dissimilarity of established, likely-to-continue trade channels.” *Id.* at 1052 (quoting *DuPont*, 177 USPQ at 567).

Our comparison is based on the goods and services as identified in Applicants’ application and the cited registration, not to any extrinsic evidence of actual use. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (it is proper for the Board to focus on “the application and

registrations rather than on real-world conditions.”); *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 8 USPQ2d 1944, 1947 (Fed. Cir. 2006) (in reviewing the second *DuPont* factor, “we consider the applicant’s goods as set forth in its application, and the opposer’s goods as set forth in its registration.”).




As to the second factor, it is not necessary that the respective goods and services be identical, or even competitive, in order to find that they are related for purposes of our likelihood of confusion analysis. The respective goods and services need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that goods [and services] emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *see also In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant goods and services are used together or used by the same purchasers; advertisements showing that the relevant goods and services are advertised together or offered by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both Applicants’ goods and services and the goods listed in the cited registration. *See In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores). The

issue is not whether purchasers would confuse the goods and services, but rather whether there is a likelihood of confusion as to the source of these goods and services. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984). We consider each class of Applicants' goods and services in turn.

1. Beer (International Class 32)

To show that wine and beer are related, the Examining Attorney made of record thirteen live third-party, use-based registrations identifying both types of goods.³¹ Although such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they have some probative value to the extent that they serve to suggest that the goods and services listed therein are of a kind which may emanate from a single source under a single mark. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988). This third-party registration evidence is sufficient to demonstrate the relatedness of Applicants' "beer" and Registrant's "wine" in the cited registration.

³¹ These include: DINGO DOG BREWING COMPANY (Reg. No. 6338913); DEVIL'S FIRE (Reg. No. 6355262); EROSION (Reg. No. 6834856); RYE KNOT (Reg. No. 6795441); FIVE SHORES (Reg. No. 5891000);  (Reg. No. 6695288); NOVA BREWING CO. & design (Reg. No. 6215946); WASH IT DOWN (Reg. No. 6032892);  (Reg. No. 5733907); DOGONGOOD (Reg. No. 6158617); TANGLED ROOTS BREWING COMPANY and design (Reg. No. 6583932);  (Reg. No. 6108396); **DSSOLVR** (Reg. No. 6136808). *See* January 20, 2023 Final Office Action at TSDR 187-230.

Additionally, the Examining Attorney submitted Internet evidence showing thirteen third-party wineries and breweries purportedly offering wine and beer under the same mark, lending further support to our finding that “beer” and “wine” are related.³² *See also Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1826-27 (TTAB 2015) (finding “beer” and “alcoholic beverages except beers,” including wine, related); *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719 (TTAB 1992) (wine and beer found related based on third-party registrations).

We are not persuaded by Applicants’ argument that confusion is not likely merely because they currently are “incapable of producing wine or of selling Registrant’s wine or, for that matter, anyone’s wine” due to regulations in New Mexico,³³ and we note that Applicants’ menu actually lists “sangria,” which is made with wine.³⁴ Consumers are not aware of regulations pertaining to alcohol, nor is the identification of goods and services in Applicants’ mark limited to selling beer in New Mexico. Rather, the evidence amply demonstrates that consumers, if they encountered these

³² *See* September 28, 2022 Non-Final Office Action (Fenton Winery & Brewery (TSDR 9-27); Mackinaw Trail Winery & Brewery (*id.* at 28-43); Von Jakob Winery & Brewery (*id.* at 44-75); January 20, 2023 Final Office Action (Springfield Manor (TSDR 10-15); Round Barn Winery & Brewery (*id.* at 16-34); Quattro Goombas (*id.* at 35-60); Wild Sun Winery & Brewery (*id.* at 61-64); Charleville Brewery & Winery (*id.* at 65-86); Garden Grove Brewery and Urban Winery (*id.* at 87-107); St. Clair Brown (*id.* at 10828); Arcadian Moon (*id.* at 129-53); Valley Vineyards and Brewery (*id.* at 154-73); and Arundel Cellars & Brewing Co. (*id.* at 174-86)).

³³ Applicants’ Appeal Br. at 18 (6 TTABVUE 19).

³⁴ December 16, 2021 Application at TSDR 6; *see also* December 17, 2022 Response to Office Action at TSDR 42 (New Mexico regulations permitting one with a small brewer’s license to, for example, conduct tastings and sell by the glass “wine or cider produced by a winegrower” and “buy or otherwise obtain wine or cider from a winegrower”).

goods sold under confusingly similar marks, are likely to believe that they emanate from the same source.

As to the third *DuPont* factor, which pertains to trade channels, because Applicants' and Registrant's identifications contain no restrictions as to channels of trade or classes of purchasers, we must presume that the identified goods travel in the ordinary channels of trade for such goods. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003). As with the second factor, we also must may not consider extrinsic evidence of actual use. *Stone Lion Cap. Partners*, 110 USPQ2d at 1162. Thus, Applicants' arguments that consumers of their beer and Registrant's wine are "seeking vastly different things" in different geographic regions are not persuasive.³⁵

It is common knowledge that beer and wine are frequently sold in the same stores to the same class of purchasers, namely, adult members of the general public. It is also common knowledge that these goods can be purchased in liquor stores and, in some cases, supermarkets and other brick and mortar and online retail outlets, as well as restaurants. The evidence of third party wineries combined with breweries and third party registrations for beer and wine shows that the identified goods and services are offered through the same providers and to the same consumers. We find this evidence is sufficient to show trade channel overlap. *See e.g., In re Embiid*, 2021 USPQ2d 577, at *31 (TTAB 2021) (evidence showing that shoes and shirts are sold together on the websites of clothing companies supports a finding of related trade channels).

³⁵ Applicants' Appeal Br. at 19 (6 TTABVUE 20).

The second and third *DuPont* factors weigh in favor of likelihood of confusion as to Applicants' "beer" in Class 32.

2. Restaurant and Taproom Services (International Class 43)

Applicants argue, citing *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003) and *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993), that there is no per se rule of relatedness of restaurant services and wine under the second *DuPont* factor and the Examining Attorney must show "something more" to demonstrate relatedness.³⁶

In *Coors Brewing*, the Court of Appeals for the Federal Circuit explained why more evidence than merely showing restaurants sell beer is required to prove that those goods and services are related:

It is not unusual for restaurants to be identified with particular food or beverage items that are produced by the same entity that provides the restaurant services or are sold by the same entity under a private label. Thus, for example, some restaurants sell their own private label ice cream, while others sell their own private label coffee. But that does not mean that any time a brand of ice cream or coffee has a trademark that is similar to the registered trademark of some restaurant, consumers are likely to assume that the coffee or ice cream is associated with that restaurant. The *Jacobs* case [*Jacobs v. Int'l Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641 (CCPA 1982)] stands for the contrary proposition, and in light of the very large number of restaurants in this country and the great variety in the names associated with those restaurants, the potential consequences of adopting such a principle would

³⁶ *Id.* at 17 (6 TTABVUE 18); *see also* Applicants' Reply Br. at 7 ("[M]ore is required than simply showing that businesses combining both wineries and breweries exist . . .") (9 TTABVUE 8).

be to limit dramatically the number of marks that could be used by producers of foods and beverages.

Coors Brewing, 68 USPQ2d at 1063; *see also Lloyd's Food Prods.*, 25 USPQ2d at 2027 (no per se rule about confusion, where similar marks are used in connection with restaurant services and food products). Thus, the relationship between Applicants' restaurant and taproom services and Registrant's wine "must consist of 'something more' than the fact that [Registrant] uses the mark on a food or beverage item and [Applicant] uses the mark in connection with restaurant services." *In re Opus One, Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001) ("*Opus One*").


The Examining Attorney made of record, inter alia, copies of ten third party registrations showing that "wine" and "Restaurant services, including sit-down service of food and take-out restaurant services" often are offered by the same entity under the same mark:³⁷

- RYE KNOT (Reg. No. 6795441) for "wine" in International Class 33; and "restaurant services" in International Class 43
- SIX BYRD (Reg. No. 6943719) for "wine" in International Class 33; and "restaurant services" in International Class 43



- (Reg. No. 5456776) for "wine; sparkling wine" in International Class 33; and "bar and restaurant services" in International Class 43
- BEAT CULTURE (Reg. No. 5662013) for "wine" in International Class 33; and "Bar and restaurant services" in International Class 43

³⁷ See January 20, 2023 Final Office Action at TSDR 187-230.

- TANGLED ROOTS BREWING COMPANY & design (Reg. No. 6583932) for “wine” in International Class 33; and “Bar and restaurant services” in International Class 43
- ZORVINO VINEYARDS (Reg. No. 6777709) for “wine” in International Class 33; “Restaurant and cafe services, namely, providing of food and alcoholic and non-alcoholic beverages for consumption on the premises” in International Class 43
- GLACIAL TILL (Reg. No. 6737826) for “wine” in International Class 33; and “restaurant services” in International Class 43
- KNIFE & BARREL (Reg. No. 6673831) for “wine” in International Class 33; and “restaurant, bar, and catering services, including restaurant carryout services” in International Class 43
- THE VIBRARY (Reg. No. 6603853) for “wine” in International Class 33; and “restaurant services” in International Class 43
-  (Reg. No. 6698225) for “wine” in International Class 33; and “restaurant services” in International Class 43

The Examining Attorney also introduced excerpts from ten third-party websites purporting to show that numerous entities use the same mark for wine and restaurant services.³⁸ Additionally, he made of record nine “website excerpts concerning private label wine.”³⁹

³⁸ See September 28, 2022 Non-Final Office Action (Fenton Winery & Brewery (TSDR 9-27); Mackinaw Trail Winery & Brewery (*id.* at 28-43); Von Jakob Winery & Brewery (*id.* at 44-75); January 20, 2023 Final Office Action (Round Barn Winery & Brewery (TSDR 16-34); Quattro Goombas (*id.* at 35-60); Charleville Brewery & Winery (*id.* at 65-86); St. Clair Brown (*id.* at 10828); Arcadian Moon (*id.* at 129-53); Valley Vineyards and Brewery (*id.* at 154-73); and Arundel Cellars & Brewing Co. (*id.* at 174-86)).

³⁹ See March 28, 2023 Denial of Request for Reconsideration (4 TTABVUE 11-36). These include: Peli Peli (*id.* at 12); Carmines (*id.* at 13); Del Frisco’s Grill (*id.* at 14); Signature Room (*id.* at 16-17); Wrigley Mansion (*id.* at 23-24); Urban Farmer (*id.* at 25); Artisan (*id.* at 31-32); Wildebeest (*id.* at 34-35); and Cucina Urbana (*id.* at 35-36).

The Examining Attorney argues this case is analogous to *Opus One*, where the applicant was seeking to register OPUS ONE for restaurant services and the registered mark was OPUS ONE for wine. There, the Board relied on evidence showing that the OPUS ONE mark was arbitrary and strong entitled to broad protection, and “it is an increasingly common practice in the industry for restaurants to offer and serve to their patrons ‘private label’ wines which are named after the restaurant, i.e., wine which is specially-made for the restaurant and served in bottles labeled with the restaurant's service mark.” *Id.* at 1815. Furthermore, the Board noted that the applicant’s OPUS ONE restaurant actually was selling OPUS ONE wine. The Examining Attorney argues that the evidence of record in this case shows that DRYLANDS, like OPUS ONE, is an arbitrary and strong mark, explaining that a search of the USPTO database revealed only three active third party records for applications and registrations for similar marks, for unrelated goods and services⁴⁰ and, as discussed above, there is evidence of private label use.

On this record, we find that the Examining Attorney has demonstrated “something more,” and the record shows that Registrant’s wine and Applicants’ restaurant services are related goods and services. Registrant’s mark DRYLANDS, is arbitrary as was the case in *Opus One* and commercially strong. Applicants’

⁴⁰ Examining Attorney’s Br. at 12 (8 TTABVUE 12); March 28, 2023 Denial of Request for Reconsideration After Final Action (4 TTABVUE). These are: TERRA FIRMA (translation of record as “dry land, firm ground”) for financial services (*id.* at 5-6); DRYLAND for bags, towels, yoga mats, and clothing (*id.* at 7-8); and DRYLAND for education, fitness, and various therapy and medical services (*id.* at 9-10). The Examining Attorney also requests that we take judicial notice of dictionary definitions of “terra firma” as “dry land” and “solid ground.” See Examining Attorney’s Br. at 16-25 (8 TTABVUE 16-25). Inasmuch as Applicants did not disagree, we have considered this evidence.

restaurant, although it does not offer Registrant's wine for sale (as was the case in *Opus One*), does offer sangria—a drink containing wine.⁴¹ There is more than sufficient evidence of record, analogous to the evidence in *Opus One*, to demonstrate that restaurants and wine often are offered under the same marks, including evidence of private label wine.

And, there is no question based on the third party evidence of record – websites of wineries that have restaurants, and third party registrations for wine and restaurant services under the same mark – that the channels of trade for Registrant's unrestricted wine and Applicants' unrestricted restaurant services overlap, and it is common knowledge that ordinary consumers of wine also frequent restaurants.

The second and third *DuPont* factors weigh in favor of likelihood of confusion as to Applicants' restaurant services in Class 43.⁴²

D. Nature and Extent of Any Actual Confusion

Applicants point to the length of time during and the conditions under which there has been concurrent use without evidence of actual confusion, the eighth *DuPont* factor, as weighing in their favor.⁴³ As the Board explained in *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at *6-7, the eighth factor has limited applicability in ex parte

⁴¹ See *supra* text accompanying note 34.

⁴² In view thereof, we need not reach the question of whether Applicants' "taproom" services are related to wine under the second *DuPont* factor. See *Baseball Am. Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1848 n. 9 (TTAB 2004) ("[I]f priority and likelihood of confusion are established as to any of the goods or services identified in an opposed class of goods or services, the opposition to registration of the mark as to all of the goods or services identified in that class will be sustained").

⁴³ Applicants' Appeal Br. at 18 (6 TTABVUE 19).

proceedings because the cited registrant is not a party, and, unlike other *DuPont* factors, it involves a fact-intensive analysis of the circumstances of the actual uses of the marks in the application and cited registration. The suggestion by Applicants' counsel that there has been no actual confusion between the marks is "no substitute for evidence" regarding the duration and extent of the actual uses of the involved marks that would enable us to determine whether there has been a meaningful opportunity for confusion to have occurred. *In re Embiid*, 2021 USPQ2d 577, at *40 (citation omitted).

The eighth *DuPont* factor is neutral in our analysis.

III. Balancing the *DuPont* Factors

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *DuPont* factors.⁴⁴

Because we have found that Applicants' mark DRYLANDS BREWING COMPANY and design and the cited mark DRYLANDS are similar; Applicants' "beer" and "restaurant services, including sit-down service of food and take-out restaurant services" are related to "wine" identified in the cited registration; and they would move in the same or overlapping trade channels and are offered to the same classes of purchasers, we conclude that confusion between Applicants' mark and the cited mark is likely.

⁴⁴ Neither Applicants nor the Examining Attorney address the fourth, seventh, ninth, tenth, eleventh, twelfth, or thirteenth *DuPont* factors. Therefore, these factors are neutral in our analysis.

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Decision: The refusal to register under Section 2(d) is affirmed for both of Applicants' International Classes.