

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: September 3, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

—  
Trademark Trial and Appeal Board  
—

*In re Liberty Orchards Company. Inc*  
—


Serial No. 97840459  
—

Alexander Lazouski of Lazouski IP LLC,  
for Liberty Orchards Company. Inc.

Elizabeth Anderson, Trademark Examining Attorney, Law Office 121,  
Richard White, Managing Attorney.

—  
Before Kuhlke, Greenbaum and O'Connor,  
Administrative Trademark Judges.

Opinion by O'Connor, Administrative Trademark Judge:

Liberty Orchards Company. Inc<sup>1</sup> (“Applicant”) seeks registration on the Principal Register of the mark  (COCOZEN in stylized format), for goods identified as

Coconut milk; coconut milk for culinary purposes; coconut  
milk-based beverages; dried coconuts; grated coconut;

---

<sup>1</sup> The Application identifies Applicant as “LIBERTY ORCHARDS COMPANY. INC” and thus we use this form to identify Applicant herein. March 15, 2023 Application, TDSR 1. References to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. All citations to documents contained in the TSDR database are to the downloaded .pdf versions of the documents.

coconut oil for food; coconut butter for food; coconut chips; pressed fruit paste; coconut, processed; condensed milk, in Class 29, and

coconut water; coconut-based beverages not being milk substitutes, in Class 32.<sup>2</sup>

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used in connection with the identified goods, so resembles the registered mark COCOZEN (in standard characters) for "Dietary supplements" in Class 5 as to be likely to cause confusion, mistake or deception.<sup>3</sup>

After the Examining Attorney made the refusal final, Applicant appealed to this Board. The appeal has been briefed. For the reasons set forth below, we affirm the refusal to register in both classes.

### I. Evidentiary Issue

To support its argument that the goods are not related, Applicant attached to its appeal brief Exhibits A-H, which feature screenshots from various websites cited by the Examining Attorney.<sup>4</sup> The screenshots are of different pages from those websites,

---

<sup>2</sup> Serial No. 97840459, filed March 15, 2023, is based on Applicant's allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), and describes the mark as follows: "The mark consists of the wording 'CocoZen' in a stylized font in green." The color green is claimed as a feature of the mark.

<sup>3</sup> Reg. No. 5892657 issued on Oct. 22, 2019.

<sup>4</sup> 4 TTABVUE 12-33, Exhibits A-H. References to the briefs on appeal refer to TTABVUE, the Board's public online docketing system. The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

and none of the pages attached by Applicant was submitted during examination. The Examining Attorney has objected to this evidence.<sup>5</sup>

We sustain the Examining Attorney's objection and do not consider this evidence, which was submitted for the first time with Applicant's brief. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d) (record "should be complete prior to the filing of an appeal"; proper procedure to introduce evidence after an appeal has been filed is to seek to suspend the appeal and remand the application for further examination); *see also In re Midwest Gaming & Entm't LLC*, Serial No. 85111552, 2013 TTAB LEXIS 55, at \*5 n.3 (TTAB 2013) (new evidence submitted with brief is "untimely and therefore not part of the record for this case").<sup>6</sup>

We now turn to the merits of the appeal.

## II. Likelihood of Confusion

"The Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion [or] mistake, or to deceive." *In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023) (cleaned up).

---


<sup>5</sup> 6 TTABVUE 2.

<sup>6</sup> As part of an internal Board pilot program to broaden acceptable forms of legal citation in Board cases, citations in this opinion are in the form recommended in 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 by the pages on which they appear in the Federal Reporter (*e.g.*, F.2d, F.3d or F.4th). For opinions of the Board, this opinion uses citations to the Lexis legal database and cites only precedential decisions. Practitioners should also adhere to the practice set forth in TBMP § 101.03.

Our determination of the issue of likelihood of confusion is based on analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65 (Fed. Cir. 2002)).

Varying weight may be assigned to each *DuPont* factor depending on the evidence presented. *See Charger Ventures*, 64 F.4th at 1381 (“In any given case, different *DuPont* factors may play a dominant role and some factors may not be relevant to the analysis.”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 1342 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Co.*, 544 F.2d 1098, 1103 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

#### A. Similarity of the Marks

Under the first *DuPont* factor, we compare the marks  and COCOZEN “in their entirety as to appearance, sound, connotation and commercial

impression.” *In re Detroit Ath. Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018) (quoting *DuPont*, 476 F.2d at 1361); *see also Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005). Applicant does not address this factor in its brief.

Applicant’s mark is COCOZEN in stylized format. The cited mark consists of the same term in standard characters. Because the cited mark may be displayed in any lettering style, font or color, including the same style, font and color as Applicant’s mark, the marks are legally identical. *i.am.symbolic*, 866 F.3d at 1324 (“Symbolic does not, and cannot, dispute that the mark, I AM in standard character form, and the registrants’ marks, I AM in standard character, typed, or stylized form, are pronounced the same way and, at a minimum, legally identical.”); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1041 (Fed. Cir. 1983); *In re Aquitaine Wine USA, LLC*, Serial No. 86928469, 2018 TTAB LEXIS 108, at \*13 (TTAB 2018) (“Since Registrant’s mark is a standard character mark, we must consider that the literal elements of the mark (the words and the letters) may be presented in any font style, size or color, including the same font, size and color as the literal portions of Applicant’s mark. This is because the rights associated with a standard character mark reside in the wording per se and not in any particular font style, size, or color.”).

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

B. Similarity of the Goods

Under this *DuPont* factor, we compare the goods as they are identified in the application and cited registration. *See Detroit Ath. Co.*, 903 F.3d at 1306; *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1325 (Fed. Cir. 2014) (Board must give “full scope” to an identification of goods or services).

We consider the similarity or dissimilarity and nature of the parties’ respective goods, *DuPont*, 476 F.2d at 1361, to determine whether the consuming public may perceive the goods as related enough to cause confusion about their source or origin. *Naterra Int’l v. Bensalem*, 92 F.4th 1113, 1117 (Fed. Cir. 2024). Although the dietary supplements identified in the cited registration are not identical to the goods in either class of the application, identity is not required to support a finding of likelihood of confusion. “Instead, likelihood of confusion can be found ‘if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012) (internal citation omitted). The issue is whether there is a likelihood of confusion as to the source of the goods, not whether purchasers would confuse the goods. *L’Oreal S.A. v. Marcon*, Opposition No. 91184456, 2012 TTAB LEXIS 77, at \*20 (TTAB 2012). Moreover, and of particular importance here, the degree of similarity between the goods required for confusion to be likely decreases because the marks are legally identical. *DeVivo v. Ortiz*, Opposition No. 91242863, 2020 TTAB LEXIS 15, at \*36 (TTAB 2020).

It is sufficient for a finding of likelihood of confusion as to a class of goods if relatedness is established for any one of the recited goods within the class. *See, e.g., Look Cycle Int'l v. Kunshan Qiyue Outdoor Sports Goods Co.*, Cancellation No. 92079409, 2024 TTAB LEXIS 289, at \*11 (TTAB 2024) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981)).

The goods in the cited registration are “dietary supplements” and the goods identified in the application are “Coconut milk; coconut milk for culinary purposes; coconut milk-based beverages; dried coconuts; grated coconut; coconut oil for food; coconut butter for food; coconut chips; pressed fruit paste; coconut, processed; condensed milk” in Class 29 and “coconut water; coconut-based beverages not being milk substitutes” in Class 32.

To demonstrate relatedness in both classes, the Examining Attorney introduced Internet printouts from the websites of multiple third-parties selling some of the applied-for goods as well as the cited goods. Several of these third parties produce and sell, under the same mark, both dietary supplements<sup>7</sup> or goods of a similar type and goods identified in one or both classes in the application. Examples include:

---

<sup>7</sup> The websites and products listed on them use terms such as “dietary supplements,” “vitamins & supplements,” “supplements,” “proteins & collagens” and the like to describe the products. *See* examples attached to June 1, 2023 Office Action, TSDR 30, 49 and 74, and to August 27, 2023 Final Office Action, TSDR 42, 83. Applicant did not advance any alleged distinction between “dietary supplements” and products with these other names, and we consider them to be encompassed by the broad goods of the cited registration. *See In re Solid State Design Inc.*, Serial No. 87269041, 2018 TTAB LEXIS 1, at \*16 (TTAB 2018) (where goods in an application or registration are broadly described, they are deemed to encompass all goods of the nature and type described therein). We take judicial notice that AMERICAN HERITAGE DICTIONARY ([www.ahdictionary.com](http://www.ahdictionary.com)) defines a “dietary supplement” as a “product containing one or more vitamins, herbs, enzymes, amino acids, or other ingredients, that is taken orally to supplement one’s diet, as by providing a missing nutrient.” *See, e.g., In re*

- Walmart and Carnation (Carnation-branded condensed milk and nutritional drinks). June 1, 2023 Office Action, TSDR 18-28.
- Z Natural Foods (Z Natural Foods-branded coconut milk powder, coconut water and shredded coconut and dietary supplements). *Id.* at 30-38.
- Laird (Laird-branded coconut water and dietary supplements). *Id.* at 40-49.
- Moon Juice (Moon Juice-branded coconut-based food and beverages and dietary supplements). *Id.* at 52-58.
- Erewhon (Erewhon-branded coconut water and coconut milk and supplement). *Id.* at 60-61, 74.
- Aloha (Aloha-branded coconut milk-based beverages and supplements).  
August 27, 2023 Final Office Action, TSDR 71-72, 77-81.

Applicant challenges the evidence of relatedness, arguing that it has “very little (if any) probative value” for several reasons.<sup>8</sup> First, Applicant argues that three of the websites, Carnation, Moon Juice and Apothekary, “do not show any references to Applicant’s Goods, specifically, products made of or containing coconuts.”<sup>9</sup> Yet Applicant’s Class 29 goods include “condensed milk,” which the evidence demonstrates is offered by the same source, under the same mark (Carnation) as nutritional drinks.<sup>10</sup> The Moon Juice website offers not only snack products

---

*Guild Mortg. Co.*, Serial No. 86709944, 2020 TTAB LEXIS 17, at \*5 n.6 (TTAB 2020) (Board may take judicial notice of dictionary definitions, including online versions of print dictionaries).

<sup>8</sup> 4 TTABUVE 6.

<sup>9</sup> *Id.*

<sup>10</sup> June 1, 2023 Office Action, TSDR 18, 23-27.



containing coconut pepitas as noted by Applicant,<sup>11</sup> but also features both a coconut milk-based beverage and supplements.<sup>12</sup>

Although the Apothekary website does not offer Applicant's exact recited goods, it offers a dietary supplement containing coconut milk powder.<sup>13</sup> Thus, this website, among others such as Aloha (offering a coconut milk-based protein drink)<sup>14</sup> and Beauty Bridge (offering a coconut-flavored dietary supplement),<sup>15</sup> supports a finding of relatedness, as the dietary supplements feature Applicant's goods as ingredients. *L'Oreal*, 2012 TTAB LEXIS 77, at \*25 (fact that aloe vera is commonly used as an ingredient in cosmetic and personal care products supported relatedness to aloe vera drinks); *In re Davia*, Serial No. 85497617, 2014 TTAB LEXIS 214, at \*18 (TTAB 2014) (although not a per se rule, food items appearing in same recipe may indicate relatedness).

Contrary to Applicant's assertion, the third-party websites do not merely show that there are some companies – engaged in vast and diverse business areas – that offer both supplements and coconut-based foods and beverages among a range of products.<sup>16</sup> A number of the websites feature Applicant's and Registrant's involved

---

<sup>11</sup> 4 TTABUVE 6.

<sup>12</sup> June 1, 2023 Office Action, TSDR 53-54 (offering the "Mango Lassi" beverage containing coconut milk and the "Super You" and other supplements).

<sup>13</sup> August 27, 2023 Final Office Action, TSDR 42-43.

<sup>14</sup> *Id.* TSDR 71-72.

<sup>15</sup> *Id.* TSDR 83.

<sup>16</sup> 4 TTABVUE 6-7. With respect to Walmart, Applicant's argument is belied by the fact that the Examining Attorney submitted only the Carnation condensed milk product page from the Walmart website, not pages from that site showing coconut products and dietary supplements generally.

goods branded under the same mark. Moreover, that some of the websites offer varied goods does not negate their relevance to the question of relatedness. These are not large supermarkets or retailers that sell a wide range of goods with no connection among them, but are specialty retailers catering to those pursuing a natural, organic or healthy lifestyle.<sup>17</sup> See *In re Ox Paperboard, LLC*, Serial No. 87847482, 2020 TTAB LEXIS 266, at \*17 (TTAB 2020) (“[T]he fact that more targeted sellers offer goods of both the Registrant and the Applicant tells us that the goods are related.”).<sup>18</sup>

Finally, Applicant faults the Examining Attorney for not submitting evidence of third-party use-based registrations featuring the goods of both parties, which it contends would be “[m]uch stronger evidence of relatedness.”<sup>19</sup> There is no requirement, however, for such evidence, although it may have some probative value to the extent the registrations show that the listed goods are of a type that may emanate from a single source. See *In re Albert Trostel & Sons Co.*, Serial No. 74186695, 1993 TTAB LEXIS 36, at \*7 (TTAB 1993). We do not find that the lack of such evidence is probative here, in the face of the other evidence submitted.

Apart from challenging the sufficiency of the Examining Attorney’s evidence of relatedness, Applicant contends that its goods are “vastly different” from the

---

<sup>17</sup> *E.g.*, June 1, 2023 Office Action, TSDR 55; August 27, 2023 Final Office Action, TSDR 70 (Naomi site founded by a “global advocate of clean and safe nutrition”), 83 (Beauty Bridge, the “curated beauty & wellness marketplace”).

<sup>18</sup> Even if, as Applicant suggests, some of the websites submitted by the Examining Attorney offer the goods in different sections of their websites, 4 TTABVUE 9, this does not negate the evidence of relatedness.

<sup>19</sup> *Id.* at 7.

registered dietary supplements, in both nature and purpose.<sup>20</sup> Applicant provides no evidentiary or legal support for its claim that the goods are not related because they are not substitutes, interchangeable or complementary, and do not fall within the same relevant market or submarket having “a cross-elasticity between them.”<sup>21</sup> “Attorney argument is no substitute for evidence.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005)). Further, as noted, the goods need not be identical or even competitive, but instead must be perceived by consumers “as related enough to cause confusion about the source or origin.” *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014) (quoting *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267) (Fed. Cir. 2002)); *Coach Servs.*, 668 F.3d at 1369 (“[I]t is not necessary that the products of the parties be similar or even competitive to support a finding of likelihood of confusion.”) (quotation omitted).

These arguments also assume limitations that are not present in Applicant’s recited goods, such as that the goods are “conventional” “ready-to-consume” coconut-based food and beverages.<sup>22</sup> From this, Applicant contends that its goods are “vastly different” from dietary supplements, defined on the FDA’s website as follows:

Dietary supplements are intended to add to or supplement the diet and are different from conventional food.

---

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.* at 8-9. The *Worthington Foods* case cited by Applicant, a district court decision rendered after a preliminary injunction hearing, does not counsel a different conclusion. *Id.* at 8 (discussing *Worthington Foods, Inc. v. Kellogg Co.*, 732 F. Supp. 1417 (S.D. Ohio 1990) (finding substitute egg/sausage products not related to breakfast cereals, despite both being breakfast foods, because they are not substitutes or complementary products)).

<sup>22</sup> 4 TTABVUE 8.

Generally, to the extent a product is intended to treat, diagnose, cure, or prevent diseases, it is a drug, even if it is labeled as a dietary supplement. Supplements are ingested and come in many forms, including tablets, capsules, soft gels, gel caps, powders, bars, gummies, and liquids.<sup>23</sup>

We are not persuaded by this argument. Although some of Applicant's recited goods are ready-to-consume food and beverage items, others, such as "coconut, processed" and "condensed milk" are not. The third-party website evidence discussed above shows that there is no bright line in the marketplace between Applicant's goods and dietary supplements. Rather, this evidence demonstrates that items encompassed within Applicant's coconut-based food and beverages are promoted as adding certain nutrients to the diet. For example, the Laird Superfood coconut water provides "nutrients like potassium,"<sup>24</sup> and the Aloha coconut milk-based protein drink contains "prebiotics for gut health, electrolytes to replenish, and MCT oil from organic coconuts [for] natural energy to give you the best recharge..."<sup>25</sup> Further support includes the organic MCT Oil offered on the Naomi website (derived from coconut oil to provide "the good fats your brain and body crave every day").<sup>26</sup> These examples disprove Applicant's unsupported argument that Registrant's dietary supplements are "different in character" from the applied-for goods.<sup>27</sup>

---

<sup>23</sup> *Id.*; June 30, 2023 Response to Office Action, TSDR 13.

<sup>24</sup> June 1, 2023 Office Action, TSDR 42.

<sup>25</sup> August 27, 2023 Final Office Action, TSDR 71-72.

<sup>26</sup> *Id.* at 55.

<sup>27</sup> 4 TTABVUE 9.

Moreover, Applicant may not restrict the scope of the goods covered in its application or the cited registration by argument or extrinsic evidence. *Stone Lion*, 746 F.3d at 1323 (“It was proper, however, for the Board to focus on the application and registrations rather than on real-world conditions....”); *Octocom Sys. Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990) (“The 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 the sales of goods are directed.”).

The third-party websites amply support a finding that the applied-for goods, in both Classes 29 and 32, are related to the dietary supplements identified in the cited registration because “consumers are accustomed to seeing a single mark associated with a source that sells both.” *Detroit Ath. Co.*, 903 F.3d at 1306 (relatedness supported by evidence that third parties sell both types of goods under the same mark); *see also Hewlett-Packard*, 281 F.3d at 1267 (Evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis....”); *Made in Nature, LLC v. Pharmavite LLC*, Opposition Nos. 91223352, 91223683 & 91227387, 2022 TTAB LEXIS 251, at \*56-57 (TTAB 2022) (third-party websites promoting sale of both parties’ types of goods showed relatedness).

Having considered all of Applicant’s arguments, we find that Applicant’s recited goods, in both Classes 29 and 32, commonly emanate from the same source under the

same mark, and therefore they are related to Registrant's dietary supplements. *Detroit Ath. Co.*, 903 F.3d at 1306.

The second *DuPont* factor weighs in favor of likelihood of confusion.

C. Similarity of the Trade Channels and Classes of Consumers

Applicant contends that the parties' goods "are in separate relevant markets" and appeal to "distinct customers."<sup>28</sup> According to Applicant, "[a]lthough more and more Americans use dietary supplements, they are nonetheless a small, discrete minority of consumers, especially compared to customers looking for ready-to-consume foods and beverages."<sup>29</sup>

Our determination under this *DuPont* factor is based on the descriptions of goods in the application and cited registration, not on extrinsic evidence of actual use. *i.am.symbolic*, 866 F.3d at 1327; *see also Octocom*, 918 F.2d at 942 (Fed. Cir. 1990). Because Applicant's and Registrant's identified goods are unrestricted as to channels of trade or classes of consumers, we presume that the goods travel through all normal channels of trade for such goods, and that they are available to all potential purchasers thereof. *i.am.symbolic*, 866 F.3d at 1327; *Squirtco*, 697 F.2d at 1042-43. Thus, and in view of the evidence discussed above, we find that the classes of consumers of the coconut and other applied-for goods and dietary supplements comprise members of the general consuming public, including those interested in preserving their health.

---

<sup>28</sup> 4 TTABVUE 8-9.

<sup>29</sup> *Id.* at 9.

The evidence discussed above of third-parties offering Applicant's identified goods and dietary supplements, on the same website and under the same mark, also demonstrates that the goods travel in the same channels of trade where they are encountered by the same consumers. *E.g.*, Z Natural Foods, June 1, 2023 Office Action, TSDR 30-37; Laird, *id.* at 40-50; Erewhon, *id.* at 60-61, 74. In addition, there is evidence that Applicant's identified goods and dietary supplements, even if bearing different marks, are often sold on the same websites, providing further support that the channels of trade are similar. These include Cap Beauty (coconut butter and supplements), *id.* at 9-16; Rawguru (coconut-based food and dietary supplements), August 27, 2023 Final Office Action, TSDR 7-24; Sakara (coconut-based food and beverages and dietary supplements), *id.* at 26-38; and Naomi (coconut-oil products and dietary supplements), *id.* at 55-56. All of this evidence demonstrates that the involved goods travel in overlapping channels of trade. *In re Davey Prods. Pty Ltd.*, Serial No. 77029776, 2009 TTAB LEXIS 524, at \*18 (TTAB 2009) (evidence that goods would be encountered by the same purchasers on the same websites showed overlap in trade channels).

It is true that the Internet is a pervasive medium, and "the mere fact that goods and services may both be advertised and offered through the Internet is not a sufficient basis to find that they are sold through the same channels of trade." *Parfums de Coeur, Ltd. v. Lazarus*, Opposition No. 91161331, 2007 TTAB LEXIS 36, at \*31-32 (TTAB 2007). But Internet evidence of the same retailers offering the same goods for sale, often under the same marks and to the same consumers, as is the case

here, is relevant evidence demonstrating that the goods can be encountered in overlapping channels of trade by the same classes of consumers. *See Charger Ventures*, 64 F.4th at 1382 (“Because the record shows that companies are known to offer both residential and commercial [real estate] services under the same mark and, often, on the same website, we find that substantial evidence supports the Board’s finding on these factors.”); *In re I-Coat Co.*, Serial Nos. 86802467, 86802618 & 86802733, 2018 TTAB LEXIS 171, at \*27 (TTAB 2018) (accepting third-party website evidence showing applicant’s and registrant’s goods offered by same businesses as evidence of a common channel of trade).

We find the third *DuPont* factor to weigh in favor of likelihood of confusion.

#### D. Remaining *DuPont* Factors

In its brief, Applicant did not separately address the other *DuPont* factors. Instead, Applicant makes two oblique references, seemingly to the sixth and twelfth factors.

Applicant refers in passing to “the weakness of the cited marks [sic],”<sup>30</sup> potentially implicating the sixth *DuPont* factor, “[t]he number and nature of similar marks in use on similar goods.” *DuPont*, 476 F.2d at 1361. Applicant cites no evidence in support and we find none in the record. As noted above, “[a]ttorney argument is no substitute for evidence.” *Cai*, 901 F.3d at 1371 (quoting *Enzo Biochem*, 424 F.3d at 1284).

---


<sup>30</sup> *Id.* at 3.



Finally, Applicant argues that the extent of potential confusion would be de minimis, apparently implicating the twelfth *DuPont* factor.<sup>31</sup> *DuPont*, 476 F.2d at 1361. The evidence considered above, however, demonstrates that confusion is more than a mere theoretical possibility, in view of the legally identical marks, relatedness of the goods and overlap in channels of trade and classes of consumers. The record evidence of multiple third-party websites selling both Applicant's and Registrant's identified goods, often bearing the same mark, supports a finding "that the goods involved here are the type of goods that would be marketed to and purchased by significant numbers of purchasers, and that the potential for confusion therefore cannot be deemed to be de minimis." *Davey Prods.*, 2009 TTAB LEXIS 524, at \*26.

The sixth and twelfth *DuPont* factors are neutral, at best.

#### E. Conclusion

Applicant's  mark is legally identical to Registrant's standard character COCOZEN mark, so the first *DuPont* factor weighs heavily in favor of likelihood of confusion. The goods are related and the channels of trade overlap, such that the second and third factors also weigh in favor of likelihood of confusion. The remaining factors are neutral. We therefore find that confusion is likely when the marks are used with their respective identified goods.

**Decision:** The refusal to register Applicant's mark under Trademark Act Section 2(d) is affirmed as to both classes.

---

<sup>31</sup> 4 TTABVUE 10-11.