

This Opinion is Not a  
Precedent of the TTAB

Mailed: August 18, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re The Breadfruit Company LLC*

Serial No. 98271727

The Breadfruit Company LLC, pro se.

Colleen Orscheln, Trademark Examining Attorney, Law Office 132,  
Brandon Marsh, Managing Attorney.

Before Lebow, Myles, and Bradley,  
Administrative Trademark Judges.

Opinion by Bradley, Administrative Trademark Judge:

The Breadfruit Company LLC (“Applicant”) seeks registration on the Principal Register of the standard character mark BIG MARBLE for “soft drinks, namely sodas” in International Class 32.<sup>1</sup>

The 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 is likely to cause

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<sup>1</sup> Application Serial No. 98271727 was filed on November 15, 2023, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming first use anywhere and first use in commerce on January 1, 2017.

confusion with the following separately-owned marks registered on the Principal Register:

- MARBLE POP in standard characters (with POP disclaimed) for “carbonated soft drinks” in International Class 32;<sup>2</sup> and
- RED MARBLE in standard characters for “Malt extracts for making liquors; extracts of hops for making beer; fruit flavored drinks; ginger ale; aerated water; aerated fruit juices; non-alcoholic fruit juice beverages; non-alcoholic cocktail mixes; drinking water with vitamins; soda water; vegetable juices; soft drinks; non-alcoholic beverages, namely, fruit beverages and fruit juices, soft drinks, frozen fruit beverages, and frozen carbonated beverages; fruit beverages and fruit juices; frozen fruit beverages; frozen carbonated beverages; low calorie soft drinks; concentrated fruit juice; fruit juice concentrates; non-alcoholic fruit extracts used in the preparation of beverages; powders used in the preparation of effervescing soft drinks; powders used in the preparation of soft drinks; powders used in the preparation of fruit-based beverages; syrups for beverages, namely, syrups for making fruit-based beverages; syrups for making fruit-flavored drinks; mineral and aerated waters; mineral water; drinking water; water pumped from underground, namely, mineral water; flavored waters; waters for drinking; still water; non-aerated water for drinking; drinkable spring water; beer; pale ale; lagers; stout; porter; beer-based cocktails; alcohol-free beers” in International Class 32.<sup>3</sup>

After the Examining Attorney issued the final refusal, Applicant filed a request for reconsideration.<sup>4</sup> The Examining Attorney denied the request for reconsideration, and Applicant filed an appeal.<sup>5</sup> Applicant then requested a remand to the Examining

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<sup>2</sup> Registration No. 3706242, registered on November 3, 2009 and has been renewed. The registration is owned by Wismettac Asian Foods, Inc.

<sup>3</sup> Registration No. 7178802, registered on October 3, 2023 and owned by Hybe Co., Ltd.

<sup>4</sup> October 10, 2024 Request for Reconsideration.

<sup>5</sup> 1 TTABVUE.

Citations in this opinion to the briefs and other materials in the appeal docket refer to TTABVUE, the Board’s online docketing system. Specifically, the number preceding

Attorney for the consideration of additional evidence, which the Board granted.<sup>6</sup> Upon review of the request for reconsideration, the Examining Attorney issued a new non-final office action which maintained the Section 2(d) refusal and raised a new issue regarding Applicant's proposed amendment to its identification of goods.<sup>7</sup> After Applicant responded to the new office action, arguing against the refusal and withdrawing its proposed amendment to the goods,<sup>8</sup> the Examining Attorney issued a subsequent final office action on the Section 2(d) refusal and the appeal resumed.<sup>9</sup> Applicant and the Examining Attorney then filed briefs.<sup>10</sup> We affirm the refusal to register.

## **I. Likelihood of Confusion**

Our determination under Section 2(d) of the Trademark Act involves an analysis of all of the probative evidence of record that is relevant to the factors bearing on a likelihood of confusion. *See In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”); *see also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005).

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TTABVUE corresponds to the docket entry number, and any number(s) following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear.

Page references to the application file 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.

<sup>6</sup> 4 TTABVUE; 5 TTABVUE.

<sup>7</sup> January 17, 2025 Office Action at 2.

<sup>8</sup> January 20, 2025 Response to Office Action at 19.

<sup>9</sup> 6 TTABVUE; 7 TTABVUE.

<sup>10</sup> 8 TTABVUE (Applicant's brief); 10 TTABVUE (Examining Attorney's brief); 11 TTABVUE (Applicant's reply brief).

We must consider “each *DuPont* factor for which there is evidence and argument.” *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (citing *In re Guild Mortg. Co.*, 912 F.3d 1376, 1380 (Fed. Cir. 2019)). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See 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.’”) (alteration in the original) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65 (Fed. Cir. 2002)). These and other factors are discussed below.

**A. Similarity of the Goods, Trade Channels and Classes of Purchasers**

We begin by analyzing the “similarity or dissimilarity and nature of the goods” and “consider the applicant’s goods as set forth in its application, and the [registrants’] goods as set forth in [their] registration[s].” *i.am.symbolic*, 866 F.3d at 1325 (quoting *M2 Software, Inc. v. M2 Communs., Inc.*, 450 F.3d 1378, 1382 (Fed. Cir. 2006)). “[W]here the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein.” *In re Solid State Design Inc.*, Ser. No. 87269041, 2018 TTAB LEXIS 1, at \*16 (TTAB 2018) (citation and quotation omitted). “[I]t is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.” *In re Aquamar, Inc.*, Ser. No.

85861533, 2015 TTAB LEXIS 178, at \*9 n.5 (TTAB 2015) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981)).

Here, Applicant's goods, "soft drinks, namely sodas", are identical to the "carbonated soft drinks" in the cited registration for MARBLE POP. Specifically, "soft drink" is defined as "[a] nonalcoholic, flavored, carbonated beverage, usually commercially prepared and sold in bottles or cans" and it is "also called regionally . . . soda."<sup>11</sup> Additionally, the goods identified in cited registration for RED MARBLE include "soft drinks," which are broad enough to encompass Applicant's more specific goods, "soft drinks, namely sodas" and as such the respective goods are legally identical. *See In re Hughes Furniture Indus.*, Ser. No. 85627379, 2015 TTAB LEXIS 65, at \*9-10 (TTAB 2016) (parties' goods were legally identical where "[a]pplicant's broadly worded identification of 'furniture' necessarily encompass[ed] [r]egistrant's narrowly identified 'residential and commercial furniture'"). Moreover, Applicant admits that the parties' "goods are legally identical."<sup>12</sup> As such, the second *DuPont* factor strongly supports a finding of a likelihood of confusion. *Fallon v. Brown Innovation, LLC*, Opp. No. 91252488, 2021 TTAB LEXIS 435, at \*10 (TTAB 2021) ("The goods are legally identical in part, which weighs heavily in favor of likely confusion.").

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<sup>11</sup> THE AMERICAN HERITAGE DICTIONARY (<https://ahdictionary.com/word/search.html?q=soft+drink>), accessed August 14, 2025. *See Performance Open Wheel Racing, Inc. v. United States Auto Club Inc.*, Opp. No. 91229632, 2019 TTAB LEXIS 137, at \*11 n.34 (TTAB 2019) ("The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format.").

<sup>12</sup> 8 TTABVUE 4; 11 TTABVUE 4.

Turning to the third *DuPont* factor regarding trade channels and consumers, neither Applicant nor Registrants limit their trade channels or classes of purchasers in their respective identifications. Accordingly, because the goods described in the application and the cited registration for MARBLE POP are identical, and the goods in the application and the cited registration for RED MARBLE are in part legally identical, “we must presume that these goods . . . travel through the same channels of trade and are offered . . . to the same or overlapping classes of purchasers.” *See In re Info. Builders Inc.*, Ser. No. 87753964, 2020 TTAB LEXIS 20, at \*11-12 (TTAB 2020) (*citing In re Viterro Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012)); *Genesco Inc. v. Martz*, Opp. No. 91121296, 2003 TTAB LEXIS 123, at \*28 (TTAB 2003) (“Given the in-part identical . . . nature of the parties’ goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade.”).

Applicant argues that this “[p]resumption [i]s [o]vercome by [m]arketplace [r]ealities” and “ignores uncontroverted evidence of divergent retail ecosystems.”<sup>13</sup> Specifically, Applicant cites evidence that its goods are sold in high-end retailers like Whole Foods, Total Wine, and Sprouts Market, and that goods sold under the mark MARBLE POP (Registration No. 3706242) are novelty items sold online, for example, on eBay.<sup>14</sup> However, we cannot take purported marketplace realities into account, as

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<sup>13</sup> 8 TTABVUE 3-4.

<sup>14</sup> 8 TTABVUE 3; 11 TTABVUE 4-5. We address Applicant’s arguments regarding the alleged absence from the market of goods offered under the mark RED MARBLE in Section I.E.

Applicant urges us to do. *See e.g., i.am.symbolic*, 866 F.3d at 1327 (“[T]he Board properly declined to import restrictions into the identification of goods based on alleged real world conditions.”); *Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 902 (CCPA 1973) (Board must “give full sweep” to an unrestricted identification of goods regardless of the registrant’s actual business). Applicant’s argument also ignores that “the owner of an unrestricted registration is entitled to change its current trade channels at any time.” *In re Detroit Ath. Co.*, 903 F.3d 1297, 1308 (Fed. Cir. 2018). Accordingly, the Registrant of the mark MARBLE POP may change its trade channels to also include Whole Foods, Total Wine, and/or Sprouts Market, and use in such trade channels is encompassed by its unrestricted federal registration. *See B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 143 (2015) (“if an application does not delimit any specific trade channels of distribution, no limitation will be applied”) (citation omitted); *Detroit Ath.*, 903 F.3d at 1308 (given the unrestricted registration “we may not assume that the club will never sell clothing online or through third-party distributors”).

In view of the foregoing, the third *DuPont* factor also weighs heavily in favor of a finding of likelihood of confusion. *See, e.g., In re Bay State Brewing Co.*, Ser. No. 85826258, 2016 TTAB LEXIS 46, at \*4-5 (TTAB 2016) (“identity in the goods and trade channels therefor, and the overlap in purchasers, are factors that weigh heavily in favor of a finding of likelihood of confusion”).

## **B. Consumers’ Sophistication and Purchasing Conditions**

Under this *DuPont* factor we consider the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ v. careful, sophisticated purchasing.” *DuPont*, 476

F.2d at 1361. Because there are no limitations on price point or consumer type in either the application or the cited registrations, we must presume that the sodas, soft drinks, and carbonated soft drinks in the application and cited registrations are sold at all price points and to all types of consumers. As such, Applicant's and Registrants' customers may include ordinary members of the general public shopping for beverages at grocery stores, supermarkets, drug stores, etc., as well as more discerning customers purchasing premium beverages at higher-end specialty shops. However, we must base our decision on "the least sophisticated potential purchasers." *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1325 (Fed. Cir. 2014).

Purchasers of "relatively inexpensive, comestible goods subject to frequent replacement . . . have been held to a lesser standard of purchasing care." *Specialty Brands, Inc. v. Coffee Bean Distribs.*, 748 F.2d 669, 672 (Fed. Cir. 1984). Applicant provided evidence that it offers its BIG MARBLE organic ginger beer soda for \$8.99 for a four pack of 12-ounce bottles.<sup>15</sup> Additionally, Applicant's evidence included a listing for MARBLE POP blueberry flavor soda for \$36 for six bottles.<sup>16</sup> Other soft drinks in Applicant's evidence are listed at similar price points including Starry lemon lime soda at \$7.28 for a pack of 12 cans, and Sunkist orange soda at \$7.59 for a pack of 12 cans.<sup>17</sup> Accordingly, goods of the type identified in Applicant's and Registrants' identifications of goods are both relatively inexpensive and consumers

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<sup>15</sup> January 20, 2025 Response to Office Action at 431.

<sup>16</sup> January 20, 2025 Response to Office Action at 437.

<sup>17</sup> January 20, 2025 Response to Office Action at 435.



are likely to use a lesser standard of care in making purchasing decisions thereby increasing the risk of confusion. *See Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000) (“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.”); *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567 (Fed. Cir. 1984) (“Bread and cheese are staple, relatively inexpensive comestibles, subject to frequent replacement. Purchasers of such products have long been held to a lesser standard of purchasing care.”).

Applicant argues that “BIG MARBLE’s premium positioning . . . implies careful purchasing decisions”<sup>18</sup> and that:

The distinct nature of BIG MARBLE—its premium price, organic and fair-trade certifications, and targeted distribution—cultivates a highly engaged and discerning consumer base. These are not impulse purchases by casual shoppers. . . . The target consumers for BIG MARBLE actively seek specific product attributes (organic, fair trade) and often make purchasing decisions based on brand values, a process that inherently involves a greater degree of attention to the full brand name and its associated messaging, rather than relying on a single, potentially common word within the mark.<sup>19</sup>

Yet, Applicant’s identification of goods is not limited to any “premium” price or positioning, and Registrants’ goods also do not contain any price or quality limitations. The only evidence Applicant identifies regarding such “premium positioning” is an article listing BIG MARBLE at number six in a list of “top trending

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<sup>18</sup> 8 TTABVUE 4.

<sup>19</sup> 11 TTABVUE 5.

brands” for mixers.<sup>20</sup> We do not find the article probative because the source and date of the article are not identified and it is unclear what criteria was used to determine placement in the list. Regardless, the article does not alter the conclusion that the parties’ identifications of goods are not limited to any “premium” categorization. Similarly, Applicant’s identification of goods is not limited to “fair trade” or “organic” soda and “even [Applicant’s] products promoted for sale as organic cannot be said to be in such an expensive price range as to suggest a greater degree of purchaser care.” *Made in Nature, LLC v. Pharmavite LLC*, Opp. Nos. 91223352, 2022 TTAB LEXIS 228, at \*65 (TTAB 2022).

We thus find that this *DuPont* factor weighs in favor of likelihood of confusion.

### **C. Strength or Weakness of the Registrants’ Marks**

Applicant contends that the word “MARBLE” is a “[d]iluted [t]erm in Class 32” and conceptually weak in the beverage context, and thus limits the scope of protection for the cited marks.<sup>21</sup> “A mark’s strength is measured both by its conceptual strength . . . and its marketplace strength . . .” *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010). In determining the strength of the cited marks, we consider inherent strength, based on the nature of the mark itself. *In re FCA US LLC*, Ser. No. 85650654, 2018 TTAB LEXIS 116, at \*36-37 (TTAB 2018). We also consider whether the mark has commercial weakness in the marketplace if there is evidence in the record. *DuPont*, 476 F.2d at 1361 (The sixth *DuPont* factor considers “the

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<sup>20</sup> January 20, 2025 Response to Office Action at 444.

<sup>21</sup> 8 TTABVUE 3; 11 TTABVUE 4.

number and nature of similar marks in use on similar goods.”). However, Applicant has not provided any evidence of third-party marketplace use of “MARBLE,” so we consider only conceptual strength here. *See New Era Cap Co. v. Pro Era, LLC*, Opp. No. 91216455, 2020 TTAB LEXIS 199, at \*36 (TTAB 2020) (“Applicant did not provide evidence of any third-party use of marks consisting of or comprised of the term ERA for these goods, and thus no evidence of commercial weakness.”).

Conceptual or inherent strength is a measure of a mark’s distinctiveness. *Chippendales*, 622 F.3d at 1353-54. A mark’s distinctiveness is “often classified in categories of generally increasing distinctiveness[:] . . . (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992). “The existence of third-party registrations on similar goods can bear on a mark’s conceptual strength. Specifically, third-party registrations containing an element that is common to both the [Registrants’] and the [Applicant’s] marks can show that that element has a normally understood and well-recognized descriptive or suggestive meaning.” *Spireon*, 71 F.4th at 1363 (citations omitted). However, to do so, such third-party registrations must be “similar marks in use on similar goods.” *Omaha Steaks Int’l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1324 (Fed. Cir. 2018) (citations omitted).

Applicant submitted evidence of four third-party registrations for “MARBLE-formative marks in Class 32.”<sup>22</sup> We find these four third-party registrations are not probative because they all cover “beer” which Applicant has not demonstrated is

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<sup>22</sup> 11 TTABVUE 4; July 20, 2025 Response to Office Action at 40-41, 91-92, 205-06, 233-234.

similar to Registrants' soft drinks or carbonated soft drinks.<sup>23</sup> *See Tao Licensing, LLC v. Bender Consulting Ltd.*, Can. No. 92057132, 2017 TTAB LEXIS 437, at \*51 (TTAB 2017) (third-party registrations in unrelated fields "have no bearing on the strength of the term in the context relevant to this case"). Applicant argues that "[c]onsumers encounter 'MARBLE'-formative marks for both alcoholic and non-alcoholic drinks in identical retail settings (e.g., grocery stores, Amazon)"<sup>24</sup> and that this "real-world retail overlap' . . . is relevant to assessing the conceptual strength of 'MARBLE'."<sup>25</sup> But Applicant failed to provide any evidence that soda or soft drinks are offered in the same retail settings as beer or of any other real world overlap and "[a]ttorney argument is no substitute for evidence." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (citation omitted) ("assertions of fact" in a brief are "not evidence under any of the relevant rules"). Further, the two registrations cited against the application in this case alone fall short of the evidence required to demonstrate weakness.<sup>26</sup> *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGaA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1373 (Fed. Cir. 2015) (applicant

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<sup>23</sup> July 20, 2025 Response to Office Action at 40, 91, 205, 233. The fact that the third-party registrations cover goods in Class 32 does not automatically mean that they are sufficiently similar to be probative. *See Detroit Ath.*, 903 F.3d at 1307 ("Classification is solely for the convenience of Patent and Trademark Office administration, and is wholly irrelevant to the issue of registrability.") (internal quotations and citations omitted).

<sup>24</sup> 8 TTABVUE 3.

<sup>25</sup> 11 TTABVUE 4.

<sup>26</sup> Applicant's reliance on *In re Bed & Breakfast Registry*, 791 F.2d 157 (Fed. Cir. 1986) is misplaced. *See* 8 TTABVUE 3; 11 TTABVUE 4. In that case the Federal Circuit affirmed the Board's determination that the phrase "bed and breakfast" was descriptive and weak because the record contained "references to 'bed and breakfast' reservation or referral services in travel guide books, directories, and newspaper articles." *Id.* at 159. Applicant has not provided any such evidence in this case.

“presented extensive evidence of third-party registrations depicting paw prints and evidence of these marks being used in internet commerce”).

Moreover, because the cited registrations are “prima facie evidence of the validity of the registered mark[s],” *see* Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), we must assume that Registrants’ MARBLE POP and RED MARBLE marks are inherently distinctive, since they are registered on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act. *See In re Davia*, Ser. No. 85497617, 2014 TTAB LEXIS 214, at \*11-12 (TTAB 2014). The term “marble” does not have any identified meaning in connection to soda or soft drinks,<sup>27</sup> and as such we find that Registrants’ marks are arbitrary. *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1340 (Fed. Cir. 2004) (“an arbitrary mark is a known word used in an unexpected or uncommon way”). As arbitrary marks, Registrants’ marks are conceptually strong. *See Palm Bay Imps.*, 396 F.3d at 1372 (“VEUVE is an arbitrary term as applied to champagne and sparkling wine, and thus conceptually strong as a trademark.”).

Accordingly, we find this factor is neutral in the likelihood of confusion analysis.

#### **D. Similarity or Dissimilarity of the Marks**

We evaluate “[t]he similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Detroit Ath.*, 903 F.3d

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<sup>27</sup> THE AMERICAN HERITAGE DICTIONARY defines “marble” as “[a] metamorphic rock formed by alteration of limestone or dolomite, often irregularly colored by impurities, and used especially in architecture and sculpture” and as “[a] small hard ball, usually of glass, used in children’s games. (<https://ahdictionary.com/word/search.html?q=marble>, accessed August 14, 2025).

at 1303 (*citing DuPont*, 476 F.2d at 1361). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, Ser. No. 87075988, 2018 TTAB LEXIS 170, at \*13 (TTAB 2018) (citation omitted). Where, as here, the goods at issue are identical and legally identical, “the degree of similarity necessary to support a conclusion of likely confusion declines.” *See Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992). “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.” *i.am.symbolic*, 866 F.3d at 1323 (*quoting Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012)).

Additionally, “[i]t is well-established that it is improper to dissect a mark, and that marks must be viewed in their entirety.” *Coach Servs.*, 668 F.3d at 1368; *Jack Wolfskin*, 797 F.3d at 1371 (“the touchstone of this factor is consideration of the marks in total”). Nonetheless, “it is settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark.” *Bay State Brewing*, 2016 TTAB LEXIS 46, at \*7 (*citing In re Nat’l Data*, 753 F.2d 1056, 1059 (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 entirety.”)).

Applicant's mark is BIG MARBLE, and the cited marks are RED MARBLE and MARBLE POP. We find that that the dominant part of Applicant's mark and the cited registrations is the arbitrary noun "MARBLE." *Stone Lion Cap.*, 746 F.3d at 1321-22 (affirming TTAB's finding that that the noun LION was the dominant part of both parties' respective marks STONE LION CAPITAL and LION CAPITAL). As discussed previously with regard to the strength of the Registrants' marks, the defined meaning of marble does not have any connection to soda or soft drinks. In contrast, consumers may perceive the word "BIG" in Applicant's mark to refer to the size of Applicant's sodas or their flavor, the word "RED" in cited Registration No. 7178802 to refer to the color of the soft drinks, and the word "POP" in cited Registration No. 3706242 is disclaimed as descriptive or generic of carbonated soft drinks. We do not disregard the words "BIG," "RED," or "POP," but we find that these descriptive or suggestive words are entitled to less weight in the analysis than the arbitrary word MARBLE, and are not sufficient to distinguish the parties' marks in the context of the parties' identical and legally identical goods. *See Stone Lion Cap.*, 746 F.3d at 1322 (finding Board did not err "by according little weight to the adjective 'STONE,' on the ground that it did not 'distinguish the marks in the context of the parties' services' . . . [as the] addition of a suggestive or descriptive element is generally not sufficient to avoid confusion") (citations omitted). We accordingly find that the marks are similar in sight, meaning, and commercial impression due to the use of the identical dominant word "MARBLE". *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 1343 (Fed. Cir. 2004) ("Viewed in their entirety with non-dominant features

[ALE, JOSE and GOLD] appropriately discounted, the marks [GASPAR'S ALE for beer and ale and JOSE GASPAR GOLD for tequila] become nearly identical.”).

Applicant argues that “[t]he marks project irreconcilable brand identities,” pointing to differences in packaging, bottle designs, appearance of the marks on the products, and other trade dress and branding.<sup>28</sup> Yet, Applicant’s mark and the cited marks are all standard character marks. As such they are not limited to any particular font or stylization, and we only consider the marks themselves and not trade dress or other branding elements that are not covered by the application or registrations. *See Kimberly-Clark Corp. v. H. Douglas Enters.*, 774 F.2d 1144, 1147 (Fed. Cir. 1985) (“[A] distinction in trade dress cannot weigh against likelihood of confusion with respect to the registration of a simple word mark . . . . The reason is that such dress might well be changed at any time; only the word mark itself is to be registered.”); *In re Aquitaine Wine USA, LLC*, Ser. No. 86928469, 2018 TTAB LEXIS 108, at \*11 (TTAB 2018) (“We must compare the marks as they appear in the drawings, and not on any labels that may have additional wording or information.”).

Applicant also argues that the marks create distinct commercial impressions and that the Examining Attorney’s focus on “MARBLE” “overlooks the significant differentiating impact of the prefixes ‘BIG,’ ‘RED,’ and the term ‘POP’”.<sup>29</sup> Specifically Applicant contends that “BIG MARBLE conveys a sense of significance, quality, or abundance. RED MARBLE suggests a color. MARBLE POP, where ‘POP’ is

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<sup>28</sup> 8 TTABVUE 2, 4-5; January 20, 2025 Office Action at 28 (Exhibit A), 31-32 (Exhibit C1 and CC1), 446-47 (Exhibit S).

<sup>29</sup> 11 TTABVUE 3.



descriptive or generic of soda and disclaimed, presents a novelty or traditional soda impression.”<sup>30</sup> To the contrary, Applicant’s argument reinforces the descriptive and suggestive nature of the other words in the marks and supports that these words are entitled to less weight in the analysis. Consumers are likely to perceive BIG MARBLE as a different variation or flavor in a product line of goods offered by the RED MARBLE or MARBLE POP registrants. *See In re Hitachi High-Technologies Corp.*, Ser. No. 79110412, 2014 TTAB LEXIS 32, at \*17 (TTAB 2014) (“consumers who may be familiar with various products in the [cited registrant’s] Optimize product line, when confronted with applicant’s mark, would be likely to view the goods marked therewith as additional products from registrant”); *In re Collegian Sportswear, Inc.*, Ser. No. 73326917, 1984 TTAB LEXIS 27, at \*6 (TTAB 1984) (“customers familiar with registrant’s ‘COLLEGIENNE’ clothing might believe that ‘COLLEGIAN OF CALIFORNIA’ clothing was a new line of clothing from registrant featuring a ‘California’ or west coast style”).

Overall, considering the identity of the dominant and arbitrary word MARBLE in the marks, as well as the lesser degree of similarity required as a result of the legally identical goods, we conclude that Applicant’s mark is similar to both of the cited registrations such that this *DuPont* factor weighs in favor of a likelihood of confusion.

#### **E. Collateral Attack on Cited Registration is Impermissible**

Applicant argues that cited Registration No. 7178802 for the mark RED MARBLE is “de facto” abandoned and has “[n]o market presence” based on Applicant’s assertion

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<sup>30</sup> 11 TTABVUE 3.

that a search in the GS1 barcode database yields no results and that there are “no active listings in beverage retail or distribution platforms.”<sup>31</sup> “Applicant acknowledges . . . that an ex parte appeal is not the proper forum for a collateral attack on the validity of a cited registration based on nonuse.”<sup>32</sup> Yet, Applicant still maintains that the alleged “lack of any known market presence for RED MARBLE is relevant” because “[a] mark with no discernible presence in the actual marketplace has a diminished practical ability to cause consumer confusion.”<sup>33</sup>

Applicant’s argument that the mark RED MARBLE is not in use is a “collateral attack on the validity of the registration.” *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1408 (Fed. Cir. 1997). As Applicant recognizes “an ex parte proceeding is not the proper forum for a trademark applicant to launch an attack on a registered mark . . . .” *In re Charger Ventures LLC*, 64 F.4th 1375, 1383 (Fed. Cir. 2023) (citation omitted; cleaned up). *See also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01(d)(iv) (May 2025) (and cases cited therein) (“During ex parte prosecution, an applicant will not be heard on matters that constitute a collateral attack on the cited registration (e.g., a registrant’s nonuse of the mark).”). Accordingly, Applicant’s argument “that a registrant no longer uses the registered mark must be disregarded.” *Dixie Rests.*, 105 F.3d at 1408 (citation omitted; cleaned up).

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<sup>31</sup> 8 TTABVUE 3, 4; January 20, 2025 Response to Office Action at 39 (Exhibit F); 11 TTABVUE 3.

<sup>32</sup> 11 TTABVUE 5.

<sup>33</sup> 11 TTABVUE 5.

## **II. Conclusion**

After reviewing the evidence of record, and the arguments relating thereto, we conclude that confusion is likely. Applicant's and Registrants' goods are legally identical, at least in part, overlapping channels of trade and classes of purchasers are presumed, and Applicant's and Registrants' marks are similar, all of which weighs in favor of a likelihood of confusion. The parties' inexpensive goods that are subject to impulse purchases also increase the risk of confusion. The strength of the marks factor is neutral and does not alter our conclusion that confusion is likely. We do not consider Applicant's impermissible collateral attack on one of the cited registrations.

**Decision:** The refusal to register under Section 2(d) is affirmed.