

This Opinion is Not a  
Precedent of the TTAB

Mailed: September 26, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Elliott*  
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Serial No. 86717843  
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Frank Salzano of Salzano, Jackson & Lampert, LLP,  
for Ezekiel Elliott.<sup>1</sup>

Diane Collopy, Trademark Examining Attorney, Law Office 107,  
J. Leslie Bishop, Managing Attorney.

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Before Lykos, Larkin, and Coggins,  
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Ezekiel Elliott (“Applicant”) seeks registration on the Principal Register of the  
mark ZEKE (in standard characters) for:


Athletic apparel, namely, shirts, pants, jackets, footwear,  
hats and caps, athletic uniforms; athletic uniforms;  
clothing for athletic use, namely, padded pants; clothing for  
athletic use, namely, padded shirts; clothing for athletic  
use, namely, padded shorts; clothing, namely, arm

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<sup>1</sup> Applicant appointed Mr. Salzano as his counsel for this application on April 23, 2018, after the briefing of this appeal. Applicant’s immediately previous counsel during prosecution of the application was Phillip Thomas Horton of the Law Office of Phillip Thomas Horton, who filed Applicant’s appeal brief.

warmers; clothing, namely, athletic sleeves; clothing, namely, base layers; clothing, namely, neck tubes; gloves as clothing; headbands for clothing; hoods; infant and toddler one piece clothing; jackets; jerseys; ties; triathlon clothing, namely, triathlon tights, triathlon shorts, triathlon singlets, triathlon shirts, triathlon suits; wearable garments and clothing, namely, shirts; women's clothing, namely, shirts, dresses, skirts, blouses; wrist bands; in International Class 25.<sup>2</sup>

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods identified in the application, so resembles the mark ZEKE'S SMOKEHOUSE, in typed form<sup>3</sup> with SMOKEHOUSE disclaimed, for "hats, caps, blouses, sweat shirts" in International Class 25, owned by one registrant (the first registrant);<sup>4</sup> and the marks ZEKE'S COFFEE, in standard

characters, and  , both with COFFEE disclaimed, for "athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms" in

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<sup>2</sup> Application Serial No. 86717843 was filed on August 7, 2015, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant's allegation of a bona fide intention to use the mark in commerce. The application contains the following statement: "The name(s), portrait(s), and/or signature(s) shown in the mark identifies Ezekiel Elliott, whose consent(s) to register is made of record."

<sup>3</sup> "Prior to November 2, 2003, 'standard character' drawings were known as 'typed' drawings. . . . A typed mark is the legal equivalent of a standard character mark." TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 807.03(i) (Oct. 2017).

<sup>4</sup> Registration No. 2942626, issued April 19, 2005; Section 8 declaration accepted; Section 15 declaration acknowledged; renewed. This registration also covers various foods in International Classes 29 and 30 which are not at issue.

International Class 25, owned by a different registrant (the second registrant);<sup>5</sup> as to be likely to cause confusion, to cause mistake, or to deceive. When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

### **I. Evidentiary Issue**

Before proceeding to the merits of the refusal, we address an evidentiary matter. Applicant attached to his brief several items, none of which had been submitted previously. The Examining Attorney objected to the new material. The evidentiary record in an application should be complete prior to the filing of an ex parte appeal to the Board. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). The Examining Attorney's objection to evidence first submitted with the appeal brief is sustained. *Id.*; *In re Fiat Grp. Mktg. & Corp. Commc'ns S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014). Accordingly, we give no further consideration to the evidence submitted for the first time with Applicant's brief, or any arguments related thereto.

### **II. Likelihood of Confusion**

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. \_\_\_, 135 S.Ct. 1293, 113 USPQ2d 2045, 2049 (2015). *See also In re Majestic*

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<sup>5</sup> Registration Nos. 4635438 (standard characters) and 4635440 (stylized), issued November 11, 2014. Each registration also identifies coffee and coffee-based goods in International Class 30 which are not at issue.

*Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). We discuss the *du Pont* factors for which Applicant and the Examining Attorney have presented evidence and arguments. “Not all of the [*du Pont*] factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1719 (Fed. Cir. 2012) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257 (Fed. Cir. 2010)).

**A. Similarity or Dissimilarity of the Goods, Channels of Trade, and Classes of Customers**

We turn first to the goods, channels of trade, and classes of consumers. We must make our determinations under these factors based on the goods as they are identified in the application and cited registrations. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

The first registrant’s goods include hats, caps, and blouses. Applicant’s goods also include hats and caps (as athletic apparel) and blouses (as women’s clothing). The second registrant’s goods include “athletic apparel, namely, shirts, pants, jackets,

footwear, hats, caps, and athletic uniforms;” and Applicant’s goods also include “athletic apparel, namely, shirts, pants, jackets, footwear, hats, caps, and athletic uniforms.” In view thereof, Applicant’s goods are, at least in part,<sup>6</sup> identical to the goods of each registrant. Because the goods are identical in part, we must presume that the channels of trade and classes of purchasers are the same as to those particular goods. *Cai v. Diamond Hong, Inc.*, \_\_ F.3d \_\_, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (“[I]t is well established that, absent restrictions in the application and registration, [identical] goods and services are presumed to travel in the same channels of trade to the same class of purchasers.” (internal quotation marks and citation omitted))); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *United Glob. Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014).

Applicant’s arguments<sup>7</sup> that his clothing is distinguishable because he is a professional athlete and his clothes are designed for athletic performance, and that the goods travel in different channels of trade, are without merit. The first registrant’s identification of goods contains no limitations on the nature of the

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<sup>6</sup> We need not discuss or analyze the other goods in Applicant’s identification. *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018). A likelihood of confusion may be found with respect to a particular class based on any item within the identification of goods for that class. See *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff’d*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

<sup>7</sup> Applicant’s Brief, pp. 11-15 (7 TTABVUE 12-16).

identified hats, caps, and blouses; therefore, Applicant's particular hats and caps identified as athletic apparel, and blouses identified as women's clothing, are subsumed under the first registrant's more generally identified hats, caps, and blouses. The second registrant's "athletic apparel" goods are identical to Applicant's "athletic apparel" goods. Further, neither Applicant's nor either of the registrants' identifications of goods contain any limitations as to channels of trade or consumers. "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." *Octocom Sys., Inc.*, 16 USPQ2d at 1787.

We find that the second and third *du Pont* factors regarding the relatedness of goods, channels of trade, and classes of consumers weigh in favor of likelihood of confusion.

#### **B. The Number and Nature of Similar Marks**

The sixth *du Pont* factor is the number and nature of similar marks in use for similar goods or services. *du Pont*, 177 USPQ at 567. This factor addresses the strength of a mark with respect to both its inherent strength, based on the nature of the term itself, and its commercial strength, based on the marketplace recognition value of the term as a mark. *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014) (citing *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both

by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”)).

Applicant points to the cited registrations, noting that they are owned by different registrants and arguing that such ownership indicates that “dilution of the terms involved in the instant refusal [is] sufficient enough that [sic] fact favors a finding of an absence of a likelihood of confusion under the relevant *du Pont* factors.”<sup>8</sup> To the extent that Applicant is arguing that if these three registrations owned by two different entities can co-exist on the register, his applied-for mark should also be registrable, we find the argument unpersuasive. While the cited registrations all include the term ZEKE’S, the mark of the first registrant includes the word SMOKEHOUSE but the marks of the second registrant include the word COFFEE. The addition of different wording in the cited registrants’ marks diminishes their similarity inter se. At any rate, while the Patent and Trademark Office strives for consistency in examination, the Board is not bound by the prior decisions of examining attorneys in allowing marks for registration. *See, e.g., In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 (TTAB 2017). It is well established that each case must be decided on its own facts. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to [applicant’s] application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”); *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987).

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<sup>8</sup> Applicant’s Brief, p. 8 (7 TTABVUE 9).

“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005) (citation omitted). Internet printouts, such as those offered by Applicant showing information about the two cited registrants only,<sup>9</sup> “on their face, show that the public may have been exposed to those internet websites and therefore may be aware of the advertisements contained therein.” *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1072 (TTAB 2011). While the Federal Circuit has held that “extensive evidence of third-party use and registrations is ‘powerful on its face,’ even where the specific extent and impact of the usage has not been established,” see *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) (citing *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)), the record evidence here of diverse ownership and use only by the cited registrants is extremely modest, and far less than that found convincing in *Jack Wolfskin* and *Juice Generation*, wherein “a considerable number of third parties’ use [of] similar marks was shown.” *Id.* Ultimately, the argument and sparse evidence of weakness here are simply not as persuasive as that in either *Juice Generation* or *Jack Wolfskin*.

Applicant also argues that the first registrant has but a single location in California, the second registrant has just three locations (one each in Maryland,

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<sup>9</sup> Request for Reconsideration, 5 TTABVUE 28-33



Pennsylvania, and the District of Columbia), and neither registrant appears to sell its goods on Amazon.<sup>10</sup> In support of his theory, Applicant submitted what appear to be Internet excerpts relating to “Zeke’s Smokehouse” and “Zeke’s Coffee” showing the first registrant with an address in Montrose, California, and the second registrant with locations in Baltimore, Maryland, and Pittsburgh, Pennsylvania.<sup>11</sup> To the extent that Applicant implies that the cited marks do not possess marketplace strength because they may be used only in limited geographic areas, we note that the registrations of the cited marks are not geographically limited. In the absence of specific geographic or other limitations in the cited registrations, we must presume that each registrant’s goods travel in all usual channels of trade and methods of distribution throughout the United States. *See Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (citing *Hewlett Packard Co. v. Packard Press, Inc.*, 62 USPQ2d at 1005); *Bd. of Regents, Univ. of Tex. Sys. v. S. Ill. Miners, LLC*, 110 USPQ2d 1182, 1193 (TTAB 2014). Moreover, there is no evidence regarding the commercial strength of the cited marks, which is typical in *ex parte* appeals in which the owner of a cited registration is not a party. *See generally In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006).

As to conceptual strength, Applicant offers no comment regarding any inherent weakness of the marks in his brief. There is no evidence of record that ZEKE or its possessive ZEKE’S has any non-source identifying meaning with respect to clothing.

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<sup>10</sup> Applicant’s Brief, pp. 15-16 (7 TTABVUE 16-17).

<sup>11</sup> Request for Reconsideration, 5 TTABVUE 28-33.

With respect to the words SMOKEHOUSE and COFFEE, those words have been disclaimed by the respective registrants, and, in view of the nature of the other goods (i.e., food and coffee, *see* footnotes 4 and 5, *supra*) identified in the cited registrations, the words appear descriptive of those collateral goods.

Considering the record as a whole, we find that the ZEKE'S portion of the registered marks has source-identifying significance and there is no evidence of other third-party use or registration of similar marks for similar goods. *Cf. Juice Generation, Inc.*, 115 USPQ2d at 1674-75; *Jack Wolfskin*, 116 USPQ2d at 1135-36. We therefore find that the registered marks ZEKE'S SMOKEHOUSE and ZEKE'S COFFEE (in both forms) are not weak nor entitled only to a narrow scope of protection.


In sum, we find that Applicant has not demonstrated any particular commercial or inherent weakness of the term ZEKE or ZEKE'S or the mark ZEKE'S SMOKEHOUSE or ZEKE'S COFFEE for apparel. In view thereof, both registrants' marks are entitled at least to a normal scope of protection, and the sixth *du Pont* factor regarding the number and nature of similar marks in use on similar goods is therefore neutral in our analysis.

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

We now consider the first *du Pont* factor, the similarity or dissimilarity of the marks when compared in their entireties in terms of appearance, sound, connotation, and commercial impression, *du Pont*, 177 USPQ at 567, keeping in mind that “[w]here ... the goods at issue are identical, the degree of similarity necessary to support a conclusion of likely confusion declines.” *Diamond Hong, Inc.*, 127 USPQ2d at 1801

(citing *In re Viterra Inc.*, 101 USPQ2d at 1908 (internal quotation marks and citation omitted)). See also *Bridgestone Ams. Tire Operations LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Citigroup Inc.*, 98 USPQ2d at 1260.

As to appearance, Applicant's mark, the first registrant's mark, and one of the second registrant's marks are all in standard characters and thus are not limited to any particular depiction. The rights associated with a standard character mark reside in the wording and not in any particular display. *In re RSI Sys. LLC*, 88 USPQ2d 1445, 1448 (TTAB 2008); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988); TMEP § 1207.01(c)(iii). The marks may, therefore, appear in any typeface and size including those that may increase the similarities. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018). The reality of this is revealed when

Applicant's mark is compared to the second registrant's other mark  , in which the term ZEKE'S is quite large and is clearly the dominant element. Applicant's mark ZEKE is similar in appearance to this mark.

Applicant's deletion of the "S" does little, if anything, to distinguish the terms ZEKE'S and ZEKE, as the possessive form used by the registrants merely suggests that the goods are possessed by or emanate from ZEKE. Cf. *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (no meaningful distinction arises from the possessive form of otherwise identical marks); *In re Curtice-Burns, Inc.*, 231 USPQ 990, 992 (TTAB 1986) (finding the marks McKENZIE'S and McKENZIE "virtually identical in commercial impression"); *Winn's Stores, Inc. v. Hi-*

*Lo, Inc.*, 203 USPQ 140, 143 (TTAB 1979) (noting that “little if any trademark significance can be attributed to the apostrophe and the letter ‘s’ in opposer’s mark”).

Turning to the connotations, commercial impressions, and meanings of the marks, Applicant argues that his mark connotes an association with Applicant himself, a professional athlete, but that the cited marks connote an association with brick-and-mortar retail establishments that sell store-branded clothing.<sup>12</sup> Applicant argues that he achieved popularity as a college and professional football player, and that ZEKE represents his “widely popular nickname.”<sup>13</sup> As to meaning, there is evidence in the record showing that Applicant is an NFL player,<sup>14</sup> but there is no evidence showing to whom ZEKE’S refers in any of the cited marks. What is also unknown is the degree of notoriety of Applicant among consumers of the subject goods; that is, although Applicant claims that he is “well known,” neither the Dallas Cowboys web excerpts nor the Wikipedia page he submitted establish this purported fact. Thus, we are uncertain how aware consumers would be of Applicant, or even that consumers would be aware that ZEKE is a nickname for someone named “Ezekiel” or for Applicant in particular.<sup>15</sup> In this regard, and on this record, there is no evidence to show that ZEKE is a nickname for “Ezekiel” in the United States. None of Applicant’s evidence,

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<sup>12</sup> Applicant’s Brief, pp. 8-10 (7 TTABVUE 9-11).

<sup>13</sup> *Id.* at 16 (7 TTABVUE 17).

<sup>14</sup> Request for Reconsideration, 5 TTABVUE 21-27;

<sup>15</sup> Inasmuch as the Examining Attorney required and accepted Applicant’s statement that the name shown in the mark identifies Applicant Ezekiel Elliott, we presume that the mark ZEKE in the involved application was intended to refer to Applicant. This does not mean, however, that Applicant’s mark would be so understood, or that all references to “Zeke” identify Applicant.

including the Wikipedia entry for “Ezekiel Elliott,” states that Applicant uses or is known by the nickname ZEKE.<sup>16</sup> However, to the extent that consumers are aware of such facts, all of the marks at issue convey the meaning of someone’s name. Similarly, due to the purported meaning of ZEKE, the connotation of Applicant’s mark is similar to the cited marks notwithstanding that the cited marks vary due to the second term SMOKEHOUSE or COFFEE. The connotation remains a reference to a person named ZEKE, as both ZEKE’S SMOKEHOUSE and ZEKE’S COFFEE presumably point to a person named “Zeke” as well as to his smokehouse or his coffee.

The cited marks are comprised of the shared term ZEKE’S as their first element, followed by a second, different word. As noted earlier, the addition of different wording in the cited registrants’ marks diminishes their similarity to each other. However, inasmuch as Applicant’s mark is comprised solely of the term ZEKE without any additional wording, it moves closer in similarity to each of the cited marks.


We note that ZEKE’S, the term that the cited marks share, is also the first word in those marks. This lead term is likely to be impressed as the dominant portion of the cited marks. *Presto Prods., Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“ . . . [it is] a matter of some importance since it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and

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<sup>16</sup> The only reference we can find in any of the evidence of record lies in the small print of a single one of the more than fifty end notes on Applicant’s six-page Wikipedia entry. This single reference states “Alton native Zeke Elliott drafted by Cowboys in first round” and appears to reference an article in the April 28, 2016 ALTON TELEGRAPH. Request for Reconsideration, 5 TTABVUE 26. At best, this small, singular note appears to indicate only that Applicant may be known as “Zeke Elliott” in the town where he was born.

remembered.”). *See also Palm Bay Imps.*, 73 USPQ2d at 1692 (“The presence of this strong distinctive term as the first word in both parties’ marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of ROYALE.”). ZEKE, as the non-possessive form of ZEKE’S, being the only term comprising the applied-for mark, is similar in appearance, sound, connotation, and commercial impression to the first term of the cited marks.

We acknowledge that the presence of SMOKEHOUSE and COFFEE as the following terms in the respective registrants’ marks partially differentiates them visually and aurally from the applied-for mark. These points of distinction, however, do not outweigh the strong similarities in meaning, connotation, and overall commercial impression engendered by the marks. Based upon the above analysis, we find that the mark ZEKE is more similar than dissimilar to the marks ZEKE’S

SMOKEHOUSE, ZEKE’S COFFEE, and  in terms of appearance, sound, connotation and commercial impression. As a result, consumers encountering ZEKE could mistakenly believe that it represents a variation on the registered marks used to identify apparel emanating from a common source. This is particularly the case because, as noted earlier, “[w]hen marks would appear on virtually identical goods . . . the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). In view thereof, the first *du Pont* factor regarding the similarity of the marks favors a finding of likelihood of confusion.

#### **D. Fame of the Prior Marks**

Turning to the fifth *du Pont* factor regarding the fame of the prior marks, Applicant argues that the cited marks “do not possess any measurable amount of fame with American consumers as a whole” compared to Applicant himself who he alleges “has obtained extreme popularity.”<sup>17</sup> The purported lack of fame of the two registrants’ marks, as argued by Applicant, is of little consequence.<sup>18</sup> *i.am.symbolic*, 116 USPQ2d at 1413. Because an examining attorney is not expected to submit evidence regarding the fame of the cited marks, the fifth *du Pont* factor is usually treated as neutral in ex parte proceedings. See TMEP § 1207.01(d)(ix). In view thereof, we consider this factor neutral.

#### **E. Conditions of Sale**

We next consider to the fourth *du Pont* factor regarding the conditions under which and buyers to whom sales are made, i.e., “impulse” versus careful, sophisticated purchasing. *du Pont*, 177 USPQ at 567. Applicant argues that

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<sup>17</sup> Applicant’s Brief, p. 16 (7 TTABVUE 17).

<sup>18</sup> Applicant’s fame or renown is another matter. To the extent that Applicant or his mark ZEKE may be famous, such a finding would not support registration of his mark. While the fame of either Applicant’s or one the cited registrants’ marks would increase the likelihood of confusion by making it more likely that purchasers will remember the famous mark and think of it when encountering similar goods sold under a similar mark, such likelihood of confusion would be a reason to refuse a new registration, not grant one. See *i.am.symbolic, llc*, 116 USPQ2d at 1413 n.7. To the extent that Applicant and his mark ZEKE are well-known, such fact might support refusal of his application, because when confusion is likely, it is the prior registrants which must prevail. Even if Applicant’s fame or renown eclipses the renown of the prior registrants, it does not entitle him to usurp the rights that they have in their marks. *Id.*

consumers will exercise care in the purchase of Applicant's goods due to the alleged notoriety of Applicant, the Dallas Cowboys, and the NFL.<sup>19</sup>

As to conditions of sale, there is nothing in the respective identifications of goods to indicate a price point for the clothing. Thus, the clothing is presumed to include items at all price points, including inexpensive clothing. *See i.am.symbolic*, 116 USPQ2d at 1413. We cannot assume, as Applicant implies, that these items are sold to different classes of buyers in different marketing contexts. Rather, we must assume that the types of buyers overlap to include both football fans as well as ordinary bargain hunters. Ordinary consumers of hats, caps, blouses, and athletic apparel are likely to exercise only ordinary care, and given the lack of price restrictions in the identifications, may even buy inexpensive clothing items on impulse. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (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."). Accordingly, the fourth *du Pont* factor favors a finding of likelihood of confusion.

#### **F. Actual Confusion and Concurrent Use**

Although Applicant identified the seventh and eighth *du Pont* factors as relevant to his application,<sup>20</sup> he failed to otherwise discuss these elements. Nonetheless, we observe that the subject application is based on intent to use and there is no evidence

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<sup>19</sup> Applicant's Brief, p. 15 (7 TTABVUE 16).

<sup>20</sup> *Id.* at 6 (7 TTABVUE 7).



of any overlap in use or opportunities in which confusion could occur. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); *Gillette Can. Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). *See also Nina Ricci S.A.R.L. v. E.T.F. Enters. Inc.*, 889 F.2d 1070, 12 USPQ2d 1901, 1903 (Fed. Cir. 1989). Further, the absence of actual confusion is entitled to little weight, especially in an ex parte context. *See Majestic Distilling Co.*, 65 USPQ2d at 1205 (“uncorroborated statements of no known instances of actual confusion are of little evidentiary value” and “[t]he lack of evidence of actual confusion carries little weight . . . especially in an ex parte context.”) (internal citation omitted). Accordingly, the nature and extent of any actual confusion, and length of time and conditions under which there has been concurrent use without evidence of actual confusion, are neutral factors.

### **G. Potential Confusion**

Applicant also argues that “the extent of potential confusion is minimal if any exists at all,”<sup>21</sup> due to the popularity of Applicant himself, different channels of trade, and presumed limited geographic retail locations of the registrants. These arguments relate to evidence and factors previously discussed herein. We addressed the trade channel argument above, explaining that legally identical goods are presumed to travel in the same channels. *See Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1847 (extent of potential confusion analysis supported by substantial evidence where Board had earlier explained that identical goods were deemed to travel in same

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<sup>21</sup> *Id.* at 17 (7 TTABVUE 18).

channels of trade and to same purchasers). Further, Applicant is seeking a national trademark registration and the two cited registered marks are not geographically limited. In the absence of specific geographic or other limitations in Applicant's application and the cited registrations, we must presume that Applicant's goods and each Registrant's goods will travel in all usual channels of trade and methods of distribution throughout the United States for such goods. *See Citigroup*, 98 USPQ2d at 1261 (citing *Hewlett Packard Co. v. Packard Press, Inc.*, 62 USPQ2d at 1005); *Bd. of Regents, Univ. of Tex. Sys.*, 110 USPQ2d at 1193. Accordingly, the twelfth *du Pont* factor is neutral.

#### **H. Balancing the Factors**

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. In view of the identical goods, the absence of limitation to their channels of trade and classes of customers, and the similarity of the marks at issue, we find that Applicant's mark so resembles each of the two registrants' marks as to be likely to cause confusion, mistake, or deception as to the source of Applicant's goods.

### **III. Decision**

The refusal to register Applicant's mark ZEKE is affirmed.