

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

Mailed: November 27, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Antonio F. Domingues and Kathy J. Bruzesse

Serial Nos. 87553246 and 87553279¹

Jonathan Charles Capp, Esq.,
for Antonio F. Domingues and Kathy J. Bruzesse.

John Salcido, Trademark Examining Attorney, Law Office 122,
John Lincoski, Managing Attorney.

Before Cataldo, Wolfson, and English,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Antonio F. Domingues and Kathy J. Bruzesse (“Applicants”) seek registration on the Principal Register of the mark FORTTUNA FOODS, in standard characters

¹ Although the cases have not been consolidated, they present common questions of law and fact. Accordingly, we have treated them in a single decision, but where appropriate, we have taken into account any relevant factual differences in the cases.

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(“FOODS” disclaimed) for “Cakes; Candy; Candy bars; Chocolate; Chocolate bars; Chocolate confections” in International Class 30,² and the mark depicted below:



(“FOODS” disclaimed), for the same goods.³

The Examining Attorney refused registration of Applicants’ marks under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a prior registration of the mark depicted below:



for: “Candied fruit snacks, nut-based snack foods, sesame oil, quail eggs, powdered milk for food purposes, dairy-based food beverages, fruit-based food beverages” in International Class 29; and “Rice noodles, Food seasonings, chili sauce, edible spices, Food package combinations consisting primarily of bread, crackers, and/or cookies,

² Serial No. 87553246, filed on August 2, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming August 22, 2001 as the date of first and date of first use in commerce.

³ Serial No. 87553279, filed August 2, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming August 22, 2001 as the date of first use and date of first use in commerce. The description of the mark reads: “The mark consists of a solid oval with the words ‘Forttuna Foods’ located within.” Color is not claimed as a feature of the mark.

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Tapioca Flour, Flour for food, Asian noodles, Grass-based food beverages, Herbal tea, Grain-based food beverages” in International Class 30.⁴

After the Examining Attorney made the refusals final, Applicants filed a request for reconsideration in each proceeding. When the requests for reconsideration were denied, Applicants filed timely appeals. Both Applicants and the Examining Attorney filed briefs. For the reasons discussed herein, we affirm the refusals to register.

I. Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) (“*DuPont*”); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). However, “[n]ot all of the [*DuPont*] 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, 1259 (Fed. Cir. 2010)). “In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services.” *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004), cited

⁴ Registration No. 4357206, issued June 25, 2013, Sections 8 and 15 combined declaration accepted and acknowledged. The description of the mark reads: “The mark consists of the stylized wording ‘FORTUNA’ outlined in the color red with the interior in the color white.” The colors red and white are claimed as features of the mark.

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in Ricardo Media Inc. v. Inventive Software, LLC, 2019 USPQ2d 311355, [*5] (TTAB 2019); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997). We consider the *DuPont* factors for which arguments or evidence have been presented; all other factors we consider to be neutral.

A. Similarity of the Marks

We initially consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “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.” *In re i.am.symbolic*, 123 USPQ2d at 1748; *see also Coach Servs.*, 101 USPQ2d at 1721; *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, [*6] (TTAB 2019); *In re Am. Cruise Lines, Inc.*, 128 USPQ2d 1157, 1160 (TTAB 2018).

It is axiomatic that marks “must be considered as a whole in determining likelihood of confusion.” *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981). That said, different features may be analyzed to determine whether the marks are confusingly similar. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (*citing In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“[I]n articulating reasons for reaching a

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conclusion on the issue of confusion, 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.”)). We consider the term FORTTUNA to be the dominant portion of Applicants’ marks for two reasons.

First, “foods” is generic for the goods and has properly been disclaimed. Disclaimed matter that is descriptive of or generic for a party’s goods is typically less significant in creating the mark’s commercial impression. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”); *In re Dixie Rests.*, 41 USPQ2d at 1533-34 (“DELTA,” not the disclaimed generic term “CAFE,” is the dominant portion of the mark THE DELTA CAFE); *Nat’l Data Corp.*, 224 USPQ at 751 (“That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark.”).

Second, consumers are generally inclined to focus on the first word of a mark, and FORTTUNA is the first word in both of Applicants’ marks. *See In re Detroit Athletic Co.*, 128 USPQ2d at 1049 (“The identity of the marks’ initial two words is particularly significant because consumers typically notice those words first.”); *Palm Bay*, 73 USPQ2d at 1692 (“VEUVE...remains a ‘prominent feature’ as the first word in the mark and the first word to appear on the label”); *In re Integrated Embedded*, 120

USPQ2d 1504, 1513 (TTAB 2016) (“[T]he dominance of BARR in Applicants’ mark BARR GROUP is reinforced by its location as the first word in the mark.”); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions). As for the design features in Applicants’ design mark, we do not find the stylization of the term FORTTUNA or the fact that the words FORTTUNA FOODS are placed within an oval to lessen the significance of the literal elements. Moreover, the difference in size between the term FORTTUNA and the much smaller depiction of the term FOODS reinforces the conclusion that FORTTUNA is the dominant portion of the mark.

Similarly, the design features of Registrant’s mark are less significant in creating its commercial impression than the term FORTUNA. The red outlining and the stylization of the letters act as mere background carriers to the literal term; indeed they are incapable of standing apart from the term itself. As has often been stated, where a mark consists of a literal portion and a design feature, it is the literal portion that will dominate the overall impression of the mark and most likely be remembered and recalled. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (“In the case of a composite mark containing both words and a design, ‘the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.’”) (internal citation omitted); *see also In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (“if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used

by purchasers to request the goods or services”); *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1433 (TTAB 2013) (design features served “primarily as background to carry the words”). Moreover, with respect to Applicants’ standard character mark, it could be displayed in red and white letters in a font style comparable to that of the cited mark. *See* Trademark Rule 2.52(a); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1187 (TTAB 2018) (“a ‘standard character mark’...may be used in ‘any particular font style, size, or color.’”).

Applicants argue that the marks are distinguishable because the first word in their mark is spelled FORTTUNA whereas the cited mark is FORTUNA. “By adding the second T - to create FORTTUNA, applicant has distinguished the word and which [sic] no longer has a literal meaning in any language. The addition[al] second T significantly changes the word FORTUNA.” Appeal Brief, 22 TTABVUE 6. We disagree. The term FORTTUNA will be perceived by consumers as an aberrant spelling of “fortuna,” which as discussed below appears to have a meaning in Spanish. Moreover, given that the double-T’s are positioned in the center of the mark, the doubling may not even be noticed by consumers. As for any difference in pronunciation, even if consumers pronounce FORTTUNA as “fort tuna,” this meaningless phrase will not prevent consumers from recognizing its similarity with the term FORTUNA, which could also be pronounced with an emphasis on “fort” as the first “syllable.” There is no correct or certain pronunciation of a mark that is not a common English word because it is impossible to predict how the public will pronounce such a mark. *See, e.g., Viterra*, 101 USPQ2d at 1912 (upholding

Board's affirmance of refusal to register XCEED based on a likelihood of confusion with the registered mark X-SEED and design); *Centraz Indus. Inc. v. Spartan Chem. Co. Inc.*, 77 USPQ2d 1698, 1701 (TTAB 2006) (acknowledging that "there is no correct pronunciation of a trademark" and finding ISHINE (stylized) and ICE SHINE confusingly similar for identical goods).

Overall, Applicants' marks are similar in appearance and pronunciation to the mark in the cited registration due to the shared element FORT(T)UNA.

Turning to connotation and commercial impression of the marks, Applicants argue that "FORTUNA means good luck or fortune in Spanish." 22 TTABVUE 6. Applicants have not submitted any evidence to support their position, but by taking judicial notice of online dictionaries that exist in printed format, we accept Applicants' argument.⁵ Nonetheless, to the extent consumers are aware that "fortuna" means "fortune" or "good luck" in Spanish or otherwise,⁶ they are likely to ascribe the same meaning to the unconventionally spelled term FORTTUNA in Applicants' marks.

⁵ The Board may take judicial notice of definitions from dictionaries, including online dictionaries that exist in printed format or have regular fixed editions. See *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018); *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1747 n.15 (TTAB 2018); *In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1953 n.2 (TTAB 2018).

⁶ We judicially notice the definition of Fortuna as "the ancient Roman goddess of fortune" from <https://www.dictionary.com/browse/fortuna?s=t>; the similar Collins English dictionary definition "The goddess of fortune" from <https://www.collinsdictionary.com/us/dictionary/english/fortuna>; and the entry for "audentes fortuna juvat" from <https://www.merriam-webster.com/dictionary/fortuna>, meaning "fortune favors the brave." Accessed November 11, 2019. We further note the translation of "fortune" into the Spanish "fortuna" meaning "luck" at <https://www.collinsdictionary.com/dictionary/english-spanish/fortune>. Accessed November 11, 2019.

Applicants argue that the cited mark is weak. There is no evidence of record regarding its commercial strength. As to conceptual strength, the term FORTUNA has no meaning with respect to foodstuffs, including candied fruit snacks and food package combinations consisting primarily of bread, crackers, and/or cookies.⁷ Applicants have provided copies of four third-party, use-based registrations for marks containing the term FORTUNA,⁸ arguing that the coexistence of these registrations demonstrates inherent weakness. Although third-party registrations may show that a term has a significance within an industry, here none of the registered marks identifies goods that are as closely related to the goods in the cited registration as are those in the involved applications.⁹ See *Nat'l Cable Television Ass'n, Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991) (“None of the third party marks and uses of ACE made of record are nearly as closely related

⁷ That the term “fortuna” could possibly be translated as “fortune” or “good luck” by a consumer does not reduce its inherent strength.

⁸ Applicants filed copies of six registrations, but two have been cancelled and have no probative value. *Action Temporary Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) (cancelled registration does not provide constructive notice of anything). Applicants also filed a TESS printout of 50 marks containing the term “fortuna.” See May 4, 2018 Response to Office Action at TSDR 41. The list has minimal probative value. See *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018) (“[T]he list does not include enough information to be probative. The list includes only the serial number, registration number, mark, and status (live or dead) of the applications or registrations. Because the goods are not listed, we do not know whether the listed registrations are relevant.”). The same applies to the list submitted by Applicants.

⁹ The goods involved in the third-party registrations are “fruit and vegetable purees; instant fruit beverages made from fruit concentrates and powder” (Reg. No. 5043803); “bar and restaurant services” (Reg. No. 3189129); “annular knives” (Reg. No. 0086798) and “fruit and vegetable juices” (Reg. No. 2169884). May 4, 2018 Response to Office Action at TSDR 40, 42, 44, and 41, respectively.

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to the activities of the parties as the virtually identical uses of the parties are to each other.”). Even if the goods were related, a mere four registrations are too few in number to rise to the level of widespread, significant and unrestrained use by third parties so as to demonstrate that the cited mark is weak and should be afforded a narrow scope of protection. *Cf. Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 n.2 (Fed. Cir. 2015) (“voluminous” and “extensive” evidence of at least fourteen relevant third-party uses or registrations of record); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1673 n.1 (Fed. Cir. 2015) (at least twenty-six relevant third-party uses or registrations of record).

The marks in their entireties are more similar than dissimilar in sight, sound, connotation, and commercial impression. The first *DuPont* factor weighs in favor of finding a likelihood of confusion.

B. Relatedness of the Goods; Trade Channels; Classes of Consumers

We turn next to the second *DuPont* factor, which requires us to determine the similarity or dissimilarity of the goods as identified in Applicants’ applications and the cited registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-1162 (Fed. Cir. 2014) (“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”); *Octocom Sys., Inc. v. Houston Comps. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Hewlett-Packard Co.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). The goods need not be identical or even

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competitive in order to support a finding of likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). Rather, it is enough that they are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the parties' goods or services. *Coach Servs.*, 101 USPQ2d at 1722; *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

Applicants' goods are "cakes; candy; candy bars; chocolate; chocolate bars; [and] chocolate confections." Registrant's goods include "candied fruit snacks" and "food package combinations consisting primarily of bread, crackers, and/or cookies." Applicants argue that "candied fruit" identifies a specific type of fruit, namely fruit that has been crystallized by being heated in sugar syrup to prolong its shelf life, and that the Examining Attorney's evidence is inadequate to show that candied fruit and candy per se are related.¹⁰ To show that these goods are sold together by a single seller under the same mark, the Examining Attorney provided copies of web pages from

¹⁰ See entry from Wikipedia, attached to Applicants' Request for Reconsideration, describing "candied fruit" as fruit that has been saturated with sugar, "preventing the growth of spoilage microorganisms....[F]ruits that are commonly candied include dates, cherries, pineapple, and a root, ginger." 4 TTABVUE 12.

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vendors selling both candied fruit and other types of candy, chocolate, or cakes. For example:

- Pittman & Davis sells candied fruits, cakes, and candies under the mark



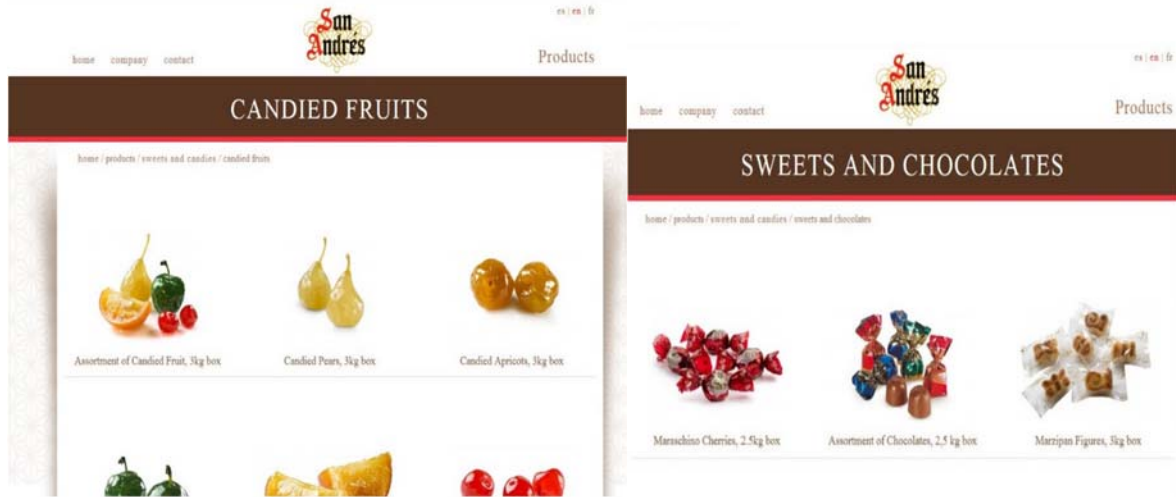
	<p>holiday fruit tray</p> <p>Holiday Fruit Tray Ideal for gifts or entertaining, this tray is full of nature's best sun drenched dried fruit. This freshly dried, moist, tender and sweet array of fancy fruit includes delectable dates, prunes, apricots, pears, pineapples and cherries. Tastes as good as candy, but it's full of...</p>	<p>Starting at \$29.99</p>
	<p>Related Products Dried Fruit Dried Fruit Tray Fruit Tray</p>	<p>buy now</p>
	<p>traditional fruit cake</p> <p>...fruits and rich nuts with a mild, warm bourbon flavor, this traditional fruit cake is the consummate yuletide taste treat. Choose any of the sizes listed here, or our fruitcake in individually wrapped slices for extra freshness. * Traditional recipe fruitcake * Made with premium nuts, candied fruits...</p>	<p>Starting at \$29.99</p>
	<p>Related Products Fruit Cake Fruitcake Sliced Fruit Cake</p>	<p>buy now</p>
	<p>christmas confection assortment</p> <p>...gift box are fresh fruit flavored, red and green Christmas Gummi Bears, sweet and salty Christmas Tree Pretzels, crunchy red and green Christmas Chocolate Almonds and Gummi Christmas Trees & Snowmen. A festive treat your friends and family will love! * A mix of Christmas candies to please the whole...</p>	<p>Starting at \$26.99 Starting at \$21.99</p>
	<p>Related Products Candy</p>	<p>buy now</p>

- San Andres sells candied fruit, candy, and assorted chocolates under the



¹¹ At <https://www.pittmandavis.com>. Denial of Request for Reconsideration, 7 TTABVUE 6-10.

¹² At <http://www.turronsanandres.com>. Denial of Request for Reconsideration, 7 TTABVUE 11-12.



- The Swiss Colony sells packaged cookies, candy, and chocolate-covered cherries under the mark  ¹³



¹³ At <https://www.swisscolony.com> and <https://bakery-cheese.swisscolony.com>. November 7, 2017 Office Action at TSDR 30-39.

The Swiss Colony
FAMILY OWNED SINCE 1924
America's Largest Handcrafting Bakery

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Learn More >

My Account | Customer Service 800-913-0743 | Order Status | Shopping Cart: 0 item(s)

SEARCH: Keyword or Item # [Go]

FOOD GIFTS | CAKES & DESSERTS | CANDY & CHOCOLATES | MEATS & CHEESES | NUTS & SNACKS | SUGAR-FREE & GLUTEN-FREE | CHRISTMAS VILLAGE | MORE WAYS TO SHOP | SALE | FOOD FOR THOUGHT

Ways to Shop

- New Arrivals (2)
- On Sale (16)
- Clearance (1)
- Delivery Included (3)

Category

- Food Gifts (288)
- Christmas Village (237)
- More Ways to Shop (162)
- Cakes & Desserts (104)
- Meats & Cheeses (89)
- Sugar-Free & Gluten-Free (58)
- Candy
- Chocolates (57)
 - All Candy & Chocolates (8)
 - Chocolate-Covered Treats (11)
 - Chocolates & Truffles (23)

Products in Candy & Chocolates

Sort by: popularity Results per page: 48 View: Grid | List

Showing Products 1 - 48 of 57 Page 1 of 2 | Next >

Candy & Chocolates

Shop our entire selection for the perfect gift or personal indulgence.

Award-winning Milk Chocolate Covered Butter Toffee \$18.99 - \$59.99 On orders by December 21st Quick View	Santa's Snacks Tin \$39.99 \$42.99 On orders by December 21st Quick View	Caramel Pecan Clusters \$20.99 - \$29.99 On orders by December 21st Quick View	Classic Candy Assortment \$29.99 \$32.99 On orders by December 21st Quick View

- Zabar's sells chocolate bars, gourmet dried fruit and nut gifts, cookie assortments and dried fruit under the mark ZABAR'S.¹⁴



¹⁴ At <https://www.zabars.com>. Denial of Request for Reconsideration, 19 TTABVUE 5-12 and 20 TTABVUE 1-7.



Zabar's Dessert Cookie Quartet
(Kosher)
\$26.98



Zabar's Fruit Flower Delight 32oz
(Kosher)
\$35.98



Zabar's Crystallized Ginger - 9oz
(Kosher)
\$5.98

The Examining Attorney also submitted copies of approximately 40 third-party, use-based registrations showing that Applicants' and Registrant's goods are of a kind that may emanate from a single source under a single mark¹⁵ Third-party registrations which individually cover a number of different items and which are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018) (citing *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001)); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.6 (TTAB 2015); *In re RiseSmart Inc.*, 104 USPQ2d 1931, 1934-1935 (TTAB 2012).

Applicants argue that they sell in different markets from Registrant, which "clearly operates as a specialist importer of certain Chinese and Vietnamese food products not otherwise available in the US." 22 TTABVUE 9. Even if, as Applicants contend, the

¹⁵ June 4, 2018 Office Action at TSDR 2 - 126.

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Registrant “only distribute[s] niche Asian products,” 22 TTABVUE 8, the cited registration describes the goods “candied fruit snacks and food package combinations consisting primarily of bread, crackers, and/or cookies” broadly and does not limit them to Asian-style foods, food imported from a foreign country, or food targeted to a niche market. Although Applicants and Registrant may not in fact market their products in the same commercial space, given the broad identification of goods in its registration, Registrant is entitled to operate in all normal and usual trade channels for such goods, including those in which cookie packs and candied fruit are normally sold, and we must presume that it does so, selling to all the usual purchasers of such goods. “Evidence of actual marketplace usages that seeks to limit or alter the usages encompassed by the marks, goods and services, or usages listed in the application and registration are not considered in assessing likelihood-of-confusion in the registration context.” *In re FCA US LLC*, 126 USPQ2d 1214, 1217 (TTAB 2018) (citing *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2054 (2015); *see also Stone Lion Capital Partners*, 110 USPQ2d at 1162 (“the [goods and] services recited in the application determine the scope of the post-grant benefit of registration”). The benefits of the Registrant’s exclusive right to use its mark is commensurate with the scope of the goods recited in the registration regardless of whether extrinsic evidence may suggest otherwise.

Likelihood of confusion must be found with respect to a class of goods or services in an application if there is likely to be confusion with respect to any item that comes within the identification of the goods or services in that class. *Tuxedo Monopoly, Inc.*

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v. General Mills Fun Grp., 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). We find Applicants' cakes, candy, candy bars, chocolate, chocolate bars, and chocolate confections to be related to Registrant's candied fruit snacks and food package combinations consisting primarily of bread, crackers, and/or cookies, and to be likely to travel in the same trade channels to the same classes of consumers.

The second and third *DuPont* factors favor a finding of likelihood of confusion.

C. Actual Confusion

Under the seventh and eighth DuPont factors, i.e., the nature and extent of any actual confusion and the length of time during and condition under which there has been concurrent use without evidence of confusion, Applicants argue that confusion is unlikely because there has been no actual confusion although the marks have been in concurrent use since 2001. 22 TTABVUE 12. Applicants point to Kathy J. Bruzzese's declaration wherein she states that "At no time have we become aware of any confusion between our products and those of the registered mark." 4 TTABVUE 39.

First, no documentary evidence supporting Applicants' claim of concurrent use has been made of record. Second, the fact that an applicant in an *ex parte* case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis inasmuch as the Board has no way to know whether the registrant likewise is unaware of any instances of actual confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred. Uncorroborated statements of no known instances of actual confusion are of little evidentiary value, "especially in an *ex parte* context."

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Majestic Distilling Co., 65 USPQ2d at 1205 (citing *In re Bissett-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion).

DuPont factors seven and eight are neutral.

D. Additional Consideration

Applicants argue that consistency in examination being a goal of the Office, “the USPTO should permit concurrent registration of FORTUNA and FORTTUNA just as it [has] done so in the past.” 22 TTABVUE 6. Applicants filed copies from the Trademark Electronic Search System (TESS) database showing their prior ownership of now cancelled registrations (Reg. No. 3457636 for the mark FORTTUNA FOODS and Reg. No. 3453453 for the mark FORTTUNA FOODS and design). Response to Office Action dated May 4, 2018 at TSDR 36-39.

The problem with Applicants' argument regarding their now-cancelled registrations is that a cancelled registration is “not evidence of anything except that the registration issued; it is not evidence of any presently existing rights in the mark shown in the registration, or that the mark was ever used.” TRADEMARK BOARD MANUAL OF PROCEDURE (TBMP) §704.03(b)(1)(A) (2019); *see also Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 109 USPQ2d 1949, 1956 n.9 (TTAB 2014) (cancelled registrations are not probative), *vacated and remanded on other grounds*, 786 F.3d 960, 114 USPQ2d 1827 (Fed. Cir. 2015), *original decision aff'd*, *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d 1184 (TTAB 2017), *civil action filed sub*

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nom Snyder's Lance, Inc. v. Frito-Lay N. Am., Inc., No. 3:17-CV-00652 (W.D.N.C. Nov. 6, 2017); *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1606 (TTAB 2018) (a cancelled registration is not evidence of use of the mark at any time); *In re Pedersen*, 109 USPQ2d 1185, 1197 (TTAB 2013) (citing *Anderson, Clayton & Co. v. Krier*, 478 F.2d 1246, 1248, 178 USPQ 46, 47 (CCPA 1973) (statutory benefits of registration disappear when the registration is cancelled)). Applicants' cancelled registrations simply do not justify registration of its current applications. *See, e.g., In re Hunter Publ'g Co.*, 204 USPQ 957, 963 (TTAB 1979) (cancellation "destroys the Section [7(b)] presumptions and makes the question of registrability 'a new ball game' which must be predicated on current thought.").

Furthermore, our determination of likelihood of confusion must be based on the facts and record before us. We are not bound by a previous examining attorney's determination that the cited mark was entitled to register, and to the extent the cited registration was issued in error, we will not repeat the error by permitting a confusingly similar mark to register again. *See In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("The Board must decide each case on its own merits.").

This *DuPont* factor is also neutral.

II. Conclusion

After considering all of the arguments and evidence of record as they pertain to the relevant *DuPont* factors, we find that Applicants' marks are substantially similar in sight, sound, connotation and commercial impression to the registered mark. We

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further find the goods are related, as are the channels of trade and classes of consumers. The remaining factors are neutral.

Accordingly, we find that there is a likelihood of confusion between Applicants'

marks FORTTUNA FOODS and



and the cited mark

Fortuna

, for the goods as identified.

Decision: The Section 2(d) refusals to register Applicants' marks are affirmed.