

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: July 21, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re CN Smokeless Company, LLC
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Application Serial No. 88814027
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Amy Allen Hinson of Parker Poe Adams & Bernstein LLC,
for CN Smokeless Company, LLC.

Matthew Tully, Trademark Examining Attorney, Law Office 105
for Jennifer Williston, Managing Attorney.

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Before Bergsman, Lynch, and Pologeorgis,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

CN Smokeless Company, LLC (“Applicant”) seeks registration on the Principal Register of the mark HORIZON (in standard characters) for “moist smokeless tobacco; smokeless tobacco,” in International Class 34.¹

The Examining Attorney refused to register Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so

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¹ Application Serial No. 88814027 was filed on February 27, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s bona fide intention to use the mark in commerce.

resembles the registered mark HORIZONTECH, in standard characters, for the goods listed below as to be likely to cause confusion:

Ashtrays for smokers; Cartomizers, namely, combination electronic cigarette refill cartridges sold empty and atomizers, sold as a component of electronic cigarettes; Cigarette cases; Cigarette paper; Electronic cigarettes; Firestones; Japanese shredded tobacco (kizami tobacco); Lighters for smokers; Match holders; Pocket machines for rolling cigarettes, in International Class 34.²

Citations to the prosecution history refer to the USPTO Trademark Status and Document Retrieval (TSDR) system in the downloadable .pdf format. Citations to the briefs refer to TTABVUE, the Board's online docket system.

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “Whether a likelihood of confusion exists between an applicant’s mark and a

² Registration No. 5029968 registered August 30, 2016; Section 8 declaration accepted.

previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). “In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1533).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).³ “Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because the ‘fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.’” *In re Embiid*, 2021 USPQ2d 577, at *10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). *See also In re*

³ For this reason, we are not persuaded by Applicant’s arguments regarding the coexistence of other marks involving different terms for goods in International Class 34. The co-existence of these other registered marks on the Principal Register is not relevant to whether confusion is likely in this case.

i.am.symbolic, llc, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004).

I. Strength of the registered mark.

When we analyze likelihood of confusion in an *ex parte* appeal, in order to determine the conceptual or inherent strength of the cited mark, we evaluate its intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary-fanciful continuum of words. Word marks that are arbitrary, fanciful, or suggestive are “held to be inherently distinctive.” *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000). *See also, In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1684 (Fed. Cir. 2010) (“In general, trademarks are assessed according to a scale formulated by Judge Friendly in *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 189 USPQ 759 (2d Cir. 1976), which evaluates whether word marks are ‘arbitrary’ or ‘fanciful,’ ‘suggestive,’ ‘descriptive,’ or ‘generic.’”). We also look to evidence pertaining to the number and nature of similar marks in use on similar goods or services, under the sixth *DuPont* factor.

The registered mark, HORIZONTECH, consists of the word “Horizon” and the suffix “Tech,” an abbreviation for the word “Technology.” THE AMERICAN HERITAGE

DICTIONARY OF THE ENGLISH LANGUAGE defines “Horizon,” inter alia, as “[t]he apparent intersection of the earth and sky as seen by an observer.”⁴

The MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) defines “Tech” as “technician,” “technology,” and “technical.”⁵ It defines “technology,” inter alia, as “the use of science in industry, engineering, etc., to invent useful things or to solve problems.”⁶

Because the meaning of HORIZONTECH does not describe features of the smoking accessories set forth in the registration’s description of goods, it is an arbitrary term entitled to a broad scope of protection or exclusivity of use.⁷ *See Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004) (defining an arbitrary mark as a “known word used in an unexpected or uncommon way” and observing that such marks are typically strong); *see also Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (arbitrary terms are conceptually strong trademarks).

⁴ Examining Attorney’s Brief (11 TTABVUE 19). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

⁵ October 26, 2021 Office Action (TSDR 77).

⁶ *Id.* at TSDR 83.

⁷ Applicant concedes that the word “Horizon” is arbitrary and non-suggestive when used in connection with smokeless tobacco. Applicant’s Brief, pp. 3-4 (4 TTABVUE 4-5). It would also be arbitrary and non-suggestive when applied to smoker’s accessories.

The only other registered mark in the record including the word “Horizon” used in connection with similar goods or services is Registration No. 5397318 for the mark HORIZON TERPENES for “flavorings, other than essential oils, for e-cigarette liquids.”⁸ Third-party registrations may be used to show the sense in which a word is used in ordinary parlance. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015).

“Third party registrations are relevant to prove that some segment of the composite marks which both contesting parties use has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Id.*; see *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 917 [189 USPQ 693, 694] (CCPA 1976) (even if “there is no evidence of actual use” of “third-party registrations,” such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”).

Juice Generation, 115 USPQ2d at 1675 (quoting 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:90 (4th ed. 2015)). Given that the record includes only a single third-party registration, we find no weakness of HORIZON in the context of the goods in the cited registration.

We find that the registered mark HORIZONTECH is an inherently strong mark entitled to a broad scope of protection.

II. The similarity or dissimilarity of the marks.

We now turn to the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial

⁸ Registered February 6, 2018.

impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing the marks, we are mindful that “[t]he 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.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)).

We keep in mind that “[s]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)).

Applicant is seeking to register HORIZON and the registered mark is HORIZONTECH. The marks are similar because they share the word “Horizon.” Consumers will perceive “Horizon” as the dominant part of the registered mark HORIZONTECH in part because it is the lead element of the mark. As we often have

said, the lead element in a mark has a position of prominence; it is likely to be noticed and remembered by consumers and so plays a dominant role in the mark. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding “the identity of the marks’ two initial words is particularly significant because consumers typically notice those words first”); *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word).

There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Under these circumstances, the fact that the registered mark encompasses Applicant’s entire mark increases the similarity between the two. *See e.g., In re Mighty Leaf Tea*, 601 USPQ2d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (applicant’s mark ML is similar to opposer’s mark ML MARK LEES both for personal care and skin products); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406, 407 (CCPA 1967) (THE LILLY as a mark for women’s dresses is likely to be

confused with LILLI ANN for women's apparel including dresses); *Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1660 (TTAB 2014) (applicant's mark PRECISION is similar to opposer's mark PRECISION DISTRIBUTION CONTROL); *In re U.S. Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985) (CAREER IMAGE for women's clothing stores and women's clothing likely to cause confusion with CREST CAREER IMAGES for uniforms including items of women's clothing).

In *U.S. Shoe*, the Board observed that "Applicant's mark would appear to prospective purchasers to be a shortened form of registrant's mark." 229 USPQ at 709. Likewise, here, Registrant's mark HORIZONTECH suggests that Registrant's products are a variation of Applicant's HORIZON line of products.

We do not agree with Applicant's contention that HORIZONTECH has a distinct meaning of its own independent of the meaning of its constituent elements."⁹ Applicant fails even to explain what such a distinct meaning might be. While the TECH component adds a nuance, the overall meaning and commercial impression remains very similar to HORIZON. As discussed above consumers will perceive HORIZONTECH products as a variation of the HORIZON product line. Where, as here, the dominant part of both marks is the same, the marks are similar notwithstanding peripheral differences. *See In re Denisi*, 225 USPQ 624, 624 (TTAB 1985) ("[I]f the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral differences."). The peripheral differences in this case fail to distinguish the marks.

⁹ Applicant's Brief, p. 4 (4 TTABVUE 5).

We find that the marks are similar in terms of appearance, sound, connotation and commercial impression.

III. The similarity or dissimilarity and nature of the goods.

Applicant is seeking to register HORIZON for “moist smokeless tobacco; smokeless tobacco.” The cited mark is registered for smoking accessories set forth below:

Ashtrays for smokers; Cartomizers, namely, combination electronic cigarette refill cartridges sold empty and atomizers, sold as a component of electronic cigarettes; Cigarette cases; Cigarette paper; Electronic cigarettes; Firestones; Japanese shredded tobacco (kizami tobacco); Lighters for smokers; Match holders; Pocket machines for rolling cigarettes.

“Smokeless tobacco” is “a type of tobacco that is not smoked or burned. It may be used as chewing tobacco or moist snuff, or inhaled through the nose as dry snuff.”¹⁰

“Smokeless tobacco products and e-cigarettes often are promoted as substitutes for cigarettes in smoke-free environments.”¹¹

Most smokeless tobacco use involves placing the product between the gum and cheek or lip. Smokeless tobacco is a noncombustible tobacco product. There are two main types of smokeless tobacco that have been traditionally marketed

¹⁰ National Cancer Institute website (cancer.gov) attached to the October 27, 2020 Response to Office Action (TSDR 15).

¹¹ “Dual Use of Smokeless Tobacco or E-cigarettes with Cigarettes and Cessation,” HHS Public Access website (ncbi.nlm.nih.gov), attached to the October 26, 2021 Office Action (TSDR 11). *See also* “Alternative Tobacco Product Use and Smoking Cessation: A National Study,” American Journal of Public Health (ncbi.nlm.nih.gov) attached to the October 26, 2021 Office Action (TSDR 15); “Dual Use of Tobacco Products,” Centers for Disease Control and Prevention website (cdc.gov) attached to the October 26, 2021 Office Action (TSDR 20).

in the United States: chewing tobacco and snuff, including snus.¹²

“Cigarettes and smokeless tobacco are the most prevalent forms of tobacco used among adults.”¹³

To prove that Applicant’s “moist smokeless tobacco; smokeless tobacco” are related to Registrant’s smoking accessories, the Examining Attorney submitted over 30 copies of third-party use-based registrations for “smokeless tobacco” and one of the smoking accessories in the description of goods in the registration.¹⁴ Third-party registrations based on use in commerce that individually cover a number of different goods may have probative value to the extent that they serve to suggest that the listed goods are of a type that may emanate from the same source. *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *8 (TTAB 2019); *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d mem.* 864 F.2d 149 (Fed. Cir. 1988).

¹² “Smokeless Tobacco Products, Including Dip, Snuff, Snus, and Chewing Tobacco,” U.S. Food and Drug website (fda.gov) attached to the October 26, 2021 Office Action (TSDR 34).

¹³ “Preventing Chronic Disease,” Centers for Disease Control website (cdc.gov) attached to the October 26, 2021 Office Action (TSDR 38).

¹⁴ May 18, 2020 Office Action (TSDR 7-114) and November 30, 2020 Office Action (TSDR 8-80).

Registration No. 5652372 for the mark HIGH TEA did not include any products that were in the cited registration (May 18, 2020 Office Action TSDR 19).

Registration Nos. 5473178 and 5478746 for the marks BLACKHOUSE VAPOR COMPANY and BLACKHOUSE VAPOR COMPANY ’15 did not include any products that were in the cited registration (May 18, 2020 Office Action TSDR 25 and 28).

The Examining Attorney included Registration Nos. 5448030, 5485851, 5772579, and 5587962 in both Office Actions.

Representative registrations, with relevant portions of the identifications, are listed below.

MARK	REG. NO.	GOODS
SPIRITUAL CHEMIST	5353047	Smokeless tobacco; Cigarette cases; electronic cigarettes
SMOKE PHARMACY	5478379	Smokeless tobacco; Japanese shredded tobacco (kizami tobacco)
PNEUMA	5672126	Smokeless tobacco; Cigarette cases; cigarette lighters; cigarette paper; ashtrays
B HIT	5410748	Smokeless tobacco; Electric cigarettes; lighters
BLACK LAVA BLACK TOBACCO	5394821	Smokeless tobacco; Smokers' oral vaporizer refill cartridges sold empty

Applicant argues that its products are unrelated to Registrant's products because "Applicant's smokeless tobacco goods are not competitive with Registrant's smoking related goods."¹⁵ Thus, Applicant concludes that "[t]he consuming public would not be confused as to the origin of the respective goods"¹⁶ because consumers for Applicant's smokeless tobacco and Registrant's smoking accessories are seeking wholly unrelated products.¹⁷

Indeed, consumers for smokeless tobacco are likely unaware of sources for smoking and/or electronic cigarette related goods because such consumers do not use those types of goods and therefore have no reason to be aware of such sources. Similarly, consumers for smoking and/or electronic cigarette related goods are likely unaware of sources for smokeless tobacco goods because such

¹⁵ Applicant's Brief, p. 5 (4 TTABVue 6).

¹⁶ *Id.*

¹⁷ *Id.* at p. 6 (4 TTABVue 7).

consumers do not use those types of goods and therefore likewise have no reason to be aware of such sources.¹⁸

We disagree. First, the issue is not whether purchasers would confuse the parties' goods, but rather whether there is a likelihood of confusion as to the source of these goods. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1737 (TTAB 2018) (“the test is not whether consumers would be likely to confuse these goods, but rather whether they would be likely to be confused as to their source.”). In this regard, the third-party registrations discussed above serve to suggest that smokeless tobacco and smoking accessories may emanate from the same source.

Second, as noted above, smokeless tobacco is promoted as a substitute for cigarettes. Indeed, some smokers turn to smokeless tobacco to quit smoking.¹⁹

Dual use of smokeless tobacco and cigarettes is prevalent in many states, and is more common among younger males. ... Potential reasons for dual use include: (1) promotion of smokeless tobacco and e-cigarettes where smoke-free air policies prevent cigarette smoking; (2) consumer beliefs that these products are safer than cigarettes; or (3) perceptions that these products aid smoking cessation.²⁰

¹⁸ *Id.* at p. 7 (4 TTABVUE 8).

¹⁹ “Dual Use of Smokeless Tobacco or E-cigarettes with Cigarettes and Cessation,” HHS Public Access website (ncbi.nlm.nih.gov), attached to the October 26, 2021 Office Action (TSDR 11).

²⁰ *Id.* at TSDR 9.

“[S]ince about 2006, various alternative tobacco products, such as snus, dissolvables, and electronic cigarettes (e-cigarettes), have been promoted in the United States. ... in 2006, the major US cigarette manufacturers acquired smokeless tobacco companies and began selling snus bearing cigarette brand names (e.g., Marlboro Snus, Camel Snus).”²¹ Accordingly, the conditions and activities surrounding the marketing of smokeless tobacco and smoking accessories are such that they would be encountered by the same persons under circumstances that could, because of the similarities of the marks, give rise to the mistaken belief that they originate from or are some way associated with the same producer. *Coach Servs.*, 101 USPQ2d at 1732.

We find that the goods are related.

IV. Established, likely-to-continue channels of trade and classes of consumers.

To prove that smokeless tobacco and smoking accessories are offered in the same channels of trade, the Examining Attorney submitted excerpts from the following websites advertising the sale of the smokeless tobacco products and smoking accessories:²²

- Mr. Snuff (mrsnuff.com) advertises e-cigarettes and smokeless tobacco;²³

²¹ Alternative Tobacco Product Use and Smoking Cessation: A National Study,” American Journal of Public Health (ncbi.nlm.nih.gov) attached to the October 26, 2021 Office Action (TSDR 15).

²² The La Dulce Vapor Lab website (ladulcevapor.com) does not advertise the sale of any products listed in the registration. May 18, 2020 Office Action (TSDR 115-121).

²³ May 18, 2020 Office Action (TSDR 122-123).

- Turning Point (turningpointbrands.com) advertises cigarette papers and smokeless tobacco;²⁴
- Will Bill's Tobacco (wildbillstobacco.com) advertises cigarette papers and chewing tobacco;²⁵
- The Briar Shoppe (briarshoppecigars.com) advertises lighters and smokeless tobacco;²⁶
- David's (davidsfinetobacco.com) advertises lighters, cigarette papers, and smokeless tobacco;²⁷
- Greenleaf Vape & Tobacco (greenleaftobaccoandvapor.com) advertises lighters, e-cigarettes, and chewing tobacco;²⁸
- Inver Grove Vape and Tobacco (invergrovetobacco.com) advertises e-cigarettes and smokeless tobacco;²⁹ and
- Brookshire Brothers Tobacco Barn (brookshirebrothers.com) advertises e-cigarettes, lighters, moist snuff, chewing tobacco, and snus.³⁰

These third-party websites and the evidence discussed above about how smokeless tobacco is promoted as a cigarette substitute prove that Applicant's smokeless tobacco

²⁴ *Id.* at TSDR 124-125.

²⁵ *Id.* at TSDR 126-127.

²⁶ November 30, 2020 Office Action (TSDR 82-86).

²⁷ *Id.* at TSDR 87-89.

²⁸ *Id.* at TSDR 94.

²⁹ *Id.* at TSDR 95-97.

³⁰ *Id.* at TSDR 101.

and Registrant's smoking accessories are offered in some of the same channels of trade to the same classes of consumers.

Applicant argues, to the contrary, that "Applicant's consumers are distinct to Registrant's consumers"³¹ in that Registrant's consumers are seeking items (i.e., smoking accessories) that are wholly unrelated to Applicant's smokeless tobacco goods.³² Users of smokeless tobacco "enjoys the discrete delivery of tobacco into their body" while users of e-cigarettes do not want to use tobacco but enjoy smoking.³³ Accordingly, Applicant concludes that the consumers do not overlap.³⁴ However, Applicant's arguments are unsupported by the facts. Applicant simply ignored the evidence that smokeless tobacco is promoted as a cigarette substitute and that, therefore, there is some consumer overlap.

We find that the products are offered, at a minimum, in overlapping channels of trade and to overlapping classes of consumers.

V. Conclusion

Because the marks are similar, the goods are related, and the goods are offered in overlapping channels of trade to overlapping classes of consumers, we find that Applicant's mark HORIZON for "moist smokeless tobacco; smokeless tobacco" is likely to cause confusion with the registered mark HORIZON TECH for the smoking accessories in the registration.

³¹ Applicant's Brief, p. 5 (4 TTABVUE 6).

³² *Id.* at p. 6 (4 TTABVUE 7).

³³ *Id.*

³⁴ *Id.* at p. 7 (4 TTABVUE 8).

Decision: We affirm the refusal to register Applicant's mark HORIZON under Section 2(d) of the Trademark Act.