

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: November 16, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Blake Farms Hard Apple Cider*  
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Serial No. 90567569  
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Alex Szypa of Carlson, Gaskey & Olds, P.C.,  
for Blake Farms Hard Apple Cider.

Raul Cordova, Trademark Examining Attorney, Law Office 114,  
Nicole Nguyen, Acting Managing Attorney.

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Before Zervas, Lykos and Lebow,  
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Blake Farms Hard Apple Cider, seeks to register the mark BLAKE'S  
BACK 40 (in standard characters) on the Principal Register for "Beer" in  
International Class 32.<sup>1</sup>

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<sup>1</sup> Application Serial No. 90567569 ("the Application") was filed on August 14, 2020, based on Applicant's allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Page references to the application record are to the downloadable .pdf version of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs are to the Board's TTABVUE docket system.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with beer, is likely to cause confusion with the mark BACK 40 (in standard characters) on the Principal Register for "Beer" in International Class 32.<sup>2</sup>

When the refusal was made final, Applicant appealed and requested reconsideration, which was denied. The appeal has been briefed. For the reasons discussed below, we affirm the refusal.

### **I. Likelihood of Confusion**

The fundamental purpose of Trademark Act Section 2(d) is to prevent confusion as to source, and to protect registrants from damage caused by registration of marks likely to cause confusion. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985). Our analysis is based on all of the probative evidence of record. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*") (setting forth factors to be considered, hereinafter referred to as "*DuPont* factors").

In making our determination, we consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992

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<sup>2</sup> Registration No. 4906905, issued March 1, 2016; Section 8 and 15 declarations accepted and acknowledged.

F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

**A. The Goods, Channels of Trade and Classes of Consumers**

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods ... described in an application or registration...,” and the third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014).

Applicant’s and Registrant’s goods are identical: Beer. Because the goods are identical, we must presume that the channels of trade and classes of purchasers are as well. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018); *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

The identity of Applicant's and Registrant's goods and their identical channels of trade and classes of purchasers not only weigh heavily in favor of finding a likelihood of confusion, but also reduce the degree of similarity between the marks necessary to find a likelihood of confusion. *In re Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).

**B. The Number and Nature of Similar Marks in Use on Similar Goods**

Under the sixth *DuPont* factor, we consider whether the strength of the cited registered mark may be attenuated by “[t]he number and nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567. Applicant adduces evidence of 12 use-based third-party registered marks, in addition to Registrant's mark, that include the term BACK 40 in one form or another for various goods and services to show that wording is weak or diluted.<sup>3</sup> No evidence of third-party use of BACK 40 was presented. For the reasons expressed below, we agree with the Examining Attorney that this third-party registration evidence does not weaken the scope of protection to which the cited registered mark is entitled.

“In determining the strength of a mark, we consider both its inherent strength based on the nature of the mark itself and its commercial strength, based on the marketplace recognition of the mark.” *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, at \*30 (TTAB 2021), *appeal docketed*, No. 22-1212 (Fed. Cir. 2021),

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<sup>3</sup> September 2, 2021 Response to Office Action, pp. 14-43.

citing, inter alia, *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).”). “[T]hird-party registrations, with no evidence of the extent of the use of the marks in commerce, do not diminish the commercial strength of Registrant’s mark, and are relevant only to the extent that they ‘may bear on conceptual weakness if a term is commonly registered for similar goods or services.’” *In re Embiid*, 2021 USPQ2d 577, \*34 (TTAB 2021) (quoting *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017)). That last phrase, “similar goods or services,” is telling, for under the sixth *DuPont* factor, “the controlling inquiry is the extent of third-party marks in use on ‘similar’ goods or services.... ‘It is less relevant that [the mark] is used on unrelated goods or services....’” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1694 (Fed. Cir. 2018) (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992)).

Here, 10 of the 12 third-party registrations are for clearly unrelated goods and services--e.g., clothing, yarn, travel information services, decorative wall hangings, slot machines, charcoal grills, kits for making jerky and spice rubs, advertising services, and ashtrays--“products far removed from the ... products at issue and therefore ... not probative.” *In re Sibony*, 2021 USPQ2d 1036, \*7-8 (TTAB 2021). That leaves two third-party registration with arguably similar goods or services, namely, Reg. No. 1138724 for the mark BACK FORTY for “wines,” and Reg. No. 1138724 for

the mark BACK 40 JUNCTION and Design for “restaurant services.”<sup>4</sup> But apart from merely asserting that “restaurant services and wine ... are very related to beer,” Applicant has not provided any evidence showing that to be true in this case. *Cai v. Diamond*, 127 USPQ2d at 1799 (“Attorney argument is no substitute for evidence.”) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

Even if restaurant services and wine are considered similar to beer, the existence of two third-party registrations (no evidence of third-party use) is far too few in number to establish that Registrant’s mark is relatively weak and entitled only to a limited protection. *See, e.g., 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 made of record); *In re Inn at St. John’s*, 126 USPQ2d 1742, 1746 (TTAB 2018) (four third-party registrations and no third-party uses were “a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant”), *aff’d per curiam*, 777 F. App’x 516 (Fed. Cir. 2019).

The sixth *DuPont* factor is neutral.

### **C. The Marks**

The first *DuPont* factor considers the “similarities or dissimilarities of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *In re Detroit Athl.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting

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<sup>4</sup> *Id.*, pp. 14-15. While likelihood of confusion has often been found where similar marks are used in connection with beverage products and restaurant services, there is no per se rule to this effect. *See Lloyd’s Food Prods., Inc. v. Eli’s, Inc.*, 987 F.2d 766, 768, 25 USPQ2d 2027, 2030 (Fed. Cir. 1993); *In re Opus One Inc.*, 60 USPQ2d 1812, 1813 (TTAB 2001).

*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*, 126 USPQ2d at 1746 (quoting *In re Davia*, 110 USPQ2d at 1812).

“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, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks omitted)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016).

Applicant’s BLAKE’S BACK 40 mark and Registrant’s BACK 40 mark and are quite similar “in their entirety as to appearance, sound, connotation and commercial impression,” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567), particularly when we consider the lesser degree of similarity needed to find a likelihood of confusion when the marks identify identical goods. *In re Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 94 USPQ2d at 1260. Both include the term “BACK 40,” which refers to a “remote, usually uncultivated acreage on a large

piece of land, as on a farm or ranch”<sup>5</sup> and that term is arbitrary when used in connection with beer. The only difference is that Applicant’s mark adds its house mark, BLAKE’S, to the beginning of the mark.<sup>6</sup>

BLAKE is also a given name or surname (real or fictional), and Applicant’s use of the possessive form (BLAKE’S) emphasizes that understanding. Such names, “per se, because of their proliferation of use, are generally considered to fall within the designation of weak [terms or] marks[.]” *Aileen, Inc. v. Eileen Togs, Corp.*, 188 USPQ 698 (TTAB 1975). It also operates as an adjective that emphasizes BACK 40 as the dominant term in the mark. *See, e.g., In re Riddle*, 225 USPQ 630, 632 (TTAB 1985) (holding RICHARD PETTY’S ACCU TUNE and design for automotive service stations, and ACCU-TUNE for automotive testing equipment, likely to cause

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<sup>5</sup> <https://www.dictionary.com/browse/back-forty> (Dictionary.com, based on THE RANDOM HOUSE UNABRIDGED DICTIONARY (2022)), accessed November 14, 2022. Applicant provided a copy of this definition as an attachment to its brief, which was insufficient to make it of record. *Inn at St. John’s*, 126 USPQ2d 1 at 1744 (quoting Trademark Rule 2.142(d), 37 C.F.R. § 1.142(d) (“The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of the notice of appeal.”)). Because the Examining Attorney does not object to this new evidence but instead discusses it in his brief, and because the meaning of BACK FORTY is relevant to our analysis, we take judicial notice of the noted definition. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Omniome, Inc.*, 2020 USPQ2d 3222, at \*2 n.17 (TTAB 2019) (“The Board may take judicial notice of dictionary definitions, including online dictionaries, definitions in technical dictionaries and translation dictionaries that exist in printed format, and we elect to do so here.”).

<sup>6</sup> We find BLAKE’S is Applicant’s house mark because Applicant’s name is Blake Farms Hard Apple Cider, BLAKE’S is a clear short form for Blake Farms Hard Apple Cider, and Applicant asserts that BLAKE’S is its house mark. 5 TTABVUE 15 (Applicant’s Brief). *See In re Apparel Ventures, Inc.*, 229 USPQ 225, 226 (TTAB 1986) (holding applicant's mark, SPARKS BY SASSAFRAS (stylized), for clothing, and registrant's mark, SPARKS (stylized), for footwear, likely to cause confusion, noting that “[t]hose already familiar with registrant’s use of its mark in connection with its goods, upon encountering applicant’s mark on applicant’s goods, could easily assume that ‘sassafras’ is some sort of house mark that may be used with only some of the ‘SPARKS’ goods”).

confusion). We thus find that BACK 40, the only term in Registrant's mark, is also the dominant term in Applicant's mark. 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.”).

Applicant argues that “[w]ith BACK FORTY and BACK 40 being weak and diluted, the term BLAKE'S is the dominant portion of Appellant's mark, both because it is significantly more distinctive than BACK 40 and because it appears first.”<sup>7</sup> Applicant further argues that “[b]y focusing on the ‘BACK 40’ portion of Applicant's mark to BACK FORTY, the Examining Attorney is improperly removing the most distinctive portion of Applicant's mark and comparing the residue,” which “amounts to improper dissection of the mark” and “[the message of the whole phrase of BLAKE'S BACK 40 is not adequately captured by the Examining Attorney's dissection and recombination.”<sup>8</sup>

As discussed above, however, the evidence does not support Applicant's contention that BACK 40 weak or diluted with respect to beer. Moreover, we find the Examining Attorney considered the marks in their entirety. It is well-settled that although we consider the marks in their entirety, “[t]here 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.” *In re Nat'l Data Corp.*, 224 USPQ at 751. Therefore, it is appropriate to

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

<sup>8</sup> *Id.* at 16.

accord more weight to dominant elements in a mark.

While the first term in a mark is often dominant, *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”), that is not always the case. “It has long been held that the addition of a trade name or house mark to a registered mark does not generally avoid confusion.” *In re Fiesta Palms, LLC*, 85 USPQ2d 1360, 1364 (TTAB 2007) (finding that “a consumer who has been told about the advantages of registrant’s MVP casino services is likely to believe that [applicant’s] CLUB PALMS MVP casino services is simply the now identified source of the previously anonymous MVP casino services.”).

Indeed, “such addition may actually be an aggravation of the likelihood of confusion as opposed to an aid in distinguishing the marks so as to avoid source confusion,” and we find that to be the case here. *In re Christian Dior, S.A.*, 225 USPQ 533, 534 (TTAB 1985) (addition of house mark in LE CACHET De DIOR does not avoid likelihood of confusion with registered CACHET mark). *See also Celanese Corp. of America v. E. I. Du Pont de Nemours & Co.*, 154 F.2d 143, 69 USPQ 69 (CCPA 1946) (addition of surname “Du Pont” to one of two otherwise confusingly similar trademarks was not of itself sufficient to avoid likelihood of confusion); *Hammermill Paper Co. v. Gulf States Paper Corp.*, 337 F.2d 662, 143 USPQ 237 (CCPA 1964) (“Hammermill E-Z Carry Pak” is so similar to “EZ Pak” and “E-Z Cari” that confusion is likely); *In re Dennison Mfg. Co.*, 229 USPQ 141, 144 (TTAB 1986) (holding use of “Glue Stic,” for general purpose adhesive in stick form, and “Uhu Glu Stic,” for

adhesives for paper and stationery, is likely to cause confusion); *In re Riddle*, 225 USPQ 630 (TTAB 1985) (RICHARD PETTY'S ACCUTUNE and design for automotive service center confusingly similar to ACCUTUNE for automotive testing equipment).

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

## **II. Conclusion**

Having considered all evidence and arguments bearing on the relevant *DuPont* factors, including similarity of the marks, identical nature of the goods and trade channels, and classes of consumers, we conclude that Applicant's BLAKE'S BACK 40 mark for "beer" is likely to cause confusion with Registrant's BACK 40 mark for "beer."

**Decision:** The refusal to register BLAKE'S BACK 40 under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), is affirmed.