

This Opinion is Not a
Precedent of the TTAB

Mailed: September 13, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

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In re Chick-A-Boom, LLC
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Serial No. 90667527
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William A. Wooten of Wooten Law Office
for Chick-A-Boom, LLC.

Shatoni Foster, Trademark Examining Attorney, Law Office 121,
Richard White, Managing Attorney.

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Before Cataldo, Adlin and Dunn, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Chick-A-Boom, LLC seeks registration of CHICK-A-BOOM, in standard characters, for “restaurant services,” in International Class 43.¹ The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the two separately-owned and previously-registered marks shown below:

CHK-A BOOM, in standard characters, for “providing of
food and drink via online ordering, takeout services, and
delivery services,” in International Class 43;² and

¹ Application Serial No. 90667527, filed April 23, 2021 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on first use and first use in commerce in February 2019.

² Registration No. 6469790, issued August 31, 2021 (the “790 Registration”).

CHICKABOOM, in typed form,³ for “processed meat, namely, chicken,” in International Class 29,⁴

that use of Applicant’s mark is likely to cause confusion. After the refusal became final, Applicant appealed and filed a request for reconsideration that was denied. The appeal is fully briefed.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record 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) (“*DuPont*”) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See 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.”).

³ There is no substantive difference between “standard character” marks and marks in “typed” form. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) (“until 2003, ‘standard character’ marks formerly were known as ‘typed’ marks, but the preferred nomenclature was changed in 2003 to conform to the Madrid Protocol ... we do not see anything in the 2003 amendments that substantively alters our interpretation of the scope of such marks”).

⁴ Registration No. 3024366, issued December 6, 2005; renewed (the “366 Registration”) .

A. The Marks

Applicant's mark and the two cited marks are quite similar "in their entireties 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). We address the cited marks one at a time.

1. The Mark in the '790 Registration

Applicant's mark CHICK-A-BOOM and the cited CHK-A BOOM mark look alike, the only differences being that the first term in Registrant's mark does not include the letter string "ic" in the word "CHICK," and Registrant's mark does not include a hyphen between "A" and "BOOM." These differences are minor, and would be easy to forget. Indeed, we must be concerned with potential consumers who see the marks at spaced intervals," i.e., consumers who encounter Registrant's mark first, but do not encounter Applicant's mark until later, or vice versa. *Grandpa Pidgeon's of Mo., Inc. v. Borgmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973). Here, we find that consumers would likely forget the small differences between the marks, especially when we keep in mind: (1) "the fallibility of memory over a period of time;" and (2) that the "average" consumer "normally retains a general rather than a specific impression of trademarks." *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). *See also In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) ("marks must be considered in light of the fallibility of memory") (citation, internal quotation marks, and ellipsis omitted).

The marks also sound identical, or at the very least almost identical. In fact, even if “CHK” in Registrant’s mark is not pronounced exactly the same as “CHICK” in Applicant’s mark, it will be pronounced similarly, perhaps with a different vowel or other sound between the “H” and “K” in the mark’s first term. *See Kimberly-Clark Corp. v. H. Douglas Enters., Ltd.*, 774 F.2d 1144, 227 USPQ 541, 542 (Fed. Cir. 1985) (HUGGIES and DOUGIES found confusingly similar in part because they “sound much alike and actually rhyme”); *Russell Chem. Co. v. Wyandotte Chem. Corp.*, 337 F.2d 660, 143 USPQ 252, 253 (CCPA 1964) (differences between SENTOL and SENTROL have “little effect either upon the eyes of the viewer or the ears of the hearer”); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740-41 (TTAB 2014) (IKEA and AKEA are “similar in appearance” and sound, and rhyme, pointing out that “[r]egardless of the pronunciation of the first vowel, the remainder of the marks will be pronounced the same”); *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1913 (TTAB 2000) (“Both marks are highly similar in sound, since YO-YO’s directly rhymes with HOHOs. Similarity in either form, spelling or sound alone may be sufficient to support a finding of likelihood of confusion.”).

Finally, the marks would convey identical or highly similar meanings and create identical or highly similar commercial impressions, because both would be perceived as a combination of “CHICK,” “A” and “BOOM,” for food service, notwithstanding that the cited mark spells the first term as “CHK.” Furthermore, the marks look and sound so similar, and as explained below are used for such similar services, that they will convey similar meanings and create similar commercial impressions.

2. The Mark in the Cited '366 Registration

There is not a meaningful difference between the involved mark CHICK-A-BOOM and the cited CHICKABOOM mark. The hyphens in Applicant's mark are minor punctuation that does not appreciably distinguish it – in appearance, sound, meaning or commercial impression – from the mark in the cited '366 Registration. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016) (finding “the hyphen in Applicant's mark MINI-MELTS [did] not distinguish it from Opposer's mark [MINI MELTS]”); *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1712 (TTAB 2010), *aff'd*, 2011 WL 5400095 (Fed. Cir. 2011) (“[B]oth marks begin with the term MAGNUM or MAG-NUM. Thus, the initial term in both marks is essentially identical; the hyphen in the Mag Instrument's mark does not distinguish them.”); *Charette Corp. v. Bowater Comm'n Papers Inc.*, 13 USPQ2d 2040, 2042 (TTAB 1989) (finding PRO-PRINT confusingly similar to PROPRINT, and stating “[i]t is also quite obvious that the marks are identical except for the division of registrant's mark by a hyphen between the syllables”); *Goodyear Tire & Rubber Co. v. Dayco Corp.*, 201 USPQ 485, 488 n.4 (TTAB 1978) (FAST-FINDER “is in legal contemplation substantially identical to” FASTFINDER). Consumers seeing the marks would likely forget or ignore that one includes hyphens and the other does not, while consumers hearing the marks would perceive them as identical. There is no difference in meaning or commercial impression.

3. Applicant's Reliance on Third-Party Registrations of "CHICK"- and "BOOM"- Formative Marks is Misplaced

Applicant argues that the terms "CHICK" (and variations thereof) and "BOOM" are weak for "similar goods and services," relying on 15 third-party registrations. 6 TTABVUE 8-10; February 18, 2022 Office Action response TSDR 13-27. For example, Applicant relies on registrations of FRIED CHXX, MAIN CHICK, BIG CHICK ENERGY, THE RED CHICKZ, BOOM CHICKEN and CHIK BOOM. February 18, 2022 Office Action response TSDR 14, 15, 17, 22, 25, 26. We are not persuaded.

While variations of "CHICK" are obviously suggestive for restaurant services and descriptive or generic for chicken, and thus conceptually weak, none of the marks Applicant cites, including CHIK CHIK BOOM, are nearly as close to the marks in the cited '790 and '366 Registrations as Applicant's involved mark. Furthermore, Applicant only cited three third-party registrations containing the term "BOOM," all for restaurant services, and this is not enough to show that "BOOM" is conceptually weak for restaurant services, much less chicken.⁵

⁵ To the extent Applicant relies on the third-party registrations to show that the cited marks are commercially weak or "diluted," that reliance is misplaced, because "third-party registrations are not evidence of third-party use of the registered marks in the marketplace, for purposes of the sixth *du Pont* factor." *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009) (citing *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992)); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009). *See also AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) ("The existence of these registrations is not evidence of what happens in the market place or that customers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive.").

4. Conclusion Regarding the Marks

Applicant's mark is highly similar to both cited marks, and this weighs heavily in favor of finding a likelihood of confusion. In fact, Applicant's mark is so similar to the cited marks as to reduce the degree of similarity between the goods and services required to support a finding of likelihood of confusion. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *Time Warner Ent. Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002); and *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).

B. The Goods and Services and Their Channels of Trade and Classes of Consumers

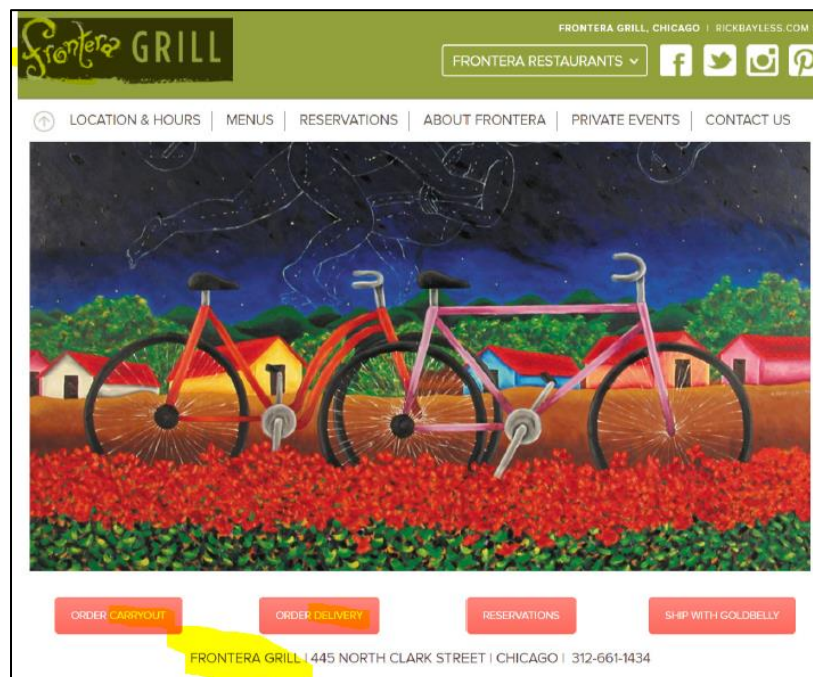
The goods and services need not be identical or even competitive in order to find a likelihood of confusion. Rather, the question is whether the goods and services are marketed in a manner that "could give rise to the mistaken belief that they emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 227 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) ("Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services."); *Recot, Inc. v. 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").

Here, the Examining Attorney has established that to the extent Applicant's identified "restaurant services" are not legally identical to the services identified in the cited '790 Registration ("providing of food and drink via online ordering, takeout services, and delivery services") they are quite closely related. The Examining Attorney has also established that Applicant's restaurant services are related to the goods identified in the cited '366 Registration ("processed meat, namely, chicken").

1. Evidence Regarding the Services Identified in the Cited '790 Registration

Even if we assume that Applicant's restaurant services do not encompass Registrant's providing of food and drink via online ordering, takeout and delivery, there is no question that these are essentially the same services, at least in part. The record shows that many restaurants offer online ordering, takeout or delivery.

For example, a Chicago restaurant offers sit-down service, delivery and carryout under its FRONTERA GRILL mark, as shown below:

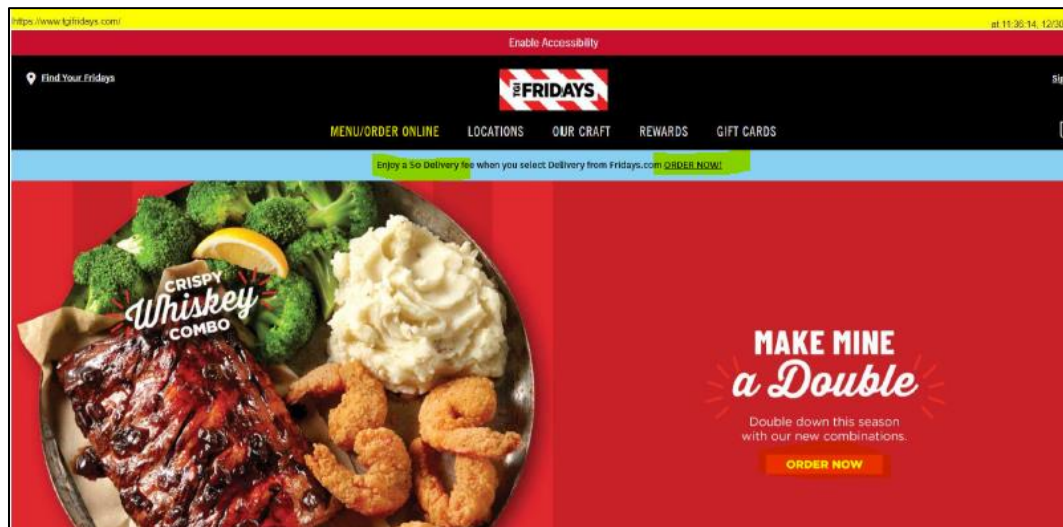


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December 30, 2021 Office Action TSDR 20 (highlighting added). A restaurant and bakery offers both restaurant services and online ordering under its MARIE CALLENDER'S mark:



Id. at 12 (highlighting added). TGI Fridays offers restaurant services, online ordering and delivery, all under the same mark:



Id. at 6 (highlighting added). Additional restaurants that offer in-restaurant dining and online ordering include: The Rub; Dave’s Hot Chicken; Popeyes; Nando’s; and Kentucky Fried Chicken.⁶ March 31, 2022 Office Action TSDR 67-73, 121-125.

In addition, the Examining Attorney introduced the following use-based third-party registrations showing that the same marks are registered for restaurant services on the one hand and providing food and drink via online ordering, takeout or delivery on the other:



(Reg. No. 5767330) is registered for “restaurant services” and “providing of food and drink.”

ROCKABILLY RIBS (Reg. No.6175699) is registered for “restaurant services,” “take-out restaurant services” and “providing of food and drink via a mobile truck.”

FREESTYLE TACOS (Reg. No. 6428541) is registered for “restaurant services” and “providing of food and drink.”



(Reg. No. 5962349) is registered for “restaurant services” and “providing of food and drink.”



(Reg. No. 5228786) is registered for “restaurant and catering services,” “carry out restaurant” and “providing of food and drink.”

PIREE’S PIRI GRILL (Reg. No. 4983466) is registered for “restaurant,” “services for providing food and drink” and “restaurant services.”

⁶ Nando’s and Kentucky Fried Chicken also offer delivery.



(Reg. No. 6127571) is registered for “dine-in restaurant services” and “carry-out restaurant services.”

EMPIRE PIZZA (Reg. No. 6250131) is registered for “restaurant services, including sit down and take out restaurant services.”

COSMIC WINGS (Reg. No. 6688045) is registered for “restaurant services, take-out restaurant services and restaurants featuring home delivery.”



(Reg. No. 6667484) is registered for “fast food restaurant services featuring meals consisting primarily of meat, fish, shrimp or poultry” and “providing of food and drink.”

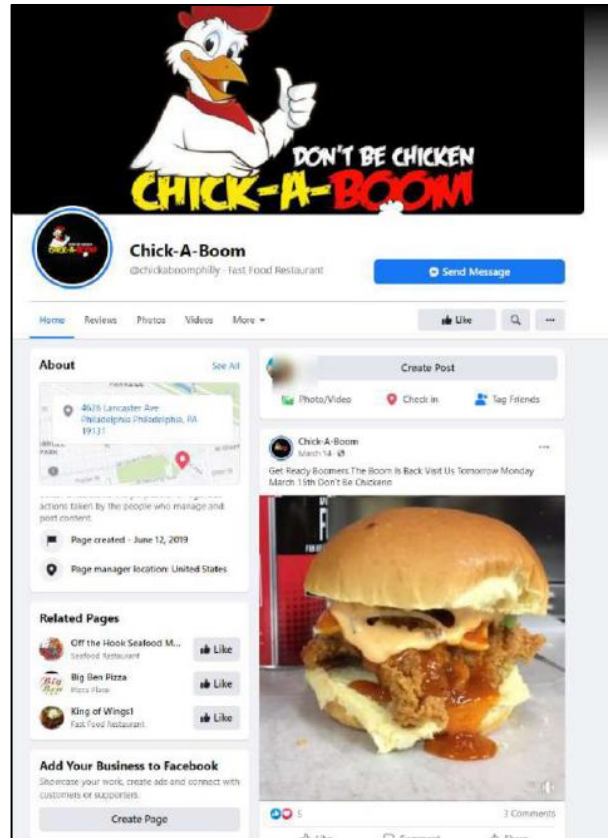


(Reg. No. 6670132) is registered for “restaurant services” and “restaurant and bar services, including restaurant carryout services.”

Id. at 76-96, 111-116.

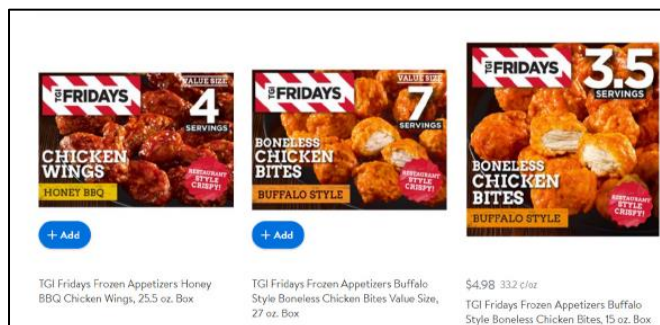
2. Evidence Regarding the Goods Identified in the Cited '366 Registration

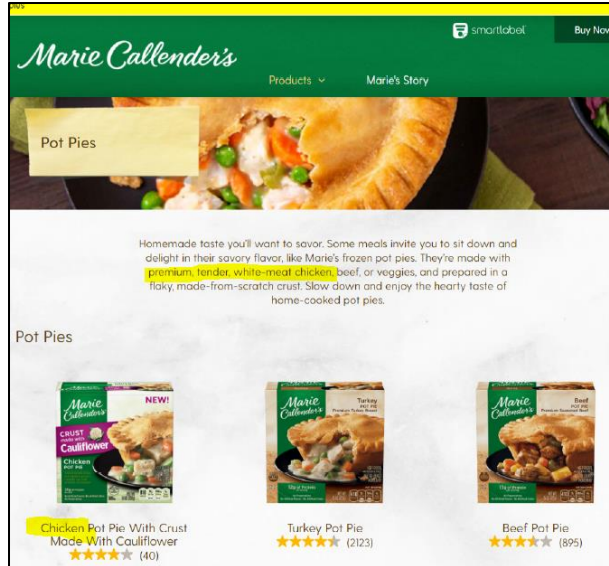
Applicant seeks registration for “restaurant services,” but also offers chicken under the same mark, as shown in Applicant’s specimen, a portion of which is reproduced below:



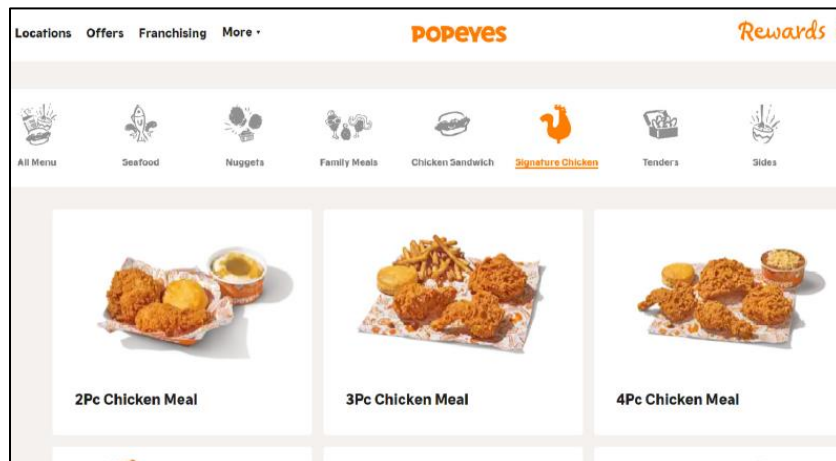
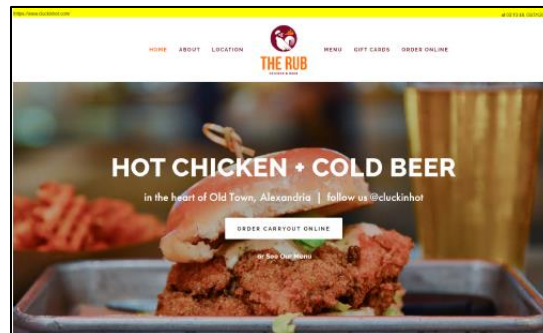
Applicant is not alone. In fact, the Examining Attorney relies on evidence that third parties offer restaurant services (Applicant's services) and chicken (the '366 Registrant's goods) under the same mark.

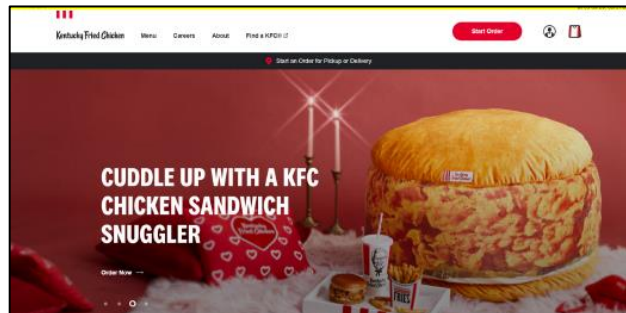
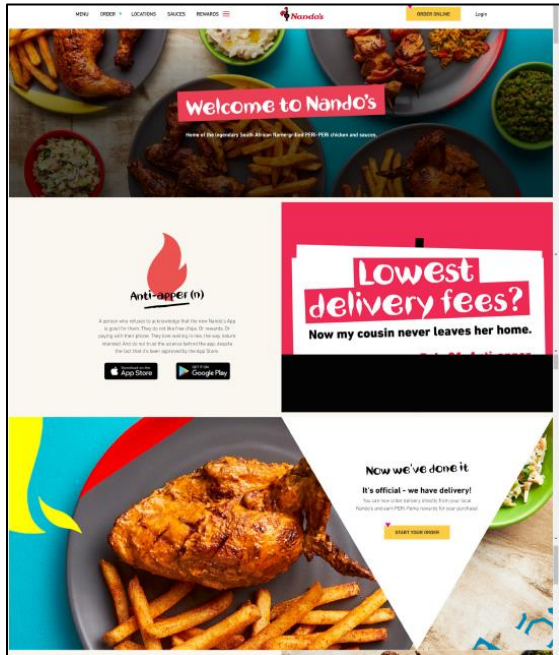
For example, the MARIE CALLENDER'S and TGI FRIDAY'S marks, used for restaurant services as shown above in the discussion of the cited '790 Registration, are also used for processed chicken, as shown below:





December 30, 2021 Office Action TSDR 31, 33 (highlighting added). In addition, The Rub, Dave's Hot Chicken, Popeyes and Nando's all offer restaurant services and chicken, as shown below:





March 31, 2022 Office Action TSDR 121-125.

The Examining Attorney introduced the following use-based third-party registrations showing that the same marks are registered for restaurant services on the one hand and chicken on the other:



(Reg. No. 5767330) is registered for “restaurant services” and “processed meat, namely ... chicken.”

ROCKABILLY RIBS (Reg. No.6175699) is registered for “restaurant services,” “chicken,” “prepared meat,” “prepared meals consisting primarily of meat ...”

FREESTYLE TACOS (Reg. No. 6428541) is registered for “chicken,” “sliced meat” and “restaurant services.”



(Reg. No. 5962349) is registered for “battered and fried meat, namely ... chicken wings, chicken patties,” “chicken balls,” “chicken nuggets,” chicken stock,” “chicken wings,” “chicken” and “restaurant services.”



(Reg. No. 5228786) is registered for “prepared food consisting (sic) poultry base,” “chicken salad” and “restaurant and catering services.”

PIREE’S PIRI GRILL (Reg. No. 4983466) is registered for “chicken products, namely, chicken nuggets, chicken breast fillets,” “prepared meals consisting wholly or mainly of chicken,” “restaurant,” “services for providing food and drink” and “restaurant services.”



(Reg. No. 6127571) is registered for “salads of meat, poultry, chicken and/or shrimp” and “dine-in restaurant services.”

EMPIRE PIZZA (Reg. No. 6250131) is registered for “prepared dishes consisting primarily of chicken, chicken wings” and “restaurant services, including sit down and take out restaurant services.”

CREAM CITY CLUCKERY (Reg. No. 6278041) is registered for “chicken” and “restaurant services.”

DAN'S SEAFOOD & WINGS (Reg. No. 6533754) is registered for “chicken” and “restaurant services.”



(Reg. No. 6449232) is registered for “grilled chicken salads, and fried chicken salads,” “chicken tenders in the nature of chicken nuggets” and “restaurant services.”

Id. at 76-102; *see also id.* at 103-120 (nine additional third-party use-based registrations for “restaurant services” and chicken products).

3. Conclusion Regarding the Goods and Services, Channels of Trade and Classes of Consumers

The evidence that third parties use the same marks for restaurant services (Applicant’s services) and either providing food and drink via online ordering, takeout or delivery (the ’790 Registrant’s services) or chicken products (the ’366 Registrant’s goods) makes clear that these goods and services are related. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (crediting relatedness evidence showing that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”). The third-party registration evidence corroborates this evidence, further establishing the relationship between the goods and services. “Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may

emanate from a single source.” *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1998).

The third-party use evidence also reveals that the channels of trade and classes of consumers for the identified goods and services overlap. In fact, many restaurants, perhaps especially fast food and fast casual restaurants, serve chicken (often processed chicken, for example chicken nuggets or sliced chicken) for consumption on or off the restaurant’s premises. Some restaurants sell processed chicken in grocery stores. Thus, it is clear that the classes of consumers for the goods and services overlap, because many restaurant goers eat chicken, whether they dine in, or eat at home after taking out, getting delivery, or buying restaurant-branded chicken products at a grocery store.

C. Applicant’s Remaining Arguments are Untenable

While there is no evidence that either of the cited marks is famous, that is irrelevant because “the owner of the cited registration is not a party to this ex parte appeal, and the Examining Attorney is under no obligation to demonstrate the fame of a cited mark.” *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). *See also In re Majestic Distilling Co.*, 65 USPQ2d at 1205 (“Although we have previously held that the fame of a registered mark is relevant to likelihood of confusion, *DuPont*, 476 F.2d at 1361, 177 USPQ at 567 (factor five), we decline to establish the converse rule that likelihood of confusion is precluded by a registered mark’s not being famous.”); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1086 (TTAB 2016) (“in an ex parte appeal the ‘fame of the mark’ factor is normally treated as neutral because the record generally includes no evidence as to fame.”).

The geographic separation between Applicant's restaurant and the restaurant owned by the '790 Registrant is also irrelevant. Indeed, Applicant seeks a geographically unrestricted registration, and both of the cited registrations are geographically unrestricted. *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 n.4 (TTAB 1987) (territorial separation of the use of the cited registered mark from the applicant is irrelevant to determining likelihood of confusion in a geographically unrestricted application); *Peopleware Sys., Inc. v. Peopleware, Inc.*, 226 USPQ 320, 321 (TTAB 1985) (while opposer and applicant may currently be geographically separated in their uses, this is irrelevant where applicant seeks a nationwide unrestricted registration).

The lack of evidence of actual confusion is also irrelevant, because we cannot gauge whether or the extent to which there has been an opportunity for confusion to occur if it were likely to occur. *See Nina Ricci S.A.R.L. v. E.T.F. Enters. Inc.*, 889 F.2d 1070, 12 USPQ2d 1901, 1903 (Fed. Cir. 1989) ("The absence of any showing of actual confusion is of very little, if any, probative value here because (1) no evidence was presented as to the extent of ETF's use of the VITTORIO RICCI mark on the merchandise in question in prior years"); *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). In any event, a lack of evidence of actual confusion carries little weight in an ex parte case such as this. *Majestic Distilling*, 65 USPQ2d at 1205. "[I]n this ex parte context, there has been no opportunity to hear from Registrant about whether it is aware of any reported instances of confusion." *In re Guild Mortg. Co.*, 2020 USPQ2d 10279 *7 (TTAB 2020). "[I]t is unnecessary to show actual confusion

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in establishing likelihood of confusion.” *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983).

These factors are all neutral.

II. Conclusion

Applicant’s mark is highly similar, if not nearly identical, to the marks in both cited registrations. Applicant’s services are related to, and travel in the same channels of trade as, the goods and services in the cited registrations. The classes of consumers for the goods and services overlap. Confusion is likely.

Decision: The refusal to register Applicant’s mark for the identified services under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), is affirmed.