

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: January 3, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Rockridge Enterprises LLC*

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Serial No. 97578343

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Harold Louis Federow, for Rockridge Enterprises LLC.

Allyson Willis, Trademark Examining Attorney, Law Office 113,  
Myriah Habeeb, Managing Attorney.

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Before Cataldo, Lykos, and Elgin,  
Administrative Trademark Judges.

Opinion by Elgin, Administrative Trademark Judge:

Rockridge Enterprises LLC (“Applicant”) seeks registration on the Principal Register of the mark ROCKRIDGE ORCHARDS (in standard characters, “orchards” disclaimed) for “Non-alcoholic cider, namely apple ciders, raspberry apple cider, strawberry apple cider and asian pear cider; non-alcoholic sweet ciders, namely spiced apple cider” in International Class 32.<sup>1</sup>

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<sup>1</sup> Application Serial No. 97578343 was filed on Sept. 4, 2022, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s allegation of first use and first use in commerce as early as Oct. 3, 1998.

Citations in this opinion to the prosecution record refer to the .pdf version of the TSDR system. Citations to the briefs in the appeal record refer to the Board’s TTABVUE docket

The Examining Attorney refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that, as applied to the goods identified in the application, it so resembles the mark ROCKRIDGE CELLARS (in standard characters, "cellars" disclaimed) for "wine" in International Class 33, as to be likely to cause confusion, to cause mistake, or to deceive.<sup>2</sup> When the refusal was made final,<sup>3</sup> Applicant filed an appeal and requested reconsideration, which was denied.<sup>4</sup> The appeal was resumed and is now fully briefed.<sup>5</sup>

For the reasons set forth below, we affirm the refusal to register.

## **I. Preliminary Issue**

Before proceeding to the merits of the refusal, we address an evidentiary matter. During prosecution and in its brief, Applicant discussed cancelled Registration No. 4000913 for ROCKRIDGE ORCHARDS (the "Prior Registration").<sup>6</sup> Applicant did not submit any evidence of the Prior Registration, such as printouts from the USPTO's databases or file history, to support its argument.

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system. *See In re Integra Biosciences Corp.*, Ser. No. 87484450, 2022 TTAB LEXIS 17, at \*6 (TTAB 2022).

<sup>2</sup> Reg. No. 3379265, registered Feb. 5, 2008 on the Principal Register; renewed.

<sup>3</sup> Jan. 23, 2024 Final Office Action.

<sup>4</sup> Apr. 23, 2024 Request for Reconsideration; May 7, 2024 Denial of Request for Reconsideration.

<sup>5</sup> Applicant's Brief and Reply Brief are at 6 TTABVUE and 9 TTABVUE. The Examining Attorney's Brief is at 8 TTABVUE.

<sup>6</sup> *See* Sept. 19, 2023 Response to Office Action at TSDR 1; Dec. 25, 2023 Response to Office Action at TSDR 10; 6 TTABVUE 5; and 9 TTABVUE 4-5. Reg. No. 4000913 issued on July 26, 2011, cancelled Jan. 28, 2022 for failure to file an acceptable declaration of continuing use under Trademark Act Section 8, 15 U.S.C. § 1058.

Under Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), the record in an application should be complete before the filing of an appeal. *See also In re tapio GmbH*, Ser. No. 87941532, 2020 TTAB LEXIS 483, \*8 (TTAB 2020).<sup>7</sup> Applicant did not submit any of the filings relating to the file history of the Prior Registration to support its argument. The Board does not take judicial notice of records residing within the USPTO. *See, e.g., Flame & Wax, Inc. v. Laguna Candles, LLC*, Can. No. 92072343, 2022 TTAB LEXIS 272, \*42-43 n.57 (TTAB 2022) (“The Board’s well-established practice is not to take judicial notice of USPTO records”; refusing to take notice of filings in prior applications). The Examining Attorney, however, not only does not dispute the basic facts asserted by Applicant, she also addresses them in her brief.<sup>8</sup> We therefore deem the Prior Registration and its file history stipulated into the record. *Cf. In re Litehouse, Inc.*, Ser. No. 78494701, 2007 TTAB LEXIS 20, \*12 n.2 (TTAB 2007) (third-party registrations submitted with applicant’s appeal brief considered because examining attorney did not object in her brief and instead presented arguments in rebuttal of this evidence).

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<sup>7</sup> As part of an internal Board pilot program on broadening acceptable forms of legal citation in Board cases, the citation form in this opinion is in a form provided in Section 101.03 of the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) (June 2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion employs citation to the Lexis (“LEXIS”) database.

<sup>8</sup> *See* 8 TTABVUE 13.

## II. Likelihood of Confusion

“The Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion [or] mistake, or to deceive.” *In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023) (cleaned up). Our determination of the likelihood of confusion under Section 2(d) of the Trademark Act is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”). See *In re Charger Ventures, LLC*, 64 F.4th at 1379.

We consider each *DuPont* factor for which there is evidence and argument. See, e.g., *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (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.” *Monster Energy Co. v. Lo, Opp.* No. 91225050, 2023 TTAB LEXIS 14, \*18 (TTAB 2023) (citing *Federated Foods, Inc. v. Ft. Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976)).

### A. Similarity or Dissimilarity of the Marks

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *Sabhnani v. Mirage Brands, LLC*, Can. No. 92068086, 2021 TTAB LEXIS 464, \*33 (TTAB 2021) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly

similar.” *Id.* (quoting *In re Inn at St. John’s, LLC*, Ser. No. 87075988, 2018 TTAB LEXIS 170, \*12-13 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019)) (internal quotation omitted).

We do not predicate our analysis on a dissection of the respective marks; we consider them in their entireties. *Stone Lion*, 746 F.3d at 1318; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”) (citation omitted). Moreover, the proper test regarding similarity “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, 1373 (Fed. Cir. 2018) (quoting *Coach Servs.*, 668 F.3d at 1368 (internal quotation marks and citation omitted)). “Similarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014).

Applicant’s mark is ROCKRIDGE ORCHARDS (“orchards” disclaimed) in standard characters. Registrant’s mark is ROCKRIDGE CELLARS (“cellars” disclaimed) in standard characters. Applicant argues that the term “orchard” connotes an area for fruit trees, and “cellars” is associated with wine, giving each mark an overall commercial impression that aligns with its goods.<sup>9</sup> The Examining Attorney counters that the marks have the same initial term ROCKRIDGE, and the

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<sup>9</sup> 6 TTABVUE 2-3; 9 TTABVUE 3-4.

terms “orchards” and “cellars” are entitled to less weight because they are disclaimed and descriptive of the goods.<sup>10</sup> She argues that “[b]ecause the dominant portions are identical in the respective marks, the marks are confusingly similar because they convey the same idea and mental reaction of a specific type of ridge, i.e., a ridge made of rock.”<sup>11</sup>

Applicant’s and Registrant’s marks share the initial term ROCKRIDGE. There is no evidence of record indicating that the term has a different connotation or commercial impression in view of the goods identified in the application and cited registration.<sup>12</sup> In this case, we find that the identical initial literal term in the marks creates strong similarities in sight, sound, connotation, and commercial impression. We also find that the descriptive terms ORCHARDS and CELLARS in the marks are subordinate to the more dominant and distinctive term ROCKRIDGE. *See Palm Bay Imps., Inc.*, 369 F.3d at 1372 (“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, 876 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, Opp. No. 91074797,

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<sup>10</sup> 8 TTABVUE 3-4.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> Applicant’s searches in the Trademark Search system, discussed further below in Section II(B), do not alter our conclusion in this regard. *See* Dec. 25, 2023 Response to Office Action at TSDR 7-8 (searches in all fields for “cellars” and “wine” showing 2,687 results; and “orchards” and “apple” showing 78 results). Applicant did not provide searches for “cellars” and non-alcoholic drinks, or “orchards” and alcoholic drinks.

1988 TTAB LEXIS 60, \*8 (“[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”).

Consumers also have a tendency to shorten marks, making it reasonable to assume that at least some consumers will “drop the highly descriptive/generic term [“orchards” or “cellars”] when calling for Applicant’s goods.” *In re Bay State Brewing Co.*, Ser. No. 85826258, 2016 TTAB LEXIS 46, \*9 (TTAB 2016) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 815 (CCPA 1978) (Rich, J., concurring) (“the users of language have a universal habit of shortening full names – from haste or laziness or just economy of words.”)). This is particular true of the goods in this case, where wine or cider often are ordered in a bar or restaurant and served in a glass, without the benefit of seeing an entire label. *See id.* at \*10.

In sum, we find that Applicant’s mark ROCKRIDGE ORCHARDS and the cited mark ROCKRIDGE CELLARS are similar in sight, sound, connotation, and overall commercial impression due to the shared term ROCKRIDGE. The first *DuPont* factor favors a finding of likelihood of confusion.

**B. Similarity or Dissimilarity of the Goods, Trade Channels, and Class of Consumers**

“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.” *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990); *see also Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*,

746 F.3d 1317, 1323 (Fed. Cir. 2014). We group these *DuPont* factors together because of the shared focus on the identifications of the goods.

The goods need not be identical or even competitive to support a finding that confusion is likely. See *On-line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1086 (Fed. Cir. 2000) (“[A]lthough the [goods] are different, it is reasonable to believe that the general public would likely assume that the origin of the [goods] are the same.”) (citing *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000)). The goods need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that the [goods] emanate from the same source.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, Opp. No. 91117739, 2007 TTAB LEXIS 58, \*28-29 (TTAB 2007)). We also keep in mind that “the greater the degree of similarity between the applicant’s mark and the registered mark, the lesser the degree of similarity between the applicant’s goods and registrant’s goods that is required to support a finding of likelihood of confusion.” *In re Thor Tech*, Ser. No. 78634024, 2009 TTAB LEXIS 253, \*4-5 (citing, *inter alia*, *In re Opus One, Inc.*, Ser. No. 75722593, 2001 TTAB LEXIS 707, \*8 (TTAB 2001)).

Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant goods or services are used together or used by the same purchasers; advertisements showing that the relevant goods or services are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both applicant’s goods and the goods



listed in the cited registration. *In re Country Oven, Inc.*, Ser. No. 87354443, 2019 TTAB LEXIS 381, \*9-10 (TTAB 2019).

Applicant's goods are various non-alcoholic ciders in Class 32 and Registrant's goods are alcoholic wines in Class 33. The Examining Attorney made of record ten registrations from nine third parties that include these goods. 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. *See, e.g., In re Country Oven, Inc.*, 2019 TTAB LEXIS 381, at \*9-10; *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, Opp. No. 91197659, 2013 TTAB LEXIS 314, \*27-28 (TTAB 2013). However, seven of the ten marks are registered under Section 44(e) of the Trademark Act, 15 U.S.C. § 1126(e), based on the registrant's ownership of a foreign registration and have been registered for less than five years.<sup>13</sup> Accordingly, "they lack probative value, and we have not considered them." *Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 TTAB LEXIS 228, \*30 (TTAB 2022) (citing *In re 1st USA Realty Pros. Inc.*, Ser. No. 78553715, 2007 TTAB LEXIS 73, \*5 (TTAB 2007)); *see also In re Mucky Duck Mustard Co.*, Ser. No. 603019, 1988 TTAB LEXIS 11, \*9 n.6 (TTAB 1988) (registrations issued pursuant to Section 44 "have very little, if any, persuasive value" for this purpose).

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<sup>13</sup> Indeed, two of these registrations have been cancelled for failure to file a declaration of use under Trademark Act Section 8. *See* Reg. Nos. 5235485 for MR.JOFF (cancelled Jan. 19, 2024) and 5344221 for ORCHARD PIG (cancelled June 7, 2024), at June 20, 2023 Office Action at TSDR 25-28.

This leaves only three registrations of record based on use under Trademark Act

Section 1(a):

- TIFLIS, owned by RCCI, Inc. (Reg. No. 6312663) for goods in Class 32 including non-alcoholic cider, various fruit juices and drinks, and non-alcoholic beverages containing fruit juices; and goods in Class 33, namely alcoholic beverages, except beer; sparkling wines; and wine;<sup>14</sup>
- OLFATORY, owned by Olfactory, Inc. (Reg. No. 6994985) for goods in Class 32 including non-alcoholic cider and sweet cider; and goods in Class 33 including dry cider, hard cider, and various wines;<sup>15</sup> and
- BEAK & SKIFF, owned by Beak & Skiff Apple Farms, Inc. (Reg. No. 6145893) for goods in Class 32, namely non-alcoholic cider, sweet cider, and non-alcoholic sparkling cider; and goods in Class 33, including hard cider and apple wine.<sup>16</sup>

The registration evidence is supplemented by website evidence of the following nine third parties:

- Delmosa Craft Non-Alcoholic Beverages – seller of non-alcoholic wines and ciders by various producers (i.e., not under the same mark);<sup>17</sup>
- Duplin Winery – producer of non-alcoholic wine, alcoholic wine, and non-alcoholic cider under the DUPLIN mark;<sup>18</sup>
- Stella Rosa Wines – producer of alcoholic wine under the STELLA ROSA mark, but no evidence of cider;<sup>19</sup>

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<sup>14</sup> June 20, 2023 Office Action at TSDR 10-11.

<sup>15</sup> *Id.* at TSDR 12-13.

<sup>16</sup> *Id.* at TSDR 18-19.

<sup>17</sup> Sept. 25, 2023 Office Action at TSDR 8-12. There is no evidence of alcoholic wine on the website.

<sup>18</sup> *Id.* at TSDR 13-17.

<sup>19</sup> *Id.* at TSDR 18-22. This website includes non-alcoholic beverages, but there is no indication these are “cider” made from expressed fruit. *See id.* at TSDR 21 (non-alcoholic rose, sparkling cranberry, and sparkling lemon lime beverages). We also see canned beverages on the site flavored with peach, pineapple, and grapefruit, but these are “low alcohol.” *Id.* at TSDR 20.

- Rose Hill Farm – producer of non-alcoholic cider, alcoholic cider, and alcoholic wine under the ROSE HILL FARM mark;<sup>20</sup>
- Hilltop Orchards – producer of alcoholic cider under the JMASH mark; non-alcoholic cider under the HILLTOP ORCHARDS mark; and alcoholic wine under the FURNACE BROOK WINERY mark;<sup>21</sup>
- McClure’s Orchard – producer of alcoholic cider, non-alcoholic cider, and alcoholic wine under the MCCLURE’s mark;<sup>22</sup>
- Holmberg Orchards – producer of non-alcoholic cider, alcoholic cider, and alcoholic wine under the HOLMBERG ORCHARDS mark;<sup>23</sup>
- Beak & Skiff – producer of non-alcoholic cider, alcoholic cider, and alcoholic wine under the BEAK & SKIFF mark;<sup>24</sup>
- Domaine La Garagista – producer of alcoholic cider and alcoholic wine under the LA GARAGISTA mark.<sup>25</sup>

Only five of these third parties produce both Applicant’s non-alcoholic cider and Registrant’s alcoholic wine under the same mark: Duplin Winery, Rose Hill Farm, McClure’s Orchard, Holmberg Orchard, and Beak & Skiff (which duplicates one of the third party registrations above). Together with the three relevant third-party registrations, we have evidence of seven third parties that use the same mark for non-alcoholic cider and alcoholic wine. This evidence demonstrates that the goods are related. *E.g., In re Charger Ventures, LLC*, 64 F.4th at 1382 (“Because the record

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<sup>20</sup> Jan. 23, 2024 Final Office Action at TSDR 7-17.

<sup>21</sup> *Id.* at TSDR 18-21.

<sup>22</sup> *Id.* at TSDR 22-24.

<sup>23</sup> *Id.* at TSDR 25-28.

<sup>24</sup> *Id.* at TSDR 29-38. The alcoholic drinks are sold under the more prominent 1911 ESTABLISHED mark, but (although it is smaller and somewhat hard to decipher) we also can see the BEAK & SKIFF mark on these bottles and cans. The registration (*see supra* note 16) confirms that the BEAK & SKIFF mark appears on the alcoholic beverages.

<sup>25</sup> *Id.* at TSDR 39-42.

shows that companies are known to offer both residential and commercial [real estate] services under the same mark and, often, on the same website, we find that substantial evidence supports the Board’s finding on [the second and third *DuPont*] factors.”); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

For its part, Applicant offered partial printouts of results for searches it conducted in the USPTO’s Trademark Search system to demonstrate that many “cellars” formative marks do not include non-alcoholic beverages, and many “orchard”-formative marks do not include alcoholic beverages.<sup>26</sup> Although we do not believe that these particular searches demonstrate lack of relatedness of the goods,<sup>27</sup> the small sample of truncated search results Applicant supplied also has very limited probative value.<sup>28</sup> *See In re 1st USA Realty Profs. Inc.*, Ser. No. 78553715, 2007 TTAB

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<sup>26</sup> 6 TTABVUE 3-4; *see* Dec. 25, 2023 Response to Office Action at TSDR 7-8 (searches for all fields for pending and registered marks with “cellars” and “wine” showing 2,687 results; and “orchards” and “apple” showing 78 results).

<sup>27</sup> A more relevant search to rebut the Examining Attorney’s evidence of relatedness might have been, for example, “wine’ but not ‘cider.” However, even this type of evidence would not prove the negative with respect to relatedness, i.e., the fact that others have not registered or even applied for marks for both types of goods does not mean that the same marks are not actually being used in commerce for such goods.

<sup>28</sup> Mere listings of registrations are not sufficient to make the registrations of record. However, because Applicant included the search results in its response to an Office Action, and the Examining Attorney did not advise Applicant that the results were insufficient to make the registrations of record at a point when it could have corrected the error, the Examining Attorney is deemed to have waived any objection to consideration of the search results, for whatever limited probative value they may have. *See, e.g., In re ActiveVideo Networks, Inc.*, Ser. No. 77967395, 2014 TTAB LEXIS 283, \*26 n.40 (TTAB 2014) (objection waived where examining attorney, in continuing a refusal, failed to advise applicant that mere listing of third-party registrations was insufficient to make them of record).

LEXIS 73, \*3-4 (TTAB 2007) (listing of particulars of third-party applications and registrations only considered to the extent that the specific data provided by applicant was visible from evidence submitted). Applicant’s argument is largely based on the unsupported representations of its attorneys (who admit that they “did not and could not review all of [the registrations]”)<sup>29</sup> as to the results of these searches, and “[a]ttorney argument is no substitute for evidence.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (citation omitted).

Applicant also argues that the goods are not related because “[w]ine, like all alcoholic beverages, is heavily regulated and controlled, both at the federal level and at the state level. The minimum age for drinking alcohol is 21. Non-alcoholic ciders, by contrast can be drunk by people at any age. In addition, wine carries a Surgeon General’s warning relating to drinking alcohol; cider does not.”<sup>30</sup> In support, Applicant made of record a website printout from the National Alcoholic Beverage Control Association (NABCA); but this evidence shows only that a very small number of U.S. jurisdictions exercise control over retail sales of beer and wine for off-premises consumption through government-operated package stores or designated agents.<sup>31</sup> The other evidence of record confirms the general knowledge that wine commonly is sold alongside non-alcoholic beverages in many grocery stores, specialty food shops, and restaurants.

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<sup>29</sup> 6 TTABVUE 3.

<sup>30</sup> *Id.*

<sup>31</sup> Dec. 25, 2023 Response to Office Action at TSDR 9 (emphasis added).

Moreover, because there are no limitations as to channels of trade or target purchasers in the cited registration or the subject application, it is presumed that the respective goods would move in all normal channels of trade, and that they are available to all usual purchasers for these goods. *In re FCA US LLC*, Ser. No. 85650654, 2018 TTAB LEXIS 116, \*12 (TTAB 2018) (“where an application contains no such restrictions, examining attorneys and the Board must read the application to cover all goods of the type identified, to be marketed through all normal trade channels, and to be offered to all normal customers therefor.”). Thus, the fact that Applicant asserts it only sells cider at farmers markets in the Seattle area, at its own store, and to some commercial establishments such as restaurants is not material.<sup>32</sup> The third-party evidence discussed above confirms that the same consumers may purchase alcoholic wine and non-alcoholic cider in the same types of locations – such as wineries and orchards and their online stores (in addition to the well-known trade channels of groceries, specialty food stores, and restaurants). Adult purchasers of wine also may purchase non-alcoholic cider. We conclude that the categories of consumers and channels of trade overlap.

Moreover, we must resolve any ambiguities regarding the coverage of the cited registration in favor of Registrant “given the presumptions afforded the registration under Section 7(b)” of the Trademark Act. *In re OSF Healthcare Sys.*, Ser. No. 88706809, 2023 TTAB LEXIS 353, \*11 (TTAB 2023) (quoting *In re C.H. Hanson Co.*, Ser. No. 77983232, 2015 TTAB LEXIS 357, \*14 (TTAB 2015)). We find, therefore,

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<sup>32</sup> See 6 TTABVUE 4.

that the goods and channels of trade are related, and the second and third *DuPont* factors weigh in favor of likelihood of confusion.

### **C. Lack of Actual Confusion**

To the extent Applicant implies, without evidence, that its mark ROCKRIDGE ORCHARDS and the ROCKRIDGE CELLARS mark have coexisted in the marketplace for approximately 17 years without confusion,<sup>33</sup> such uncorroborated assertions generally are entitled to little or no evidentiary value because Registrant is not a participant to this proceeding and cannot respond to Applicant's claims. *See In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 1317 (Fed. Cir. 2003) ("uncorroborated statements of no known instances of actual confusion are of little evidentiary value"); *accord, In re Opus One Inc.*, 2001 TTAB LEXIS 707, at \*19-20. In any event, the record is devoid of probative evidence relating to the extent of use of Applicant's and Registrant's marks and, thus, whether there have been meaningful opportunities for instances of actual confusion to have occurred in the marketplace. *See Made in Nature, LLC*, 2022 TTAB LEXIS 228, at \*71 ("[F]or the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred.").

Accordingly, the seventh and eighth *DuPont* factors regarding the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion are neutral.

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<sup>33</sup> 6 TTABVUE 5; 9 TTABVUE 4.

## **D. Other Probative Facts**

We next turn to two of Applicant's principal arguments under the thirteenth *DuPont* factor, which examines "any other established fact probative of the effect of use." *DuPont*, 476 F.2d at 1361. Rarely invoked, the thirteenth factor is intended to accommodate "the need for flexibility in assessing each unique set of facts." *See In re Strategic Partners, Inc.*, Ser. No. 77903451, 2012 TTAB LEXIS 80, \*6 (TTAB 2012).

### **1. Applicant's Prior Registration**

Applicant argues that it owned the now-cancelled Prior Registration for the identical mark ROCKRIDGE ORCHARDS in standard characters, which co-existed with the cited registration on the Principal Register for ten years.<sup>34</sup> "Where an applicant owns a prior registration and the mark is 'substantially the same' as in the applied-for application, this can weigh against finding that there is a likelihood of confusion." *In re Country Oven, Inc.*, 2019 TTAB LEXIS 381, at \*19 (citing *In re Inn at St. John's, LLC*, 2018 TTAB LEXIS 170, at \*18).

When determining whether the coexistence of an applicant's prior registration with another party's registration weighs against citing the latter registration in a Section 2(d) refusal of the applicant's mark, we consider: (1) whether the applicant's prior registered mark is the same as applicant's mark or is otherwise not

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<sup>34</sup> *See* 6 TTABVUE 5. Applicant argues that the Prior Registration was allowed in 2011 after Applicant "withdrew the application in Class 33." *Id.*; *see also* 9 TTABVUE 4-5. The underlying application, however, was filed only for non-alcoholic ciders in Class 32. If Applicant filed a separate application for the ROCKRIDGE ORCHARDS mark in Class 33, as it intimates, there is no indication of it in the record. But any such application would support the Examining Attorney's argument that the non-alcoholic cider and alcoholic wine are related – especially if it demonstrated that Applicant's mark was in use for alcoholic wine.



meaningfully different; (2) whether the identifications of goods or services in the application and the applicant's prior registration are identical or identical in relevant part; and (3) the length of time the applicant's prior registration has coexisted with the registration being considered as the basis for the Section 2(d) refusal. *In re Strategic Partners*, 2012 TTAB LEXIS 80, at \*9; *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01 (Nov. 2024).

The situation present in *Strategic Partners* is not applicable here. Although the marks and goods in the subject application and Prior Registration are the same, and the cited registration co-existed with the Prior Registration for ten years, the Prior Registration is cancelled. "A cancelled registration is only evidence that the registration issued and it does not carry any of the legal presumptions under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b). . . . Simply put, 'dead' or cancelled registrations have no probative value at all." *In re Embiid*, Ser. No. 88202890, 2021 TTAB LEXIS 168, \*48-49 n.48 (cleaned up; internal citations removed); *see also In re Hunter Publ'g Co.*, 1979 TTAB LEXIS 87, \*19 (TTAB 1979) (no number in original) (cancellation "destroys the Section [7(b)] presumptions and makes the question of registrability 'a new ball game' which must be predicated on current thought.") (citations omitted).

For this reason, we are not persuaded by Applicant's argument that we should be guided by a recent decision, *In re Gaia Herbs, Inc.*, Ser. No. 90052133, 2022 TTAB LEXIS 516 (TTAB 2022) (not precedent). In that case, unlike here, the applicant

owned three prior registrations over five years of age that remained active on the Principal Register.<sup>35</sup>

We also note that prior decisions and actions of other trademark examining attorneys in allowing the Prior Registration are not binding on the USPTO or the Board. *See In re Int’l Watchman, Inc.*, Ser. No. 87302907, 2021 TTAB LEXIS 446, \*35 (TTAB 2021) (citing *In re Cordua Rests., Inc.*, 823 F.3d 594, 600 (Fed. Cir. 2016)); *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 1174 (Fed. Cir. 2009) (“[E]ach application must be considered on its own merits.”); *In re Nett Designs*, 236 F.3d 1339, 1342 (Fed. Cir. 2001) (same). Trademark rights are not static, and eligibility for registration must be determined on the basis of the facts and evidence of record that exist at the time registration is sought. *In re Int’l Watchman, Inc.*, 2021 TTAB LEXIS 446, at \*35 (citing *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332 (CCPA 1982) and *In re Thunderbird Prods. Corp.*, 406 F.2d 1389 (CCPA 1969)).

## **2. Alleged Abandonment of Registrant’s Mark**

Finally, Applicant asserts that, based on its online search of Registrant’s use, the cited mark appears to be abandoned and therefore there can be no confusion.<sup>36</sup> We

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<sup>35</sup> Although Applicant was permitted to cite to non-precedential cases for whatever probative value they have, the Board does not encourage the practice. *See In re tapio GmbH*, 2020 TTAB LEXIS 483, at \*26 n.30, \*32 n.34 (“Generally, the practice of citing non-precedential opinions is not encouraged”; Board found unpersuasive non-precedential decisions decided on different records). In any event, this case is closer to other recent non-precedential decisions wherein the Board distinguished *Strategic Partners* for the same reason we do here: because the prior registrations were cancelled. *See In re Reach Int’l, Inc.*, Ser. No. 97335655, 2024 TTAB LEXIS 531, \*7 (TTAB 2024) (not precedent); *In re FWREF II Rochester, LLC*, Ser. No. 97343258, 2024 TTAB LEXIS 230, \*29 (TTAB 2024) (not precedent); *In re Pizza Inn, Inc.*, Ser. No. 88244151, 2024 TTAB LEXIS 122, \*22 n.46 (TTAB 2024) (not precedent); *In re GlobaConnect Inc.*, Ser. No. 88776035, 2021 TTAB LEXIS 583, \*15 (TTAB 2021) (not precedent).

<sup>36</sup> 6 TTABVUE 4-5; 9 TTABVUE 4.

agree with the Examining Attorney that, to the extent that Applicant's assertions constitute a collateral attack on Registrant's cited registration, they are impermissible.<sup>37</sup> Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), provides that a certificate of registration on the Principal Register shall be prima facie evidence of the validity of the registration, of the registrant's ownership of the mark and of the registrant's exclusive right to use the mark in connection with the goods or services identified in the certificate. During ex parte prosecution, including an ex parte appeal, an applicant will not be heard on matters that constitute a collateral attack on the cited registration (e.g., applicant's claim that the registered mark is abandoned). *See In re Charger Ventures LLC*, 64 F.4th at 1383 (an ex parte proceeding is not the proper forum for a trademark applicant to launch an attack on a registered mark) (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 1309 (Fed. Cir. 2018)); *see also* TMEP § 1207.01(d)(iv) (collateral attack on registration improper in ex parte proceeding).

Of course, Applicant was not without other remedies against the refusal of its pending application in this case. For example, it could have sought a suspension of the prosecution of the subject application or this appeal to pursue cancellation of the cited registration(s), if appropriate. *See* Trademark Rule 2.67, 37 C.F.R. § 2.67 (the Office has the discretion to suspend an action "for a reasonable time for good and sufficient cause"); *see also* TMEP § 716.02; TBMP § 1213(3). The record does not

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<sup>37</sup> *See* 8 TTABVue 14.

demonstrate that Applicant sought any suspension or other remedies. Accordingly, no consideration has been given to Applicant's arguments in this regard.

Overall, this is not a case in which "unique factors" outweigh the impact of the other *DuPont* factors on the issue of a likelihood of confusion, particularly because the Examining Attorney's refusal is justified on the record in this case. The thirteenth *DuPont* factor is neutral.

#### **E. Weighing and Balancing the *DuPont* Factors**

We have carefully considered, weighed, and balanced all of the evidence made of record, and the arguments related thereto. *In re Charger Ventures, LLC*, 64 F.4th at 1384 ("[I]t is important . . . that the Board . . . weigh the *DuPont* factors used in its analysis *and* explain the results of that weighing.").

Because we have found that Applicant's mark ROCKRIDGE ORCHARDS and the cited mark ROCKRIDGE CELLARS are similar; Registrant's "wine" is related to Applicant's "non-alcoholic cider, namely apple ciders, raspberry apple cider, strawberry apple cider and asian pear cider; non-alcoholic sweet ciders, namely spiced apple cider"; the goods move in the same or overlapping trade channels and are offered to the same classes of purchasers; and the other factors are neutral, we conclude that confusion between Applicant's mark and the cited mark in Registration No. 3379265 is likely.

#### **Decision**

The refusal to register is **affirmed**.