

This Opinion is Not a
Precedent of the TTAB

Mailed: April 21, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re NAAJ LLC
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Serial No. 98577734
—

Michael D. Eisenberg of the Law Office of Michael D. Eisenberg,
for NAAJ LLC.

Robert Ratcliffe, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

—
Before Lykos, Lebow and Brock,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

NAAJ LLC (“Applicant”) seeks to register on the Principal Register the standard character mark READY, FETCH, GO! for “dog toys” in International Class 28.¹

¹ Application Serial No. 98577734, filed May 31, 2024 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use the mark in commerce. The mark appears on the drawing page as “Ready, Fetch, GO!” but retains a claim as to standard characters and not special form. *See* Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a) (setting forth requirements for standard character mark); *see also In re Calphalon Corp.*, No. 86356713, 2017 TTAB LEXIS 98 at *10-11 (applicant’s amendment of mark from SHARPIN to SharpIn did not transform mark from standard character to special form).

Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system in Portable Document Format (“PDF”). Citations to the record

Applicant appealed the Trademark Examining Attorney's final refusal to register the mark on the grounds that Applicant's mark so resembles the registered standard character mark READY SET FETCH on the Principal Register for "Flying discs; flying disc throwing apparatus; rubber balls; tennis balls; tennis ball throwing apparatus" in International Class 28, that it is likely to cause confusion or mistake or to deceive under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).²

When it filed its notice of appeal, Applicant requested reconsideration, but the Examining Attorney denied Applicant's request and maintained the final refusal.

The appeal is briefed.³ For the reasons explained below, we affirm the refusal to register.

also include references to TTABVUE, the Board's online docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, No. 94002505, 2014 TTAB LEXIS 17, at *6 n.6.

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 by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For Board decisions, this opinion uses citations to the Lexis® legal database, as well as the TTABVUE proceeding number, where available. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03(a)(2) (2025) for acceptable citation options to cases.

² Registration No. 7156726 registered on September 5, 2023.

³ As reset by the Board, Applicant's brief was due on November 3, 2025. 5 TTABVUE. Applicant timely filed its brief on September 29, 2025. 6 TTABVUE. In view thereof, Applicant's motion to accept its late-filed brief has been given no consideration. 6 TTABVUE 25.

We further note that Applicant submitted third-party registrations with its brief. Any materials not properly of record are untimely and have been given no consideration. *See* Trademark Rules 2.142(d) and (d)(1), 37 C.F.R. §§ 2.142(d) and (d)(1). To the extent any of the submissions duplicate evidence from the record, they are superfluous. The Board strongly disapproves of this practice because it requires additional time to compare the registrations against the record to determine admissibility. *See In re Info. Builders Inc.*, No. 87753964, 2020 TTAB LEXIS 20, at *5 n.4 (attaching previously submitted evidence to an appeal brief is unnecessary and impedes efficient disposition of the appeal by the Board), *appeal voluntarily dismissed*, No. 20-1979 (Fed. Cir. Oct. 20, 2020); *accord In re Jimenez*, No. 97551823, 2025 TTAB LEXIS 441, at *14.

I. Likelihood of Confusion

Section 2(d) of the Trademark Act 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, ... 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.

15 U.S.C. § 1052(d). 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. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 144 (2015); see also *In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023); *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003). We have considered each *DuPont* factor for which there is evidence and argument. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019). When analyzing these factors, the overriding concerns are not only to prevent buyer confusion as to the source of the goods, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. See *In re Shell Oil Co.*, 992 F.2d 1204, 1207 (Fed. Cir. 1993).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 1353 (Fed. Cir. 2011). “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, 1199 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the first and second *DuPont* factors, the similarity or dissimilarity of the marks and the goods. See *In re i.am.symbolic, LLC*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (citing *Herbko Int’l, Inc. v.*

Kappa Books, Inc., 308 F.3d 1156, 1164-65 (Fed. Cir. 2002)); *see also In re Embiid*, No. 88202890, 2021 TTAB LEXIS 168, at *10 (“[T]he 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.”) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976)). These factors, as well as others, are discussed below.

A. The Goods

In this case, we begin with the second *DuPont* factor which considers the similarity of the goods based on the identifications in the application and cited registration. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1307 (Fed. Cir. 2018); *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002).

Although the Examining Attorney analyzes the second *DuPont* factor on the premise that the respective goods are not identical, the language of the identifications shows otherwise. Applicant’s goods are identified as “dog toys,” and the cited registration identifies, *inter alia*, “rubber balls” and “flying discs.” The record establishes that rubber balls and flying discs are types of dog toys.⁴ Because the cited identification contains no limitation as to the nature, purpose, or intended use of “rubber balls” and “flying discs,” we must construe it broadly to encompass all types of rubber balls and flying discs, including those made specifically for dogs. *See Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 902 (CCPA 1973) (Board must

⁴ See third-party marketplace evidence discussed *infra* in Section I.A.

“give full sweep” to an identification of goods regardless of registrant’s actual business). Rubber balls and flying discs for dogs are therefore encompassed within the broader category of “dog toys,” making the goods legally identical in part. *See, e.g., In re Hughes Furniture Indus., Inc.*, No. 85627379, 2015 TTAB LEXIS 65, at *10 (holding that applicant’s broadly worded identification of “furniture” encompassed registrant’s more narrowly identified “residential and commercial furniture”).

Alternatively, the Examining Attorney has shown that the goods are related through third-party evidence. The Examining Attorney made of record approximately twenty-nine (29) use-based, third-party registrations showing that the same entities have registered single marks identifying both “dog toys” on one hand, and either “rubber balls” and/or “flying discs” on the other.⁵ Third-party registrations that cover goods from both a cited registration and an applicant’s application are relevant to show that the goods are of a type that may emanate from a single source under one mark. *In re Guild Mortg. Co.*, 86709944, 2020 TTAB LEXIS 17, at *13; *In re Mucky Duck Mustard Co.*, No. 603019, 1988 TTAB LEXIS 11, at *6-7, *aff’d per curiam*, 864 F.2d 149 (Fed. Cir. 1988). In this case, “[t]he [third-party] registrations are sufficient in both quality and quantity to provide a reasonable predicate supporting the Examining Attorney’s position.” *In re Country Oven, Inc.*, No. 87354443, 2019 TTAB

⁵ April 18, 2025 Final Office Action, at TSDR 8-58 (Registration Nos. 6865087, 7599067, 6884605, 7073822, 5579204, 7644271, 7687365, 7661296, 6773608, 5719017, 7140039, 5155996, 7140039, 5155996, 7355321, 7487682, 6763431, 6265887, 6326649, 7368763, 6862761, 6510640, 7260646, 6620790, 7224964, 6663927, 7571379, 6808414, 7639700, 7711594, and 7372979).

LEXIS 381, at *12.

The Examining Attorney also submitted third-party marketplace evidence showing consumer exposure to “dog toys” and “rubber balls” and/or “flying discs” from a common source under the same trademark. *See Detroit Athletic Co.*, 903 F.3d at 1307 (crediting third-party website evidence that retailers use the same mark for the goods at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both.”). The following evidence is most relevant:

Kong offers the “Kong Ball with Hole” which is described as “an extra bouncy, durable ball ... made with natural KONG rubber for rounds of bouncing, fetching and chewing”; the “KONG Classic Red Rubber ball for fetching fun;” the “Kong Puppy Flyer” flying disc “for puppies that are learning to play fetch”; and the “KONG Rubber Goodie bone;”⁶

Nerf offers the “Nerf Dog Toss and Tug Ring Dog Toy Flying Disc”; the “Nerf Dog Nylon Flyer Dog Toy Flying Disc”; and “Nerf Dog Rainbow Vortex Chain Tug Dog Toy”;⁷

Amazon offers West Paw branded products such as the “WEST PAW Zogoflex Zisc Dog Flying Disc”; the “WEST PAW Seaflex Sailz Dog Toy Flying Disc”; and the “WEST PAW Seaflex Drifty Dog Toy”;⁸ and

Chewy, an online pet store website, offers the “Ruff Dawg Ball XL,” advertised as a “Ball Tough Dog Chew Toy” and the “Ruff Dawg Big Dawg Barbell Tough Chew toys.”⁹

⁶ April 18, 2025 Final Office Action at TSDR 92-97.

⁷ April 18, 2025 Final Office Action at TSDR 105 and 110.

⁸ April 18, 2025 Final Office Action at TSDR 113-116.

⁹ April 18, 2025 Final Office Action at TSDR 127-129.

In sum, the goods are legally identical in part. And even if they were not, we have more than ample third-party registration and marketplace evidence showing relatedness. The second *DuPont* factor weighs in favor of finding a likelihood of confusion.

B. The Established, Likely-to-Continue Channels of Trade

Next, we consider the third *DuPont* factor, “the similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 476 F.2d at 1361. As with the second *DuPont* factor, we are guided by the language in the identification of the application and cited registration. See *Detroit Athletic Co.*, 903 F.3d at 1307; *Stone Lion*, 746 F.3d at 1323; *Hewlett-Packard*, 281 F.3d at 1267.

First, based on our finding that “rubber balls” and “flying discs” are subtypes of “dog toys,” rendering the goods legally identical, we find that the established, likely-to-continue trade channels of trade and classes of consumers are the same. Since both the application and cited registration are unrestricted as to trade channels, we must presume that those particular goods travel in the same ordinary trade and distribution channels and will be marketed to the same potential consumers, namely dog owners/caregivers, dog rescue and foster organizations, and dog daycare and boarding facilities. See *In re Viterra, Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (Board was entitled to rely on presumption that, absent restrictions, legally identical goods travel in the same channels of trade to the same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 771 (CCPA 1968) (where there are legally identical goods, the channels of trade and class of purchasers is considered to be the same).

Alternatively, even if we were to assume that the goods are related rather than legally identical, we would reach the same conclusion. Neither the registration nor the application contains any limitations on the channels of trade or classes of purchasers. As such, Applicant's and Registrant's "dog toys," "rubber balls," and "flying discs" presumptively move in all normal trade channels and to consumers that purchase such goods. *See Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1373 (Fed. Cir. 2013). The record demonstrates that the normal trade channels for "dog toys," "flying discs" and "rubber balls" are online retail websites specializing in dog products, such as Clean Run¹⁰ and Chewy,¹¹ which carry such items from various brands. It also includes the business-to-consumer ("B2C") websites discussed above. Collectively, this evidence shows that the classes of consumers overlap to include dog owners.

Whether the goods are identical or merely related, the result is the same: the trade channels and classes of consumers overlap. The third *DuPont* factor favors a likelihood of confusion.

C. The Marks

Now we direct our attention to the first *DuPont* factor, the similarity or

¹⁰ April 18, 2025 Final Office Action at TSDR 75-76 (printouts from www.cleanrun.com offering for sale Doggone branded dog toys as well as Chuckit, Booda, and Hyperlife flying discs).

¹¹ April 18, 2025 Final Office Action at TSDR 135-188 (printouts from chewy.com offering for sale dog toys, rubber balls, and flying discs under various brand names).

While the record includes evidence that the online retailer Amazon sells both Applicant's and Registrant's goods, we do not deem this as appropriate overlapping trade channel evidence given the wide variety of products sold on Amazon.

dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See, e.g., Charger Ventures*, 64 F.4th at 1380 (citing *DuPont*, 476 F.2d at 1361); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005) (same). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, No. 87075988, 2018 TTAB LEXIS 170, at *13 (quoting *In re Davia*, No. 85497617, 2014 TTAB LEXIS 214, at *21-24), *aff’d per curiam*, 777 F. App’x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

“[S]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 1344 (Fed. Cir. 2003)). 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 [Registrant and Applicant].” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012) (internal quotation marks and citation omitted)).

Our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985); *see also*

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.”). “No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone.” *In re Electrolyte Labs. Inc.*, 929 F.2d 645, 647 (Fed. Cir. 1990) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293 (CCPA 1974)).

We now compare Applicant’s mark READY, FETCH, GO! with the cited mark READY SET FETCH, both in standard characters. Applicant argues that the marks look and sound different because the cited mark contains the word SET and does not include the word GO or an exclamation point. Applicant also contends that the marks differ in connotation and commercial impression because READY, FETCH, GO! conveys “a spirited, call-to action voice” that “signals energy and enthusiasm,” whereas the cited mark READY SET FETCH “introduces a more restrained, perhaps even instructive tone.”¹² Elaborating, Applicant maintains that the exclamation point and the inclusion of the word GO! at the end of the phrase “gives the mark a joyful, commanding presence closely aligned with the action of play and engagement between a dog and its owner” while the cited mark “reads as a single command or product title, not a playful interaction.”¹³

¹² Applicant’s Brief, 6 TTABVUE 27.

¹³ Applicant’s Brief, 6 TTABVUE 27.

Applicant's arguments are unpersuasive. Both marks are short, three-word phrases that evoke the familiar idiom "Ready, set, go," making them similar in structure and cadence. Each mark begins with READY and incorporates the word FETCH. While FETCH appears in a different position in each mark, that distinction does not significantly alter the marks' appearance or sound. Nor does the substitution of GET for GO appreciably change the marks in sight or sound.

As to connotation and commercial impression, both marks are a clever play on the expression "Ready, set, go." The record includes evidence demonstrating that this expression is well-known:

The U.S. English version of THE CAMBRIDGE DICTIONARY defines "ready, set, go" as an idiom that is "[s]aid at the start of a race, especially one for children." It offers the following examples: "When we were lined up at the starting line, the teacher shouted 'ready, set, go!'; "As soon as my dad said 'ready, set, go' we all pedaled as fast as we could down the sidewalk."¹⁴

THE MERRIAM-WEBSTER DICTIONARY entry for "(get) ready, (get) set, go" is "a command to start a race."¹⁵

THE FREE DICTIONARY defines "ready, set, go" as "an instruction to begin something, typically some kind of competition" and is "primarily heard in the U.S."¹⁶

THE U.S. DICTIONARY defines "ready, set, go" as describing "someone [who] is eager or prepared to do something" or "to start something quickly and without hesitation." The entry also states that "[t]he phrase also pops up in various forms

¹⁴ December 30, 2024 Office Action at TSDR 7 (printout for the entry "ready, set, go" from www.dictionary.cambridge.org/us/dictionary/English accessed on 12/30/24).

¹⁵ December 30, 2024 Office Action at TSDR 17 (printout for the entry for "(get) ready, (get) set, go" from www.merriam-webster.com/dictionary accessed on 12/30/24).

¹⁶ April 18, 2025 Office Action at TSDR 189 (printout for the entry "ready, set, go" from <https://idioms.thefreedictionary.com> accessed on 4/18/2025).

of media, from TV shows to video games to heighten tension and excitement.”¹⁷

GRAMMARIST explains that “On your mark, get set, go!” and “ready, set, go!” are synonymous phrases with “roots in foot races and running” but may also be used “to start a competition that is not a race.”¹⁸

Against this backdrop, Applicant’s mark READY, FETCH, GO! and Registrant’s mark READY SET FETCH each call to mind the idiom “Ready, set, go” in a novel way. The shared term FETCH projects the same connotation by suggesting that a pet dog is ready to play a game of fetch with a dog toy, stick, ball or flying disc.

We further find that neither mark has a dominant element. Rather, each mark is a unitary phrase whose elements are “inseparable” and projects a single commercial impression. *Cf. Dena Corp. v. Belvedere Int’l, Inc.*, 950 F.2d 1555, 1561 (Fed. Cir. 1991) (for purposes of disclaimer requirement, finding EUROPEAN FORMULA and design for cosmetic products not unitary since the “elements are not so merged together that they cannot be regarded as separate” and the proximity of the words to the design feature “does not endow the whole with a single, integrated, and distinct commercial impression.”). Even when the wording is slightly different, as it is here, if the marks convey the same idea, meaning or commercial impression, they may still be similar. *See, e.g., Proctor & Gamble Co. v. Conway*, 419 F.2d 1332, 1335 (CCPA 1970) (holding MISTER STAIN likely to be confused with MR. CLEAN on cleaning products because the words “stain” and “clean” “pertain to a state of relative

¹⁷ September 4, 2025 Denial of Request for Reconsideration at TSDR 38 (printout for the entry for “ready, set, go” from www.usdictionary.com accessed on 9/4/2025).

¹⁸ April 18, 2025 Office Action at TSDR 192 (<https://grammarist.com> accessed on 4/18/2025).

cleanliness”); *In re M. Serman & Co.*, 1984 TTAB LEXIS 74, at *3 (holding CITY WOMAN for ladies’ blouses likely to be confused with CITY GIRL for a variety of female clothing); *H. Sichel Sohne, GmbH v. John Gross & Co.*, 1979 TTAB LEXIS 70, at *10 (holding BLUE NUN for wines likely to be confused with BLUE CHAPEL for the same goods noting that “the prayer activity and meditation in the daily life of a nun very frequently takes place in a rather small edifice or structure known as a chapel”). Such is the case here where consumers are likely to recognize both phrases incorporating the word “fetch” as a playful variation of the expression “Ready, set, go.”

Finally, although Applicant’s mark includes commas and an exclamation point while Registrant’s does not, such minor differences in punctuation do not materially distinguish the marks in either sound, appearance, connotation or commercial impression. “Punctuation, such as quotation marks, hyphens, periods, commas, and exclamation marks, generally does not significantly alter the commercial impression of the mark.” *Peterson v. Awshucks SC, LLC*, No. 92066957, 2020 TTAB LEXIS 520, at *53. Here, the exclamation point in Applicant’s mark merely reflects the imperative nature of this phrase. *Cf. In re Litehouse, Inc.*, No. 78494701, 2007 TTAB LEXIS 20, at *9 (the presence of the exclamation points in the mark CAESAR!CAESAR! fails to negate the mere descriptiveness of the mark as a whole as applied to salad dressings.). The commas present in Applicant’s mark do not distinguish the marks either and are likely to be ignored by consumers.

Overall, the marks are similar in appearance and sound, and project a similar, if not identical, connotation and commercial impression. Consumers “have but dim recollections from having previously seen or heard one or the other of the involved marks.” *Neutrogena Corp. v. Bristol-Myers Co.*, 410 F.2d 1391, 1393 (CCPA 1969). The first *DuPont* factor weighs in favor of finding a likelihood of confusion.

D. The number and nature of similar marks in use on similar goods

We now address the number and nature of similar marks in use on similar goods under the sixth *DuPont* factor. *DuPont*, 476 F.2d at 1361. This factor “is a measure of the extent to which other marks weaken the assessed mark,” *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023), and indicates whether it is “entitled to only a narrow scope of protection.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1324 (Fed. Cir. 2018) (quoting *Palm Bay*, 396 F.3d at 1373). “When a field is crowded with similar marks, the theory is that customers will be more adept at distinguishing marks from each other and are less likely to be confused by similar marks.” *Apex Bank v. CC Serve Corp.*, 156 F.4th 1230, 1235 (Fed. Cir. 2025) (citing *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338 (Fed. Cir. 2015)).

“[T]he strength of a mark is not a binary factor” and “varies along a spectrum from very strong to very weak.” *Id.* (internal citations omitted). “The weaker [the registrant’s] mark, the closer [an applicant] mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Id.* (internal citations omitted).

In determining the strength or weakness of a mark, we consider both its inherent or conceptual strength, based on the nature of the mark itself, and, if there is evidence in the record of marketplace recognition of the mark, its commercial or marketplace strength. *Spireon*, 71 F.4th at 1362 (“There are two prongs of analysis for a mark’s strength under the sixth factor: conceptual strength and commercial strength.”) (citing *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010)). Conceptual strength “is a measure of a mark’s distinctiveness, *Chippendales*, 622 F.3d at 1353, and distinctiveness is ‘often classified in categories of generally increasing distinctiveness[:] ... (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful.’” *Spireon*, 71 F.4th at 1362 (quoting *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992)). “Commercial strength, on the other hand, is the marketplace recognition value of the mark,” *Spireon*, 71 F.4th at 1362 (internal citation and quotation marks omitted), and “whether consumers in fact associate the . . . mark with a unique source.” *Id.* In this regard, the purpose of introducing evidence of third-party marketplace use is “to show that customers have become so conditioned by a plethora of such similar marks that customers ‘have been educated to distinguish between different [such] marks on the bases of minute distinctions.’” *Omaha Steaks*, 908 F.3d at 1325 (quoting *Palm Bay*, 396 F.3d at 1373-74). Thus, an applicant in an ex parte appeal can contract the scope of protection otherwise accorded a cited mark by adducing evidence of conceptual and/or commercial weakness. In this case, Applicant challenges only the conceptual strength of the cited mark.

We begin by addressing Applicant's assertion that the cited mark READY SET FETCH is not inherently distinctive. Applicant is mistaken. The cited mark is registered on the Principal Register without a claim of acquired distinctiveness, and thus carries a presumption under Trademark Act Section 7(b), 15 U.S.C. § 1057(b), that it is inherently distinctive. *See, e.g., New Era Cap Co. v. Pro Era, LLC*, No. 91216455, 2020 TTAB LEXIS 199, at *29. This does not, however, prevent Applicant from disputing the mark's conceptual strength.

Applicant argues that variations of the idiom "Ready, set, go" are widespread in the toy and game industry. Applicant introduced the following third-party registrations from six (6) different registrants purporting to show conceptual weakness: READY SET DANCE in both word mark and stylized format (Registration Nos. 6010110 and 6121044); READY SET DISCOVER! (Registration No. 6342882); COMMONWEALTH READY-SET-SNUGGLE (Registration No. 3441199); READYGO (Registration. No. 7732422); YETI, SET, GO! (Registration No. 5633055); and READY.SIT.GO! (Registration No. 6609684).¹⁹ Applicant further argues that the word "fetch" is "highly descriptive of the functionality of products like tennis balls, throwing discs, or ball launchers,"²⁰ and that when considered in tandem with the third-party registration evidence, the mark is conceptually weak.

Third-party registrations may "prove that some segment of a mark has a normally understood and well recognized descriptive or suggestive meaning, leading to the

¹⁹ March 28, 2025 Response to Office Action at TSDR 15-35.

²⁰ Applicant's Brief, 6 TTABVUE 29.

conclusion that that segment is relatively weak” in connection with the goods or services. *Juice Generation*, 794 F.3d at 1339 (internal quotation omitted). 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.” *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 917 (CCPA 1976).

From both a quantitative and qualitative perspective, Applicant’s evidence falls short. Registration No. 5633055 for the mark YETI, SET, GO! was cancelled on July 4, 2025 for failure to file a Section 8 affidavit/declaration of use or excusable nonuse. “The existence of a cancelled registration— particularly one cancelled for failure to provide a declaration of continued use—does not tend to show that the cited mark is weak due to third-party use.” *Inn at St. John’s*, 2018 TTAB LEXIS 170, at *9.

To fully assess the probative value of the remaining third-party registrations, a “controlling inquiry is the extent of third-party marks in use on ‘similar’ goods or services’ offered to ‘the relevant public.’” *Omaha Steaks*, 908 F.3d at 1324 (citing *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992)). The goods identified in Registration No. 6609684 for the mark READY.SIT.GO! consist of elliptical exercise machines, products that bear no relationship whatsoever to “flying discs” or “rubber balls.”

This leaves us with essentially four third-party registrations for toys and/or games. “[T]he sixth *DuPont* factor does not require identical goods—only similar ones.” *Apex Bank*, 156 F.4th at 1236. While these registrations are relevant because

they involve similar goods, none of the marks incorporate the word “fetch,” making them less similar than the cited mark. The omission of the term “fetch” is critical because of the unique connotation of that word in connection with dog toys. As a result, although the remaining third-party registered marks are a homage to the phrase “Ready, set, go,” none project the same meaning as the cited mark.

Applicant has not shown that the cited mark is conceptually weak in connection with the identified goods or goods related thereto, making the cited mark deserving a lesser scope of protection. The sixth *DuPont* factor is neutral.

E. Lack of actual confusion and concurrent use

Lastly, we address Applicant’s argument there is no known evidence of actual confusion, either between Applicant’s and Registrant’s marks or among the third-party registered marks discussed above. Applicant’s contention implicates the seventh *DuPont* factor, the “nature and extent of any actual confusion,” and the eighth *DuPont* factor, “length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 476 F.2d at 1361. Unlike the second and third *DuPont* factors, these factors require us to look at actual market conditions, to the extent there is evidence of such conditions of record. *In re Guild Mortg. Co.*, 2020 TTAB LEXIS 17, at *19; *see also New Era*, 2020 TTAB LEXIS 199, at *29. In other words, for the absence of actual confusion to be probative, there must have been a “significant opportunity” for confusion to have occurred. *Barbara’s Bakery Inc. v. Landesman*, No. 76308993, 2007 TTAB LEXIS 9, at *14.

Applicant's argument is flawed in several respects. First, Applicant conflates the sixth *DuPont* factor, which looks at the impact of third-parties operating in the marketplace as well as third-party registrations for similar marks, with the seventh and eighth *DuPont* factors which examine the marketplace impact of Applicant and Registrant. The seventh and eighth factors involve real-world conditions, focusing on whether Applicant's and Registrant's marks have in fact coexisted; if so, whether they coexist in the same market; and whether consumers were in fact confused through, for example, misdirected emails or calls. These factors do not look to third-party use or registration of the cited mark or components thereof.

A second shortcoming with Applicant's argument is that the involved application was filed based on a bona fide intent to use the mark in commerce, and Applicant did not introduce any evidence that it has commenced use of its mark in connection with the goods identified in its intent-to-use application. Nor did Applicant submit any evidence regarding Registrant's actual use in the marketplace of its registered mark in connection with any of its identified goods. It is therefore no surprise that there is no evidence of actual consumer confusion between Applicant's and Registrant's marks since there has been no opportunity for coexistence.

In view of the foregoing, the seventh and eighth *DuPont* factors are neutral.

F. Conclusion – Weighing and Balancing the *DuPont* factors

The final step in analyzing likelihood of confusion is to assess our findings under the *DuPont* factors discussed above and determine whether, on balance, confusion is

likely. *See Charger Ventures LLC*, 64 F.4th at 1379.

We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto. Each of the *DuPont* factors we have considered points in the same direction. The first *DuPont* factor weighs in favor of a likelihood of confusion because overall, the marks are similar in sound, appearance, meaning and commercial impression. The second and third factors also tip the scale in favor of a likelihood of confusion because the goods are closely related and marketed in overlapping trade channels to the same classes of consumers. The sixth factor is neutral because Applicant has failed to show that the cited mark is conceptually or commercially weak. The seventh and eighth factors are also neutral. With no factors weighing against a likelihood of confusion, we conclude that confusion is likely.

Decision: The Section 2(d) refusal is affirmed.