

This Opinion is Not a
Precedent of the TTAB

Mailed: October 24, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

QuikTrip West, Inc.

v.

Weigel Stores, Inc.

Opposition No. 91235273

Rachel Blue and Jessica L. John Bowman of McAfee & Taft for
QuikTrip West, Inc.

Robert E. Pitts, Paul A. Forsyth, and Jacob G. Horton of Pitts and Lake, P.C. for
Weigel Stores, Inc.

Before Taylor, Wolfson and Lynch,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background and Evidentiary Record

Weigel Stores, Inc. (“Applicant”) seeks registration on the Principal Register of the

mark  , with a disclaimer of KITCHEN and

a disclaimer of NOW OPEN as to the services in International Class 43,¹ for “Processed, ready to eat foods, namely, sandwiches, wrap sandwiches, pizza and pastries” in International Class 30 and “Restaurant services” in International Class 43.

QuikTrip West, Inc. (“Opposer”) opposes registration of Applicant’s marks based on alleged likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C.



§ 1052(d), with the registered mark for “Garden, vegetable, meat, cheese and fruit salads” in International Class 29 and “Processed, ready to eat foods, namely, sandwiches, wraps, pastries and pasta salads” in International Class 30.² Opposer submitted under Notice of Reliance a TSDR printout for this registration, showing that the registration is subsisting and owned by Opposer.³

¹ Application Serial No. 87324199 was filed on February 3, 2017 based on alleged first use and first use of the mark in commerce as of October 20, 2016 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). According to the description, “[t]he mark consists of a white ‘W’ justified to the right and inside of a red circle. To the right of the ‘W’ in the circle is ‘Weigel’s’ above ‘Kitchen’ in large black font. To the right of the ‘Weigel’s’ and ‘Kitchen’ is ‘Now’ above ‘Open’ in diagonal, stylized, black font.” The colors red, white and black are claimed as a feature of the mark.

² Registration No. 4118738 issued March 27, 2012; Sections 8 and 15 combined declaration accepted and acknowledged. According to the description, “[t]he mark consists of the letters ‘QT’ in white on a red square background; the word ‘KITCHENS’ in black and underlined in black; and a chef-style hat outlined in black located at the top left corner of the red square.” The colors red, white and black are claimed as a feature of the mark.

³ 14 TTABVUE 17-18. Citations refer to TTABVUE, the Board’s online docketing system.

In its Answer, Applicant denies the salient allegations in the Notice of Opposition. The opposition is fully briefed.

The parties raise no evidentiary objections. The record includes the pleadings and pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the opposed application. The record also includes documents filed under notices of reliance by each party, as well as affidavit testimony. The record includes materials designated as confidential by the parties, which are discussed only in general terms.

II. Standing

Opposer must prove standing by showing a real interest in the outcome of the proceeding and a reasonable basis for believing that it will suffer damage if the mark is registered. *See* 15 U.S.C. § 1063; *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). Applicant has not contested Opposer's standing. Opposer's pleaded registration, for which Opposer has proven status and title, establishes its standing. *See Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727-28 (Fed. Cir. 2012); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000).

III. Priority

Because Opposer has made its registration of record, which Applicant has not counterclaimed to cancel, priority is not an issue as to the mark and goods covered by the registration. *See Top Tobacco LP v. N. Atl. Op. Co.*, 101 USPQ2d 1163, 1169 (TTAB 2011) (citing *King Candy, Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 82 USPQ 108 (CCPA 1974)); *see also Massey Junior Coll., Inc. v. Fashion Inst. of*

Tech., 492 F.2d 1399, 181 USPQ 272, 275 n.6 (CCPA 1974) (“prior use need not be shown by a plaintiff relying on a registered mark unless the defendant counterclaims for cancellation”); *Itel Corp. v. Ainslie*, 8 USPQ2d 1168, 1169 (TTAB 1988) (“because of the existence of opposer’s valid and subsisting registration, it need not prove prior use as to the services recited therein”).

IV. Likelihood of Confusion

The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). A likelihood of confusion analysis often focuses on the similarities between the marks and the similarities between the goods and/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.”). Opposer bears the burden of proving its claim of likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848. Opposer may establish likelihood of confusion as to either class of goods or services in Applicant’s application by showing the relatedness of its goods to any item within that class of goods or services in the opposed application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335,

209 USPQ 986, 988 (CCPA 1981); *Apple Comput. v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007).

A. The Goods and Services

“[L]ikelihood of confusion can be found ‘if the respective goods [or services] are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Coach Servs.*, 101 USPQ2d at 1722 (internal citations omitted). In fact, relatedness may be found if consumers would believe that Opposer’s goods and Applicant’s goods or services are “in some way associated with the same producer” or that there is an association between the sources of the goods and services. *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423, 1432 (TTAB 1993). We “focus on the application and registration[] rather than on real world conditions, because ‘the question of registrability of an Applicant’s mark must be decided on the basis of the identification of goods [and services] set forth in the application.’” *Stone Lion Capital*, 110 USPQ2d at 1162.

Opposer’s and Applicant’s goods overlap in part, as to sandwiches, pastries, and wraps/wrap sandwiches. Applicant points out that the goods in International Class 30 do not overlap entirely, and contends that “the weight of this factor should be diminished appropriately.”⁴ However, as noted above, where the relatedness – or in this case identical nature – is established as to at least one item in a class of the

⁴ 21 TTABVUE 32 (Applicant’s Brief).

application, this suffices to establish it for likelihood of confusion purposes as to the entire class. *Tuxedo Monopoly*, 209 USPQ at 988.

Turning to Applicant's restaurant services in International Class 43, Opposer argues that they are related to Opposer's goods because Applicant's restaurants serve the type of food items identified in Opposer's registration. Applicant's Brief mentions the restaurant services in passing, but makes no argument addressing them, instead limiting its arguments on relatedness to the lack of complete overlap as to the goods identified in International Class 30.⁵ We follow our primary reviewing court's holding that "the fact that restaurants serve food and beverages is not enough to render food and beverages related to restaurant services for purposes of determining the likelihood of confusion. Instead, . . . 'to establish likelihood of confusion a party must show something more than that similar or even identical marks are used for food products and for restaurant services.'" *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003) (citation omitted). The *Coors Brewing* decision makes clear that the relatedness of restaurant services and food items is not to be assumed and that evidence sufficient to meet the "something more" standard is necessary. *Id.* at 1063-64.

Applicant's restaurant services are unlimited in nature, and therefore include restaurants located in convenience stores attached to gasoline fueling stations. Applicant acknowledges that both Applicant and Opposer are engaged in the business

⁵ 21 TTABVUE 31-32.

of operating convenience stores attached to gasoline fueling stations.⁶ In its Brief, Applicant describes its restaurant services as “offering made-to-order, freshly prepared food in specially designated and designed kitchen areas of some of its convenience stores.”⁷ Website evidence in the record shows that convenience store restaurants often also offer ready-to-eat foods, such as sandwiches, wraps, and pastries, under the same mark, suggesting that consumers are accustomed to encountering such goods and services under the same mark. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (evidence of third parties offering both types of goods under the same mark demonstrates relatedness of the goods). For example:

- Family Express Convenience Stores’ website shows its Cravin’s To Order and design mark used in connection with restaurant services “[l]ocated inside of select Family Express locations,” and promotes under the same Cravin’s To Order and design mark \$3 Breakfast Combos that include a breakfast sandwich ⁸
- The Sheetz website features photos of sandwiches and pastries and describes its quick-serve restaurant services offered “at a convenience store.”⁹

⁶ 21 TTABVUE 9 (Applicant’s Brief).

⁷ 21 TTABVUE 12.

⁸ 17 TTABVUE 80-81.

⁹ 17 TTABVUE 83-86.

- The Thorntons website promotes sandwiches and wraps available in its deli case, sells beverages labeled “Thorntons,” and advertises that “[s]elect stores have real kitchens, with real cooks, handcrafting real food.”¹⁰

An article Applicant submitted from the Convenience Store News website notes that the convenience store retailer FriendShip operates an in-store restaurant under that mark and also provides “FriendShip Pizza or FriendShip Famous Chicken ... in a FriendShip store.”¹¹ The evidence suggests that in contexts such as convenience stores and quick-serve restaurants, the same marks are used in connection with the restaurant services as are also used for food items such as sandwiches, wraps, and pastries. This is “something more” than merely that the restaurants serve these foods, and we find it sufficient to establish the relatedness of Applicant’s restaurant services and the food items in Opposer’s registration. *See Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1060 (TTAB 2017) (use of the mark to promote alcoholic drinks as well as the night clubs contributed to a showing of “something more”).

This factor weighs in favor of a likelihood of confusion.

B. Trade Channels and Classes of Consumers

Because Applicant’s goods in International Class 30 are in-part identical to Opposer’s, we presume that they travel in the same channels of trade to the same classes of consumers. Notably, Applicant admits that its goods and services, and

¹⁰ 17 TTABVUE 88-89.

¹¹ 16 TTABVUE 449-52 (confidential).

Opposer's goods, "are sold in convenience stores that are located in or near gasoline service stations."¹² This admission is consistent with the third-party website evidence discussed above showing that convenience stores sell goods such as Opposer's and offer restaurant services such as Applicant's. We therefore also find that Applicant's services in International Class 43 move in at least some of the same channels of trade as Opposer's goods, and to the same classes of consumers.

This factor weighs in favor of a finding of a likelihood of confusion.

C. The Strength of KITCHEN(S)

Before we turn to the similarity of the marks, we consider Applicant's assertion that in the context of the relevant goods and services, the word KITCHEN(S) is descriptive or generic, as that will affect the comparison of the marks. The strength of a mark under the fifth *DuPont* factor rests on the extent to which "a significant portion of the relevant consuming public . . . recognizes the mark as a source indicator." *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (citing *Palm Bay Imps.*, 73 USPQ2d at 1694). This factor involves assessing the mark "along a spectrum from very strong to very weak." *Id.* (internal citations omitted). Under the sixth *DuPont* factor, proof of recent consumer exposure to third-party use of similar components of a mark in connection with similar goods or services may show commercial weakness of the term, in that consumers generally distinguish among marks consisting of or containing such

¹² 14 TTABVue 30 (answers to request for admission; see also 21 TTABVue 12 ("At the present time, goods and services are offered under Applicant's Mark in twelve of Weigel's 66 fuel station convenience stores.")).

similar component (here, “kitchen”) based on minor distinctions. *See Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). Third-party registrations also may be considered “powerful” evidence of conceptual weakness of a term.¹³ *Id.* Here, we are particularly focused on the KITCHEN(S) portion of the marks, a term which they share in common, but which Applicant contends is descriptive and should be given “little weight in reaching a conclusion on likelihood of confusion.”¹⁴

Dictionary entries of record make clear that a “kitchen” is “a room where food is prepared and cooked,”¹⁵ or “a room or place or the equipment for the preparation and cooking of food.”¹⁶ In declaration testimony, Applicant’s founder and Chairman Bill Weigel stated that he has encountered numerous third-party uses in the industry (and “closely related fields”) of marks incorporating KITCHEN(S), and he attached supporting documentary evidence to his declaration.¹⁷ Examples include:

¹³ To the extent Applicant attempts to rely on a TESS printout of marks containing KITCHEN, 16 TTABVUE 252-95, we do not find the evidence persuasive. A mere number of live marks that include some variant of “kitchen” without showing the goods or services and other relevant information, “has no probative value.” *See Nat’l Fidelity Life Ins. v. Nat’l Ins. Trust*, 199 USPQ 691, 694 n.5 (TTAB 1978); *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018) (“[T]he list does not include enough information to be probative. The list includes only the serial number, registration number, mark, and status (live or dead) of the applications or registrations. Because the goods are not listed, we do not know whether the listed registrations are relevant.”); *cf. Nat’l Cable Television Ass’n, Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991) (“None of the third party marks and uses of ACE made of record are nearly as closely related to the activities of the parties as the virtually identical uses of the parties are to each other”).

¹⁴ 21 TTABVUE 30 (quoting *Cunningham*, 55 USPQ2d at 1846).

¹⁵ 16 TTABVUE 433-34 (Cambridge English Dictionary).

¹⁶ *Id.* at 443 (Collins English Dictionary, American).

¹⁷ 15 TTABVUE 17-19, 107-54.

- MCLANE KITCHEN FRESH PRODUCE, a “nationally distributed produce solution for convenience stores.”¹⁸
- PARKER’S KITCHEN, a convenience store chain with 53 locations offering made-to-order food.¹⁹
- Photographs of restaurants named FOOD NETWORK KITCHEN,²⁰ RICKER’S KITCHEN,²¹ FRESH KITCHEN,²² and ET’S KITCHEN.²³
- Articles profiling ZOË’S KITCHEN, a fast-casual restaurant (Retail & Restaurant Facility Business),²⁴ THORNTON’S REAL KITCHEN, REAL FOOD foodservice program (Convenience Store News),²⁵ and FRIENDSHIP KITCHEN, a foodservice platform within FriendShip Food Stores (Convenience Store Decisions).²⁶

Applicant also introduced third-party use-based registrations of marks that include the term KITCHEN(S) for some of the same goods and services at issue in this case, and they include disclaimers of KITCHEN or a claim of acquired distinctiveness that encompasses KITCHEN. For example:

¹⁸ 15 TTABVUE 108.

¹⁹ 15 TTABVUE 110-121.

²⁰ 15 TTABVUE 144.

²¹ 15 TTABVUE 127.

²² 15 TTABVUE 138-40.

²³ 15 TTABVUE 146.

²⁴ 15 TTABVUE 125

²⁵ 15 TTABVUE 129-31.

²⁶ 15 TTABVUE 142. *See also* 17 TTABVUE 105-07.

-  (KITCHEN disclaimed) for goods including pastries, sandwiches, and sandwich wraps.²⁷
- TEXAS KITCHEN in standard characters (Section 2(f) claim) for goods including chicken salad, potato salad, tuna salad, ham salad, fruit salad, and pasta salad.²⁸
- CRAVIN’S KITCHEN in standard characters (KITCHEN disclaimed) for goods including pizza and sandwiches.²⁹

Applicant also submitted excerpts from Retail & Restaurant Facility Business magazine showing:

- A cover from November 2017 featuring a photo of ZOË’S KITCHEN restaurant, describing it as a “Mediterranean fast casual concept.”³⁰
- An article from June 2017 titled, “Do Smarter Kitchens Mean Better Bottom Lines,” describing automation trends in restaurant operations and using KITCHENS in the restaurant context, such as “a data-driven approach to

²⁷ 16 TTABVUE 404-08.

²⁸ 16 TTABVUE 409-13.

²⁹ 16 TTABVUE 414-17. A December 2017 article from Convenience Store Decisions magazine states that the Family Express convenience store chain “debuted a new made-to-order hot foodservice offering, labeled Cravin’s Kitchen.” 15 TTABVUE 123.

³⁰ 16 TTABVUE 430.

kitchen operations” and “smarter kitchens can make your restaurant more efficient.”³¹

Applicant also introduced an article from the Convenience Store News website on “The Transformation of FriendShip Food Stores” that describes the opening of a large new convenience store and “the unveiling of its proprietary FriendShip Kitchen restaurant.”³²

Opposer disputes the descriptiveness of KITCHEN(S), arguing that KITCHEN is not defined in reference to the goods or services at issue. Regardless, Opposer maintains that this element of the marks must not be disregarded in the comparison of marks.

We find that the record as a whole demonstrates that in the context of Applicant’s and Opposer’s goods and services, KITCHEN(S) is rather weak, because it is at least highly suggestive, if not descriptive of the relevant goods and services. The dictionary definitions make clear that a kitchen is where food items (such as the identified goods) are prepared, and the definitions and evidence show that a kitchen is where a restaurant prepares the food it serves. Articles reflect descriptive and suggestive use of the wording in connection with offering the same types of relevant goods and services. Third-party use in the industry and third-party registrations, as well as the disclaimers and 2(f) claim therein, also suggest that restaurants and food retailers view KITCHEN(S) as descriptive or highly suggestive. The use evidence further

³¹ 16 TTABVUE 432.

³² 16 TTABVUE 449-50.

demonstrates that consumers frequently are exposed to KITCHEN(S) in connection with the relevant goods and services, making the consumers less likely to rely on such wording to distinguish source. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1060, 224 USPQ 749, 752 (Fed. Cir. 1985). Overall, the evidence convinces us that KITCHEN(S) should be considered a relatively weaker component in Opposer's and Applicant's marks.

D. Similarity of the Marks

Turning to the first *DuPont* factor, we must compare the marks "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay*, 73 USPQ2d at 1691 (quoting *DuPont*, 177 USPQ at 567). The test assesses not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs.*, 101 USPQ2d at 1721; *see also Edom Labs. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

Some findings about each mark provide a useful background for the comparison. The first element in Applicant's mark is a large W appearing in a red circle, next to the stacked words WEIGEL'S KITCHEN, next to the relatively smaller cursive wording NOW OPEN. In the context of the mark as a whole, the W points to and reinforces WEIGEL'S, and we find that these two elements dominate Applicant's mark. The size, color and prominence of the encircled W, along with its placement as

the first literal element in the mark, contribute to its dominance. *See Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (first part of a mark “is most likely to be impressed upon the mind of a purchaser and remembered.”); *see also Palm Bay Imps.*, 73 USPQ2d at 1692. As previously discussed, KITCHEN is descriptive or highly suggestive in this context, and Applicant has disclaimed it, pursuant to an apparent requirement by the Examining Attorney, complied with and entered by the Examiner’s Amendment dated March 3, 2017. Given the weakness of this term, it occupies a less significant role in the source-indicating function of the mark. NOW OPEN also has been disclaimed as to the restaurant services, and Opposer maintains that in the context of Applicant’s mark, NOW OPEN is a “functional element”³³ that “primarily [] inform[s] customers that the kitchen was ‘now open.’”³⁴ While we assess the mark as a whole and therefore do not, as Opposer suggests, consider the element “likely to be omitted,”³⁵ we agree that the wording NOW OPEN gives the impression that the restaurant services or the kitchen preparing the identified food is now open for business, and consumers would not likely rely on it for source indication.



Overall, we find that as to , consumers will focus and rely most for source-indication on the encircled W and the possessive

³³ 19 TTABVUE 34.

³⁴ 19 TTABVUE 19 (Opposer’s Brief).

³⁵ 19 TTABVUE 37 (Opposer’s Brief).

surname WEIGEL'S. The possessive surname, WEIGEL'S, which precedes and modifies KITCHEN, also contributes to an emphasis on WEIGEL'S as the focus of source-indication.



In Opposer's , the large letters QT appearing in a red square shape, with a chef's hat perched on top, stand out as the dominant portion of the mark. Because this unique design element precedes the word KITCHENS and is more prominent in terms of size and color, and because KITCHENS, despite being stylized, is weak and highly suggestive of the goods, consumers likely would rely more on the QT and design component of the mark for source indication.

Comparing the marks visually, we find them quite different. With the exception of KITCHEN(S), the literal elements of the marks share no similarities. Even the common word KITCHEN(S) appears in a very different font in each mark – unremarkable block letters in Applicant's mark, and stylized cursive in Opposer's mark. Although the left side of each mark contains one or two large letters appearing on a red background, the letters are not similar – Applicant has the single letter W, while Opposer has two letters, Q and T. While both are red, the background carriers for the letters are in different shapes, a circle in Applicant's mark versus a square in Opposer's. And this portion of Opposer's mark is further differentiated by a prominent design element at the upper left, showing a chef's hat tilted to one side, as

though worn by the QT square. Applicant's mark includes no such additional design element. Given their overall compositions and content, the fact that both marks contain red geometric shapes and include the relatively weak word KITCHEN(S) is not enough to render them visually similar.

We also find the marks phonetically different. The literal elements, W WEIGEL'S KITCHEN NOW OPEN, simply do not sound similar to QT KITCHENS, regardless of the nearly identical shared wording KITCHEN(S). The letters do not rhyme or otherwise sound close to one another, and the component WEIGEL'S adds an entirely different sound to Applicant's mark, for which there is no counterpart in Opposer's mark. Similarly, the NOW OPEN wording in Applicant's mark adds more to its sound. We decline Opposer's invitation to find that consumers "would drop some or all of the opening elements when referring to Applicant's services."³⁶ If any shortening were to occur, we consider it more likely that the opening elements would be retained while the more descriptive or informational wording at the end would be dropped. Overall, the marks are far from "similar, and nearly identical" in sound, as Opposer asserts.³⁷

The connotation and commercial impression of Applicant's mark centers on WEIGEL'S, which term likely would be perceived as the possessive form of a surname (presumably that of Applicant's founder, Bill Weigel),³⁸ and is reinforced by the

³⁶ 19 TTABVUE 38.

³⁷ 19 TTABVUE 38.

³⁸ *See also* 16 TTABVUE 19 (Applicant's registration for the standard-character mark WEIGEL'S issued under Section 2(f), presumably requiring a claim of acquired distinctiveness because it is a surname).

prominent W initial. *See, e.g., Azeka Building Corp. v. Bryan Kenji Azeka*, 122 USPQ2d 1477, 1482 (TTAB 2017) (surname significance “reinforced by the use of the possessive”). The mark likely would be perceived as referring to a kitchen, now open for business, which is run by or belongs to someone with the surname Weigel. As noted above, in terms of what consumers would rely on to distinguish source, the KITCHEN and NOW OPEN components contribute less to the commercial impression. By contrast, the connotation and commercial impression of Opposer’s mark centers on QT, which may be perceived as initials. The mark as a whole likely would be perceived as referring to multiple kitchens run by QT, and the chef’s hat design adds a nuance that the food sold under the mark is created or prepared by a chef, or at least is skillfully prepared. Overall, we do not find the connotations and commercial impressions of the marks similar.

This factor weighs heavily against a likelihood of confusion.

E. Thirteenth *DuPont* Factor

Under the thirteenth “catchall” *DuPont* factor, Opposer argues that Applicant’s awareness of Opposer’s marks in advance of Applicant’s adoption of the marks at issue, as well as an alleged pattern of bad behavior with regard to Opposer’s intellectual property, show “knowing and willful appropriation.”³⁹ Opposer and Applicant both presented evidence regarding the genesis of Applicant’s mark, earlier versions to which Opposer objected, and their disputes over “marks and intellectual

³⁹ 19 TTABVUE 14-15.

property”⁴⁰ other than the marks at issue here. Applicant counters that the history between the parties and Applicant’s prior modifications of its marks in response to concerns expressed by Opposer reflect its good faith, rather than bad faith. Applicant argues that the facts in this case are not analogous to cases of bad faith willful copying both because Applicant has repeatedly changed its mark “to accentuate its differences from Opposer’s Mark,”⁴¹ and more to the point, because Applicant’s mark is so dissimilar to Opposer’s that it cannot be considered copying.

“[A]n inference of ‘bad faith’ requires something more than mere knowledge of a prior similar mark.” *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987). A finding of bad faith must be supported by evidence of an intent to confuse, rather than mere knowledge of another’s mark or even an intent to copy. *See, e.g., Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 588 F.3d 97, 92 USPQ2d 1769, 1782 (2d Cir. 2009) (“[T]he ‘only relevant intent is intent to confuse. There is a considerable difference between an intent to copy and an intent to deceive.’” (quoting 4 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:113)). This record does not show such an intent to confuse consumers, and instead reflects Applicant’s willingness to take some steps – albeit not all the steps Opposer wanted – to avoid confusion. We find no bad faith in Applicant’s adoption of the proposed mark.

⁴⁰ 19 TTABVUE 18; *see also* 15 TTABVUE 157-99; 13 TTABVUE 2-65.

⁴¹ 21 TTABVUE 43.

Also under this factor, Applicant points to its prior registrations of marks that consist of or include some of the same elements in the opposed mark – the encircled W and WEIGEL’S.⁴² We do not agree with Applicant that its marks are “substantially the same” under *In re Strategic Partners, Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012), where there was “no meaningful difference between” the marks. However, Applicant’s prior marks, particularly the red encircled W, corroborate the lack of bad faith in incorporating that element into the mark at issue in this case.

F. Purchasing Conditions

The parties agree that the goods and services in question are relatively inexpensive and may be subject to “impulse” purchasing under the fourth *DuPont* factor.⁴³ Applicant argues that the geographically distinct areas in which each party operates and the fact that the respective goods and services are encountered only in the parties’ respective convenience stores help avoid consumer confusion. As to the geographic separation, “[g]iven that registrant’s registration[] encompass[es] nationwide rights, and that [A]pplicant is seeking a geographically unrestricted registration, [A]pplicant’s argument is unavailing.” *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1218 (TTAB 2001). Similarly, because the identifications of goods and services are not restricted as to the channels of trade, we do not rely on their alleged availability exclusively in the parties’ convenience stores as a probative consideration. *See Bose Corp. v. QSC Audio Products, Inc.*, 293 F.3d 1367, 63 USPQ2d

⁴² 15 TTABVUE 4-6, 160; 16 TTABVUE 16-26.

⁴³ 21 TTABVUE 33 (Applicant’s Brief); 22 TTABVUE 17 (Opposer’s Reply Brief).

1303, 1310-1311 (Fed. Cir. 2002). Based on the parties' agreement as to "impulse" purchasing and the lack of countervailing evidence, this factor weighs somewhat in favor of likely confusion.

G. Actual Confusion

Opposer has conceded it is not aware of any actual confusion,⁴⁴ but argues that since Applicant has only used its mark since late 2016,⁴⁵ and the parties are not actually in close proximity or overlapping geographic areas,⁴⁶ the opportunity for confusion has been too limited for its absence to be meaningful in this case. *See DuPont*, 177 USPQ at 567 (identifying the seventh and eighth *DuPont* factors as "the nature and extent of any actual confusion," and "the length of time during and conditions under which there has been concurrent use without evidence of actual confusion"). The limited amount of time Applicant's mark has been used creates "little opportunity for confusion to have occurred." *See Bd. of Regents v. S. Illinois Miners, LLC*, 110 USPQ2d 1182, 1196 (TTAB 2014) (finding actual confusion factors neutral where only two years of simultaneous use); *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1915 (TTAB 2000) (lack of actual confusion not significant where "the time period in which both products have been on the market has been relatively brief--a little more than two years at the time of applicant's testimony"). Accordingly, we find this factor neutral.

⁴⁴ 16 TTABVUE 129, 343, 371.

⁴⁵ 15 TTABVUE 21.

⁴⁶ 21 TTABVUE 32.

H. Other Factors

Applicant makes brief arguments that the “restricted set of goods in constrained settings (i.e. within [the parties’] respective convenience stores)” weighs against likely confusion under the ninth *DuPont* factor, and that the lack of geographic overlap or proximity in the parties’ markets minimizes the “extent of potential confusion” under the twelfth *DuPont* factor. The same arguments have been raised under other factors, and for the reasons previously discussed, we do not find them persuasive. We consider these factors neutral.

V. Conclusion

Although the identical-in-part goods, and otherwise related goods and services, and the overlapping channels of trade and classes of consumers who may engage in impulse purchasing weigh in favor likely confusion, in this case, Applicant’s mark is so dissimilar to Opposer’s pleaded mark, and the common element between them is so weak that no likelihood of confusion exists. *See Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1460 (Fed. Cir. 1998) (“one *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks”); *Omega SA v. Alpha Phi Omega*, 118 USPQ2d 1289, 1293 (TTAB 2016); *see also Kellogg Co. v. Pack’em Ent. Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) (single *DuPont* factor of the dissimilarity of the marks outweighed the other relevant factors, and was therefore dispositive on the issue of likelihood of confusion)

Decision: The opposition is dismissed.