

THIS OPINION
IS NOT A PRECEDENT
OF THE T.T.A.B.

Mailed:
January 10, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Pura Vida Tequila, LLC

Serial No. 77853437

Ruy Garcia-Zamor, Esq. of Garcia-Zamor Intellectual
Property Law for Pura Vida Tequila, LLC.

Michael Webster, Examining Attorney, Law Office 102 (Karen
M. Strzyz, Managing Attorney).

Before Quinn, Zervas and Kuczma, Administrative Trademark
Judges.

Opinion by Zervas, Administrative Trademark Judge:

On October 21, 2009, Pura Vida Tequila, LLC
("applicant") filed an application pursuant to Section 1(b)
of the Trademark Act, 15, U.S.C. §1051(b), for registration
on the Principal Register of the mark PURA VIDA (in
standard character form) for goods identified as "tequila"
in International Class 33. The English language
translation of the mark according to the translation
statement in the record is "pure life."

The examining attorney issued a final refusal to register pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), in view of Registration No. 2970871 for the mark PURA VIDA (in standard character form) for "brewed malt-based alcoholic beverages in the nature of a beer and beer" in International Class 32.

Applicant appealed the final refusal of its application. Both applicant and the examining attorney filed briefs. The refusal to register is affirmed.

We first address one evidentiary issue. Applicant submitted a printout of a webpage as an exhibit to its brief (Exhibit L), which was not in the record prior to the filing of the appeal. Trademark Rule 2.142(d) reads as follows:

The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed.

Applicant provided no explanation for the late filing of the webpage. The examining attorney's objection to Exhibit L is sustained and we have not considered this webpage.

Next, we turn to the merits of the refusal to register applicant's mark. Our determination of the issue of likelihood of confusion is based on an analysis of all of

the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key, although not exclusive, considerations are 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 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

The Marks

There is no dispute that the marks are identical. The *du Pont* factor regarding the similarity of the marks therefore is resolved against applicant.

The Goods

In order to find that the goods are related, it is sufficient to show that because of the conditions surrounding their marketing, or because they are otherwise related in some manner, the goods would be encountered by the same consumers under circumstances such that offering the goods under confusingly similar marks would lead to the mistaken belief that they come from, or are in some way

associated with, the same source. *In re Iolo Techs., LLC*, 95 USPQ2d 1498 (TTAB 2010); see *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); TMEP §1207.01(a)(i) (8th ed. 2011). In addition, where the marks of the respective parties are identical, as is the case in this appeal, there need be only a viable relationship between the relevant goods to support a finding of likelihood of confusion. See, e.g., *In re Thor Tech, Inc.*, 90 USPQ2d 1634 (TTAB 2009); *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001); see also *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

The examining attorney's evidence in support of the refusal includes the following:

An article from Booze News regarding a tequila and beer tasting event;

An Internet posting from answers.com regarding an alcoholic drink containing a mixture of beer and tequila;

A webpage from bostoncitylinks.com regarding a specialty bar in Boston which features beer and tequila;

A review of tequila flavored beer on livingsocial.com, under the link "beer";

Search results for "tequila beer" on alibaba.com showing drinks such as beer flavored with tequila;¹

¹ The alibaba.com search results also include entries for foreign trading companies offering both tequila and beer. Because there is no evidence in the record that consumers in the United States (including wholesalers) import beer and tequila from foreign

A review on brewingkb.com describing a drink in which a shot glass of tequila is added to draft beer; and

A recipe for a "beer margarita" on examiner.com which includes both beer and tequila.

The record also includes a number of third-party registrations submitted by the examining attorney which identify both "beer" and "distilled spirits." Third-party registrations that individually cover different items and are based on use in commerce serve to suggest that the listed goods and services are of a type that may emanate from a single source. See *Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (although third-party registrations are "not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may nonetheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source"). See also *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993). Because none of the third-party registrations list

trading companies, many of the search results are not probative of any relationship between the goods.

"tequila," we presume the examining attorney assumed that "tequila" is included within "distilled spirits."²

Also, applicant submitted a webpage from Lee's Discount Liquor. According to applicant, the webpage demonstrates "that beer, wine and liquor such as tequila are typically sold together in [l]iquor stores."

Applicant's brief at 5.³

The evidence of record and applicant's acknowledgement at page 5 of its brief that beer and liquor such as tequila are typically sold together in liquor stores establishes that tequila and beer may appear in the same beverage; are consumed at the same time by the same consumers; and are offered for sale to the same purchasers in the same outlets. We therefore find that the goods travel in the same trade channels; that the purchasers of tequila and beer are adult consumers of alcoholic beverages and overlap, and that because of the overlap in trade channels and purchasers, and because the goods are used in the same beverage, the goods are related.

² It would have been preferable for the examining attorney to have located third-party registrations that specifically recite tequila. Applicant has not objected to the third-party registrations as not including tequila; we therefore have accorded them their full probative value.

³ The webpage states that Lee's Discount Liquor "is filled with the best variety of liquor, wine, beer, mixers and bar accessories."

Our finding is consistent with *Majestic Distilling, supra*, where the Federal Circuit, our primary reviewing court, affirmed the Board's decision that RED BULL for "tequila" is likely to be confused with RED BULL for "malt liquor." The evidence in the record in *Majestic* similarly consisted of (1) articles demonstrating that malt liquor and tequila are occasionally found in some of the same places, and (2) articles relating to applicant's goods, a tequila-flavored beer. The court stated:

[M]alt liquor and tequila are similar by virtue of the fact that both are alcoholic beverages that are marketed in many of the same channels of trade to many of the same consumers. ... Because substantial evidence supports the Board's conclusions that malt liquor and tequila are similar goods and are sold in many of the same established and likely-to-continue trade channels, we conclude that the second and third *DuPont* factors, respectively, weigh against *Majestic*

Our finding is also consistent with *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1948 (Fed. Cir. 2004), where the Federal Circuit affirmed the Board's finding of a likelihood of confusion between marks for tequila and beer, and stated that such goods often emanate from the same source and that "substantial evidence supports the Board's finding of a close relationship between tequila and beer or ale."

We next consider the *du Pont* factor regarding the number and nature of similar marks in use for similar goods. According to the Federal Circuit, "[e]vidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection." *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005), citing, *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 626-27 (8th Cir. 1987); and J. Thomas McCarthy, 2 *McCarthy on Trademarks and Unfair Competition* § 11:88 (4th ed. 2001).

We are not persuaded by applicant's evidence that PURA VIDA is a weak mark. Applicant's evidence of third-party use of PURA VIDA consists of a photograph of a Martellotto Wine Productions bottle of wine and three pricelists for the same wine. The recipes for a "pura vida" drink from answerbag.com and a webpage titled "cocktail equipment" do not exhibit trademark use and hence have no probative value under this *du Pont* factor. Further, the two webpages which use "pura" in connection with beer and the three examples of use of "vida" in connection with beer and wine do not demonstrate that the terms are so widely used, rendering the terms, alone or in combination with each other, weak.

Cf. *In re Broadway Chicken Inc.*, 38 USPQ2d 1559 (TTAB 1996). In addition, as the examining attorney correctly observed, even if "pura" and "vida" are weak terms in connection with alcoholic drinks (which applicant has not established on this record), applicant's and registrant's marks are identical, and this fact outweighs any weakness in the marks.

Turning next to the *du Pont* factor regarding purchasing conditions, applicant argues that "[p]urchasers of tequila tend to be very sophisticated consumers of alcohol that spend significant time selecting their tequila," brief at 7, and that "the typical purchaser of specialty tequilas is careful in selecting a tequila" Brief at 8. Applicant has provided no evidence to support its assertions and we are dubious of their accuracy. Moreover, the Federal Circuit in *Majestic Distilling* did not disturb the Board's finding that malt liquor and tequila are both relatively inexpensive products⁴ that are likely to be purchased on impulse rather than selected with careful, studied consideration and sophistication. *Id.* at 1205. The court reasoned:

First, even if Majestic were correct that "common experience" shows that consumers sometimes become

⁴ In *Chatam International*, 71 USPQ2d at 1948, the Federal Circuit stated that tequila and beer are "inexpensive commodities."

attached to a particular brand of beer or spirits after purchasing and consuming that brand at least once, that would say little, if anything, about whether the consumer's initial selection of that brand was based on studied consideration and sophistication or, alternatively, on impulse. Secondly, it appears to us that brand-consciousness not only can be expected to lead a consumer who already has a favorite brand of tequila to be loyal to that brand, but it also should compel a consumer who enjoys "RED BULL"-brand malt liquor but has not yet developed a taste for a particular brand of tequila to purchase "RED BULL"-brand tequila in the mistaken belief that it is manufactured or sponsored by the same entity.

Id. at 1204 - 05. We therefore find that the *du Pont* factor regarding purchasing conditions at best for applicant to be neutral.

In view of the identity of the marks, trade channels and purchasers, and the similarity of the goods, we find that applicant's mark for tequila is likely to be confused with registrant's mark for "brewed malt-based alcoholic beverages in the nature of a beer and beer."

DECISION: The refusal to register under Section 2(d) of the Trademark Act is affirmed.