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Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Loggerhead Distillery, LLC

Serial Nos. 88441155 and 88452674

Ashley V. Brewer of BrewerLong PLLC
for Loggerhead Distillery, LLC

Angela Duong, Trademark Examining Attorney, Law Office 104,
Zachary Cromer, Managing Attorney.

Before Wellington, Heasley, and English
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Loggerhead Distillery, LLC, seeks registration on the Principal Register of the standard character mark **LOGGERHEAD DISTILLERY** and the composite mark



Both applications disclaim “DISTILLERY,” and both identify “distilled spirits” in International Class 33 and “alcohol distillery services” in International Class 40.¹

The Trademark Examining Attorney has refused registration of Applicant’s marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the registered mark **LOGGERHEAD LANDING** (in standard characters) for “bar and cocktail lounge services; café services; restaurant services” in International Class 43.²

When the refusals were made final, Applicant appealed. On the Examining Attorney’s motion, the appeals were consolidated.³ We affirm the refusals to register.

I. Likelihood of Confusion

Section 2(d) of 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

¹ Application Serial No. 88441155, for the standard character mark, was filed on May 22, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use anywhere and in commerce since at least as early as April 26, 2019. The application also covers “spirits distillery services” in International Class 40.

Application Serial No. 88452674, for the word and design mark, was filed on May 30, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use anywhere and in commerce since at least as early as April 26, 2019. The application includes this description: “The mark consists of double concentric circle with two swords crossed over the circles, a bare skull in the center of the circles, two stars each to the left and right of the skull, the word **LOGGERHEAD** above the skull, and the word **DISTILLERY** in the bottom center inside the circles, below the swords.” Color is not claimed as a feature of the mark.

² Registration No. 5318481, issued on the Principal Register on October 24, 2017.

³ 7 TTABVUE. All references will be to the record and briefs in ex parte appeal 88441155, unless otherwise stated. Page references to the application record are to the downloadable .pdf version of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board’s TTABVUE docket system.

goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d).

We base our determination of likelihood of confusion under Section 2(d) on an analysis of all of the probative facts of record. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). In making our determination, we have considered each *DuPont* factor for which there is evidence or argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019); *see Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”)).

“The Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers.” *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985). Consistent with these purposes, varying weights may be assigned to each *DuPont* factor depending on the evidence presented in a particular case. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). “In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services.” *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004), *cited in Ricardo Media*

Inc. v. Inventive Software, LLC, 2019 USPQ2d 311355, *5 (TTAB 2019).

A. Similarity or Dissimilarity and Nature of the Goods and Services, and Channels of Trade

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration...,” and the third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567.

Applicant’s goods and services are “distilled spirits” and “alcohol distillery services; spirits distillery services,” while Registrant’s services are “bar and cocktail lounge services; café services; restaurant services.” A proper comparison of these goods and services “considers whether ‘the consuming public may perceive [the respective goods or services...] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)) *quoted in In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018). As the Board has declared:

It is not necessary that the ... respective goods and services be competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods and services are related in some manner, or that the conditions and activities surrounding the marketing of the goods and services are such that they would or could be encountered by the same persons under circumstances that could give rise to the mistaken belief that they originate from the same source.

DeVivo v. Ortiz, 2020 USPQ2d 10153, *11 (TTAB 2020) (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012)).

Applicant states that while likelihood of confusion has often been found where similar marks are used in connection with food or beverage products and restaurant services, there is no *per se* rule that they are related.⁴ See *Jacobs v. Int'l Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982); *In re Opus One, Inc.*, 60 USPQ2d 1812, 1813 (TTAB 2001). To show relatedness, the evidence or record must show “something more” than the mere fact that Applicant’s distilled spirits could be served at Registrant’s bar, cocktail lounge, café or restaurant, Applicant contends.⁵ See *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1064 (Fed. Cir. 2003) (citing *Jacobs v. Int'l Multifoods*, 212 USPQ at 642).

We are cognizant of the “something more” precedent set by our primary reviewing court in such cases as *Coors* and *St. Helena Hospital*. See generally *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050 (TTAB 2012). “Something more” is required when we compare goods with services, and the relatedness of those goods and services is not evident, well-known or generally recognized. *In re Country Oven, Inc.*, 2019 USPQ2d 443903, *12 (TTAB 2019) (citing *In re St. Helena Hosp.*, 113 USPQ2d at 1087). In this case, we must determine whether Applicant’s distillery services and the product of those services, distilled spirits, are so similar in nature to Registrant’s services—particularly its bar and cocktail lounge services—that they would be related in the

⁴ Applicant’s brief, 4 TTABVUE 4.

⁵ Applicant’s brief, 4 TTABVUE 5. Applicant purports to “incorporate by reference and reiterate” the arguments it made during the course of prosecution. Applicant’s brief, 4 TTABVUE 2. However, the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) provides that “If an applicant, in its appeal brief, does not assert an argument made during prosecution, it may be deemed waived by the Board.” TBMP § 1203.02(g) (2020). We accordingly address the arguments Applicant raises in its brief, in conjunction with the evidence adduced during examination.

mind of the consuming public. *See Shen Mfg. Co. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1355-56 (Fed. Cir. 2004). “As we have long held, each case must be decided on its own facts and the differences are often subtle ones.” *In re St. Helena Hosp.*, 113 USPQ2d at 1087.

In this case, the record shows that relatedness. The Examining Attorney submitted website printouts from fifteen entities⁶ across the country showing that the same entity commonly provides distillery services, distilled spirits, and restaurant services under the same mark:

- Falls Church Distillery, Falls Church VA
- Mason Dixon Distillery & Restaurant, Gettysburg PA
- Breckenridge Distillery, Breckenridge CO
- Karrikin Spirits, Cincinnati OH
- Barrel 21 Distillery & Dining, State College PA
- Dogfish Head, Rehoboth, Milton DE
- Driftless Glen Distillery with restaurant, Baraboo WI
- High West Distillery, Park City Utah
- Lula Restaurant Distillery, New Orleans LA
- Founding Spirits/Founding Farmers, Washington DC
- Social Still, Lehigh Valley PA
- Saint Lawrence Spirits, Clayton NY
- Dells Distillery, Wisconsin Dells WI

⁶ August 12, 2019 Office Action at TSDR 7-35, March 5, 2020 Office Action at 12-55, 203-238.

- Green Bay Distillery, Green Bay WI
- Treaty Oak, Dripping Springs TX

To this evidence, the Examining Attorney adds four articles discussing the growing trend of restaurant-distilleries:

- “Trend: The Boom in Restaurant-Distilleries”: “Craft distilling is hugely popular and enjoying unprecedented growth—there are 1,315 U.S. craft distillers, according to the American Crafts Spirits Association. Pair this trend with the popularity of gastropubs, and you’ve got the unique experience of customers enjoying on-trend pub fare while taking pleasure in the drama of seeing spirits made before their eyes, sampling it straight or enjoying a craft cocktail.”⁷
- “Top Beverage Trends for 2016”: “A recent trend has emerged of restaurants showcasing beverages produced either in-store or locally. One such example is Denver’s Mile High Spirits, a private label micro-distillery, cocktail lounge and tasting room.”⁸
- “D.C.’s first distillery-eatery taps into a growing trend”⁹
- “The 5 Best Distillery Restaurants in America” “Distilleries offer so much more than tours these days, whether you want to stay the night or take in the great outdoors. And now, more and more distilleries are opening on-site restaurants, where they can showcase their spirits in cocktails and pair them with local ingredients to make the experience even more immersive.” Reviews:
 - Tuthill House at the Mill, Gardiner NY
 - Star Hill Provisions, Loretto KY
 - Service Bar, Columbus OH
 - The Bar & Table, Chicago IL
 - Cardinal Spirits Kitchen, Bloomington IN¹⁰

⁷ RDMag.com, March 5, 2020 Office Action at 56-61, 239-244.

⁸ Sirvo.com March 5, 2020 Office Action at 71-78, 254-261.

⁹ BDCNetwork.com March 5, 2020 Office Action at 68-70, 251-253.

¹⁰ Supercall.com, March 5, 2020 Office Action at 62-67, 245-250.

In our view, this record evidence shows the relatedness of Applicant's distillery services and Registrant's services. *See Hewlett-Packard v. Packard Press*, 62 USPQ2d at 1004 (evidence that "a single company sells the goods and services of both parties, if presented, is relevant to the relatedness analysis...."). "[I]t is settled that evidence of third-party use of the same mark for an applicant's identified goods and services (or similar goods or services) on the one hand, and an opposer's (or registrant's) identified goods and services (or similar goods and services) on the other, may establish a relationship between those goods and services." *Ricardo Media v. Inventive Software*, 219 USPQ2d 311355, at *3 (citing *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018)).

Moreover, this evidence shows the requisite "something more" to establish that distilled spirits are related to bar and cocktail lounge services, café services and restaurant services in this case. Applicant argues that even if distillery/restaurant combinations are increasing in prevalence, that is not enough for consumers to expect such a combination.¹¹ But the nationwide growth of distillery/restaurants, coupled with the media articles publicizing the trend, suggest that consumers have been exposed to the combination on a widespread basis. "[T]his industry trend and the media attention it has received contribute to 'something more' showing that consumers would be likely to perceive [Applicant's] goods as related to [Registrant's] services." *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1061-62

¹¹ Applicant's brief, 4 TTABVUE 7. *See* Applicant's Feb. 11, 2020 Response to Office Action comparing the estimated 1,835 distilleries extant in August 2018 with the estimated one million plus restaurants. Estimates from ex. L, DistilleryTrail.com and ex. M, Restaurant.org., Feb. 11, 2020 Response to Office Action at 18, 68-70.

(TTAB 2017). On this evidentiary record, the relationship “is the opposite of obscure, unknown, or generally unrecognized, [and] the relevant line of case law holds that confusion may be likely to occur from the use of the same or similar marks for goods, on the one hand, and for services involving those goods, on the other.” *In re Country Oven*, 2019 USPQ2d 443903, at *13.¹²

Applicant argues that it cannot legally sell its distilled liquors at the distillery; it can only offer free samples to assist customers in selecting a whole bottle for purchase. Furthermore, it argues, Registrant, which owns and operates hotels, only uses its LOGGERHEAD LANDING mark in connection with a hotel pool bar, so customers would not expect distilled liquors to be sold in connection with a distillery in either circumstance.¹³

¹² The Examining Attorney cites a nonprecedential Board decision, *In re Mauna Kea Rum Co. LLC*, 2019 BL 256416 (TTAB 2019), which found MAUNA KEA RUM COMPANY (“RUM COMPANY” disclaimed) for “packaged spirits; packaged rum” confusingly similar to MAUNA KEA and Design and MAUNA KEA BEACH HOTEL and Design (“BEACH HOTEL” disclaimed) for *inter alia* “restaurant and hotel services.” Based on evidence similar to that adduced in this case, the Board found the requisite “something more” establishing the relatedness between packaged spirits and rum and restaurant services. *Id.* at *7. “Board decisions which are not designated as precedent are not binding on the Board, but may be cited and considered for whatever persuasive value they may hold.” *In re Soc’y of Health & Physical Educators*, 127 USPQ2d 1584, 1587 n.7 (TTAB 2018), *quoted in In re Alabama Tourism Dept.*, 2020 USPQ2d 10485, at *6 n. 25 (TTAB 2020). Applicant attempts to distinguish that decision, pointing out that disregarding the disclaimed words “RUM COMPANY” and “BEACH HOTEL” renders the marks identical: MAUNA KEA. 4 TTABVUE 8. In the present case, Applicant argues, the differing suffixes “DISTILLERY” and “LANDING” distinguish the marks. 4 TTABVUE 4. We find, however, that the cited registration in this case identifies “bar and cocktail lounge services; café services; restaurant services” that are even closer in nature to Applicant’s “distilled spirits” than those in the *Mauna Kea Rum* case. And the marks’ suffixes do not dispel the similarity engendered by their shared dominant component, LOGGERHEAD.

¹³ Applicant’s brief, 4 TTABVUE 6-7; *see also* affidavit of Colby Theisen, Applicant’s Manager, Feb. 11, 2020 Response to Office Action, ex. O, at 72.

However, there is no limitation in Applicant's identification of goods and services restricting how it sells its distilled spirits. And Registrant's services are not limited to hotel or poolside settings. "The relevant inquiry in an ex parte proceeding focuses on the goods and services described in the application and registration, and not on real-world conditions." *In re Detroit Athletic*, 128 USPQ2d at 1052. They must be read to encompass all goods and services of the type identified. *Southwestern Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015). "It is well established that the Board may not read limitations into an unrestricted registration or application." *In re Country Oven*, 2019 USPQ2d 443903, at *5. So Applicant's recourse to extrinsic limitations is unavailing.

The respective goods and services can be expected to flow through the same or similar channels of trade, as the website evidence demonstrates. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272-73 (TTAB 2009) (website evidence shows same or overlapping channels of trade and classes of customers). And they would flow to some of the same classes of consumers—in this case, ordinary adult consumers of alcoholic beverages. *In re Bay State Brewing Co., Inc.*, 117 USPQ2d 1958, 1960 (TTAB 2016); *In re Inn at St. John's*, 126 USPQ2d 1742, 1747 (TTAB 2018), *aff'd* 777 Fed. Appx. 516 (Fed. Cir. 2019) ("Because the services at issue are "restaurant and bar services," the average customer is an ordinary consumer.").

We find accordingly that the respective goods and services are similar and related in nature, and that they would flow to the same classes of consumers via the same or

similar channels of trade. The second and third *DuPont* factors therefore weigh in favor of a likelihood of confusion.

B. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's*, 126 USPQ2d at 1746 (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).



Again, Applicant's marks are **LOGGERHEAD DISTILLERY** and **LOGGERHEAD DISTILLERY**, with "DISTILLERY" disclaimed in both. Registrant's mark is **LOGGERHEAD LANDING**.

Applicant contends that **LOGGERHEAD LANDING** "is actually **suggestive** of the actual goods and services, because (i) [Registrant's] business is a pool bar/restaurant situated inside a beach resort, (ii) a Loggerhead is a sea turtle, which (iii) 'lands' on beaches to lay its eggs. ... Context suggests the naming was purposeful

and intended to be suggestive, specifically to appeal to beachgoing tourists.”¹⁴ In contrast, it argues, “[t]he word LOGGERHEAD in LOGGERHEAD DISTILLERY is arbitrary, or at least more arbitrary than Registrant’s Mark, because Applicant’s distillery is located inland, in the City of Sanford, Florida, and a distillery has nothing inherently to do with Loggerhead turtles.”¹⁵ As we have seen, though, the cited registration and the applications are broadly phrased, without geographic restrictions, despite Applicant’s allusions to extrinsic evidence.

As the Examining Attorney correctly observes, the marks share the dominant, word LOGGERHEAD. A “loggerhead” is “a very large chiefly carnivorous sea turtle (*Caretta caretta*) of subtropical and temperate waters.”¹⁶ The word LOGGERHEAD is displayed prominently as the first word in each mark. *See Palm Bay Imps.*, 73 USPQ2d at 1692 (“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); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered”) *cited in In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1090 (TTAB 2016). Even though we compare the respective marks as a whole, we may give their constituent terms more or less weight depending on their effect on the overall commercial impression. *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d

¹⁴ Applicant’s brief, 4 TTABVUE 3.

¹⁵ Applicant’s brief, 4 TTABVUE 4.

¹⁶ Merriam-Webster.com, Feb. 11, 2020 Response to Office Action at 25.

1944, 1948 (Fed. Cir. 2004). In this case, we find that the dominant, prominent, shared component, **LOGGERHEAD**, carries the most weight, yielding a common commercial impression.

The disclaimed word “**DISTILLERY**” does little to dispel the marks’ similarity. *See Citigroup Inc. v. Capital City*, 98 USPQ2d at 1257 (“[W]hen a mark consists of two or more words, some of which are disclaimed, the word not disclaimed is generally regarded as the dominant or critical term.”) *quoted in In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018). Even though it disclaims “**DISTILLERY**,” Applicant argues that **LANDING** is not disclaimed, so the differing suffixes distinguish the marks: “Thus, we have **LANDING**, a relaxing place to land and unwind vs. **DISTILLERY**, a manufacturing facility. The commercial impressions are diametrical opposites....”¹⁷ As the aforementioned evidence shows, however, distillery services, producing distilled spirits, are often combined with restaurant services. So Applicant’s distinctions make little or no difference in the marks’ commercial impression. “[I]f the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral differences.” *In re Denisi*, 225 USPQ 624, 624 (TTAB 1985).

In the design mark, **LOGGERHEAD** appears in bold capital letters atop the logo, reinforcing the loggerhead turtle skull image. **LOGGERHEAD** is far more prominent than the disclaimed word **DISTILLERY**, which appears in much smaller size at the bottom of the logo. *See In re Coors Brewing Co.*, 68 USPQ2d at 1062 (where the “Blue

¹⁷ Applicant’s brief, 4 TTABVUE 4, 7-9.

Moon Brewing Co.” appeared “at the bottom of the mark in significantly smaller font, it was reasonable for the Board to find that those words do not significantly contribute to distinguishing the two marks”) *cited in In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1736 (TTAB 2018).

In such a design mark, “the words are normally given greater weight because they would be used by consumers to request the products.” *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1431 (TTAB 2013) (citing *In re Viterra Inc.*, 671 F. 3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012) (“the verbal portion of a word and design mark likely will be the dominant portion”). Distilled spirits are “often ordered by name, in a bar or restaurant, or from a menu, where only the name of the [beverage] will be used Many consumers ordering these goods from a bartender or waiter/waitress will not have the opportunity to see a label when they order the product. Further, if the [beverage] is served in a glass ..., the consumer may never see a label.” *In re Bay State Brewing*, 117 USPQ2d at 1961 (discussing beer consumption).

The relevant consumers, moreover, would include ordinary adult consumers of alcoholic beverages, who retain a general rather than a specific impression of the marks’ sounds, and would naturally tend to shorten their pronunciation of Applicant’s mark, asking a bartender or waiter for LOGGERHEAD. *See, e.g., In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (J. Rich, concurring); *Marshall Field & Co. v. Mrs. Fields Cookies*, 25 USPQ2d 1321, 1333 (TTAB 1992).

Applicant argues that distilleries must place their name and address on container labels, thereby negating consumer confusion.¹⁸ However, the Lanham Act does not contemplate such an exception for alcoholic beverages. *See, e.g., In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003) (RED BULL for tequila likely to be confused with RED BULL for malt liquor). It is unclear how prominently the distillery's name would be placed on its container labels, and since Applicant's name, "Loggerhead Distillery, LLC" is nearly identical to its standard character mark, its addition cannot be expected to dispel the marks' similarity. Instead, given the aforementioned prevalence of distillery/restaurants, it would imply, at best, an affiliation between Applicant and Registrant.

For these reasons, the marks are more similar than dissimilar, and the first *DuPont* factor weighs in favor of finding a likelihood of confusion.

C. Consumer Care and Sophistication

Under the fourth *DuPont* factor, we consider "[t]he conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing." *DuPont*, 177 USPQ at 567. "Purchaser sophistication may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect." *Palm Bay Imps.*, 73 USPQ2d at 1695.

Applicant argues that its consumers "are shopping specifically for quality craft distilled spirits vs. mass produced brands...."¹⁹ But since the subject applications and

¹⁸ Applicant's brief, 4 TTABVUE 6.

¹⁹ Applicant's brief, 4 TTABVUE 14.

registration contain no restriction as to price or quality, there is no reason to infer that the consumers of the alcoholic beverages will be particularly sophisticated, discriminating, or careful in making their purchases. *See Somerset Distilling Inc. v. Speymalt Whisky Dist. Ltd.*, 14 USPQ2d 1539, 1542 (TTAB 1989); *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 765 (TTAB 1986).

The fourth *DuPont* factor is therefore neutral.

D. The Number and Nature of Similar Marks in Use on Similar Goods and Services

Under the sixth *DuPont* factor, we consider “[t]he number and nature of similar marks in use on similar goods [and services].” *DuPont*, 177 USPQ at 567.

Applicant argues that the word **LOGGERHEAD** is so commonly used that the USPTO database is replete with registered marks with the word:

Mark	Class	Registration No.
Loggerhead Coffee	035	3952163
Loggerhead Club & Marina	036, 037	3154550
Loggerhead	040	5919889
Loggerhead	020	4724973

Loggerhead	035	4439120
Loggerhead	008	3402976
Loggerhead	008	3175611

.20

Applicant maintains that the USPTO routinely registers marks sharing animal names as long as they have other elements and consumers are so used to seeing animal names such as **TURTLE** in brands that they look to other elements to

²⁰ Feb. 11, 2020 Response to Office Action at 23-24, ex. P, 73-82.

distinguish the brands' sources.²¹

Applicant's evidence consists of seven third-party registrations, not evidence of use in the marketplace. As the Federal Circuit has stated, "evidence of third-party use of similar marks on similar goods 'can show that customers have been educated to distinguish between different marks on the basis of minute distinctions.'" *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)) (emphasis added). For example in *Coors Brewing*, "the applicant had introduced evidence that there are more than 100 restaurants in the United States whose names incorporate that term [Blue Moon]." *In re Coors Brewing*, 68 USPQ2d at 1061 (dissent). But the existence of third-party registrations is not evidence of what happens in the marketplace or that customers are familiar with the marks. *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) quoted in part in *In re Inn at St. John's*, 126 USPQ2d at 1746.

For example, in *Palm Bay Imports*, where Palm Bay's intent-to-use application for the mark VEUVE ROYALE for sparkling wine was refused registration based on opposer Veuve Clicquot's registered VEUVE-formative marks for sparkling wine. Palm Bay introduced evidence of at least five different third-party alcoholic beverage marks that used the term VEUVE or a foreign equivalent. 73 USPQ2d at 1693. The Federal Circuit, affirming the Board's refusal, held that "The probative value of third-

²¹ Applicant's brief, 4 TTABVue 9-10, Feb. 11, 2020 Response to Office Action at 13, ex. D, 38-42.

party trademarks depends entirely upon their usage. ... As this court has previously recognized where the record includes no evidence about the extent of third-party uses the probative value of this evidence is thus minimal.” *Id.* (quoting *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1561 (Fed. Cir. 2001) (emphasis in original, punctuation omitted).

Applicant’s third-party registration evidence is even weaker. Six of Applicant’s seven third-party marks carry little to no probative value because they are for unrelated goods or services—such as hardware, real estate management, printing, outdoor furniture—ranging far afield from the goods and services in this case. *See Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693-94 (Fed. Cir. 2018) (the controlling inquiry under the sixth *DuPont* factor is the extent of third-party marks in use on “similar” goods or services); *In re Inn at St. John’s*, 126 USPQ2d at 1745 (unrelated third-party registrations of little or no probative value). And the seventh registration is cancelled. *Id.* at 1746 (dead or cancelled registrations have no probative value at all).

In sum, Applicant’s cited third-party registrations containing the term LOGGERHEAD “do not diminish the distinctiveness of the cited mark or its entitlement to protection against Applicant’s mark.” *In re Information Builders Inc.*, 2020 USPQ2d 10444, *8 (TTAB 2020).

The sixth *DuPont* factor is therefore neutral.

E. Actual Confusion

Under the seventh and eighth *DuPont* factors, we consider the nature and extent

of any actual confusion, in light of the length of time and conditions under which there has been contemporaneous use of the subject marks. *DuPont*, 177 USPQ at 567.

Applicant argues that “[t]here is no evidence of actual consumer confusion.”²² But “While evidence of actual confusion may be considered in the *DuPont* analysis, a showing of actual confusion is not necessary to establish a likelihood of confusion.” *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017) (internal punctuation omitted).

Moreover, “The fact that an applicant in an ex parte case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis, inasmuch as the Board in such cases generally has no way to know whether the registrant likewise is unaware of any instances of actual confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred.” *In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001). The extent the respective marks’ use in the marketplace is unknown. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000). And the marks have coexisted for only about two years, if Applicant’s claim of first use is credited. *See Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1039-40 (TTAB 2016) (three years’ contemporaneous use not a meaningful opportunity for confusion to occur). So we are at a disadvantage to gauge the opportunity for actual confusion to have occurred in the marketplace.

²² Applicant’s brief, 4 TTABVUE 14.

For these reasons, we do not expect the Examining Attorney to present evidence concerning actual confusion, *vel non*, see *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003).

We regard the seventh and eighth *DuPont* factors as neutral.

II. Conclusion

When we consider the record and the relevant likelihood of confusion factors, and all of the arguments relating thereto, we find that Applicant's and Registrant's marks are more similar than dissimilar, that the respective goods and services are similar and related in nature, that those goods and services would flow through the same or similar channels of trade to some of the same classes of consumers, that these consumers, including ordinary adult consumers of alcoholic beverages, could not be expected to exercise more than an ordinary amount of care and sophistication in their purchases, that there are no similar marks in use or registered for similar goods and services that would weaken the strength of the cited registered mark, and that the absence of evidence of actual confusion does not negate a likelihood of confusion. There is therefore a likelihood of confusion under Section 2(d) of the Trademark Act. 15 U.S.C. § 1052(d).

Decision: The refusals to register Applicant's marks are affirmed.