

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: March 25, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Rockaway Drinks LLC*  
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Serial No. 90115947  
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Angela S. Kalsi of Amin Talati Wasserman LLP,  
for Rockaway Drinks LLC.

Raul Cordova, Trademark Examining Attorney, Law Office 114,  
Nicole Nguyen, Acting Managing Attorney.

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Before Greenbaum, Pologeorgis and Lebow,  
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Rockaway Drinks LLC, seeks to register the mark ROCKAWAY (in standard characters) on the Principal Register for “Non-alcoholic sparkling water-based beverages, namely, functional beverages containing herbal extracts, plant infusions, and fruit” in International Class 32.<sup>1</sup>

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<sup>1</sup> Application Serial No. 90115947 (“the Application”) was filed on August 14, 2020, based on Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

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 are to the

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with the goods identified above, so resembles the mark ROCKAWAY BREWING COMPANY (in standard characters, BREWING COMPANY disclaimed) on the Supplemental Register for "Beer; Brewed malt-based alcoholic beverage[s] in the nature of a beer," in International Class 32, as to be likely to cause confusion, to cause mistake, or to deceive.<sup>2</sup>

When the refusal was made final, Applicant appealed and requested reconsideration, which was denied. The appeal has been briefed.<sup>3</sup>

We affirm the refusal.

## **I. Likelihood of Confusion**

The fundamental purpose of Trademark Act Section 2(d) is to prevent confusion as to source, and to protect registrants from damage caused by registration of marks likely to cause confusion. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985). Our analysis is based on all of the probative evidence of record. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567

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Board's TTABVue docket system.

<sup>2</sup> Registration No. 4499687 ("the Registration"), issued March 18, 2014; Section 8 and 15 declarations accepted and acknowledged.

<sup>3</sup> When it came to the Board's attention that Applicant filed an amendment to allege use in support of the Application on December 14, 2021, the same day Applicant filed its reply brief in the appeal, the Board suspended the appeal and remanded the Application to the Trademark Examining Attorney to consider the amendment in accordance with standard examining procedures. 10 TTABVue. The Examining Attorney approved the amendment to allege use on March 18, 2022 and returned the application to the Board on March 24, 2022, whereupon the appeal was resumed. 11-12 TTABVue.

(CCPA 1973) (“*DuPont*”) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”).

In making our determination, we consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *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) (“[T]he 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 or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *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.”).

#### **A. Similarity of the Marks**

The first *DuPont* factor considers the “similarities or dissimilarities of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *In re Detroit Athl.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). “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 1742,

1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d at 1812), *aff'd mem.*, 777 Fed. App'x. 516 (Fed. Cir. 2019).

"The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks omitted)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016).

"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." *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981). *See also In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). However, "in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety." *Id.* at 751.

The Examining Attorney argues that "applicant's mark, ROCKAWAY, conveys a similar commercial impression as registrant's mark, ROCKAWAY BREWING

COMPANY, since the salient, if only element of the marks, resemble each other in appearance and meaning.”<sup>4</sup> Noting that “BREWING COMPANY” is disclaimed in the Registration, and that “[d]isclaimed matter that is descriptive of a party’s goods is typically less significant or less dominant when comparing marks (quoting *Detroit Athl.*, 128 USPQ2d at 1050, and TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) §1207.01(b)(viii) and (c)(ii)), he concludes that “[s]ince the principal element of registrant’s mark is ROCKAWAY, which is the entirety of applicant’s mark, the overall commercial impression of the marks is the same.”<sup>5</sup>

Because both marks begin with the identical term ROCKAWAY, we agree that the marks are similar in sound, appearance, connotation and commercial impression. It is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered when making purchasing decisions. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *see also Presto Prods., v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). Therefore, consumers will focus more on the ROCKAWAY portion of Registrant’s mark as the source-indicator for the goods in the Registration, as opposed to the non-source identifying and disclaimed portion comprised by the wording BREWING COMPANY. *See, e.g., In re James Haden, M.D., P.A.*, 2019 USPQ2d 467424, at \*5 (TTAB 2019) (“Generic matter must be disclaimed to permit registration on the Supplemental Register.”). *Compare In re Dixie Rests., Inc.*, 105

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<sup>4</sup> 6 TTABVue 5 (Examining Attorney’s Brief).

<sup>5</sup> *Id.*

F.3d 1405, 41 USPQ 1531 (Fed. Cir. 1997) (“DELTA,” not the disclaimed generic term “CAFÉ,” was the dominant portion of the mark THE DELTA CAFÉ). “[W]e also keep in mind the penchant of consumers to shorten marks.” *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring: “the users of language have a universal habit of shortening full names -- from haste or laziness or just economy of words”) *See also In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (“ML is likely to be perceived as a shortened version of ML MARK LEES when used on the same or closely related skin care products.”).

Applicant does not argue that the marks are dissimilar, but claims the mark ROCKAWAY BREWING COMPANY in the Registration is weak and entitled to a narrow scope of protection because it is descriptive and registered on the Supplemental Register.<sup>6</sup> We agree that the level of descriptiveness of a cited mark

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<sup>6</sup> 4 TTABVUE 8-9 (Applicant’s Brief). Applicant relies on portions of the file history of the Registration in its brief, *id.* at 7, but did not submit the file history into the record. The file of a cited registration is not automatically of record, and it is well-established that the Board does not take judicial notice of records residing in the USPTO. *See, e.g., In re Sela Prods., LLC*, 107 USPQ2d 1580, 1583 (TTAB 2013); *In re Jonathan Drew Inc.*, 97 USPQ2d 1640, 1644 n.11 (TTAB 2011); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1208.02 (2021). Nevertheless, Registrant’s mark may be primarily geographically descriptive of its beer to the extent Registrant is located in the same general vicinity as Rockaway, New York, a recognized geographic location. *See Pinocchio’s Pizza Inc. v. Sandra Inc.*, 11 USPQ2d 1227, 1229 n. 6 (TTAB 1989) (taking judicial notice of the location of Catonsville, Maryland). Such marks, however, are not generic designations, and are usually eligible for registration on the Principal Register upon a showing of acquired distinctiveness. *See Trademark Act* § 2(f), 15 U.S.C. § 1052(f). Thus, while we cannot assume that Registrant’s mark is now eligible for registration on the Principal Register, the cited mark does not, as a whole, appear to be generic or highly descriptive of Registrant’s goods. Geographic descriptiveness is a separate inquiry from determining likelihood of confusion, and even if a geographically descriptive mark may not be given a broad scope of protection, the fact that it is registered on the Supplemental Register is enough for it to ground the *ex parte* refusal of an application for registration of a similar mark for use on closely related goods or services.

may influence whether confusion is likely. *In re Clorox Co.*, 578 F.2d 305, 198 USPQ 337, 341 (CCPA 1978). However, even if there is some degree of inherent weakness to the word ROCKAWAY, even weak marks are entitled to protection against a mark that is substantially similar in sight, sound, and commercial impression and is used on or in connection with goods that are related. *See In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1676 (TTAB 2018) (citing *China Healthways Inst., Inc. v. Wang*, 491 F.3d 1337, 83 USPQ2d 1123, 1125 (Fed. Cir. 2007)).

Overall, considering the marks in their entireties and taking into account that the mark in the Registration is registered on the Supplemental Register, we find that the first *DuPont* factor favors a finding of likelihood of confusion.

### **B. Similarity of the Goods and Trade Channels**

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods ... 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; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014).

The goods need not be identical or even competitive in order to find a likelihood of confusion. Rather, the question is whether the goods are marketed in a manner that

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*Cf. In re Research and Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (“Board correctly applied the ROPELOCK registration on the Supplemental Register as a reference in terms of section 2(d) against the application for registration of ROPELOCK on the Principal Register. It is not material whether or not registration on the Supplemental Register implies that there is a degree of descriptiveness to that mark....”).

“could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs., Inc.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (“Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services.”).

### **1. Third-Party Use Evidence**

The Examining Attorney argues that the respective goods “are sold in the same trade channels and to the same class of consumers.”<sup>7</sup> In particular, he contends that Registrant’s “beer” and Applicant’s goods, which he characterizes as “non-alcoholic water-based beverages,” “are sold under the same brand name.”<sup>8</sup> In support, he refers to third-party use evidence he made of record, including the following:<sup>9</sup>

- “Appalachian Brewing Company offers a variety of Flagship beers,” as well as well as “Appalachian Craft Soda”<sup>10</sup> that “is small-batched brewed to the highest standards using only the finest ingredients” and “natural sweeteners

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<sup>7</sup> 6 TTABVUE 6 (Examining Attorney’s Brief).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> “Soda” is “a sweet drink consisting of soda water, flavoring, and often ice cream,” MERRIAM-WEBSTER DICTIONARY (merriam-webster.com), or “carbonated water,” THE AMERICAN HERITAGE DICTIONARY (ahdictionary.com), both accessed February 23, 2022. The Board may take judicial notice of dictionary definitions from online sources when the definitions themselves are derived from dictionaries that exist in printed form or have regular fixed editions. *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).



like pure cane sugar, stevia and honey.... Naturally gluten-free and caffeine-free, you'll feel good every time you share our products with friends and family of all ages!"<sup>11</sup>

- Millstream Brewing Co. sells various beers (i.e. unfiltered wheat and peach-flavored beers) and sodas (i.e., root beer, cream soda, and ginger beer) under its MILLSTREAM brand.<sup>12</sup>
- Motor City Brewing Works offers various beers (i.e., a pineapple-jalapeno beer), ciders, wines, and sodas under its MOTOR CITY brand.<sup>13</sup>
- Roslyn Brewing Company offers several beers, as well as a root beer soft drink under its ROSLYN brand that it describes as "an excellent thirst quencher and very popular with our customers."<sup>14</sup>
- Saint Arnold, another brew company, offers different beers (i.e., a blonde ale "with real blood oranges," an Indian Pale Ale that is low-calorie "with juicy pineapple and melon flavors "that will enlighten you," and "a fruited Berliner Weisse" "wheat beer brewed with lots and lots of real raspberry") and cider, as well as a root beer under its SAINT ARNOLD brand.<sup>15</sup> "The only way to

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<sup>11</sup> December 14, 2020 Office Action, TSDR 8-12 (abcbrew.com).

<sup>12</sup> *Id.* at 13-18 (millstreambrewing.com). The Examining Attorney's Brief includes a quotation from Millstream Brewing Co.'s website that is not shown in the webpage excerpts of record.

<sup>13</sup> *Id.* at 19-20. The Examining Attorney's Brief includes a quotation from Motor City Brewing Works' website that is not shown in the webpage excerpts of record.

<sup>14</sup> *Id.* at 21-22 (roslynbrewery.com).

<sup>15</sup> January 27, 2021 Final Office Action, TSDR 6-18 (saintarnold.com). "Root beer" is "a carbonated soft drink flavored with extracts of certain plant roots and herbs and usually artificial flavorings." THE AMERICAN HERITAGE DICTIONARY, accessed February 21, 2022.

improve on our Root Beer is to add a scoop of vanilla ice cream.”<sup>16</sup>

- Sprecher Brewing Co. sells beers, sodas, and waters under its SPRECHER brand.<sup>17</sup> Its website displays a video about the secret recipe of its root beer, and encourages prospective customers to “try our hand-crafted soda collection.”<sup>18</sup>
- St John Brewers Island Brewery & Pub in the U.S. Virgin Islands offers “Local craft beers, sodas and our Green Flash energy drink!” in its Tap Room.<sup>19</sup>
- Stevens Point Brewery offers beer and “gourmet soda” (i.e., root beer, vanilla cream, black cherry cream, orange cream, and a “kitty cocktail”) together under its POINT brand.<sup>20</sup>
- Stone Arch Brewpub & Dining Room offers beers (i.e., a “Fruited Gose” beer), hard seltzer (i.e., mango flavored), and “gourmet sodas” in its brewpub, dining room, taproom, and “to go.”<sup>21</sup>

Summarizing this evidence, the Examining Attorney argues that:

Applicant’s goods consisting of non-alcoholic water-based beverages, and registrant’s goods consisting of beer are the types of products, while not viewed as being identical, are sold side-by-side as the above referenced websites indicate ... A consumer entering a brick and mortar store, a bar or restaurant, or visiting an online retailer, would enter the section where these type of goods are sold and see them either adjacent to each other or near each other or in the case of restaurants, on the same menu, and because of the similarities of the marks, would assume they come from same or a related source. As can be noted, it is common practice in

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<sup>16</sup> *Id.* at 18.

<sup>17</sup> *Id.* at 20-23 (sprecherbrewery.com).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 24-25 (stjohnbrewers.com).

<sup>20</sup> *Id.* at 26-29 (pointbeer.com).

<sup>21</sup> *Id.* at 30-35 (stonearchbrewpub.com).

the trade that applicant's and registrant's goods are of the type featured in certain restaurant and bar establishments.<sup>22</sup>

Applicant agrees that the Examining Attorney's "evidence show[s] that breweries and beer producers often sell root beer, soda, soft drinks, hard cider, or hard seltzers in addition to beer," but asserts that its goods do not include any of those products.<sup>23</sup> Applicant also criticizes the Examining Attorney's characterization of its goods as "non-alcoholic water beverages." According to Applicant:

[T]he Examining Attorney's brief incorrectly identified the parties' goods as "**beer and non-alcoholic water-based beverages**" in at least three separate instances. This is important to correct because Applicant's goods in the ROCKAWAY application are significantly more limited. Applicant's goods are "**Non-alcoholic sparkling water-based beverages, namely, functional beverages containing herbal extracts, plant infusions, and fruit.**" These goods can be seen in the Allegation of Use filed by Applicant concurrently with the present reply brief.... As can be seen from Applicant's specimens of use, [Applicant's] goods do not span the broad universe of water-based beverages. Rather, they are a specific type of sparkling health beverage containing herbal extracts, plant infusions, and fruit.

The Examining Attorney's brief noted the infirm definition of functional beverages. However, discomfort with this relatively new industry term-of-art should not prevent registration of Applicant's mark on its distinct goods. The specimens submitted with Applicant's Allegation of Use show that its functional beverages are not the equivalent of "water-based beverages" but instead identify a narrow type of health beverage with carefully selected ingredients that provide various physical benefits, such as reducing inflammation or boosting immunity.<sup>24</sup>

The Examining Attorney disagrees that Applicant's recent amendment to its identification of goods to specify that its "non-alcoholic [sparkling] water-based

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<sup>22</sup> 6 TTABVUE 8-9 (Examining Attorney's Brief).

<sup>23</sup> 7 TTABVUE 6 (Applicant's Reply Brief).

<sup>24</sup> *Id* (italic emphasis in original).

beverages” are “functional beverages containing herbal extracts, plant infusions, and fruit” is sufficient to distinguish the source of Applicant’s and Registrant’s goods.<sup>25</sup> He provides further Internet evidence to show that “the definition of a functional beverage is infirm,” and that, as shown by the Internet evidence above, “beers may be infused with herbs and enhancers and thus diminishing the commercial space between beers and non-alcoholic water-based beverages that may be equally infused.” For example:

- Wikipedia describes a “functional beverage” as “a conventional liquid food marketed to convey product ingredients or supposed health benefit.” It further points out that “[a]lthough a ‘functional’ beverage may be marketed as a panacea or a performance-enhancing substance, there is no scientific evidence for any specific health effects of such beverages or for their uniform regulation internationally as of 2020”;<sup>26</sup>
- The Spruce Eats has an article titled “The 10 Best Fruit Beers to Drink in 2021,” including cherry, watermelon, pear, grapefruit, raspberry, apricot and peach, and strawberry flavored “organic” beers;<sup>27</sup>
- The Manual has an article titled “We Ranked the 10 Best Fruit Flavors For Beer” that lists grapefruit, lime, watermelon, orange, pumpkin, apricot, pineapple, strawberry, raspberry, and cherry, as the best fruits to incorporate

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<sup>25</sup> 6 TTABVue 12 (Examining Attorney’s Brief).

<sup>26</sup> May 4, 2021 Reconsideration Letter, TSDR 6-9 (Wikipedia.com).

<sup>27</sup> *Id.* at 10-11 (thespruceeats.com).

into a fruit beer.<sup>28</sup>

- Craft Brewing Business has an article, “Brewing with spice: Here are 28 spice and herb flavor profiles for your next infused beer,” which lists anise, chamomile flowers, cardamom, chilis, cinnamon, cloves, coriander, fennel seeds, fenugreek seeds, ginger root, ginseng, hibiscus flowers, lavender petals, lemongrass, juniper berries, lemon peels, licorice root, lime peel, peppercorns, peppermint, sweet and bitter orange peel, rooibos, rosehips, sage, stevia, and turmeric as preferred ingredients.<sup>29</sup> According to the article, “[m]ore brewers are expanding their ingredient horizons and exploring the world of herbs, spices and teas during the brewing process.”<sup>30</sup>

- The Beverage People Fermenter’s Warehouse website has an article, “Brewing With Herbs & Spices,” explaining that while “[h]ops are the most common herb in beer nowadays,” “long before the Reinheitsgebot [“the Bavarian Purity Law limiting the ingredients that could be used to make beer”], “a plethora of ingredients were used to bitter, flavor, and add aroma to beers.”<sup>31</sup> The article goes on to provide a “general list of potential herbs and spices you can use in brewing,” including vanilla, coriander, cinnamon, cardamom, bitter and sweet orange peel, licorice, sarsaparilla, chamomile, paradise seed, mugwort, spruce tips, redwood tips, coffee, hibiscus, cloves,

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<sup>28</sup> *Id.* at 12-25 (themanual.com).

<sup>29</sup> *Id.* at 31-36 (craftbrewingbusiness.com).

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

<sup>31</sup> *Id.* at 39-44 (thebeveragepeople.com).

basil, chili pepper, caraway seed, peppermint, heather, nutmeg, rosemary, black pepper, and ginger.”

In reply to such evidence, Applicant argues that:

[B]eing flavored with the same added ingredients does not mean that consumers are at risk of confusing these goods. After all, fruit and herbs can be added to any number of food or beverage products, but that does not increase their relatedness for likelihood of confusion purposes. “Something more” must be shown to establish likelihood of confusion. *In re Cent. Soya Co.*, 220 U.S.P.Q. at 916 (mere use of an identical mark on food products and restaurant services not enough to establish likelihood of confusion). Here, the Examining Attorney has not shown that “something more.”

“However, the question is not whether consumers will confuse the beverages, but whether they will confuse the source of the beverages.” *Orange Bang, Inc. v. Olé Mexican Foods, Inc.*, 116 USPQ2d 1102, 1117 (TTAB 2015) (citation omitted). Applicant’s reliance on *In re Cent. Soya Co., Inc.* 220 USPQ 914, 916 (TTAB 1984), which cites *Jacobs v. Int’l Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982), for the proposition that “something more” is needed to show the relationship between food products and restaurant services, is also not apt. The “something more” requirement is limited to certain factual situations where the relationship “is not evident, well-known or generally recognized.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1087 (Fed. Cir. 2014) (something more needed to show health care services related to printed materials). *See also In re Coors Brewing Co.*, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003) (“finding of relatedness between food and restaurant services requires ‘something more’ than the fact that restaurants serve food” (quoting *Jacobs v. Int’l Multifoods Corp.*, 668 F.2d 1234, 1236 (CCPA 1982)).

Such facts are not present in this case, where it is apparent from the record that the same entities provide both beers and non-alcoholic water-based beverages, including those that are sparkling or carbonated.

In any event, we agree with the Examining Attorney that Applicant's characterization of its "non-alcoholic sparkling water-based beverages" as "functional beverages containing herbal extracts, plant infusions, and fruit" in order to convey "supposed health benefits" (as Wikipedia puts it), does not avoid a finding of relatedness or confusion as to source.

Applicant argues that "this evidence misses the point – sharing some of the same ingredients does not make beer related to sparkling functional beverages."<sup>32</sup> We disagree with this contention, since there is no clear definition of what is or is not a "functional" beverage, and the evidence shows that many of the same ingredients, as well as other fruits and herbs, are used in making beer. Notably, the specimen of use Applicant provided with its allegation of use shows that Applicant's "Coastal Immunity" drink contains pineapple, ginger, tulsi, turmeric, and sea salt; its "Tidal Defense" drink contains berry, hibiscus, vitamin C, astragalus, and sea salt; its "Endless Summer Energy" drink contains watermelon, guava, maca, ginseng, and sea salt; and its "Last Stop Chill" drink contains lemon, lemongrass, ashwagandha, and sea salt.<sup>33</sup> As the Examining Attorney's evidence shows, many beers today also include herbal extracts, plant infusions, and/or fruit, just like Applicant's purportedly

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<sup>32</sup> 7 TTABVUE 9 (Applicant's Reply Brief).

<sup>33</sup> December 14, 2021 Specimen of Use, TSDR 1-2.

“functional” non-alcoholic water-based beverages.

When a registration describes goods broadly, as the Registration does here with “beers,” and there is no limitation as to their nature, it is presumed that the registration encompasses all goods of the type described, including beers that contain herbal extracts, herbal infusions, and/or fruit that could be classified as functional. *See Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1373, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”).

Similarly, with respect to channels of trade and classes of purchasers, because the goods are related and contain no limitations, it is presumed that they move in all channels of trade normal for those goods, and that they are available to all classes of purchasers, including health-conscious consumers seeking herbal and fruit infusions in their beers or other sparkling beverages. *See Stone Lion*, 110 USPQ2d at 1161. *See also Coach Servs.*, 101 USPQ2d at 1723 (absent limitation “goods are presumed to travel in all normal channels . . . for the relevant goods.”).

## **2. Third-Party Registration Evidence**

In addition to the third-party use evidence discussed above, the Examining Attorney also provided evidence in the nature of numerous third-party use-based registrations from the USPTO’s X-Search database,<sup>34</sup> including the following thirteen representative examples we consider relevant, to “show[] that “beer and non-alcoholic

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<sup>34</sup> January 27, 2021 Final Office Action, TSDR 36-78.



water-based beverages, are of a kind that may emanate from a single source under a single mark”:<sup>35</sup>

Reg. No.	Mark	Pertinent Goods/Services
6240327	2ND PHASE BREWING	Beer; ale; lager; porter; stout; lager; stout, pilsner; shandy; <sup>36</sup> flavored beer; ginger beer; non-alcoholic beer; non-alcoholic beer flavored beverages; non-alcoholic cider, and root beer.
6187703	LOUIS HILTON	Ale; beer; soda water; water beverages.
6257973	CHEERSWEET	Beer; non-alcoholic fruit juice beverages.
6071571 (Supplemental Register)	MALTA REGIONAL and Design	Beer; Fruit juice; Fruit juice beverages; Fruit drinks; Mineral water; Non-alcoholic fruit juice beverages; Non-alcoholic beverages containing fruit juices; Non-alcoholic sparkling fruit juice beverages.
6203888	CZ CERVEZA ZULIA LA ORIGINAL and Design	Beer; fruit juice beverages; mineral water; non-alcoholic fruit juice beverages; non-alcoholic beverages containing fruit juices; non-alcoholic sparkling fruit juice beverages.
6157972	BEERBURG BREWING AUSTIN, TX and Design	Beer; craft beers; soft drinks, namely, sodas.
6232592	WHOLEBERRY (stylized)	Aerated water; aloe vera drinks; beer; cola; energy drinks; fruit

<sup>35</sup> 6 TTABVUE 9 (Examining Attorney’s Brief);

<sup>36</sup> A “shandy” is “a drink consisting of beer mixed with a nonalcoholic drink: ... *especially*: beer mixed with lemon soda.” MERRIAM-WEBSTER DICTIONARY (merriam-webster.com), accessed February 23, 2022.

Reg. No.	Mark	Pertinent Goods/Services
		drinks and juices; non-alcoholic fruit juice beverages; soft drinks; sports drinks; water beverages.
6256746	COOL OUT	Beer; non-alcoholic beverages, namely, seltzers, soft drinks, flavored water and fruit juices.
3817129	ICE COOL and Design	Beauty beverages, namely, fruit juices and energy drinks containing nutritional supplements; beer; drinking water; drinking water with vitamins; energy drinks; fruit flavored soft drinks; mineral and aerated waters; non-alcoholic beverages containing fruit juices; non-alcoholic beverages, namely, carbonated beverages; non-alcoholic honey-based beverages; pop; soft drinks; soft drinks, namely, carbonated soft drinks; sports drinks; energy drinks.
6148932 6149001	MATERNITA V PEDIA-V	Beer; non-alcoholic fruit juice beverages; protein-enriched sports beverages; energy drinks; mineral water.
6165352	Misc. Design	Bottled water; energy drinks; fruit-flavored beverages; fruit flavored soft drinks; sports drinks; non-alcoholic beverages containing fruit juices; mineral waters; water beverages; drinking waters; drinking water with vitamins; soda pops; protein-enriched sports beverages; carbonated water; soda water.

Reg. No.	Mark	Pertinent Goods/Services
6198791	SOBER CURIOUS	Water beverages; non-alcoholic beverages, namely, flavored waters, drinking water; carbonated beverages; non-alcoholic beverages containing fruit juices; energy drinks; alcoholic beverages, namely, beer.

This third-party registration evidence further supports the relationship between beer and various non-alcoholic sparkling water-based beverages, including many that could be considered “functional” by Applicant’s definition. *See Detroit Athl.*, 128 USPQ2d at 1050 (crediting relatedness evidence showing that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard Co.*, 62 USPQ2d at 1004 (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

In sum, we find the third-party use evidence sufficient to establish that “non-alcoholic sparkling water-based beverages,” including those that contain “herbal extracts, plant infusions, and fruit” and therefore, according to Applicant (and Wikipedia) may be called “functional beverages,” are of a type that commonly originate from the same source under the same mark, and are used by the some of the same consumers. Similarly, although the third-party registrations are not evidence that the registered marks are in use or that the public is familiar with them,

they nonetheless have probative value to the extent they are based on use in commerce and serve to suggest that such goods are of a kind which may emanate from a single source under a single mark. *See In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

With respect to channels of trade and classes of purchasers, because the goods are related and contain no limitations as to channels of trade, classes of consumers or prices, it is presumed that they move in all channels of trade normal for those goods, and that they are available to all classes of purchasers, including health-conscious consumers seeking herbal and fruit infusions in their beers or other sparkling beverages, at all price points. *See Stone Lion*, 110 USPQ2d at 1161. *See also Coach Servs.*, 101 USPQ2d at 1723 (absent limitation “goods are presumed to travel in all normal channels . . . for the relevant goods.”). The third-party websites demonstrating that the goods identified in both the Application and Registration are related (e.g., Millstream Brewing Co. and Saint Arnold) also support a finding that such goods move in the same channels of trade, such as breweries, and that they are sold to the same classes of consumers, namely, adult members of the general public. *See In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012); *Stone Lion*, 110 USPQ2d at 1161.

Based on the foregoing, the second and third *DuPont* factors weigh in favor of finding likelihood of confusion.

## **II. Conclusion**

Having considered all evidence and arguments bearing on the relevant *DuPont*

factors, including similarity of the marks, similarity of the goods and trade channels, we conclude that Applicant's mark ROCKAWAY for "Non-alcoholic sparkling water-based beverages, namely, functional beverages containing herbal extracts, plant infusions, and fruit" is likely to cause confusion with Registrant's mark ROCKAWAY BREWING COMPANY for "Beer; Brewed malt-based alcoholic beverage[s] in the nature of a beer."

**Decision:** The refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), is affirmed.