

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: April 12, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Valhalla Spirits, LLC

Serial No. 90729792

Valhalla Spirits, LLC, pro se, by Greg Meffert, Director.

Rohini Pandit, Trademark Examining Attorney, Law Office 117,
Cynthia Tripi, Managing Attorney.

Before Cataldo, Shaw, and Coggins,
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Valhalla Spirits, LLC (“Applicant”) seeks registration on the Principal Register of the mark VALHALLA VODKA (in standard characters, with VODKA disclaimed) for goods ultimately identified as “alcoholic beverages, namely, vodka and beverages containing vodka,” in International Class 33.¹

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 VALHALLA

¹ Application Serial No. 90729792 was filed on May 24, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

VODKA mark, as applied to the alcoholic beverages identified in the application, so resembles the mark VALHALLA (in typed form) for “alcoholic beverages, namely, wines,” in International Class 33,² on the Principal Register as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant requested reconsideration. After the Examining Attorney denied the request for reconsideration, Applicant appealed to this Board. We affirm the refusal to register.

I. Evidentiary Issues

The Examining Attorney objects as untimely to the 16 pages of printouts from various websites attached to Applicant’s brief because they were not submitted during prosecution of the application but only during appeal with the brief.³ Applicant replies that “[i]t is not clear . . . why the Examining Attorney would desire the Board to disregard relevant facts” purportedly demonstrated by the new evidence “consist[ing] of readily available internet web pages” which “provide publicly available knowledge that relate to the facts in this Appeal,”⁴ and repeatedly asks us to consider this evidence.

² Registration No. 2676364, issued January 21, 2003. Renewed; Section 15 Declaration acknowledged. A typed mark is the legal equivalent of a standard character mark. *See In re Vitterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012).

³ Examining Attorney’s Brief, 6 TTABVUE 2 (objection); Applicant’s Brief, 4 TTABVUE 22-37 (attachments as Exhibits A-P). Citations to the briefs in the appeal record refer to the TTABVUE docket system; citations to the prosecution record refer to the .pdf version of the TSDR system. *See In re Integra Biosciences Corp.*, 2022 USPQ2d 93, *7 (TTAB 2022).

⁴ Applicant’s Reply Brief, 11 TTABVUE 2-3.

It is well-settled that the record in an ex parte proceeding should be complete prior to appeal. Trademark Rule 2.142(d); 37 C.F.R. § 2.142(d). Exhibits that are attached to a brief but not made of record during examination are untimely, and will not be considered. *See In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018) (“The evidence submitted with Applicant’s appeal brief that Applicant did not previously submit during prosecution . . . is untimely and will not be considered.”), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 1203.02(e) and 1207.01 (2022). If Applicant wished to introduce additional evidence, its recourse was to file a separately captioned written request with the Board to suspend the appeal and remand the application for further examination pursuant to Trademark Rule 2.142(d)(1). *See* TBMP § 1207.02. Applicant did not do so.⁵ Accordingly, the Examining Attorney’s evidentiary objection is sustained, and we give no consideration to the evidence submitted for the first time with Applicant’s appeal brief.

There are similar issues with Applicant’s reply brief. We will not, for example, consider the list of registrations embedded within that brief and to which the

⁵ Applicant did file a request for reconsideration prior to the appeal, but attached only two pages of evidence thereto. *See* June 2, 2022 Request for Reconsideration. The two pages attached to the request lack a URL and date, but the Examining Attorney did not object. Since any objection has been waived, we consider that evidence. *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1587 (TTAB 2018). Additionally, one of the pages attached to that request (purportedly from Registrant’s website) matches one of the pages attached to Applicant’s brief; however, the matching page attached to the brief was supplemented with additional matter from the same source which was not previously submitted. *See id.* at 6; 4 TTABVUE 23-24. We consider only the pages as filed with the request for reconsideration, not the new evidence.

Examining Attorney had no opportunity to respond.⁶ The Board does not take judicial notice of registrations, and the submission of a list of registrations does not make the registrations part of the record. *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007); TBMP § 1208.02 (“[T]he Board does not take judicial notice of records residing in the Patent and Trademark Office.”).

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

Our determination under Section 2(d) involves an analysis of all probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*,” setting forth factors to be considered and referred to as “*DuPont* factors”) cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

“Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). We

⁶ See 7 TTABVUE 4 (listing five registrations purportedly owned by Eastman Kodak Company).

consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). “Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

Varying weights may be assigned to the *DuPont* factors depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1260 (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.”). “Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods . . . because 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.’” *In re Embiid*, 2021 USPQ2d 577, at *10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). *See also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent consumer confusion as to source and to protect registrants from damage caused by registration of similar marks likely to cause such confusion. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *see also Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

A. 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 entirety, considering their appearance, sound, connotation, and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee 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, LLC*, 126 USPQ2d at 1746; *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014).

Registrant's mark is VALHALLA, and Applicant's mark is VALHALLA VODKA. The marks share the identical term VALHALLA, which comprises the entirety of Registrant's mark and the dominant portion of Applicant's mark. In its main brief, Applicant appears to concede that its "[m]ark may appear similar to the Registrant's [m]ark in terms of appearance."⁷ To the extent that Applicant's and Registrant's marks contain the identical term VALHALLA, the marks are similar in sound and appearance. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-344 (Fed. Cir. 1997).

The AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE defines VALHALLA as "*Norse Mythology* The hall in which Odin received the souls of slain

⁷ 4 TTABVUE 4.

heroes.”⁸ There is no evidence of record demonstrating that VALHALLA would have any other meaning in connection with wines or vodka. To the extent that Applicant’s and Registrant’s marks contain the identical term VALHALLA, the marks are also similar in connotation and commercial impression.

The term VODKA is the generic designation of Applicant’s vodka. *See Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1045 (Fed. Cir. 2018) (“A generic term ‘is the common descriptive name of a class of goods or services.’”) (quoting *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)). Applicant’s mark adds the generic term VODKA to Registrant’s mark. Consumers are less likely to focus on such term to indicate source. Because the term VODKA is generic and has been appropriately disclaimed by Applicant, it is less likely to make an impact in the minds of consumers. *See In re Dixie Rests.*, 41 USPQ2d at 1533-34 (disclaimed matter that is descriptive of or generic for a party’s goods is typically less significant or less dominant when comparing marks).

We find that when considered in their entirety the cited mark VALHALLA and Applicant’s mark VALHALLA VODKA are highly similar in appearance, sound, connotation, and commercial impression. Accordingly, the first *DuPont* factor strongly favors finding a likelihood of confusion.

⁸ Ahdictionary.com (accessed April 5, 2023). “The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions.” *In re tapio GmbH*, 2020 USPQ2d 11387, at *3 n.10 (TTAB 2020).

B. Strength of the Cited Mark

The fifth and sixth *DuPont* factors are relevant to Applicant's arguments that the cited mark is weak⁹ because they involve, respectively, the strength of the prior mark and the number and nature of similar marks in use on similar goods. *See DuPont*, 177 USPQ at 567; *In re Embiid*, 2021 USPQ2d 577, at *33. These factors may be considered in tandem to determine the strength of the cited mark and the scope of protection to which it is entitled. *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017).

We therefore consider the inherent or conceptual strength of the cited mark based on the nature of the mark itself, and its commercial strength based on marketplace recognition if there is any evidence regarding commercial strength. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength."); *New Era Cap. Co. v. Pro Era LLC*, 2020 USPQ2d 10596, at *10 (TTAB 2020); *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength).

1. Conceptual Strength

In assessing the inherent or conceptual strength of the mark VALHALLA, we start with its definition. *See Hancock v. Am. Steel & Wire Co. of N.J.*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) (In assessing the mark, we may consider dictionary

⁹ *See* 4 TTABVUE 15-17; 7 TTABVUE 9-11.

definitions “to determine the ordinary significance and meanings of words.”). As indicated above, the dictionary definition of VALHALLA is “*Norse Mythology* The hall in which Odin received the souls of slain heroes.”¹⁰ There is no evidence of record demonstrating that VALHALLA has any meaning in connection with wine. Nor is there any evidence of third-party registrations demonstrating that VALHALLA has a normally understood and well recognized descriptive or suggestive meaning in connection with wine. *See, e.g., Jack Wolfskin Austrang Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Top Tobacco v. N. Atl. Operating Co.*, 101 USPQ2d at 1173. Applicant makes no argument that the mark is conceptually weak.

Based on the record, VALHALLA is arbitrary for wine, and we therefore find that Registrant’s mark is conceptually strong. *See Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004) (defining an arbitrary mark as a “known word used in an unexpected or uncommon way” and observing that such marks are typically strong). As an arbitrary mark, it falls on the stronger side of the distinctiveness spectrum. *See Palm Bay Imps.*, 73 USPQ2d at 1692 (arbitrary terms are conceptually strong trademarks).

2. Commercial Strength

While there is no evidence of record relating to commercial strength under the fifth *DuPont* factor,¹¹ Applicant argues under the sixth factor that VALHALLA is

¹⁰ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (ahdictionary.com). *See supra* footnote 8.

¹¹ In an ex parte appeal, the owner of the cited registration is not a party, and the Examining Attorney is under no obligation to demonstrate exposure to or recognition of the cited mark

used by multiple third-parties in connection with wine, vineyards, and beer.¹² There is no evidence of record to support Applicant's argument, *see e.g., Palm Bay Imps.*, 73 USPQ2d at 1693 ("Evidence 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."), and argument is no substitute for evidence. *See In re Nextgen Mgmt., LLC*, 2023 USPQ2d 14, *4 (TTAB 2023) (citing *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018)).

3. Conclusion as to Strength

We find based on the record before us that the registered mark VALHALLA is an inherently strong mark for which Applicant has not demonstrated any commercial weakness. We therefore afford Registrant's mark the broad scope of protection to which arbitrary and distinctive marks are entitled. *See Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (stating that likelihood of confusion fame varies along a spectrum from very strong to very weak).

C. Similarity or Dissimilarity of the Goods and Trade Channels

The second *DuPont* factor considers the similarity or dissimilarity and nature of the goods as described in an application or registration, and the third *DuPont* factor considers the similarity or dissimilarity of established, likely-to-continue trade

in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). *See also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01(d)(ix) (July 2022); *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006).

¹² 4 TTABVUE 16-17; 7 TTABVUE 10-11.

channels. *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *19 (TTAB 2021) (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018) and *DuPont*, 177 USPQ at 567).

The issue is not whether purchasers would confuse the goods, but whether there is a likelihood of confusion as to the source of the goods. *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, *5 (TTAB 2020); *L’Oreal v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012). The goods need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be “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., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *see also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993).

In considering the similarity or dissimilarity of the goods, we look to the identifications in the application (here, “alcoholic beverages, namely, vodka and beverages containing vodka”) and cited registration (“alcoholic beverages, namely, wines”). *See Detroit Athletic Co.*, 128 USPQ2d at 1052; *Stone Lion*, 110 USPQ2d at 1162; *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Evidence of relatedness may include excerpts from computer databases showing that the goods are used by the same purchasers; advertisements showing that the goods are advertised together or sold by the same manufacturer or dealer; and copies of prior use-based registrations of the same mark for both applicant's goods and the goods listed in the cited registration. *In re Embiid*, 2021 USPQ2d 577, at *22-23 (citing *Ox Paperboard*, 2020 USPQ2d 10878, at *5; and *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”)).

The Examining Attorney argues that Applicant's “alcoholic beverages, namely, vodka and beverages containing vodka” are related to Registrant's “alcoholic beverages, namely, wines” because the respective goods commonly emanate from a single source, are sold through the same trade channels, are used by the same classes of consumers, and are complementary in terms of purpose or function.¹³

In support of these positions, the Examining Attorney cites copies of third-party webpages made of record in the March 1, 2022 Office action and July 13, 2022 Reconsideration Letter showing various third parties offering and advertising under the same mark wine and vodka.¹⁴ The following examples are illustrative:

- Cedar Ridge offers wine and vodka under the mark Cedar Ridge;¹⁵

¹³ 6 TTABVUE 7.

¹⁴ 6 TTABVUE 6-7.

¹⁵ March 1, 2022 Office action at 6-8.

- Charbay offers wine, vodka, and vodka-based beverages under the mark Charbay;¹⁶
- Fiore Winery offers wine and vodka under the mark Fiore;¹⁷
- Denmark Distilling produces and sells wine and vodka. As the website explains, “With our creativity in wine and brewing beer since the 1990’s, distilling was the last piece of the puzzle. We decided to start distilling in May of 2018. We started with a few spirits: Sugar Moonshine, Triple-distilled Vodka and Skipper Jim’s Rum. We currently have three stills: a reflux column still for distilling our vodka and gin and two traditional pot stills.”);¹⁸
- Flag Hill is both a winery and distillery, offering wine and vodka under the mark Flag Hill;¹⁹
- McMenamins offers wine and vodka, both under the marks McMenamins and Edgefield;²⁰
- Six Mile Creek Winery & Distillery offers wine, vodka, and beverages containing vodka, all under the marks Six Mile Creek and SMC;²¹ and
- Nashoba Valley is both a winery and distillery, offering wine and vodka under the mark Nashoba.²²

Applicant attempts to diminish this evidence by arguing that at least two of the cited third parties offer a variety of other goods such as food and clothing “that are clearly not related to each other” and that “there mere fact that a single entity sells two different products does not automatically make those products ‘related’ for likelihood of confusion purposes.”²³ The evidence of record does not support this

¹⁶ March 1, 2022 Office action at 9-15.

¹⁷ March 1, 2022 Office action at 16-17.

¹⁸ March 1, 2022 Office action at 21.

¹⁹ March 1, 2022 Office action at 23-30.

²⁰ July 13, 2022 Reconsideration Letter at 5-9.

²¹ July 13, 2022 Reconsideration Letter at 10-6.

²² July 13, 2022 Reconsideration Letter at 17-28.

²³ 4 TTABVUE 12.



argument. Applicant also argues that “wine and vodka are clearly distinct products,”²⁴ but, of course, that is not the test. The question is not whether consumers would confuse the goods, but whether there is a likelihood of confusion as to their source. *In re Ox Paperboard*, 2020 USPQ2d 10878, at *5. All that is required is simply that the goods are related in some manner or the marketing therefor could give rise to the mistaken belief that they emanate from a common source. *See Coach Servs.*, 101 USPQ2d at 1722; *In re G.B.I. Tile and Stone, Inc.*, 92 USPQ2d 1366, 1371 (TTAB 2009) (holding the goods, while different and not interchangeable, are related because the evidence, including Internet excerpts showing third parties using the same marks for both sets of products, clearly demonstrates that there are entities that are the source of both sets of products); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009); *Seaguard Corp. v. Seaward Int’l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (it is a “well-settled proposition” that goods do not have to be similar or even competitive, only that they are related in some manner or their marketing is such that they would be encountered by the same persons under conditions that could give rise, because of the marks used thereon, to the mistaken belief that they emanate from or are in some way associated with the same source).

We find that the third-party webpage evidence showing the same mark used for both Applicant’s goods and Registrant’s goods is probative to demonstrate that the goods are related for likelihood of confusion purposes. *See, e.g., Detroit Athletic Co.*, 128 USPQ2d at 1051 (relatedness supported by evidence that third parties sell both

²⁴ 4 TTABVUE 11.

types of goods under same mark, showing that “consumers are accustomed to seeing a single mark associated with a source that sells both.”); *In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012) (Internet excerpts from “several third-party car dealerships offering ‘tires’ for sale on their websites” was “evidence that consumers expect to find both ‘tires,’ . . . “and ‘automobiles’ . . . emanating from a common source.”).

In further support of the relationship between the goods, the Examining Attorney submitted the following five, use-based, third-party registrations for marks identifying, inter alia, wine and vodka:²⁵

- Registration No. 6170335 for the mark 5 LETTER;
- Registration No. 6430851 for the mark  ;
- Registration No. 6255413 for the mark  Necstar;
- Registration No. 6405190 for the mark KUCH NAI; and
- Registration No. 6530860 for the mark COMTE DE BRIM

These third-party registrations based on use in commerce that individually cover a number of different goods serve to suggest that the listed goods are of a type that may emanate from the same source. *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *8 (TTAB 2019); *In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018); *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013).

Applicant points to the decision in *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282 (TTAB 2009) in support of its contention that wine and vodka are not related.

²⁵ March 1, 2022 Office action at 44-55.

However, in *White Rock*, the Board not only found insufficient support in the record for the examining attorney's argument that "energy vodka infused with caffeine" was related to "sparkling fruit wine, sparkling grape wine, sparkling wine, [and] wines," but also found that the applicant's mark VOLTA was more dissimilar from, than



similar to, the registered mark ^{T E R Z A}_{VOLTA}. 92 USPQ2d at 1285. In the case before us, the Examining Attorney's evidence of record supports a finding that vodka and wine emanate from common sources, under the same house marks or trademarks, and as discussed above, we find the marks highly similar in their entirety.

With regard to the similarity of the trade channels in which the goods are encountered, we must base our likelihood of confusion determination on the goods as they are identified in the application and registration at issue. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). *See also Octocom*, 16 USPQ2d at 1787 ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."). Neither the cited registration nor the application contains any restrictions on the channels of trade or classes of purchasers for the broadly-identified wine, vodka, and beverages containing vodka.

In other words, we may not limit or restrict Applicant's broadly identified vodka and beverages containing vodka, or the similarly unrestricted wine listed in the cited registration by availability in certain stores, or limited to local sales, but rather must consider both wine and vodka available at all typical vendors. We thus are not persuaded by Applicant's arguments that the relevant classes of consumers, such as persons of legal drinking age, do not face the respective goods in a same manner due to some states' restrictions on the sale of liquor as opposed to the sale of wine.²⁶

Applicant's contentions rely upon restrictions not present in either identification of goods. The same third-party webpages referenced above demonstrate that wine, vodka, and vodka beverages may be encountered by the same classes of consumers under the same marks in at least one common trade channel – the websites of wineries and distilleries, i.e., wine and vodka producers and sellers. This evidence supports a finding, in line with the Examining Attorney's argument, that these goods are offered in at least one common channel of trade, that is, the websites operated by the third-party wineries and distilleries.

Although Applicant's argument that many states within the United States restrict the sale of hard liquor to certain stores, "during certain days and certain times, while wine has completely different regulations,"²⁷ nothing in the record suggests that any such restrictions apply to website advertising. In addition, the identifications of goods in the cited registration and involved application do not recite any limitations as to

²⁶ See 4 TTABVUE 13-14.

²⁷ 4 TTABVUE 13.

the channels of trade in which the goods are or will be offered. In the absence of trade channel limitations on the goods offered under Applicant's and Registrant's marks, we must presume that these goods are offered in all customary trade channels. *See Citigroup v. Cap. City Bank Grp.*, 98 USPQ2d at 1261; *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

In view of the evidence adduced by the Examining Attorney, we find that the second and third *DuPont* factors regarding the similarity of the goods and channels of trade also favor a finding of a likelihood of confusion.

D. Purchasing Conditions and Consumer Sophistication

"The fourth *DuPont* factor . . . considers '[t]he conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing.'" *In re Embiid*, 2021 USPQ2d 577, at *31 (quoting *DuPont*, 177 USPQ at 567). Purchaser sophistication or degree of care 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.

"[T]he applicable standard of care is that of the least sophisticated consumer." *Stone Lion Cap.*, 110 USPQ2d at 1163 (affirming that Board properly considered all potential investors for recited services, which included sophisticated investors, but that precedent requires consumer care for likelihood-of-confusion decision to be based "on the least sophisticated potential purchasers"). The purchasers in this case are ordinary consumers that drink wine, vodka, and beverages containing vodka.

Applicant argues that “[p]urchasers of alcoholic beverages tend to exercise a high degree of sophistication and care when making their purchasing decisions,” and “[c]onsumers of wine are particularly sophisticated.”²⁸ However, there is no evidence in the record of purchaser sophistication. Applicant also disagrees with the Examining Attorney’s argument that wine and vodka are relatively low-priced and may be subject to impulse buying, and argues that wine may “cost anywhere from \$10 to over \$200, or even over \$1,000 for certain brands. These are not ‘low-cost’ goods.”²⁹

We emphasize again that we are bound by the identifications of goods, which do not limit the classes of consumers, channels of trade, or the conditions of sale to any particular quality or price-point for the respective wines, vodkas, and beverages containing vodka. *See In re Guild Mortg. Co.*, 2020 USPQ2d 10279, *5 (TTAB 2020) (citing cases). Therefore, we must presume that Applicant’s and Registrant’s alcoholic beverages will be sold at all price points, including lower prices, and available in any common channels of trade. *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764-65 (TTAB 1986) (rejecting the applicant’s arguments regarding the high cost and quality of its wine and the sophistication of its purchasers, where application identified goods merely as “wine”). *See also In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1195 (TTAB 2018) (“Wine purchasers are not necessarily sophisticated or careful in making their purchasing decisions” and because “there is no restriction in the subject

²⁸ 4 TTABVUE 14.

²⁹ 7 TTABVUE 7.

application [] and registration as to price or quality, there is no reason to infer that the consumers or purchasers of these alcoholic beverages will be particularly discriminating or careful in distinguishing Applicant's wine from Registrant's."); *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (finding that not all purchasers of wine may be discriminating because while some may have preferred brands, "there are just as likely to be purchasers who delight in trying new taste treats."). There is nothing in the nature of these alcoholic beverages, without any limitation as to their type, price point, or intended consumers, to suggest their purchasers are particularly sophisticated or careful. *See In re I-Coat*, 126 USPQ2d at 1739.

In the absence of evidence relating to the degree of care purchasers exercise, the similarity of the marks and relatedness of the goods outweigh Applicant's assertion that purchasers are sophisticated or careful in their purchases. *See HRL Assocs., Inc. v. Weiss Assocs., Inc.*, 12 USPQ2d 1819, 1823 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods). Because the purchasers of the respective goods cannot be considered to have any particular sophistication about these alcoholic beverages, we find the fourth *DuPont* factor neutral.

E. Actual and Potential Confusion

Applicant contends that three other *DuPont* factors weigh in its favor because the record does not include any evidence relating to actual or potential confusion: the

absence of actual confusion (seventh factor); the length of time of contemporaneous use without evidence of actual confusion (eighth factor); and that the extent of potential confusion is de minimis (twelfth factor).³⁰ Contrary to the gist of Applicant's arguments, it is not necessary to show actual confusion in order to establish likelihood of confusion. *See e.g., Detroit Athletic Co.*, 128 USPQ2d at 1053; *Weiss Assocs. v. HRL Assocs.*, 14 USPQ2d at 1842-43. Applicant's assertion, particularly in this ex parte proceeding, is entitled to little weight. *See In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) ("uncorroborated statements of no known instances of actual confusion are of little evidentiary value"). *See also In re Bisset-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that testimony of applicant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion); *In re Binion*, 93 USPQ2d 1531, 1536 (TTAB 2009); *In re 1st USA Realty Pros. Inc.*, 84 USPQ2d 1581, 1588 (TTAB 2007); *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). In any event, the record is devoid of evidence relating to the extent of use of Applicant's and Registrant's marks that would enable us to determine whether there have been meaningful opportunities for instances of actual confusion to have occurred in the marketplace. *See In re Embiid*, 2021 USPQ2d 577, at *39; *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at *6; *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, *8-9 (TTAB 2019). Accordingly, these *DuPont* factors are considered neutral.

³⁰ 4 TTABVUE 17-19; 7 TTABVUE 11-13.

F. Any Other Established Fact Probative of the Effect of Use

The thirteenth, “catchall” *DuPont* factor “pertains to ‘any other established fact probative of the effect of use,’” *Country Oven*, 2019 USPQ2d 443903, at *15, and “accommodates the need for flexibility in assessing each unique set of facts” *Id.* (quoting *In re Strategic Partners Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012)).

Applicant observes that while the cited registration originally issued for “alcoholic beverages, namely wine and spirits,” sometime during its twenty-year life the registration was amended to delete “and spirits” from the identification.³¹ Applicant argues that the amendment demonstrates “that Registrant is clearly not associating spirits with this mark.”³²

It appears that Applicant is arguing that confusion is unlikely because the remaining goods in the registration (i.e. just wine) are different from Applicant’s goods (i.e., vodka and beverages containing vodka). Applicant’s reliance on the deletion of these identical or highly similar goods is not necessarily sufficient to avoid a finding of likelihood of confusion. We reiterate that the goods do not have to be identical or even competitive in order to find that they are related to support a finding of likelihood of confusion. *On-line Careline*, 56 USPQ2d at 1475. *See also Coach Servs.*, 101 USPQ2d at 1722; *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d

³¹ Registration No. 2676364 issued January 21, 2003. *See* February 7, 2022 Office Action at 5. The identification of goods appears as “Alcoholic beverages, namely, wines [and spirits].” *See* TMEP § 1402.12 (The Post Registration Section of the USPTO uses single square brackets to indicate that goods have been deleted from a registration either by amendment under 15 U.S.C. §1057, filing of a partial affidavit of continued use under 15 U.S.C. §1058, or filing of a partial renewal application under 15 U.S.C. §1059.).

³² 4 TTABVUE 20. *See also* 7 TTABVUE 14.

1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991). The issue is whether there is a likelihood of confusion as to the source of the goods, not whether purchasers would confuse the goods. *Ox Paperboard*, 2020 USPQ2d 10878, at *5; *L’Oreal S.A. v. Marcon*, 102 USPQ2d at 1439; *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

G. Conclusion as to Likelihood of Confusion

Because the marks are highly similar in appearance, sound, connotation, and commercial impression; the registered mark is an inherently strong mark for which Applicant has not demonstrated any commercial weakness; and the goods are related and travel in at least one of the same trade channels to ordinary consumers who exercise no more than an ordinary degree of care, we find that confusion is likely between Applicant’s mark VALHALLA VODKA for “alcoholic beverages, namely, vodka and beverages containing vodka” and the cited mark VALHALLA for “alcoholic beverages, namely, wines.”

III. Decision

The refusal to register Applicant’s mark VALHALLA VODKA is affirmed.