

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: November 26, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Louis Leonetti and Brandon Leonetti*

Serial No. 97321068

Ruth K. Khalsa of The Ideas Law Firm, PLLC,  
for Louis Leonetti and Brandon Leonetti.

Cayla Keenan, Trademark Examining Attorney, Law Office 122,  
Kirstin Dahling, Managing Attorney.

Before Lynch, Pologeorgis, and Larkin,  
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Louis Leonetti and Brandon Leonetti, as joint applicants (“Applicants”), seek registration on the Principal Register of the standard character mark JERSEY GIRL WHISKEY (“WHISKEY” disclaimed) for “distilled spirits” in International Class 33.<sup>1</sup>

The Trademark Examining Attorney refused registration of Applicants’ mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of

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<sup>1</sup> Application Serial No. 97321068, filed on March 20, 2022, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an allegation of a bona fide intention to use the mark in commerce.

likelihood of confusion with the following three marks, owned by the same registrant, and registered on the Principal Register:

- Registration No. 3576044 for the standard character mark **JERSEY GIRL** for “wines” in International Class 33;<sup>2</sup>



- Registration No. 5203866 for the mark (“BREWING CO.” and “ESTD 2014” disclaimed) for “Beer; Beer wort; Beer, ale and lager; Beer, ale and porter; Beer, ale, lager, stout and porter; Beer, ale, lager, stout, porter, shandy; Beer-based cocktails; Beer-based coolers; Beers; Alcohol-free beers; Black beer; Brewed malt-based beers; Coffee-flavored beer; Craft beers; De-alcoholised beer; Extracts of hops for making beer; Flavored beers; Ginger beer; Hop extracts for manufacturing beer; Imitation beer; Malt beer; Malt extracts for making beer; Malt liquor; Non-alcoholic beer; Non-alcoholic beer flavored beverages; Pale beer; Porter; Processed hops for use in making beer; Root beer; Wheat beer” in International Class 32;<sup>3</sup>



- Registration No. 5217069 for the mark (“BREWING CO.” and “ESTD 2014” disclaimed) for “Beer; Beer making kit; Beer wort; Beer, ale and lager; Beer, ale and porter; Beer, ale, lager, stout and porter; Beer, ale, lager, stout, porter, shandy; Beer-based cocktails; Beer-based coolers; Beers; Alcohol-free beers; Black beer; Brewed malt-based beers; Coffee-flavored beer; Craft beers; De-alcoholised beer; Extracts of hops for making beer; Flavored beers; Ginger beer; Hop extracts for manufacturing beer; Imitation beer; Malt beer; Malt extracts for making beer; Malt liquor;

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<sup>2</sup> Registration No. 3576044, issued February 17, 2009; renewed. This registration originally issued to an entity called Jack John Investments, Inc. but was subsequently assigned to the same entity that owns the two other cited marks at issue in this appeal. *See* Assignment Record for this registration, Reel/Frame: 7554/0714.

<sup>3</sup> Registration No. 5203866, issued May 16, 2017; renewed.

Non-alcoholic beer; Non-alcoholic beer flavored beverages; Pale beer; Porter; Processed hops for use in making beer; Root beer; Wheat beer,” in International Class 32.<sup>4</sup>

When the refusal was made final, Applicants appealed and requested reconsideration. When the request for reconsideration was denied, the appeal proceeded. The Examining Attorney and Applicants filed briefs. For the reasons explained below, we affirm the Section 2(d) refusal to register.<sup>5</sup>

### **I. Preliminary Matter - Evidentiary Objection**

We initially turn to an evidentiary objection lodged by the Examining Attorney regarding evidence purportedly presented by Applicants for the first time with their appeal brief.<sup>6</sup> The Examining Attorney objects to copies of various local regulations governing breweries, distilleries, and wineries, all allegedly submitted for the first time as Exhibits 1-12 to Applicants’ appeal brief, for the purpose of demonstrating that consumers are unlikely to confuse the marks when used in connection with the relevant goods because of these regulations.<sup>7</sup>

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<sup>4</sup> Registration No. 5217069, issued on June 6, 2017; renewed. The colors red, black and white are claimed as a feature of the mark.

<sup>5</sup> The TTABVue and Trademark Status and Document Retrieval (“TSDR”) citations refer to the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .PDF version of the documents. Additionally, as part of an internal Board pilot program to broaden acceptable forms of legal citation in Board cases, citations in this opinion are in the form recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For opinions of the Board, this opinion uses citations to the Westlaw legal database and cites only precedential decisions, unless otherwise noted.

<sup>6</sup> Examining Attorney’s Brief, p. 12 (11 TTABVue 12).

<sup>7</sup> See Exhibits 1-12 of Applicants’ Brief; 9 TTABVue 26-69.

It is well-settled that the record in an ex parte proceeding should be complete prior to appeal. Trademark Rule 2.142(d); 37 CFR § 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 Fitch IBCA, Inc.*, (Serial No. 75628232), 2002 WL 745593, at \*1 n.2 (TTAB 2002); *see also* TBMP §§ 1203.02(e) and 1207.01.

Here, Applicants did timely submit with their Request for Reconsideration the materials that comprise Exhibit 12 to their appeal brief.<sup>8</sup> Accordingly, as to these materials, the Examining Attorney's evidentiary objection is overruled and we will consider Exhibit 12 of Applicants' appeal brief for whatever probative value it merits. On the other hand, the Examining Attorney's evidentiary objection is sustained as to Exhibits 1-11 inasmuch as Applicants did not timely submit these materials during the prosecution of their application. Thus, we will give no consideration to Exhibits 1-11 attached to Applicants' appeal brief.

## **II. Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) ("*DuPont*"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1314-15 (Fed. Cir. 2003). We have considered each *DuPont* factor that is relevant and for which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 1378-79 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending

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<sup>8</sup> See Applicants' August 7, 2023 Request for Reconsideration, TSDR pp. 28-42.

on the evidence presented. See *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 1355 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 1206 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Notwithstanding, “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, 1199 (CCPA 1973) (internal citations removed).

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

We initially consider the first *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. See *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005) (quoting *DuPont*, 476 F.2d at 1361). Similarity as to any one of these means of comparison may be sufficient to support a finding that the marks are confusingly similar. See *Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 732 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”); *In re Inn at St. John’s, LLC*, (Serial No. 87075988), 2018 WL 2734893, at \*5 (TTAB 2018), *aff’d*, 777 Fed. App’x 516 (Fed. Cir. 2019) (“Similarity in any one of these elements may be sufficient to find the marks confusingly similar.”) (quoting *In re Davia*, (Serial No. 85497617), 2014 WL 2531200, at \*2 (TTAB 2014)).

The proper test regarding similarity “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.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012) (internal quotation marks and citation omitted)). Moreover, the marks at issue “must be considered ... in light of the fallibility of memory ....” of consumers. *In re St. Helena Hosp.*, 774 F.3d 747, 750-51 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 685 (CCPA 1977)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Bay State Brewing Co., Inc.*, (Ser. No. 85826258), 2016 WL 1045677, at \*2 (TTAB 2016) (citing *Spoons Rests. Inc. v. Morrison Inc.*, (Opposition No. 91179317), 1991 WL 35524923, at \*5 (TTAB 1991), *aff’d per curiam*, 972 F.2d 1353 (Fed. Cir. 1992)); *see also In re Binion*, 2009 WL 5194992, at \*2 (TTAB 2009). Here, the average purchasers are members of the general public over the legal drinking age seeking alcoholic beverages.

Furthermore, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (CCPA 1981) (“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.”). “No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone.” *In re Electrolyte Labs. Inc.*, 913 F.2d 930, 647 (Fed. Cir.

1990) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 1295-96 (CCPA 1974)). “On the other hand, 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 entireties. Indeed, this type of analysis appears to be unavoidable.” *Nat’l Data Corp.*, 753 F.2d at 1058.

Applicants’ mark is JERSEY GIRL WHISKEY in standard characters. The cited marks, all owned by the same registrant, are as follows:

- JERSEY GIRL in standard characters;



-  ; and



-  .

Here, we find that the wording JERSEY GIRL is the dominant feature of both Applicants’ mark and the cited marks for several reasons. First, one of the cited marks is comprised solely of the wording JERSEY GIRL. The other two cited marks present JERSEY GIRL as the focal point, in the center of the background carriers

and in a much larger and more prominent font than is used for the other wording. Second, the inclusion of the disclaimed term WHISKEY in Applicants' mark and the presence of the disclaimed wording "BREWING CO." and "ESTD 2014" in the two cited composite marks do not detract from the overall similarities between Applicant's mark and the cited marks due to the shared and dominant wording JERSEY GIRL. Disclaimed matter that is descriptive of, or generic for, a party's goods or services, as is the case here, is typically less significant or less dominant when comparing marks. *In re Detroit Athletic Co.*, 903 F.3d 1297, 1305 (Fed. Cir. 2018) (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407 (Fed. Cir. 1997)); TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") §§ 1207.01(b)(viii) and (c)(ii) (May 2024).

Third, while we acknowledge that the two cited composite marks include the slogan "BORN AND BREWED IN NEW JERSEY," the slogan appears in the smallest wording at the very bottom of these marks, dwarfed by the dominant shared wording JERSEY GIRL. As such, the inclusion of this slogan in the two cited composite marks is insufficient to overcome the similarities between Applicants' and Registrant's marks due to the shared, dominant wording JERSEY GIRL. In fact, the inclusion of the slogan reinforces the JERSEY GIRL portion of the cited composite marks because the term JERSEY is commonly known to be a slang shorthand for the U.S. state of New Jersey.

Fourth, although two of the cited marks include design elements, "the verbal portion of the mark is the one most likely to indicate the origin of the goods to which



it is affixed.” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGaA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1371 (Fed. Cir. 2015) (citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581-82 (Fed. Cir. 1983)). Greater weight is often given to the wording because it is the wording that purchasers would use to refer to or request the goods or services. *See, e.g., In re Viterra, Inc.*, 671 F.2d 1358, 1362 (Fed. Cir. 2012). This principle certainly applies here, where the designs in the two cited marks are relatively insignificant background carriers and small decorative stars. As noted above, we find the wording JERSEY GIRL to be the dominant element of the two cited composite marks because the wording appears most prominently in the center of these two marks.

Additionally, 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.*, 396 F.3d at 1372; *see also Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, (Opposition No. 91074797), 1988 WL 252340, at \*3 (TTAB 1988). As such, consumers will focus more on the JERSEY GIRL portion of Applicants’ mark than the term WHISKEY as the source-indicator for Applicants’ goods, especially since the word WHISKEY is the generic name of one type of the “distilled spirits” identified in the application.

As to stylization, Applicants’ proposed mark is a standard character mark, and marks appearing in standard character form may be displayed in any font style, color and size, including the identical stylization of the JERSEY GIRL wording in the two cited composite marks, because the rights reside in the wording and not in any

particular display or rendition. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 1041 (Fed Cir. 1983) (“[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display. By presenting its mark merely in a typed drawing, a difference cannot legally be asserted by that party.”); *In re Aquitaine Wine USA, LLC*, (Serial No. 86928469), 2018 WL 1620989, at \*5 (TTAB 2018). Thus, because Applicants’ JERSEY GIRL WHISKEY mark may be displayed in the identical manner as the JERSEY GIRL literal portion of the composite cited marks, the mere stylization of the words JERSEY GIRL in these cited marks is insufficient to distinguish the respective marks.

Additionally, given the identity of the dominant JERSEY GIRL portion of the marks and their overall similarity, consumers who are familiar with Registrant’s marks for beer or wine and who then separately encounter Applicants’ JERSEY GIRL WHISKEY mark for alcoholic beverages falling within the full scope of the “distilled spirits” identified in the application may think Applicants’ “distilled spirits” are a product line extension of Registrant’s beer and wine products. *See, e.g., Double Coin Holdings Ltd. v. Tru Dev.*, (Cancellation No. 92063808), 2019 WL 4877349, at \*9 (TTAB 2019) (“ROAD WARRIOR looks, sounds, and conveys the impression of being a line extension of WARRIOR”); *Joel Gott Wines LLC v. Rehoboth Von Gott, Inc.*, (Opposition No. 91197659), 2013 WL 5407313, at \*10 (TTAB 2013) (“Purchasers of opposer’s GOTT and JOEL GOTT wines are likely to assume that applicant’s goods, sold under the mark GOTT LIGHT and design, are merely a line extension of goods emanating from opposer”).

In challenging the refusal, Applicant argues that the marks must be considered as a whole in a likelihood of confusion analysis, and that the marks in this case are distinguishable, particularly “in amount of words and overall length” that result in different pronunciations.<sup>9</sup> Applicants also contend that marks differ in sound and pronunciation<sup>10</sup> and that the cited marks are diluted.<sup>11</sup>

We do not find Applicant’s arguments persuasive. First, while Applicants’ mark includes the term WHISKEY and the cited composite marks include the disclaimed wording “BREWING CO.” and “ESTD 2014,” as well as the slogan “BORN AND BREWED IN NEW JERSEY” and design elements, for the reasons discussed above, we nonetheless find that these differing elements do not detract from the overall similarities of the marks based on the shared, dominant wording JERSEY GIRL.

With regard to Applicants’ argument that the cited marks are diluted, we note that Applicants did not submit any third-party registrations or marketplace evidence showing use of marks identical or similar to the cited marks for identical or similar goods. Instead, Applicants rely on the “pairs” of third-party registrations they submitted into evidence to demonstrate the parties’ respective goods are unrelated. These pairs of third-party registrations, however, are not for marks similar to those at issue, and therefore do not bear on the conceptual or commercial strength of the cited marks. Because the cited JERSEY GIRL marks issued on the Principal Register,

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<sup>9</sup> Applicant’s Appeal Brief, p. 7-10, 9 TTABVUE 9-11.

<sup>10</sup> *Id.* at 9-10; 9 TTABVUE 10-11.

<sup>11</sup> *Id.* at pp. 22-23, 9 TTABVUE 23-24.

without a claim of acquired distinctiveness, the marks are presumed to be inherently distinctive for the goods listed in the cited registrations. Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *Tea Bd. of India v. Republic of Tea, Inc.*, (Opposition No. 91118587), 2006 WL 2460188, at \*21 (TTAB 2006) (a “mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods”). Therefore, we accord the cited marks the normal scope of protection afforded an inherently distinctive mark.

Quite simply, the cited marks and Applicants’ mark consist of or include the identical dominant wording, i.e., JERSEY GIRL. We find the other matter in the marks less significant. For the reasons discussed above, consumers are more likely to remember the term JERSEY GIRL than the other elements of Applicants’ mark or the cited marks. *Nat’l Data*, 753 F.2d at 1058. While we have not overlooked (1) the disclaimed, generic wording WHISKEY in Applicants’ mark, (2) the design and disclaimed wording in the two cited composite marks, and (3) the slogan “BORN AND BREWED IN NEW JERSEY” appearing in very small lettering at the bottom of the cited composite marks, we nonetheless conclude that Applicants’ JERSEY GIRL WHISKEY mark and the cited JERSEY GIRL marks, when considered in their entirety, are very similar in appearance, connotation and overall commercial impression in light of the shared, dominant wording JERSEY GIRL.

Thus, the first *DuPont* factor strongly favors a finding of likelihood of confusion.

*See Naterra Int'l, Inc. v. Bensalem*, 94 F.4th 1113, 1119 (Fed. Cir. 2024) (first *DuPont* factor should weigh heavily in favor of finding of likelihood of confusion when the marks at issue are more similar than dissimilar as to appearance, sound, connotation and commercial impression).

### **B. Relatedness of the Goods**

We next turn to the comparison of the goods, the second *DuPont* factor. In making our determination regarding the relatedness of the goods, we must look to the goods as identified in Applicants' application and the goods listed in the cited registrations. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990) ("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.")); *see also In re Giovanni Food Co.*, (Ser. No. 77796257), 2011 WL 810217, at \*2 (TTAB 2011).

It is sufficient that the respective goods are related in some manner, or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs.*, 668 F.3d at 1369-70 (internal citation omitted); *Hilson Rsch., Inc. v. Soc'y for Human Res. Mgmt.*, (Cancellation No. 92019007), 1993 WL 290669, at \*9 (TTAB 1993). The issue here is not whether

consumers would confuse Applicants' goods with Registrant's goods, but rather whether there is a likelihood of confusion as to the source of these goods. *See L'Oreal S.A. v. Marcon*, (Opposition No. 91184456), 2012 WL 1267956, at \*6 (TTAB 2012). Furthermore, in assessing the relatedness of the goods involved, the more similar the marks at issue are, as is the case here, the less related the goods need to be to support a finding of likelihood of confusion. *See In re Shell Oil Co.*, 992 F.2d 1204, 1207 (Fed. Cir. 1993).

More importantly in this case, while Applicants point out that distilled spirits and beer or wine are different goods and not interchangeable, goods may nonetheless be related even if they are not identical, competitive, or combinable. “[G]oods that are neither used together nor related to one another in kind may still ‘be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis.’” *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1244 (Fed. Cir. 2004) (citing *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000)). *See also McDonald's Corp. v. McKinley*, (Opposition No. 91074168, 1989 WL 274414, at \*3 (TTAB 1989) (“In order to find that there is a likelihood of confusion, it is not necessary that the goods or services on or in connection with which the marks are used be identical or even competitive. It is enough if there is a relationship between them such that persons encountering them under their respective marks are likely to assume that they originate at the same source or that there is some association between their sources”).

Here, the goods listed in the cited registrations include various types of beer and

beer making ingredients, and “wine,” while the goods identified in the application are “distilled spirits,” which includes “whiskey.” *In re Country Oven, Inc.*, 2019 WL 6170483, at \*5 (TTAB 2019) (an application “that describes goods broadly is presumed to encompass all goods ... of the type described.”). As to the distilled spirits of Applicants, and the wines and beer products of Registrant, we are fully aware of the specific differences between them such as appearance, flavor, aroma, alcohol content, cost, consumer recognition, and even the fact that distilled alcoholic beverages are separated from wines and beer and sold at different counters in different sections in retail liquor stores. However, as stated above, the issue before us is not the likelihood of confusion as between the specific products of Applicants and Registrant, but rather the likelihood of confusion as to the source of such products. The fact that purchasers may be aware of the differences between the goods does not necessarily preclude the likelihood that they would confuse one trademark for another, and thereby be misled into believing that the goods have a common origin. *See In re BASF AG*, (Serial No. unknown), 1975 WL 20946, at \*1 (TTAB 1975).

In support of her argument that the parties’ respective goods are related, the Examining Attorney submitted screenshots from sixteen (16) websites of third-party online alcohol business establishments that demonstrate that these retailers sell both distilled spirits and wine or beer under the same mark.<sup>12</sup> The third-party retailers are as follows:

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<sup>12</sup> January 18, 2023 Office Action, TSDR pp. 14-20, 23-24, 26-27, 29, 32-58; May 9, 2023 Final Office Action, TSDR pp. 11-16, 18-26, 28, 31, 34, 37-80.

- Ranger Creek
- Ransom Spirits and Wines
- Cedar Ridge Wine
- Flaghill
- Lexington Brewing Co.
- Maplewood Brew
- Bartlett Winery
- Fiore Winery
- McMenamins
- Gervasi Vineyard
- Old House Today
- Round Barn
- Two Brothers Brewing
- Bent Brewstillery
- Little Toad Creek
- Springfield Manor

This evidence establishes that it is not uncommon for a single entity to offer under a single mark both “distilled spirits” and “wine” or beer products and supports a finding that Applicants’ goods and the goods listed in the cited registrations are related. *See, e.g., In re Detroit Athletic*, 903 F.3d at 1306-07 (crediting relatedness evidence showing that third parties use the same mark for the goods and services); *Hewlett-Packard v. Packard Press*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (evidence



that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”); *Made in Nature*, 2022 WL 2188890, at \*25 (third-party websites promoting sale of both parties’ goods showed relatedness); *L’Oreal*, 2012 WL 1267956, at \*8 (evidence that “companies have marketed cosmetics and beverages under the same mark” supported finding goods related); *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, (Opposition No. 91197659), 2013 WL 540313, at \*9 (TTAB 2013) (finding water and wine related based on marketplace evidence and third-party registrations).

This finding is consistent with prior precedent. Although there is no per se rule that all alcoholic beverages are related, see *In re White Rock Distilleries Inc.*, (Ser. No. 77093211) 2009 WL 3401827, at \*2 (TTAB 2009), the Federal Circuit and the Board have previously found that beer or wine and distilled spirits are related goods for purposes of a Trademark Act Section 2(d) analysis based on sufficient record evidence of relatedness. See e.g., *In re Chatam Int’ Inc.*, 380 F.3d 1340, 1344-45 (Fed. Cir. 2004) (beer and tequila); *Schieffelin & Co. v. Molson Cos.*, (Opposition No. 69312), 1989 WL 277823, at \*3-4 (TTAB 1989) (Cognac brandy related to malt liquor, beer and ale); *Monarch Wine Co. v. Hood River Distillers, Inc.*, (Opposition No. unavailable), 1977 WL 2267, at \*2-3 (TTAB 1977) (finding distilled spirits related to wine and champagne); *In re AGE Bodegas Unidas, S.A.*, (Serial No. 16765), 1976 WL 21131, at \*1 (TTAB 1976) (finding wine related to whiskey); *Ex Parte Am. Wine Co.*, (Ser. No. unavailable), 1951 WL 4258, at \*1 (Comm’r Pat. 1951) (wine related to whiskey).

Applicants argue that the parties' respective goods are different, being made via a different process and containing different ingredients.<sup>13</sup> Even if true, this argument is not persuasive. Again, at issue is not whether the goods per se are the same or in some way distinguishable, but whether they are related such that confusion as to source is likely when offered under similar marks. Here, as noted above and supported with evidence of record, Applicants' distilled spirits and Registrant's beer and wine are goods of a kind that are provided by a single source under the same mark.

Additionally, Applicants argue that the regulations concerning the manufacturing and sale of whiskey, as compared to beer or wine, are governed differently by the U.S. federal government and each U.S. state,<sup>14</sup> and thus the goods cannot be related for purposes of the second *DuPont* factor. We disagree. We acknowledge that distilled spirits and beer or wine may have different regulations governing their sale. We nonetheless find Applicants' evidence unpersuasive inasmuch as the evidence of record demonstrates that numerous entities provide both distilled spirits and beer or wine under the same mark, showing that these parties apparently comply with the differing regulations governing the sale of these goods. More importantly, consumers are accustomed to encountering them under the same marks, without regard to any underlying regulatory schemes.

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<sup>13</sup> Applicants' Appeal Brief, p. 12; 9 TTABVUE 13.

<sup>14</sup> *Id.* at p. 14, 9 TTABVUE 15.

Applicants also dispute the probative value of the evidence submitted by the Examining Attorney, dismissing it as showing only “big box stores like BevMo and Total Wine.”<sup>15</sup> However, the evidence submitted by the Examining Attorney does not reflect sales by “big box stores” but rather business establishments who produce and specialize in providing alcoholic beverages, and specifically providing the types of alcoholic beverages at issue here both at the same place and, equally importantly, under the same mark.

Applicants also reference the document they submitted, i.e., the “Executive Order on Promoting Competition in the American Economy,” as further proof that the goods here not related.<sup>16</sup> This Executive Order is neither relevant nor persuasive because protecting the “vibrancy of the American markets for beer, wine, and spirits,” as argued by Applicants, was not necessarily the aim of this order, and has no bearing on the registrability of trademarks. Applicants have provided no basis for applying this Executive Order to the question of the registrability of a trademark for use with distilled spirits, and have provided no explanation as to how the registration of Applicants’ mark would further the goal of promoting competition. Instead, the registration of Applicants’ mark would be likely to cause confusion in the marketplace based on the similarity of the JERSEY GIRL marks and the relatedness of distilled spirits, wine and beer, as discussed above.

In a further attempt to demonstrate that the goods are not related, Applicants

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<sup>15</sup> *Id.* at p. 15, 9 TTABVUE 16.

<sup>16</sup> *Id.* at p. 24, 9 TTABVUE 25; see also Applicants’ Request for Reconsideration, TSDR pp. 825-838.

submitted 140 “pairs” or “sets” of printouts from TSDR of third-party registrations purporting to show that the USPTO has registered the same mark to different parties for “distilled spirits,” including whiskey, on the one hand, and beer or wine, on the other.<sup>17</sup> See *In re Embiid*, (Serial No. 88202890) 2021 WL 2285576, at \*18 (TTAB 2021) (“[A]pplicants may submit sets of third-party registrations to suggest . . . that the Office has registered the same mark to different parties for the goods at issue,’ suggesting that the goods are not related.”) (quoting *In re G.B.I. Tile & Stone, Inc.*, (Serial No. 77369073), 2009 WL 3491050 at \*5 (TTAB 2009)). See also *In re Thor Tech, Inc.*, (Serial No. 85667188), 2015 WL 496133, at \*4 (TTAB 2015) (considering similar argument). Upon closer inspection, the number of Applicants’ relevant sets of third-party registrations is lower than suggested.

We find that only approximately 60 of the 140 pairs of third-party registrations have any significant probative value. The majority of the remaining third-party registrations are for marks that are not sufficiently similar to one another because they have differing connotations and overall connotations. *Thor Tech*, 2009 WL 3491050 at \*5. Accordingly, they have very limited, if any, probative value. A representative sample of these third-party registrations are identified below:

<b>Registration 1 of Pair</b>	<b>Registration 2 of Pair</b>
<b>CLASE AZUL</b> for “tequila”	<b>CASA AZUL</b> for “wine”
<b>WHALER’S</b> for “rum”	<b>WHALE ROCK</b> for “wine.”
<b>OCHO</b> for “tequila”	<b>DISTRICT 8</b> for “wine”

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<sup>17</sup> Applicants’ March 17, 2023 Response to Office Action, TSDR pp. 194-831.

<b>Registration 1 of Pair</b>	<b>Registration 2 of Pair</b>
<b>LAZY DAZE</b> for "hard cider"	<b>BEACH DAZE</b> for "wine"
<b>ALPHABET VODKA</b> for "vodka"	<b>Z ES LA ULTMA LETRA DEL ALFABETO</b> for "wine"
<b>3 KILOS</b> for "cognac; vodka"	<b>3 WEIGHT</b> for "beer"
<b>SOUL OF NOMAD</b> for "vodka"	<b>SOUL OF THE VINE</b> for "wine"
<b>II PALMS</b> for "vodka"	<b>II</b> for "wine"
<b>LET IT FLOW</b> for "vodka"	<b>LET IT BLOSSOM</b> for "wine"
<b>CROWN CLUB</b> for "vodka; whiskey"	<b>SONOMA CROWN</b> for "wine"
<b>J.W. DANT</b> for "vodka"	<b>J.W. MORRIS</b> for "wine"
<b>FIVE LAKES</b> for "vodka"	<b>NINE LAKES</b> for "wines and ciders"
<b>RUSSIAN GOLD</b> for "vodka"	<b>SICILIAN GOLD</b> for "wine"
<b>CINCO</b> for "vodka"	<b>CINCO MANOS</b> for "wine"
<b>THREE OLIVES</b> for "vodka"	<b>THREE GHOST VINE</b> for "wine"
<b>42 BELOW</b> for "vodka infused with fruit flavoring and flavored spirits"	<b>LATITUDE 42</b> for "wines"
<b>FORTY DEGREES VODKA</b> for "vodka"	<b>FORTY WINKS</b> for "wine"
<b>BLUE DIAMOND</b> for "vodka"	<b>DIAMOND COLLECTION</b> for "wines"
<b>PAINTED LADY</b> for "distilled spirits"	<b>PAINTED FACE</b> for "alcoholic beverages, except beer."

Additionally, some of the registrations are cancelled and, therefore, have no

probative value. *See In re Kysela Pere et Fils Ltd.*, (Ser. No. 77686637), 2011 WL 1399224, at \*2 (TTAB 2011) (“‘dead’ or cancelled registrations have no probative value at all”). Examples of such registrations are Reg. No. 2680991 for the mark SIX for “vodka;” Reg. No. 2720490 for the mark BOSTON WINE for “wine;,” and Reg. No. 5225590 for the mark LET IT BLOSSOM for “wine.”

Furthermore, some of the other third-party registrations submitted by Applicants are not based on use in commerce and, therefore, have very limited probative value. *In re 1st USA Realty Pros., Inc.*, (Ser. No. 78553715), 2007 WL 2315610, at \*2 (TTAB 2007) (registrations not based on use in commerce not probative to show relatedness of the goods). Some examples are Reg. No. 3811129 for the mark FIVE LAKES for “vodka;” Reg. No. 4745780 for the mark INK and design for “gin;” Reg. No. 5033751 for the mark HELLO VODKA (VODKA disclaimed) for “vodka;” Reg. No. 5193541 for the mark TINTO ARROYO for “wines;” and Reg. No. 5415086 for the mark SOURCE VODKA and design (VODKA disclaimed) for “vodka.”<sup>18</sup>

That being said and as noted above, Applicants did submit approximately 60 pairs of third-party registrations for identical marks or for marks with the identical

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<sup>18</sup> Applicants also submitted third-party registrations for goods and services not similar to the goods at issue. For example, Applicants submitted Reg. No. 5940513 for the mark HELLO FRESH for, in relevant part, for “Foodstuffs and dietetic substances for medical or veterinary purposes, namely, dietetic foods and beverages adapted for medical or veterinary use; plasters and materials for dressings, namely, plasters for medical purposes, gauze for dressings, bandages for dressings; powdered milk for babies; substitutes for mothers milk, namely, infant formula and baby foods; dietary fibre to aid digestion ; food for diabetics, namely, dietetic foods and beverages adapted for medical use, artificial sweeteners adapted for diabetics in the nature of dietetic foods adapted for medical use.” Accordingly, these types of registrations are not probative because they cover goods unrelated to either Applicants’ or Registrant’s goods. *Made in Nature, LLC*, 2022 WL 2188890, at \*10 (third-party registrations of marks for unrelated goods have little or no probative value).

first term followed by a generic or highly descriptive term for various distilled spirits on the one hand and beer or wine on the other. These pairs of third-party registrations are identified below:

<b>Registration 1 of Pair</b>	<b>Registration 2 of Pair</b>
<b>CAVEMAN VODKA</b> (VODKA disclaimed) for “vodka”	<b>CAVEMAN RED</b> (RED disclaimed) for “red wine”
<b>ALPINE RYE WHISKEY</b> (RYE WHISKEY disclaimed) for “whiskey”	<b>ALPINE</b> for “wine”
<b>6 DEGREE</b> for “tequila”	<b>SIX DEGREES</b> for “wine”
<b>3 AMIGOS</b> for “distilled blue agave liquor; cocktails and liquors made with spirits distilled from blue agave; mezcal”	<b>THREE AMIGOS VINEYARD</b> (VINEYARD disclaimed) for “wine”
<b>CHASE</b> for “vodka”	<b>CHASE</b> for “wine”
<b>SINGLE ESTATE</b> for “distilled spirits”	<b>SINGLE</b> for “wine”
<b>RED DIAMOND</b> for “vodka”	<b>RED DIAMOND</b> for “wine”
<b>IDLE HANDS</b> for “whiskey”	<b>IDLE HANDS</b> for “wines”
 for “vodka”	<b>GF</b> (standard characters) for “wines”
<b>CR</b> for “vodka”	<b>CR</b> for “alcoholic beverages except beer”
<b>3 VODKA</b> (VODKA disclaimed) For “vodka”	<b>VINAS 3</b> (VINAS disclaimed) For “wine”

<b>Registration 1 of Pair</b>	<b>Registration 2 of Pair</b>
<b>MERMAID VODKA</b> (VODKA disclaimed) for “vodka”	<b>MERMAID WINERY</b> (WINERY disclaimed) for “wines”
<b>SOURCE VODKA</b> (VODKA disclaimed) for “vodka”	<b>SOURCE</b> for “wines”
<b>MUSCLE VODKA</b> (VODKA disclaimed) For “vodka”	<b>MUSCLE WINE</b> (WINE disclaimed) for “wines”
<b>NOVA</b> for “vodka”	<b>NOVA CELLARS</b> (CELLARS disclaimed) for “wine”
<b>PRIME VODKA</b> (VODKA disclaimed) for “vodka”	<b>PRIME CELLARS</b> (CELLARS disclaimed) for “wine”
<b>PRECIOUS VODKA</b> (VODKA disclaimed) for “vodka”	<b>PRECIOUS</b> for “wine”
<b>VENOM VODKA</b> (VODKA disclaimed) for “vodka”	<b>VENOM</b> for “wine”
<b>BUCKEYE VODKA</b> (VODKA disclaimed) for “vodka”	<b>BUCKEYE BLUSH</b> (BLUSH disclaimed) for “wine”
<b>KAI</b> for “vodka”	<b>KAI</b> for “wines”
<b>OCEAN VODKA</b> (VODKA disclaimed) for “vodka”	<b>OCEAN RESERVE</b> (RESERVE disclaimed) for “wines”
<b>PEAK SPIRITS</b> (SPIRITS disclaimed) for “vodka”	<b>PEAK</b> for “wine”
<b>SIN VODKA</b> (VODKA disclaimed) for “vodka”	<b>SIN ZIN</b> (ZIN disclaimed) for “zinfandel wines”



<b>Registration 1 of Pair</b>	<b>Registration 2 of Pair</b>
<b>SASSAY VODKA</b> (VODKA disclaimed) for “vodka”	<b>SASSY PREMIUM WINES</b> (PREMIUM WINES disclaimed) for “wine”
<b>TRUE PREMIUM VODKA</b> (PREMIUM VODKA disclaimed) for “vodka”	<b>TRUE RED</b> (RED disclaimed) for “wine”
<b>PLUSH VODKA</b> (VODKA disclaimed) for “vodka”	<b>PLUSH</b> for “wine”
<b>EXTRA</b> for “vodka”	<b>EXTRA BLANC</b> (BLANC disclaimed) for “wines”
<b>GLASS CINNAMON VODKA</b> (CINAMON VODKA disclaimed) for “cinnamon-flavored red vodka”	<b>GLASS</b> for “wine”
<b>WHEEL HOUSE</b> for “vodka”	<b>WHEEL HOUSE</b> for “wines”
<b>HUSTLER</b> for “vodka”	<b>THE HUSTLER</b> for “wine”
<b>DEVIATION DISTILLING</b> (DISTILLING disclaimed) for “vodka”	<b>DEVIATION</b> for “wines”
<b>SPLIT ROCK DISTILLING</b> (DISTILLING disclaimed) for “vodka”	<b>SPLIT ROCK</b> for “wine”
<b>CARDINAL SPIRITS</b> (SPIRITS disclaimed) for “vodka”	<b>CARDINAL RED</b> (RED disclaimed) for “wine”
<b>NOBLE VODKA</b> (VODKA disclaimed) for “vodka”	<b>NOBLE ESTATE WINERY</b> (ESTATE WINERY disclaimed) for “wine”

<b>Registration 1 of Pair</b>	<b>Registration 2 of Pair</b>
<b>RC DISTILLERY</b> (DISTILLERY disclaimed) for “vodka”	<b>RC RESERVE</b> (RESERVE disclaimed) for “wine”
<b>BEYOND VODKA</b> (VODKA disclaimed) for “distilled spirits, namely, vodka for human consumption”	<b>BEYOND REISLING</b> (REISLING disclaimed) for “wine”
<b>PRESIDENTE</b> for “brandy”	<b>PRESIDENTE</b> for “beer”
<b>NEW AMSTERDAM</b> for “gin”	<b>NEW AMSTERDAM</b> for “beer”
<b>THUNDER ROAD</b> For “alcoholic beverages, namely, Tennessee sour mash whiskey and moonshine”	<b>THUNDER ROAD</b> for “Beer”
<b>MAMBO</b> for “alcoholic beverages, namely, liqueurs”	<b>MAMBO</b> for “beer”
<b>HERITAGE</b> for “alcoholic beverages, namely, absinthe”	<b>HERITAGE</b> for “beer”
<b>HEISENBERG</b> for “vodka”	<b>HEISENBERG</b> for “beer”
<b>EL HEFE</b> for “tequila”	<b>EL HEFE</b> for “beer”
<b>TABLE ROCK</b> for “distilled spirits”	<b>TABLE ROCK</b> for “beer”
<b>ASTRAL</b> for “tequila”	<b>ASTRAL</b> for “beer”
<b>SPRING HOUSE</b> for “distilled spirits”	<b>SPRING HOUSE</b> for “beer”
<b>METROPOLIS</b> for “alcoholic cocktails”	<b>METROPOLIS</b> for “beer and ale”
<b>TAPATIO</b> for “tequila”	<b>TAPATIO</b> for “beer”
<b>LA BAMBA</b> for “tequila”	<b>LA BAMBA</b> for “beer”

<b>Registration 1 of Pair</b>	<b>Registration 2 of Pair</b>
<b>ALAMO</b> for “distilled spirits, except distilled blue agave liquor”	<b>ALAMO</b> for “beer”
<b>BULLDOG</b> for “distilled spirits, namely, gin”	<b>BULLDOG</b> for “lager beer”
<b>PEARL</b> for “distilled spirits, namely, vodka”	<b>PEARL</b> for “malt beverages, namely, beer”
<b>ALIEN</b> for “premium tequila made from 100 percent blue agave”	<b>ALIEN</b> for “beer”
<b>LONERIDER</b> For ‘blended spirits”	<b>LONERIDER</b> for “beer”
<b>CALIFORNIA COWBOY</b> For “whiskey”	<b>CALIFORNIA COWBOY</b> For “beer”
<b>DUET</b> for “liquor”	<b>DUET</b> for “beer”
<b>FIRE IN THE HOLE</b> for “distilled spirits, namely, whiskey”	<b>FIRE IN THE HOLE</b> for “beer”
<b>FIRST CALL</b> for “whiskey”	<b>FIRST CALL</b> for “beer”

Although the approximately 60 pairs of third-party registration evidence submitted by Applicants is not an insignificant number, we nonetheless find that these third-party registrations do not justify the registration of Applicants’ mark because, as we conclude below, confusion with the cited marks is likely. *In re Toshiba Med. Sys. Corp.*, (Ser. No. 79046106), 2009 WL 1896059, at \*6 (TTAB 2009) (citing *Plus Prods. v. Star-Kist Goods, Inc.*, (Opposition No. 9164636), 1983 WL 51884, at \*3 (TTAB 1983)). Indeed, with respect to the probative value of the 60 pairs, we lack important marketplace information such as (i) whether the “paired” registrants

entered into any coexistence agreements, (ii) whether the marks themselves have actually coexisted in the marketplace without confusion, *see In re Thomas*, (Ser. No. 78334625), 2006 WL 1258862, at \*8 (TTAB 2006) (fact that marks co-existed on register does not prove that they coexisted in the marketplace without confusion), and (iii) whether the marks coexist in a crowded field such that consumers have been conditioned to distinguish among the specific marks based on minute differences.

Moreover, in terms of discerning any USPTO policy regarding the similarity or dissimilarity of these types of goods based on the paired registrations, there is no comparative evidence concerning how many times applications covering “distilled spirits,” including whiskey, were refused based on existing registrations of similar marks for either wine or beer, or vice versa. *See In re Ala. Tourism Dep’t*, 2020 WL 2301221, at \*13 (TTAB 2020) (“Applicant’s evidentiary submission almost certainly presents an incomplete picture of USPTO practice, as it omits marks in applications that were refused registration under Section 2(b) in a manner likely to be highly consistent with the action in this case.”). Additionally, the fact that the respective goods may sometimes emanate from different sources does not negate the other evidence of record supporting that the goods may emanate from a common source. *Made in Nature*, 2022 WL 2188890, at \*25 (“For Applicant’s and Registrant’s identified goods to be related, it is not necessary that they always emanate from the same source under the same mark.”).

We do recognize that the Board has previously considered “pairs” of third-party registrations as part of a larger record that did rebut the examining attorney’s

evidence of purported relatedness. *See In re Thor Tech, Inc.*, 2015 WL 496133. In *Thor Tech*, the Board reversed a Section 2(d) refusal based, in part, on approximately 50 pairs of third-party registrations submitted by the applicant in that appeal. *Id.* at \*3. More specifically, the Board found that the applicant's evidence of third-party registrations for the same or very similar marks owned by different entities for "automobiles, trucks or sport utility vehicles on the one hand and recreational vehicles, travel trailers, and/or motor homes on the other," rebutted the "relevant, two third-party registrations made of record by the Trademark Examining Attorney." *Id.* at \*4. The Board explained, based in part on this evidence, that it could not conclude that consumers would assume a common source for the goods. *Id.*

However, the record in *Thor Tech* differs substantially from the record in this appeal. The record in *Thor Tech* (1) included only two third-party registrations to show a relationship between the involved goods, *id.* at \*2;<sup>19</sup> (2) established that the applicant's and registrant's goods were expensive, respectively ranging between about \$8,000-23,000 and \$17,000-40,000, *id.* at \*5; and (3) did not establish overlapping channels of trade. *Id.*

That is in contrast to the Examining Attorney's evidence of sixteen (16) third-party marketplace uses in this appeal, which we find, under the circumstances of this case, is sufficient to establish a relationship between "distilled spirits" and beer or wine. The contrast with *Thor Tech* is further shown through "distilled spirits" and

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<sup>19</sup> Depending on the particular facts of a case, two third-party registrations might be insufficient to show relatedness even in the absence of countervailing evidence.

beer or wine being frequently served in the same establishments and sold in the same retail outlets, and at much lower price points than automobiles, trucks, sport utility and recreational vehicles and motor homes which were the goods involved in *Thor Tech*. We also note, as discussed below, that the trade channels and classes of consumers in this appeal overlap, in contrast to the decision in *Thor Tech*.

Furthermore, Applicants offered no evidence showing the extent to which the marks in their registration pairs are actually used in commerce, or consumers' familiarity with them. "[W]here the 'record includes no evidence about the extent of [third-party] uses . . . [t]he probative value of this evidence is thus minimal.'" *Palm Bay Imps.*, 396 F.3d at 1373-74 (citing *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1338 (Fed. Cir. 2001)); *see also Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 1005 (CCPA 1973) ("But in the absence of any evidence showing the extent of use of any of [the third-party registrations] or whether any of them are now in use, they provide no basis for saying that the marks so registered have had, or may have, any effect at all on the public mind so as to have a bearing on likelihood of confusion. The purchasing public is not aware of registrations reposing in the Patent Office and though they are relevant, in themselves they have little evidentiary value on the issue before us.").

In short, the Examining Attorney's third-party marketplace evidence is sufficient to establish that "distilled spirits" and wine or beer commonly originate from the same source under the same mark. Here, the totality of the Examining Attorney's evidence demonstrates that consumers would expect that these goods emanate from

the same sources. *In re I-Coat Co.*, (Ser. No. 86802467), 2018 WL 2753196, at \*10 (TTAB 2018). *See also, e.g., In re C.H. Hanson Co.*, (Ser. No. 77983232), 2015 WL 6121759, at \*5-6 (TTAB 2015) (six websites showing sale of the subject goods, coupled with five third-party registrations of marks for them, “support the conclusion that the goods are related”); *Kysela Pere et Fils*, 2011 WL 1399224, at \*3 (relying on over twenty third-party registrations listing wine and beer and webpages showing that companies make and sell both types of goods, finding: “[t]he third-party registration evidence and the website evidence together amply demonstrate the relatedness of beer and wine”); *In re Davey Prods. Pty Ltd.*, (Ser. No. 77029776), 2009 WL 2420527, at \*5-6 (TTAB 2009) (two websites showing sale of the subject goods and twenty-one third-party registrations probative of relatedness of subject goods).

In the final analysis, “neither the Trademark Examining Attorney nor the Board is bound to approve for registration an Applicant’s mark based solely upon the registration of other assertedly similar marks for other goods or services having unique evidentiary records.” *In re Datapipe, Inc.*, (Ser. No. 85173828), 2014 WL 3543477, at \*7 (TTAB 2014); *see also In re Nett Designs, Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001) (“The Board must decide each case on its own merits. .... Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”). “While we recognize that consistency is highly desirable . . . consistency in examination is not itself a substantive rule of trademark law, and a desire for consistency with the decisions of prior examining attorneys must yield to proper

determinations under the Trademark Act and rules.” *In re Ala. Tourism Dep’t*, 2020 USPQ2d 10485, at \*11 (quoting *In re Am. Furniture Warehouse Co.*, 126 USPQ2d 1400, 1407 (TTAB 2018) (internal quotations omitted)).

Ultimately, we find that Applicants’ “sets” or “pairs” of prior third-party registrations, although significant in number, do not rebut the Examining Attorney’s arguments and corresponding evidence that the goods at issue are related for the reasons explained above. We therefore find, based on the record, that Applicants’ goods are related to Registrant’s goods. Accordingly, the second *DuPont* factor favors a finding of likelihood of confusion.

### **C. Similarity of Trade Channels**

Next we consider established, likely-to-continue channels of trade, the third *DuPont* factor. Because there are no limitations or restrictions as to trade channels or classes of purchasers in the respective identifications of goods, we presume that the goods are or would be marketed in all normal trade channels for such goods and to all normal classes of purchasers of such goods. *See Packard Press Inc. v. Hewlett-Packard Co.*, 281 F.3d at 1268. The trade channels for both Applicants’ and Registrant’s goods include liquor stores (both online and brick and mortar establishments, and independent and state-controlled outlets), bars and restaurants, and the alcoholic beverage sections of retail outlets. The relevant class of consumers for both sets of goods includes connoisseurs of legal drinking age, as well as ordinary adult consumers of legal drinking age who consume alcoholic beverages, or purchase different types of alcoholic beverages as gifts or to stock a bar at home. *See Somerset Distilling, Inc. v. Speymalt Whiskey Distribs. Ltd.*, (Opposition No. 9176019) 1989 WL



274426, at \*3 (TTAB 1989) (“While we realize that certain purchasers of alcoholic beverages may be aficionados and know not only ‘their brands’ but which companies make which trademarked products, we also realize that other consumers may not be as knowledgeable, and may purchase Scotch whisky, gin or vodka as gifts, or to stock a bar for their guests.”). Accordingly, the trade channels and classes of consumers for the goods at issue, at a minimum, overlap.

Thus, the third *Dupont* factor favors a finding of likelihood of confusion.

#### **D. Sophistication of Consumers**

The fourth *DuPont* factor considers the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ v. careful, sophisticated purchasing.” *DuPont*, 476 F.2d at 1361. Because there are no limitations on price point or consumer type in either the application or the cited registrations, we must presume that the alcoholic beverages listed in the application and cited registrations are sold at all price points and to a variety of consumers of legal drinking age that consume alcohol. As such, Applicants’ and Registrant’s customers may include ordinary adult consumers purchasing alcohol at supermarkets, liquor stores, bars and restaurants, etc., as well as more discerning adult customers purchasing alcohol at higher-end specialty shops. However, we must base our decision on “the least sophisticated potential purchasers.” *Stone Lion Cap. Partners*, 746 F.3d at 1325. Nevertheless, Applicants argue, without any evidence, that the parties’ respective consumers are sophisticated purchasers.<sup>20</sup>

Applicants’ arguments are unavailing. Mere argument regarding the

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<sup>20</sup> Applicant’s Appeal Brief, pp. 7, 23-24, 4 TTABVUE 8, 24-25.

sophistication of actual or potential consumers is not evidence. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005)); *see also In re U.S. Tsubaki, Inc.*, (Serial No. 85267349), 2014 WL 986175, at \*5 (TTAB 2014) (finding that there was no proof to support the statements in the record by counsel).

Notwithstanding, purchasers of modestly priced goods are likely to exercise a lower degree of ordinary care in purchasing these goods. *See Hard Rock Café Licensing Corp. v. Elsea*, (Opposition No 91093436), 1998 WL 766704, at \*11 (TTAB 1998) (“because of the relatively inexpensive nature of the goods and/or services, [purchasers] are held to a lesser standard of purchasing care.”). The record demonstrates that a bottle of whiskey may be purchased as low as \$28.95<sup>21</sup> and a bottle of wine as low as \$19.<sup>22</sup> Accordingly, goods of the type identified in Applicant’s and Registrant’s identifications of goods may be relatively inexpensive and consumers may not use an elevated standard of care in making purchasing decisions. *See, e.g., Aquitaine Wine USA, LLC*, (Ser. No. 86928469), 2018 WL 1620989, at \*9 (TTAB 2018) (“Wine purchasers are not necessarily sophisticated or careful in iron balaking their purchasing decisions.”). Here, there is no evidence that the least sophisticated purchasers in the alcohol-consuming adult general public will exercise anything other than ordinary care.

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<sup>21</sup> January 18, 2023 Office Action, TSDR p. 24.

<sup>22</sup> *Id.* at p. 27.

Overall, we find the *DuPont* consumer sophistication factor to be neutral.

### **E. Extent of Potential Confusion**

Applicant argues that the twelfth *DuPont* factor, the extent of potential confusion, i.e., whether de minimis or substantial, is also a relevant consideration. According to Applicant, any potential confusion would be de minimis because the marks at issue differ in appearance and sound, and the goods and trade channels are distinct.<sup>23</sup>

Applicants misunderstand this factor. We have already made findings on all the other *DuPont* factors raised in this appeal. The twelfth factor is a separate factor. In cases where we find some factor or factors relatively more important, we simply weigh or balance them more heavily in the final step of determining the collective indication of all the relevant factors as to whether confusion is likely. *See, e.g., In re Charger Ventures LLC*, 64 F.4th 1375, 1381 (Fed. Cir. 2023). If we were simply to add up the other factors to make a twelfth factor finding and then add the twelfth factor into the final *DuPont* weighing step, we would be double counting the *DuPont* factors.

Here, Applicants did not submit the kind of evidence we have previously considered under the twelfth *DuPont* factor. For example, in *Iron Balls Int'l Ltd. v. Bull Creek Brewing, LLC*, (Cancellation No. 92079099), 2024 WL 2844425, at \*27 (TTAB 2024), we assessed under the twelfth factor that the goods involved are the type of goods that would be marketed to and purchased by significant numbers of purchasers, which did not support the applicant's argument that the potential for confusion was de minimis. *See also In re Davey Prods. Pty Ltd.*, (Ser. No. 77029776),

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<sup>23</sup> Applicant's Appeal Brief, pp. 23-24; 7 TTABVUE 23-24.

2009 WL 2420527, at \*9 (TTAB 2009) (same). And in *Toro Co. v. Torohead Inc.*, (Opposition No. 91114061), 2001 WL 1734485, at \*6 (TTAB 2001), we looked at, inter alia, “the highly technical nature of applicant's goods, and the limited number of potential purchasers,” which favored the applicant in that case. Applicants do not make these types of argument here.

The twelfth *DuPont* factor is therefore neutral.

## II. Conclusion

We have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. Because we have found that: (1) the marks are very similar in appearance, connotation and commercial impression due to the shared and dominant wording JERSEY GIRL; (2) Applicants’ “distilled spirits” are related to Registrant’s wine and beer products; (3) the parties’ respective goods move, at a minimum, in overlapping channels of trade and are offered to overlapping classes of purchasers; and (4) *DuPont* factors 4 and 12 are neutral, we conclude that Applicants’ JERSEY GIRL WHISKEY mark, as used in connection with the goods identified in the application, so resembles the cited marks for the identified goods as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.

While this is a closer case due to the “pairs” of third-party registrations submitted by Applicants, “[w]e do not believe that our decision here is inconsistent with the registration of the third-party marks cited by Applicant[s], but to the extent that it is, it is the decision required under the statute on the record before us.” *In re Ala. Tourism Dep’t*, 2020 USPQ2d 10485 at \*11. Moreover, to the extent that there is

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doubt about our conclusion that a likelihood of confusion exists, we must resolve that doubt in favor of the Registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 864-65 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1568 (Fed. Cir. 1984). *See also G.B.I. Tile & Stone*, 2009 WL 3491050 at \*8 (noting that any doubt must be resolved in favor of the cited registrant).

**Decision:** The refusal to register Applicants' JERSEY GIRL WHISKEY mark under Section 2(d) of the Trademark Act is affirmed.