

This Opinion is not a  
Precedent of the TTAB

Hearing: October 27, 2016

Mailed: January 10, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Clipper City Brewing Co., LP*  
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Serial No. 86353682  
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Rebecca J. Stempien Coyle of Levy & Grandinetti,  
for Clipper City Brewing Co., LP.

Rebecca Povarchuk and Mark Leipzig,<sup>1</sup> Trademark Examining Attorneys,  
Law Office 115, John Lincoski, Managing Attorney.

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Before Wellington, Heasley and Lynch,  
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

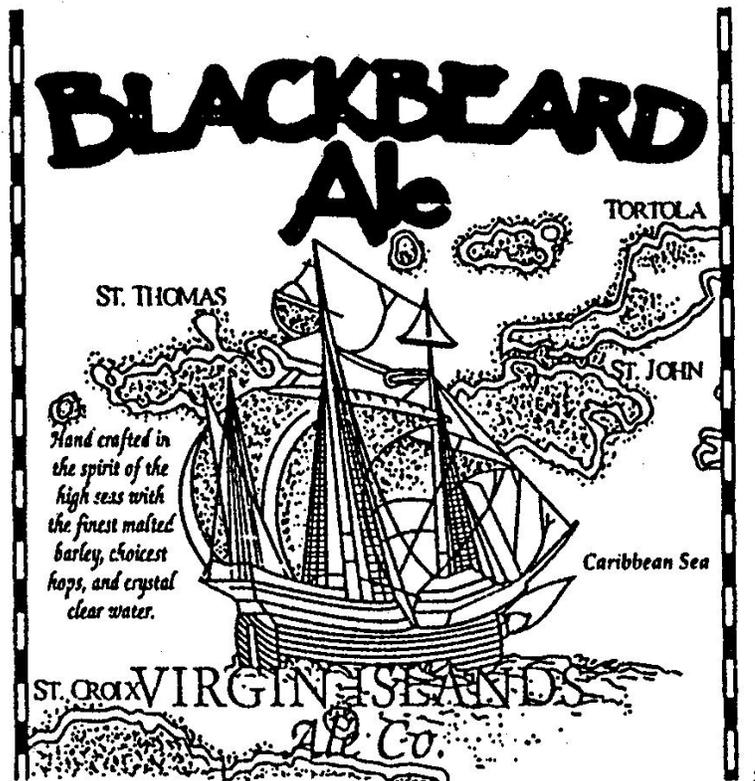
Clipper City Brewing Co., LP (“Applicant”) seeks registration on the Principal Register of the mark BLACKBEARD’S BREAKFAST (in standard characters) for “beverages, namely, beers, ales, and malt liquors” in International Class 32.<sup>2</sup>

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<sup>1</sup> Examining Attorney Rebecca Povarchuk examined the subject Application and wrote the brief on appeal. Examining Attorney Mark Leipzig represented the Office at oral hearing.

<sup>2</sup> Application Serial No. 86353682 was filed on July 31, 2014, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the following registered word and design mark for "beers" in International Class 32 as to be likely to cause confusion or mistake, or to deceive prospective purchasers:



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

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<sup>3</sup> Registration No. 2245413, issued on the Principal Register on May 18, 1999, Section 8 & 15 declarations accepted and acknowledged, and Section 9 renewal granted. The words "Ale", "Virgin Islands Ale Co.", "St. Thomas", "Tortolas", "St. John", "St. Croix" and "Caribbean Sea" are disclaimed.

## I. Analysis

We base our determination of likelihood of confusion under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1293, 113 USPQ2d 2045, 2049 (2015). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

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

We have considered each *DuPont* factor that is relevant, and have treated any other factors as neutral. See *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d

1687, 1688 (Fed. Cir. 1993) (factors “may play more or less weighty roles in any particular determination”).

Two key considerations are the similarities between the marks and the similarities between the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *Joel Gott Wines, LLC v. Rehoboth Van Gott, Inc.*, 107 USPQ2d 1424, 1429 (TTAB 2013).

#### **A. Similarity of the Goods, Channels of Trade, and Classes of Customers**

We begin with the second *DuPont* factor, “[t]he similarity or dissimilarity and nature of the goods ... as described in an application or registration....” *DuPont*, 177 USPQ 567. Registrant’s identified goods are “beers” and Applicant’s identified goods are “beverages, namely, beers, ales, and malt liquors.” Ale and malt liquor are types of beer. According to the American Heritage dictionary, ale is “A usually full-bodied beer that has been fermented at a relatively warm temperature.”<sup>4</sup> And according to the Merriam-Webster dictionary, malt liquor is “a type of beer that has a high amount of alcohol.”<sup>5</sup> Thus, Registrant’s identification of “beer” encompasses Applicant’s goods in their entirety. See *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1959 (TTAB 2016) (“The goods are identical insofar as the identifications in the application and in the cited registration both include ‘beer.’ The remaining goods in the cited registration, ‘ale’ and ‘lager,’ are otherwise closely related to, and in fact are types of beer.”).

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<sup>4</sup> At [www.AHDictionary.com](http://www.AHDictionary.com), downloaded 11/14/2014, Nov. 14, 2014 Office Action p. 10.

<sup>5</sup> At [www.Merriam-Webster.com](http://www.Merriam-Webster.com), 11/14/2014, Nov. 14, 2014 Office Action p. 7.

In its brief, Applicant suggests in passing that its beer will be infused with coffee,<sup>6</sup> but “[w]e must consider the goods as they are identified in the application and registration,” *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990), and that ingredient is nowhere to be found in its identification. We find, accordingly, that the goods are identical.

Since the goods are identical, and there are no restrictions on channels of trade in either the Application or the Registration, it is presumed under the third *DuPont* factor that Applicant’s goods and Registrant’s goods move in the same channels of trade normal for those goods (such as liquor stores, beer sections of grocery and convenience stores, bars and restaurants) to the same classes of purchasers for those goods. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Bay State Brewing*, 117 USPQ2d at 1959-60; *Syndicat Des Proprietaires Viticulteurs De Chateauneuf-Du-Pape v. Pasquier DesVignes*, 107 USPQ2d 1930, 1942 (TTAB 2013); *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069, 2073 (TTAB 1989).

The identity in the goods, the channels of trade through which they would be distributed, and the classes of customers to whom they would be purveyed all weigh in favor of finding a likelihood of confusion under the second and third *DuPont* factors.

### **B. Similarity of the marks**

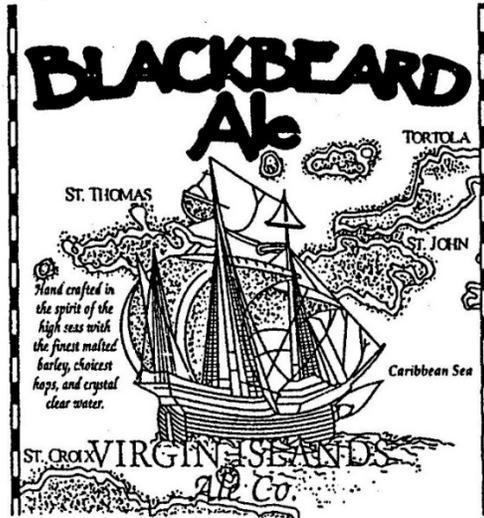
Under the first *DuPont* factor, we determine the similarity or dissimilarity of

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<sup>6</sup> Applicant’s brief, pp. 17-18, 4 TTABVUE 22-23.

Applicant's and Registrant's marks as compared in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “[T]wo marks may be found to be confusingly similar if there are sufficient similarities in terms of sound *or* visual appearance *or* connotation.” *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016) (emphasis in original; quoting *Kabushiki Kaisha Hattori Seiko v. Satellite Int’l, Ltd.*, 29 USPQ2d 1317, 1318 (TTAB 1991), *aff’d mem.*, 979 F.2d 216 (Fed. Cir. 1992)). Since the goods are identical, the degree of similarity between the marks necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *In re Bay State Brewing*, 117 USPQ2d at 1960; *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012).

Even though both marks begin with the name BLACKBEARD, Applicant argues that the marks, taken in their entireties, are dissimilar in sight and sound. Applicant's mark adds a possessive “S” and “BREAKFAST” to form BLACKBEARD’S BREAKFAST, and Registrant's mark includes a design and additional wording:



Applicant contends that, “In light of the size and prominence of the design element of the Registered Mark, the meaning of which is reinforced by the literal elements, the design element is the dominant feature of the Registered Mark.”<sup>7</sup> Applicant further argues that beer is “primarily sold in a visual or self-service manner, such as in stores or bars” so “the visual impact predominates over any phonetic impact.”<sup>8</sup>

Although the design is somewhat prominent, we agree with the Examining Attorney that the dominant component of both marks is the name BLACKBEARD. As Applicant admits, both marks refer to the notorious English pirate (real name Edward Teach) who sailed the Caribbean in the early 1700’s under the nickname BLACKBEARD.<sup>9</sup> The BLACKBEARD name appears prominently as the first word in each mark. *See Palm Bay Imps.*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark

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<sup>7</sup> *Id.* at p. 12, 4 TTABVUE 17.

<sup>8</sup> Applicant’s brief, p. 6, 9-10, 4 TTABVUE 11, 14-15.

<sup>9</sup> [www.OxfordDictionaries.com/us/definition/Americanenglish/Blackbeard](http://www.OxfordDictionaries.com/us/definition/Americanenglish/Blackbeard) 11/14/2014, Nov. 14, 2014 Office Action p. 12. Applicant’s brief, pp. 2-3, 13-18, 4 TTABVUE 7-8, 18-23.

and the first word to appear on the label); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered”). In the case of a composite mark such as Registrant’s, consisting of words and a design, “the words are normally given greater weight because they would be used by consumers to request the products.” *Joel Gott Wines*, 107 USPQ2d at 1431 (citing *In re Viterra Inc.*, 101 USPQ2d at 1911 (“the verbal portion of a word and design mark likely will be the dominant portion”).

Consumers ordering Applicant’s or Registrant’s beer from a bartender or a server would tend to ask for the drink by name, without having the opportunity to see a label. *See In re Bay State Brewing*, 117 USPQ2d at 1961; *Schieffelin v. Molson*, 9 USPQ2d at 2073 (“We also take into consideration the fact that the products of the parties are of the type ordered verbally in bars and restaurants.”). And these consumers, who retain a general rather than specific impression of the marks, *see Joel Gott Wines*, 107 USPQ2d at 1430, would naturally tend to shorten their pronunciation to the first, most memorable, part of each mark. *See Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1819 (TTAB 2015) (“While Opposer’s beer was originally sold under the *BUDWEISER* brand, customers soon began to abbreviate the mark, calling for *BUDWEISER* beer just by the name ‘*BUD.*’”); *In re Bay State Brewing*, 117 USPQ2d at 1961. Hence, although we compare the marks in their entireties, “it is not improper to give more weight to this dominant feature [BLACKBEARD] in determining the commercial impression created by the

mark.” *In re Bay State Brewing*, 117 USPQ2d at 1960 (citing *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)); *see also Somerset Distilling Inc. v. Speymalt Whisky Dist. Ltd.*, 14 USPQ2d 1539, 1542 (TTAB 1989).

The remaining, non-dominant portions of the registered mark do not serve to distinguish them from Applicant’s mark. The old-fashioned sailing ship and map design serves to reinforce the reference to BLACKBEARD, who sailed among the islands of the Caribbean.<sup>10</sup> *Cf. Joel Gott Wines*, 107 USPQ2d at 1430-31 (“As for the design element, it does not create a separate commercial impression but serves merely as a carrier for the words. Further, even if we were to consider the wave design as creating a separate impression, it is of less significance than the dominant feature, GOTT....”). Applicant maintains that the registered mark, unlike the two-syllable applied-for mark, rambles on for 28 words. But as it admits, many of these words, such as Tortola, St. Thomas, St. John, and St. Croix, “are locations or descriptive terms that invoke the image of the Caribbean,”<sup>11</sup> and are thus consistent with the overall BLACKBEARD theme. The disclaimed word ALE, which appears near the top and bottom of the registered mark, is generic: “Because ALE has nominal commercial significance, the Board properly accorded the term less weight in assessing the similarity of the marks under *DuPont*. As a generic term, ALE simply delineates a class of goods.” *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004). And the remaining words in Registrant’s mark, “hand crafted in the spirit

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<sup>10</sup> *See* [www.OxfordDictionaries.com/us/definition/Americanenglish/Blackbeard](http://www.OxfordDictionaries.com/us/definition/Americanenglish/Blackbeard) 11/14/2014, Nov. 14, 2014 Office Action p. 12.

<sup>11</sup> *Id.* at p. 14, 4 TTABVUE 19.

of the high seas with the finest malted barley, choicest hops, and crystal clear water”, are so highly descriptive that they would tend to be omitted by average beer purchasers--purchasers who, as noted above, would naturally shorten their pronunciation of Registrant’s mark to its first, dominant element, BLACKBEARD.

Similarly, the remaining elements of Applicant’s mark do not distinguish it from Registrant’s. Applicant argues that the possessive “s” at the end of BLACKBEARD’S ties it to BREAKFAST, yielding a unitary mark with a humorous connotation and commercial impression, suggesting that the goods (beers, ales, and malt liquors) are what the pirate Blackbeard had for breakfast.<sup>12</sup> But the possessive form does not render the mark unitary, *see In re Royal BodyCare, Inc.*, 83 USPQ2d 1564, 1567 (TTAB 2007); nor does it distinguish it from the term BLACKBEARD. *See In Re Jack B. Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (“Further, the dominant portion of registrant’s mark is virtually identical to applicant’s mark BINION, differing only by the concluding apostrophe ‘S’ that may be viewed as the possessive form of BINION. The absence of the possessive form in applicant’s mark BINION has little, if any, significance for consumers in distinguishing it from the cited mark.”). If anything, the possessive form reinforces the reference to the pirate. Applicant’s addition of BREAKFAST would tend to be seen as a variation of Registrant’s mark, suggesting another line of beer, such as one with more substance, emanating from the same source. “Those consumers who do recognize the differences in the marks may believe that applicant’s mark is a variation of [Registrant’s] mark that [Registrant] has

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<sup>12</sup> Applicant’s brief, pp. 2-3, 14, 4 TTABVUE 7-8, 19.

adopted for use on a different product.” *Schieffelin & Co. v. Molson Co’s.*, 9 USPQ2d 2069, 2073 (TTAB 1989). Thus, Applicant’s addition of the possessive “s” and BREAKFAST do little to distinguish its applied-for mark from Registrant’s mark.

Overall, comparing the marks in their entireties, in terms of appearance, sound, connotation and commercial impression, Applicant’s mark is similar to Registrant’s. *See In re Chatam Int’l*, 71 USPQ2d at 1947. The first *DuPont* factor also weighs in favor of finding a likelihood of confusion.

### **C. Number and Nature of Similar Marks in use on Similar Goods**

Under the sixth *DuPont* factor, the Federal Circuit has stated that “evidence of third-party use of similar marks on similar goods ‘can show that customers have been educated to distinguish between different marks on the basis of minute distinctions.’” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)). “The weaker an opposer’s mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Juice Generation*, 115 USPQ2d at 1674.

Applicant contends that the BLACKBEARD element of Registrant’s mark is weak and should be afforded a narrow scope of protection because Blackbeard is a well-known pirate and historical figure whose name has been used by third parties in

connection with alcoholic beverages and related services.<sup>13</sup> In its request for reconsideration, Applicant adduced evidence of:

- An article from the Washington BEER Blog, about a newly-opened brewery and pizza restaurant in Westport, Washington State, “Blackbeard’s Brewing Co.”;



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- BlackBeard Spiced Rum;



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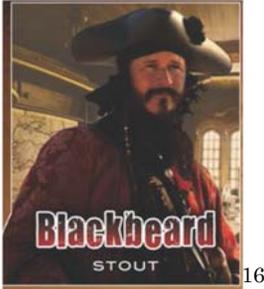
- Pensacola Bay Brewery's Blackbeard Stout;

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<sup>13</sup> Applicant's brief p. 17, 4 TTABVUE 22.

<sup>14</sup>www.WashingtonBeerBlog.com, 10/23/2015, Applicant's Nov. 5, 2015 Request for Reconsideration pp. 16-20.

<sup>15</sup>www.BlackBeardRum.com, 10/23/2015, Applicant's Nov. 5, 2015 Request for Reconsideration pp.21-30.



- Blackbeards Beers Wines Spirits/Grand Cayman Island;<sup>17</sup>
- Blackbeard's Cove Family Fun Park in South Carolina;



- Blackbeard's Grill and Grog Seafood Restaurant in Beaufort, North Carolina;<sup>19</sup>
- A BeerAdvocate search results page listing approximately a dozen "Blackbeard" beers.<sup>20</sup>

A similar factual scenario arose in *Palm Bay Imports*, where Palm Bay's intent-to-use application for the mark VEUVE ROYALE for sparkling wine was opposed based on Veuve Clicquot's registered VEUVE-formative marks for sparkling wine. Palm Bay introduced evidence of at least five different third-party alcoholic beverages that

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<sup>16</sup> www.pbbrew.com, 10/23/2015, Applicant's Nov. 5, 2015 Request for Reconsideration pp.31-33.

<sup>17</sup> www.Blackbeards.ky, 10/23/2015, Applicant's Nov. 5, 2015 Request for Reconsideration pp. 34-35.

<sup>18</sup> Applicant's Nov. 5, 2015 Request for Reconsideration pp.36-38.

<sup>19</sup> www.Facebook.com 10/23/2015, Applicant's Nov. 5, 2015 Request for Reconsideration pp. 39-48.

<sup>20</sup> www.BeerAdvocate.com, 10/23/2015, Applicant's Nov. 5, 2015 Request for Reconsideration p.49.

used the term VEUVE or a foreign equivalent. 73 USPQ2d at 1693. The Board nonetheless sustained the opposition, and the Federal Circuit affirmed, holding that:

The probative value of third-party trademarks depends entirely upon their usage. *E.g., Scarves by Vera, Inc. v. Todo Imports, Ltd.*, 544 F.2d 1167, 1173 (2d Cir. 1976) (“The significance of third-party trademarks depends wholly upon their usage. Defendant introduced no evidence that these trademarks were actually used by third parties, that they were well promoted or that they were recognized by consumers.”). While the Beverage Media Guide is compelling evidence that distributors were aware that the term VEUVE was used for other alcoholic products, it is not evidence that the consuming public was likewise aware. At best, the Beverage Media Guide is evidence that the consuming public could potentially be cognizant of third-party use of the term VEUVE. Absent evidence of the consuming public's awareness, however, the Beverage Media Guide standing alone does not suffice. As this court has previously recognized where the “record includes no evidence about the *extent of [third-party] uses* ... [t]he probative value of this evidence is thus minimal.” *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1338 (Fed. Cir. 2001) (emphasis added).

*Id.* (emphasis in original).

So too here. There is little or no evidence of the extent of these third-party marks' actual use in commerce. The “Blackbeard” Grand Cayman Islands website does not show use of the mark in the United States.<sup>21</sup> *See Person's Co. Ltd. v. Christman*, 900 F.2d 1565, 14 USPQ2d 1477 (Fed. Cir. 1990) (extraterritorial use irrelevant to trademark rights in the United States). The Blackbeard's Cove Family Fun Park, in South Carolina, evidently serves beers under familiar labels, such as Bud Lite, Miller Lite, and the like, but its services are not sufficiently related or similar to Registrant's goods to weaken its mark. *DuPont*, 177 USPQ at 567 (sixth *DuPont* factor is number and nature of similar marks “on similar goods”). The BeerAdvocate website,

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<sup>21</sup> www.Blackbeards.ky, Applicant's Nov. 5, 2015 Request for Reconsideration pp. 34-35.

apparently devoted to aficionados and/or those in the business, lists a number of “Blackbeard” beers on a search results page, but with no further explanation. The list fails to explain the criteria for inclusion, to state whether the beers are in the planning or production phases, or on the market, or to describe the extent of their promotion, geographic reach, volume of sales, or duration of use—factors that might lend some probative value to an otherwise unexplained search results page. Thus, although the subject matter of the BeerAdvocate website appears to be more focused than a more general Internet search engine, such as Google.com, a mere listing of results, without more, lacks sufficient context, and is of little or no probative value. *Cf. In re Thomas Nelson Inc.*, 97 USPQ2d 1712, 1715 (TTAB 2011) (“A search summary of Internet search results has little probative value, because such a list does not show the context in which the term is used on the listed web pages.”) (citing *inter alia In re Thomas*, 79 USPQ2d 1021 (TTAB 2006) (Board rejected applicant’s attempt to show weakness of a term in a mark through citation to a large number of GOOGLE® “hits” because the “hits” lacked sufficient context)).

Taking all of Applicant’s proffered evidence into account, there appear to be some third-party uses of “Blackbeard” in commerce, but as in *Palm Bay Imports*, there is no evidence that the consuming public, including both sophisticated and casual beer drinkers, has become so familiar with a multiplicity of the same or similar marks that it can distinguish them based on minor differences. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010); *In re C. H. Hanson Co.*, 116 USPQ2d 1351, 1353 (TTAB 2015) (citing *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476

F.2d 1004, 177 USPQ 462, 463 (CCPA 1973); *Carl Karcher Enters. Inc. v. Stars Rests. Corp.*, 35 USPQ2d 1125, 1130-31 (TTAB 1995)).

Further, the mere existence of these names does not imply that the term BLACKBEARD carries a highly suggestive connotation in the relevant beer industry and therefore may be considered weak. Applicant has introduced no third-party registrations showing a sense in which the “Blackbeard” element is used in ordinary parlance. *See Juice Generation*, 115 USPQ2d at 1674-75; *Jack Wolfskin*, 116 USPQ2d at 1136; *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016).

Applicant’s third-party evidence thus fails to undermine the strength of Registrant’s mark, either commercially or conceptually, and the sixth *DuPont* factor is neutral.

#### **D. Sophistication of the Customers**

The fourth DuPont factor concerns the conditions under which and buyers to whom sales are made, i.e. “impulse” versus careful, sophisticated purchasing. *DuPont*, 177 USPQ at 567. Applicant asserts that “[p]urchasers of the goods under both Marks would be expected to be more sophisticated and acquainted with products from micro-breweries. Purchasers would be expected to know that they are shopping in the microbrewery section of a store and, thus, would be less likely to purchase either the Applicant’s goods or the Registered Mark’s goods on a whim or because they happened upon the goods, unlike, for example, peanuts or magazines.”<sup>22</sup>

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<sup>22</sup> Applicant’s brief, p. 20, 4 TTABVUE 25.

The Examining Attorney responds that this assertion is unsupported by any evidence of record or any restrictions of trade channels to a “microbrewery” section of a store.<sup>23</sup> We agree. As we have observed above, the registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application. *Octocom*, 16 USPQ2d at 1787. “Further, in the absence of any evidence to the contrary in this case, we take judicial notice that beer is often relatively inexpensive, subject to impulse purchase, and often ordered orally in a bar or restaurant. ... Because the respective identifications include ‘beer’ without any limit regarding a particular price point, we must treat the goods as including inexpensive as well as more costly beers, and therefore presume that purchasers for ‘beer’ include ordinary consumers who may buy inexpensive beer on impulse.” *In re Bay State Brewing*, 117 USPQ2d at 1960 & n4. Here, there is no restriction in the subject Application and Registration as to price or quality, or as to the means of production and retail display of Applicant’s and Registrant’s respective beers—i.e., whether they are “micro” or “macro” brewed. Hence, there is no reason to infer that the consumers of these beers will be particularly sophisticated or careful in making their purchases. *See Somerset Distilling v. Speymalt Whisky*, 14 USPQ2d at 1542; *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 765 (TTAB 1986). And even those who are sophisticated could well infer from the similar marks that a single brewery produced Registrant and Applicant’s respective beers. *See In re Bay State Brewing Co.*, 117 USPQ2d at 1961.

The fourth *DuPont* factor is therefore neutral.

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<sup>23</sup> Examining Attorney’s brief, 7 TTABVUE 12.

## **II. Conclusion**

Having carefully considered all of the arguments and evidence of record, and all relevant *DuPont* factors, we find that: Applicant's and Registrant's goods, channels of trade, and classes of customers are the same; their marks, taken in their entirety, are similar in appearance, sound, connotation and commercial impression; the number of similar marks in use on similar goods does not undermine the strength of Registrant's mark; and the conditions of sale do not encourage careful, sophisticated purchasing decisions. All other factors are deemed neutral. All in all, we find that there is a likelihood of confusion under Section 2(d).

**Decision:** The refusal to register Applicant's mark BLACKBEARD'S BREAKFAST is affirmed.