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Mailed:  
May 17, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Miguel Torres, S.A.  
v.  
Complejo Industrial RM, S.A. de C.V.

Opposition No. 91188401  
to application Serial No. 77525448  
filed on July 17, 2008

J. Scott Gerien of Dickenson Peatman & Fogarty for Miguel Torres, S.A.

Albert S. Penilla of Martine Penilla & Gencarella, LLP for Complejo Industrial RM, S.A. de C.V.

Before Grendel, Mermelstein and Ritchie, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

**INTRODUCTION.**

Complejo Industrial RM, S.A. de C.V. (applicant) seeks registration on the Principal Register of the mark **GRAN SOL**

(and design), depicted below, for goods identified in the application as "tequila."<sup>1</sup>



Miguel Torres, S.A. (opposer) has opposed registration of applicant's mark pursuant to Trademark Act Section 13, 15 U.S.C. §1063, alleging likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. §1052(d), as its ground of opposition. Specifically, opposer alleges (in pertinent part) that it owns Principal Register Registration No. 2270845, which is of the mark **GRAN VIÑA SOL** (registered in standard character form; VIÑA disclaimed), for goods identified in the registration as "wines."<sup>2</sup>

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<sup>1</sup> Serial No. 77525448, filed on July 17, 2008. The application is based on use in commerce, under Trademark Act Section 1(a), 15 U.S.C. §1051(a). October 10, 2001 is asserted in the application to be the date of first use of the mark and the date of first use of the mark in commerce. The application includes the following "Description of Mark" statement (see Trademark Rule 2.37, 37 C.F.R. §2.37): "The mark consists of an abstract design of the sun simulating an agave plant with the rays of the sun symbolized by the leaves of the plant. The design is above the wording 'gran sol.'" The application also includes the following translation statement (see Trademark Rule 2.32(a)(9), 37 C.F.R. §2.32(a)(9): "The foreign wording in the mark translates into English as Awesome Sun."

<sup>2</sup> Registration No. 2270845, issued on August 17, 1999; renewed. The registration includes the following translation statement:

Opposer alleges that applicant's mark, as applied to the goods identified in the application, so resembles opposer's previously-registered GRAN VIÑA SOL mark as to be likely to cause confusion, to cause mistake, or to deceive.<sup>3</sup>

Applicant filed an answer by which it denied the allegations of the notice of opposition which are essential to opposer's Section 2(d) claim.<sup>4</sup>

The evidence of record includes the pleadings and, by rule, the file of applicant's application involved in this proceeding. See Trademark Rule 2.122(b), 37 C.F.R. §2.122(b). Additionally, both parties submitted evidence at trial.<sup>5</sup> The case is fully briefed.

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"The English translation of 'GRAN VIÑA SOL' is 'great sun vineyard.'"

<sup>3</sup> Opposer also pleaded ownership of prior common law rights in its GRAN VIÑA SOL mark for wines. In the context of this case, we need not address this claim, and shall base our decision solely on opposer's pleaded ownership of Reg. No. 2270845. We note here that applicant in its brief (at page 8) has conceded opposer's priority in any event.

<sup>4</sup> Applicant's answer also asserts three "affirmative defenses," but they consist essentially of arguments in furtherance of applicant's denial of opposer's likelihood of confusion allegations. We have considered them as such.

<sup>5</sup> Under its Notice of Reliance (hereinafter "opposer's NOR Exh. \_\_\_"), opposer made of record the following evidence: excerpts from various printed publications; printouts of documents from the Office's electronic database pertaining to various third-party registrations; various dictionary definitions; and certain of applicant's discovery responses. Opposer also submitted the testimony deposition of its counsel's paralegal Kimberly Tracey-Hall and exhibits thereto (Tracey-Hall depo.). (As the Board noted in its March 18, 2010 order, this deposition in its entirety (including its exhibits) was improperly designated as confidential and submitted under seal. See *In re Violation of Rule 28(d)*, \_\_\_ F.3d \_\_\_, 98 USPQ2d 1144

**Opposition No. 91188401**

To prevail in this opposition proceeding, opposer must establish (1) its standing to oppose, and (2) at least one statutory ground of opposition to registration of applicant's mark. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). After careful consideration of all of the evidence of record and all of the arguments of the parties, and for the reasons discussed below, we find that opposer has established both its standing to oppose and its pleaded Section 2(d) ground of opposition. Therefore, we **SUSTAIN** the opposition.

**STANDING.**

Opposer has properly made its pleaded Reg. No. 2270845 of record, establishing that the registration is in effect and is owned by opposer. (Opposer's NOR Exh. 1.) In view

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(Fed. Cir. 2011). The Board allowed opposer time to resubmit the deposition in properly-redacted form, but opposer failed to do so. The deposition and its exhibits clearly are not confidential materials and we will discuss them freely in this opinion. Additionally, inasmuch as opposer failed to avail itself of the opportunity to file a properly-redacted version of the deposition (as allowed in the Board's March 18, 2010 order), we are re-designating the deposition in its entirety as non-confidential and are re-docketing it as part of the publicly-available record of this proceeding. See *Morgan Creek Productions Inc. v. Foria Int'l Inc.*, 91 USPQ2d 1134, 1136 n.9 (TTAB 2009).

Under its Notice of Reliance (hereinafter "applicant's NOR Exh. \_\_\_"), applicant made of record the following evidence: printouts from the Office's electronic database pertaining to certain other registrations owned by opposer; excerpts from various printed publications; official records consisting largely of various federal regulations and statutes; various dictionary definitions; a copy of the Board's decision in a prior opposition proceeding involving opposer; and certain of opposer's discovery responses.

**Opposition No. 91188401**

thereof, and because opposer's pleaded Section 2(d) claim is not frivolous, we find that opposer has a real interest in the outcome of this proceeding and thus a reasonable basis for believing that it would be damaged by the issuance to applicant of the registration applicant seeks. Accordingly, we find that opposer has established its standing to oppose registration of applicant's mark. See *Cunningham v. Laser Golf Corp.*, 55 USPQ2d 1842 at 1844. See also *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

**SECTION 2(d) PRIORITY.**

Because opposer has made its pleaded registration of record (Opposer's NOR Exh. 1), Section 2(d) priority is not an issue in this case as to the mark (GRAN VIÑA SOL) and the goods (wines) covered by that registration. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974); *Miss Universe L.P. v. Community Marketing Inc.*, 82 USPQ2d 1562, 1566 (TTAB 2007).

**LIKELIHOOD OF CONFUSION.**

Our likelihood of confusion determination under Section 2(d) is a legal conclusion, based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue (the *du Pont*

factors), as set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973).<sup>6</sup> See *M2 Software Inc. v. M2 Communications Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1946 (Fed. Cir. 2006); *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005).

**Du Pont Factor 1: Similarity or Dissimilarity of the Marks.**

Under the first *du Pont* factor, we determine the similarity or dissimilarity of applicant's mark and opposer's mark when they are viewed in their entirety in terms of appearance, sound, connotation and commercial impression. See *Palm Bay Imports, Inc.*, 73 USPQ2d 1689 at 1691.

The test under the first *du Pont* factor is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their overall commercial impressions as to be likely to cause confusion when used on or in connection with the goods at issue. This necessarily

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<sup>6</sup> In this case, the relevant *du Pont* factors as to which there is pertinent evidence of record (and/or argument by the parties), in the order we shall discuss them, are: Factor 1 (similarity of the marks); Factor 6 (third-party use of similar marks on similar goods); Factor 5 (fame of opposer's mark); Factor 3 (similarity of trade channels); Factor 2 (similarity of goods); Factor 4 (conditions of purchase); and Factors 7 and 8 (actual confusion).

**Opposition No. 91188401**

requires us to take into account the fallibility of memory over time and the fact that the average purchaser retains a general rather than a specific impression of trademarks.

See *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1468 (TTAB 1988); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Comparing the marks in terms of appearance, we find that the marks are similar to the extent that they both include the words GRAN and SOL. The marks look different to the extent that applicant's mark includes the "sun" design element, and to the extent that the words GRAN SOL in applicant's mark are depicted in stylized lettering. We note with respect to the stylized lettering, however, that opposer's mark is registered in standard character form, and that opposer's use of the mark therefore is "not limited to any particular rendition of the mark." *In re Mighty Leaf Tea*, 94 USPQ2d 1257 at 1260.<sup>7</sup> See also *Citigroup Inc. v. Capital City Bank Group Inc.*, \_\_\_ F.3d \_\_\_, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011); *Cunningham v. Laser Golf Corp.*, 55 USPQ2d 1842 at 1847. The marks also look different to the

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<sup>7</sup> In *Mighty Leaf Tea*, a standard character mark consisting of the letters "ML" was found to be similar to the mark depicted below, despite the highly-stylized lettering in which the letters "ML" appeared in the latter mark:



MARK LEES

extent that the word VIÑA appears in opposer's mark but not in applicant's mark. On balance, we find the marks to be somewhat more dissimilar than similar in terms of appearance, due primarily to the presence of the design element in applicant's mark.

In terms of sound, we find that the marks are different to the extent that opposer's mark includes the word VIÑA and applicant's mark does not. However, we find that the words GRAN and SOL would be pronounced the same in both marks, as the entirety of applicant's mark and as the prominent first and last syllables of opposer's three-syllable mark. On balance, we find that the similarity in sound which results from the presence in both marks of the identically-pronounced words GRAN and SOL outweighs the dissimilarity which results from the presence of the word VIÑA in opposer's mark.

In terms of connotation, we find the parties' marks to be similar. Initially, we find that the purchasers of the parties' goods would include American consumers who do not speak Spanish.<sup>8</sup> We find that these consumers are likely to

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<sup>8</sup> The parties (especially applicant) have presented detailed arguments in support of their contrary positions regarding the proper English translations of the respective marks and the similarity or dissimilarity of the meanings of the marks in terms of those English translations. We note, however, that because both parties' marks consist of words from the same foreign language (Spanish), it is unnecessary to apply or consider the doctrine of foreign equivalents in this case. See *Brown Shoe Co. v. Robbins*, 90 USPQ2d 1752, 1756 (TTAB 2009). In any event, regardless of whether the marks would have similar or dissimilar

attribute similar meanings to applicant's mark GRAN SOL and opposer's mark GRAN VIÑA SOL. Such consumers are likely to perceive GRAN and SOL simply as foreign words (most likely Spanish words) which, because they look and sound the same in both marks, would also have the same or similar meanings in both marks. See *Brown Shoe Co. v. Robbins*, 90 USPQ2d 1752 at 1756. We find (as applicant repeatedly argues) that non-Spanish-speaking American consumers viewing the word VIÑA in opposer's mark are likely to guess or assume (correctly) that it describes or refers to wine (especially since opposer's goods are wine),<sup>9</sup> a meaning which is not present in applicant's mark. Considering the marks in their entireties, we find that non-Spanish-speaking American consumers are likely to assume, because the marks share the identical words words GRAN and SOL and differ only as to the

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connotations to Spanish-speaking American consumers under the doctrine of foreign equivalents, we find that the marks in this case are similar in connotation under the first *du Pont* factor, based on their likely significance to the substantial portion of American consumers who do not speak Spanish.

<sup>9</sup> We note that in a prior (non-precedential) Board decision upon which applicant relies in this case (applicant's NOR Exh. 27), the Board found (with respect to another of opposer's marks, VIÑA SOL) that because the word "VIÑA" is very similar to the word "vino," which itself appears in and is defined in unabridged American dictionaries as "wine," non-Spanish-speaking U.S. purchasers "may not understand the meaning of VIÑA in the abstract," but they "would recognize VIÑA as meaning 'wine' when said term is used in conjunction with wine." *Miguel Torres, S.A. v. Advantage Wine Group*, Opp. No. 91101101, slip op. at 6 (TTAB Nov. 23, 1999).

**Opposition No. 91188401**

additional descriptive word VIÑA in opposer's mark, that the marks have similar (even if not identical) meanings.

We turn now to a comparison of the parties' marks in terms of commercial impression.

Initially, it is settled that although the marks at issue must be considered in their entirety, one feature of a mark may be found to be more significant than another in terms of the mark's function as a source-indicator, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark, and in comparing the marks at issue under the first *du Pont* factor. See *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004). "Indeed, this type of analysis appears to be unavoidable." *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 at 751 (Fed. Cir. 1985).

Moreover, "[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark..." *Id.* Thus, while a mark must be considered in its entirety, a less-distinctive or non-distinctive feature of the mark generally is accorded lesser weight in the determination of the mark's commercial impression (and in the comparison of the marks at issue under the first *du Pont* factor), because it contributes less (and in some cases little or nothing) to the mark's

**Opposition No. 91188401**

significance and function as an indication of the source of the goods. See *Palm Bay Imports Inc.*, 73 USPQ2d 1689 at 1693; *In re Chatam Int'l Inc.*, 71 USPQ2d 1944 at 1946.

Applying these principles in this case, we find, first, that the word VIÑA in opposer's mark GRAN VIÑA SOL is a highly descriptive word as applied to opposer's goods (wines), and that it therefore is entitled to lesser weight in our determination of the commercial impression of opposer's mark and in our comparison of the parties' marks under the first *du Pont* factor. As discussed above in connection with the connotations of the marks, and as applicant repeatedly argues, even American purchasers who do not speak Spanish are likely to guess or assume that the Spanish word VIÑA in opposer's mark describes or refers to wine, especially since opposer's goods in fact are wine. These consumers thus are likely to perceive and understand the word VIÑA in opposer's mark primarily or merely as an indication of what the goods are (wines). They are less likely (or even unlikely) to use the word VIÑA in opposer's mark as a basis for or aid in identifying and distinguishing the *source* of the wine. For these reasons, while we certainly are considering opposer's mark in its entirety, we find that it is appropriate to discount the commercial

**Opposition No. 91188401**

significance of VIÑA in our comparison of the parties' marks under the first *du Pont* factor.<sup>10</sup>

Next and with respect to applicant's mark GRAN SOL (and design), we find that the dominant source-indicating feature of the mark is the wording GRAN SOL. The sun design element is a visually significant feature of the mark, but we find that it nonetheless is entitled to somewhat lesser weight in

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<sup>10</sup> We are not persuaded by applicant's arguments to the contrary. For example, we are not persuaded by applicant's argument that VIÑA actually should be deemed to be the dominant feature of opposer's mark because it appears as the center word in the mark. (There is no *per se* rule for determining a term's dominance based on word order, although it has been said that the *first* word of a mark often makes a greater impression on the customer. See, e.g., *Presto Prods., Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988)). Likewise, the fact that VIÑA appears in other registered marks owned by opposer (applicant's NOR Exh. 2) does not persuade us in this case that the highly descriptive word VIÑA is the dominant word in opposer's mark. Applicant further argues that opposer responded to applicant's Requests for Admissions Nos. 20 and 26 (applicant's NOR Exh. 28) by stating that opposer considers VIÑA to be an integral part of opposer's brand name for its wines, but we find that to be self-evident and it does not preclude a finding that the word is entitled to lesser weight in our determination of the commercial impression of opposer's trademark. Finally, applicant argues that opposer responded to applicant's Request for Admission No. 24 (applicant's NOR Exh. 28) by stating that its GRAN VIÑA SOL mark "is a unitary composite with no portion receiving greater emphasis than any other portion." However, while we certainly have considered this statement by opposer, we find that it is not dispositive here. It does not relieve us of our duty to make our own determination as to the relative strength of the words appearing in opposer's mark based on the record as a whole, nor our duty to undertake our own analysis of the overall commercial impression created by opposer's mark when considered in its entirety. For all of the reasons discussed above, we shall accord lesser weight to VIÑA in our determination of the commercial impression of opposer's mark as a source-indicator, and in our comparison of the parties' marks under the first *du Pont* factor.

**Opposition No. 91188401**

assessing the mark's commercial impression, for the following reasons.

When a mark consists of a word portion and a design portion, it often is the word portion that is found to dominate the commercial impression of the mark because it would be used by purchasers to call for the goods. See *M.C.I. Foods Inc. v. Bunte*, 96 USPQ2d 1544, 1551 (TTAB 2010); *Anthony's Pizza & Pasta Int'l Inc. v. Anthony's Pizza Holding Co.*, 95 USPQ2d 1271, 1279 (TTAB 2009). In this case in particular, the wording in applicant's mark is more dominant given the nature of the goods and how they are encountered by purchasers. The likely purchasers of applicant's goods would include restaurant and bar patrons (see discussion below) who in many instances would call for or order alcoholic beverages such as applicant's tequila by name, and they likely would not even see the bottle label containing the design when they order their drinks. See *Guinness United Distillers & Vintners B.V. v. Anheuser-Busch Inc.*, 64 USPQ2d 1039, 1044 (S.D.N.Y. 2002) (noting "the often chaotic conditions under which alcoholic beverages are purchased in bars"). Also, applicant's tequila could reasonably be expected to be recommended by word-of-mouth in many situations, in which case, again, the label bearing the design would not be seen by the party to whom the tequila is being recommended when the recommendation is made.

**Opposition No. 91188401**

For these reasons, although we are considering applicant's mark in its entirety, we shall accord relatively more weight to the wording GRAN SOL in our assessment of the commercial impression of applicant's mark and in our comparison of the parties' marks under the first *du Pont* factor. We have considered applicant's arguments to the contrary, but we are not persuaded by them.

Keeping in mind these findings regarding the relative weight to be accorded to the various features of the respective marks, we find that the presence of the words GRAN and SOL in both marks (as the entirety of the wording in applicant's mark and as the prominent first and last words of opposer's mark) gives the two marks similar commercial impressions when they are considered in their entireties as source-indicators. We find that this basic point of similarity in the marks' commercial impressions outweighs the differences in the marks.

Further with respect to commercial impression, we again acknowledge (as applicant argues) that purchasers would understand from the highly descriptive word VIÑA in opposer's mark that opposer's goods are wines, and that no such impression is created by applicant's mark, which lacks the word VIÑA and which is used on tequila, not wine. However, we find that this point of difference in commercial impression goes merely to purchasers' ability to distinguish

**Opposition No. 91188401**

the goods, i.e., it indicates that opposer's goods are wine, and that applicant's goods are not. This difference in commercial impression which arises from the presence of the highly descriptive word VIÑA in opposer's mark, while it would enable purchasers to distinguish the goods themselves (see discussion below), is unlikely to also be used by purchasers as a basis for distinguishing the source of the respective goods.

As noted above, in comparing the parties' marks under the first *du Pont* factor, we must take into account the fallibility of purchasers' memory over time and the fact that purchasers tend to retain a general rather than a specific impression of the many trademarks they encounter. While applicant's mark and opposer's mark are not identical, that is not the test under the first *du Pont* factor. See *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 at 1468. We find that the points of dissimilarity between the marks, including the differences in appearance arising from the sun design element and the stylized lettering in applicant's mark,<sup>11</sup> and the presence of the highly descriptive word VIÑA in opposer's mark and the absence of that word from

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<sup>11</sup> And again, as noted above, opposer's mark is registered in standard character form and thus is not limited in the manner in which its lettering might be displayed.

applicant's mark,<sup>12</sup> are outweighed by the overall similarity which results from the dominant presence in both marks of the identical, distinctive words GRAN and SOL.

For all of the reasons discussed above, we find that applicant's mark and opposer's mark, when they are considered in their entirety in terms of appearance, sound, connotation and commercial impression, are sufficiently similar that confusion is likely to result if the marks were to be used on similar goods. In our likelihood of confusion analysis, this finding (under the first *du Pont* factor) supports a conclusion that confusion is likely.

***Du Pont* Factor 6: Similar Marks In Use on Similar Goods.**

There is no evidence in the record (under the sixth *du Pont* factor) of any use by third parties of marks similar to opposer's GRAN VIÑA SOL mark in connection with alcoholic beverages which might support a finding that the scope of protection to which opposer's mark is entitled should be limited or narrowed by such third-party use. We find

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<sup>12</sup> See *In re Mighty Leaf Tea*, 94 UPQ2d 1257 at 1260 ("... the presence of an additional term in the mark does not necessarily eliminate the likelihood of confusion if some terms are identical"). This is especially so when the additional term is descriptive or generic. See *In re National Data Corp.*, 224 USPQ 749 at 751.

(contrary to applicant's argument) that the sixth *du Pont* factor is neutral in our likelihood of confusion analysis.

***Du Pont* Factor 5: Fame of Opposer's Mark.**

To the extent that opposer is arguing that its mark is a famous mark (under the fifth *du Pont* factor), we find that opposer's evidence (consisting merely of a few magazine advertisements and product reviews) fails to support such claim of fame. The fifth *du Pont* factor is neutral in this case.

***Du Pont* Factor 3: Similarity or Dissimilarity of Trade Channels and Purchasers.**

We next shall consider the third *du Pont* likelihood of confusion factor, under which we determine "the similarity or dissimilarity of established, likely-to-continue trade channels" for the parties' respective goods. Under this factor, we also shall consider the related issue of the comparison of the classes of purchasers of the parties' respective goods.

Applicant's goods, as identified in the application, are "tequila." The goods identified in opposer's pleaded registration are "wines."

Because there are no limitations or restrictions as to trade channels or classes of purchasers in applicant's and

**Opposition No. 91188401**

opposer's 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.*, 227 F.2d 1352, 56 USPQ2d 1351, 1357 (Fed. Cir. 2000).

The Board and the Federal Circuit Court of Appeals repeatedly have found that different types of alcoholic beverages share identical trade channels and classes of purchasers. See, e.g., *In re Chatam Int'l Inc.*, 71 USPQ2d 1944 at 1948; *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); *Monarch Wine Co. v. Hood River Distillers, Inc.*, 196 USPQ 855, 857 (TTAB 1977); *In re AGE Bodegas Unidas, S.A.*, 192 USPQ 326, 326 (TTAB 1976).

Moreover in this case, applicant has specifically admitted (in its responses to opposer's Requests for Admissions; opposer's NOR Exh. 14-16): that "wine and tequila have similar channels of trade" (Request No. 15); that wines and tequila both are sold in retail stores, liquor stores, and other retail outlets where wine is sold (Request No. 4); that wines and tequila both are sold in bars (Request Nos. 5-6); that wines and tequila both are sold in restaurants (Request Nos. 7-8); and that wines and tequila both are sold over the Internet on the same websites

**Opposition No. 91188401**

by the same online alcoholic beverage retailers (Request No. 10).

Contrary to applicant's argument, it is not dispositive (even if it is true; applicant has submitted no evidence to support the argument) that distilled spirits and wines might be offered for sale on different shelves or in different areas of the alcoholic beverage sections of retail stores, or on different sections of a restaurant or bar beverage menu. *See Monarch Wine Co. v. Hood River Distillers, Inc.*, 196 USPQ 855 at 857:

... we believe that a prospective purchaser of an alcoholic beverage upon entering and browsing through the various alcoholic products located or displayed on the various shelves or counters in retail liquor establishments would, upon encountering a whiskey, rum, brandy or vodka identified by the term "MONARCH," and then continuing on his jaunt to another counter or section of the same store and seeing a wine or champagne sold under the identical mark "MONARCH," be likely to believe that both products originated with the same producer.

For these reasons, we find (as applicant has admitted) that the normal trade channels for the parties' respective goods (tequila and wines) are identical, i.e., they are marketed and purchased in bars, in restaurants, in liquor stores and other retail outlets, and through online retailers. We also find that the normal classes of purchasers of the parties' respective goods are identical, i.e., they are ordinary consumers of alcoholic beverages,

including bar patrons, restaurant patrons and retail purchasers of alcoholic beverages. In our likelihood of confusion analysis, these findings (under the third *du Pont* factor) support a conclusion that confusion is likely.

***Du Pont* Factor 2: Similarity or Dissimilarity of the Goods.**

Under the second *du Pont* factor, we determine the similarity or dissimilarity of opposer's goods as they are identified in opposer's registration, i.e., "wines," and applicant's goods as they are identified in applicant's application, i.e., "tequila."

It is settled that it is not necessary that the respective goods at issue be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis under the second *du Pont* factor. "Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services." *Hewlett-Packard Co. v. Packard Press Inc.*, 227 F.3d 1261, 62 USPQ2d 1001 at 1004 (Fed. Cir. 2002). The issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. The goods need only be sufficiently related that consumers would be likely to assume, upon encountering the goods marketed under the marks

**Opposition No. 91188401**

at issue, that the goods originate from, are sponsored or authorized by, or are otherwise connected to the same source. See *Black & Decker Corp. v. Emerson Electric Co.*, 84 USPQ2d 1482, 1492 (TTAB 2007).

The Federal Circuit Court of Appeals and the Board repeatedly have found that different types of alcoholic beverages are related goods for purposes of the second *du Pont* factor, even though they are specifically different beverages that are readily distinguishable from each other and would not be confused for each other by purchasers. See, e.g., *In re Chatam Int'l Inc.* 71 USPQ2d 1944 at 1947-48 (beer and ale related to tequila "because both are alcoholic beverages that are marketed in many of the same channels of trade to many of the same consumers"); *In re Majestic Distilling Co.*, 65 USPQ2d 1201 at 1204 (malt liquor related to tequila for the same reason); *Somerset Distilling, Inc. v. Speymalt Whiskey Distribs. Ltd.*, 14 USPQ2d 1539, 1542 (TTAB 1989) (whiskey related to gin and vodka because they "are what may be characterized as basic alcoholic beverages"). See also *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1265 (TTAB 2011) (beer related to wine); *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (beer related to wine); *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069, 2073 (TTAB 1989) (Cognac brandy related to malt liquor, beer and ale); *Monarch Wine Co. v. Hood*

**Opposition No. 91188401**

*River Distillers, Inc.*, 196 USPQ 855 at 857 (distilled spirits related to wine); *In re AGE Bodegas Unidas, S.A.*, 192 USPQ 326 at 326 (wines related to whiskey); *Rosenblum v. George Willsher & Co.*, 161 USPQ 492, 492 (TTAB 1969) (Scotch whisky related to rum).<sup>13</sup>

In the present case, there is no question that, as applicant repeatedly emphasizes in its arguments, tequila and wine are specifically different alcoholic beverage products in terms of their ingredients, production methods and alcohol content, and that consumers will not confuse wine for tequila, or vice versa. The evidence submitted by applicant shows that wine is a fermented alcoholic beverage produced by the natural alcoholic fermentation of the juice of grapes or other fruits and agricultural products, containing between 7 percent and 24 percent alcohol by volume. (Applicant's NOR Exh. 14, 21.) Tequila is a distilled alcoholic beverage, specifically, an alcoholic distillate from a fermented mash derived from a specific variety of the Mexican blue agave plant grown exclusively in

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<sup>13</sup> The Board has noted that different types of alcoholic beverages are related in that "[a] typical consumer of alcoholic beverages may drink more than one type of beverage and may shop for different alcoholic beverages in the same liquor store. Moreover, a person may serve more than one kind of alcoholic beverage before or during a meal or at a party." *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069 at 2073. Likewise in *Somerset Distilling, Inc.*, the Board noted that a consumer may purchase different types of alcoholic beverages as gifts, or to stock a bar at home. 14 USPQ2d 1539 at 1542.

**Opposition No. 91188401**

specific locations in Mexico, bottled at not less than 40 percent alcohol by volume. (Applicant's NOR Exh. 3, 15.)

However, these technical differences between wine and tequila in terms of ingredients and production methods are not dispositive. As noted above, the Board has specifically found that wines and distilled spirits are related goods. See *Monarch Wine Co.*, 196 USPQ 855 at 857; *In re AGE Bodegas Unidas*, 192 USPQ 326 at 326. Cf. *In re Majestic Distilling Co.*, 65 USPQ2d 1201 at 1204 (finding malt liquor and tequila to be related goods despite the fact that "malt liquor is a brewed product, whereas tequila is distilled"); *In Sailerbrau Franz Sailer*, 23 USPQ2d 1719 at 1720 (finding beer and wine to be related goods despite the differences between the two products, which "are numerous and significant, wines being produced by wine growers from grapes which are harvested, pressed, fermented and aged before bottling, whereas beer is made from grain, produced in breweries by cooking and is consumed within six months of its production").

The Board discussed this point in *Monarch Wine Co. v. Hood River Distillers, Inc.*:

As to the distilled alcoholic beverages of applicant, and the wines and champagnes of opposer, we are fully aware of the specific differences between them such as appearance, flavor, aroma, alcoholic content, cost, consumer recognition, and even the fact that distilled alcoholic beverages are separated from wines and

champagnes and sold at different counters in different sections in retail liquor stores. However, the issue before us is not the likelihood of confusion as between the specific products of applicant and opposer, 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.

196 USPQ 855 at 857 (internal citations omitted).<sup>14</sup>

In this case, we find that the evidence opposer has submitted establishes that tequila and wines are sufficiently related that source confusion is likely to result from the use of similar marks on the two products.

First, opposer has made of record thirteen use-based third-party registrations which include in their identifications of goods both tequila and wine. (Opposer's

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<sup>14</sup> See also *Schieffelin & Co. vs. The Molson Companies Ltd.*, 9 USPQ2d 2069 at 2073 (finding malt liquor and Cognac brandy to be related under the second *du Pont* factor, even though "we have no doubt that purchasers are not likely to consume a malt liquor thinking that it is Cognac brandy"). See also *D.J. Bielzoff Prods. Co. v. White Horse Distillers, Ltd.*, 107 F.2d 583, 43 USPQ 397, 399 (CCPA 1939):

Of course, one served with a glass of "Red Horse" gin, cordial, liqueur, brandy, or rum would not likely believe that he was drinking a glass of "White Horse" Scotch whisky, but those familiar with "White Horse" or "Black Horse" Scotch whiskies might readily believe that "Red Horse" cordials, liqueurs, brandies, rums, cocktails, gins, and alcoholic bitters have the same origin....

**Opposition No. 91188401**

NOR Exh. 2.)<sup>15</sup> Although these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the extent that they serve to suggest that the goods identified therein are products which are produced and/or marketed by a single source under a single mark. See *Venture Out Properties LLC v. Wynn Resorts Holdings LLC*, 81 USPQ2d 1887, 1893 (TTAB 2007); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993). We find in this case that opposer's third-party registration evidence establishes that tequila and wine are related goods under the second *du Pont* factor. See *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261 at 1264-65 (third-party registration evidence can suffice to establish relatedness

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<sup>15</sup> These are Reg. Nos. 3107961, 3209611, 3083621, 3220474, 2748932, 2745279, 2742928, 3326272, 3188831, 3703348, 3558733, 3521695, and 3587909. Although the identifications of goods in these thirteen third-party registrations include other alcoholic beverage products in addition to tequila and wine, we find (contrary to applicant's argument) that the number of such additional products is not so great that the probative value of the registrations as evidence of the relatedness of tequila and wine, per se, is negated. See *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009). However, we have not relied on the rest of the third-party registrations submitted by opposer which, as argued by applicant, include in their identifications of goods so many different products in addition to tequila and wine that the probative value of the registrations as evidence of the relatedness of tequila and wine, per se, is significantly lessened.

of different alcoholic beverages); *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719 at 1720 (same).<sup>16</sup>

Additionally, the relatedness of tequila and wines under the second *du Pont* factor is further suggested by opposer's evidence which shows that wine can be and often is used as a substitute for tequila in margarita cocktails, to create a cocktail known as a "wine margarita." The record (including evidence submitted by applicant) shows, and it is common knowledge, that the margarita cocktail is a very popular alcoholic cocktail, and that tequila is the primary alcoholic ingredient in the usual margarita cocktail.<sup>17</sup>

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<sup>16</sup> Even if we discount these third-party registrations as evidence that tequila and wine may be produced and/or marketed by a single manufacturer, it would not be dispositive. With respect to the malt liquor and tequila at issue in *Majestic Distilling Co.*, the court noted that there was no evidence in that case that the two products are produced by the same manufacturer, but stated that "[u]nless consumers are aware of the fact, if it is one, that no brewer also manufactures distilled spirits, that fact is not dispositive. ... In this case Majestic has not demonstrated that consumers distinguish alcoholic beverages by manufacturer rather than brand name." 65 USPQ2d 1201 at 1204.

<sup>17</sup> Applicant has admitted that tequila is used as an ingredient in margaritas. (Applicant's response to opposer's Request for Admission No. 23 (opposer's NOR Exh. 14). Also, see Toma Margaritas! The Original Guide to Margaritas and Tequila (BarMedia 2002) at p. 3 (opposer's NOR Exh. 4 and applicant's NOR Exh. 19); Margaritas 101 (John Wiley & Sons, Inc. (2006) at p. 6 (opposer's NOR Exh. 5); The Tequila 1000 (Sourcebooks, Inc. 2008) at p. 3 (applicant's NOR Exh. 20.) (We grant opposer's request (made in its notice of reliance) that we take judicial notice of the content of these publications. Applicant has not objected to opposer's request, and we note that applicant itself submitted at trial some of these same publications (among others) and specifically relies on their content in support of the arguments in its brief.)

However, tequila is a distilled spirit, and many restaurants, bars and retail outlets are not licensed by state or local authorities to sell distilled spirits or cocktails containing distilled spirits, but are licensed to sell only beer and wine. Because the margarita is such a popular cocktail, these establishments having only wine and beer liquor licenses often offer and serve "wine margaritas," which are margaritas which substitute wine for tequila as the alcoholic ingredient in the margarita.<sup>18</sup> Moreover, these wine margaritas include margaritas made with "agave wine," a wine which, like tequila, is derived from the agave plant.<sup>19</sup> The record also shows that wine and

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<sup>18</sup> See Toma Margaritas!, supra at p. 83: "What's with the wine? Well, several of these recipes were created at restaurants with licenses that permit them to serve only beer and wine, the others feature wine as a flavoring agent. Whatever the initial reason behind their creation, these light, refreshing and flavorful concoctions are well worth sampling."

<sup>19</sup> See Tracey-Hall depo. Exh. 6 (a printout from the website of San Gabriel Beverage Group (an apparent alcoholic beverage distributor) (at [www.sangabrielbeveragegroup.com](http://www.sangabrielbeveragegroup.com)):

La Quinta is a typical Agave wine produced through fermentation of the Agave plant with the resulting wine then fortified to 20% or 24% alcohol by volume using Agave spirits. This is similar to how Port is created and allows the end product to receive a "wine" classification. This is an important point as the primary market for Agave wine in the USA exists predominantly in those restaurants, bars, six-pack shops and convenience stores that do not have a distilled spirits license, only a beer and wine license. In the restaurant trade, an establishment can serve a legitimate Margarita drink using Agave wine in place of Tequila. At 20% or 24% by volume, it is near the strength of 1-1/2 oz. of tequila served in an 8 oz. glass. There is no

tequila can be used together as complementary ingredients in a margarita.<sup>20</sup>

On this point, opposer has submitted evidence consisting of menus and restaurant reviews of restaurants from around the country which include "wine margaritas" and "agave wine margaritas" among the beverages they offer and serve. (Tracey-Hall depo. Exh. 6, 8, 11, 14, 15, 18-26, 28.) Opposer also has submitted evidence which shows that pre-prepared and pre-packaged wine margaritas and agave wine margaritas are marketed directly to retail consumers through various retail trade channels. (Tracey-Hall depo. Exh. 7, 9, 10, 13.) We find that this evidence regarding wine margaritas further supports a finding that wines and tequila are related goods under the second *du Pont* factor.

Finally, applicant argues at length that tequila and wines are unrelated goods because various U.S. and Mexican

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telltale taste making the drink indistinguishable from an actual Margarita.

Applicant contends (brief p. 19) that "agave wine" is a "misnomer" because federal regulations prohibit the advertising of wine as a distilled spirit or as containing distilled spirits. (Applicant's NOR Exh. 14.) However, assuming *arguendo* that these regulations technically would apply to agave wine, the record shows that "agave wine" in fact is marketed, by that name, to consumers in the United States.

<sup>20</sup> Toma Margaritas!, supra at 83-84 (opposer's NOR Exh. 4); Margaritas 101, supra at p. 103 (opposer's NOR Exh. 5). In this regard, applicant has admitted (more generally) that wine often is used as an ingredient in various cocktails. (Applicant's response to opposer's Request for Admission No. 24 (opposer's NOR Exh. 14)).

regulations and international trade agreements provide that tequila is a product distinctive to Mexico, and that a product may be marketed as "tequila" only if it originates from particular locations in Mexico and is certified by the Mexican government as complying with strict production and export requirements. By contrast, applicant argues, wine is not a product distinctive to Mexico but rather is produced all over the world. (We note that applicant has admitted that wine is produced in Mexico. (Applicant's answer to opposer's Request for Admission No. 27 (Opposer's NOR Exh. 14))). However, even if we assume that U.S. purchasers are aware that "tequila" must come only from Mexico, there is no basis in the record for finding that purchasers would understand or assume, based on that geographic limitation, that there could be no source, licensing or other connection or affiliation between a tequila and a wine (whether produced in Mexico or elsewhere) which bear similar trademarks.<sup>21</sup>

In summary with respect to the second *du Pont* factor, we note again that the Board and the Federal Circuit repeatedly have found that different types of alcoholic

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<sup>21</sup> Cf. *Schieffelin & Co. v. The Molson Companies Ltd.*, 9 USPQ2d 2069 (finding that Cognac brandy and malt liquor are related goods, while also noting that "Cognac" brandy must come only from the Cognac region of France); *Rosenblum v. George Willsher & Co.*, 161 USPQ 492 at 492 (finding Scotch whisky and rum related despite the fact that they do not "normally emanate from the same geographic areas").

**Opposition No. 91188401**

beverages are related goods. Having considered all of the evidence of record and the arguments of counsel, we likewise find in this case that tequila and wine are related goods. Again, the issue here is not whether purchasers would confuse tequila and wine for each other (they would not), but rather whether they are likely to be confused as to the source of those products if they are marketed under similar marks. We find that the evidence of record suffices to establish that tequila and wine are sufficiently related goods that such source confusion is likely. In our likelihood of confusion analysis, this finding (under the second *du Pont* factor) supports a conclusion that confusion is likely.

***Du Pont* Factor 4: Conditions of Purchase.**

Under the fourth *du Pont* factor, we consider the conditions under which the goods at issue are purchased.

The Board and the Federal Circuit have often found that alcoholic beverages (including applicant's broadly-identified "tequila" and opposer's broadly-identified "wines") are or can be inexpensive goods which might be purchased on impulse or without a great degree of care.

*See, e.g., In re Chatam Int'l Inc.*, 71 USPQ2d 1944 at 1948 (tequila); *In re Majestic Distilling Co.*, 65 USPQ2d 1201 at 1204-05 (tequila); *Palm Bay Imports, Inc.*, 73 USPQ2d 1689 at

**Opposition No. 91188401**

1695 (champagne and sparkling wine); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261 at 1267 (wine); *In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001) (wine); *In re Bercut-Vandervoot & Co.*, 229 USPQ 763, 764-65 (TTAB 1986) (wine).

Although some consumers might be relatively knowledgeable in purchasing alcoholic beverages, other consumers may not be.

The applicable standard of care to be applied under the fourth *du Pont* factor is that which would be exercised by these least-sophisticated consumers. See *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1027 (TTAB 2009).

Moreover, even loyal, brand-conscious consumers of alcoholic beverages would not necessarily be immune to source confusion arising from the use of similar marks on different alcoholic beverages.<sup>22</sup> In a case involving tequila (and malt liquor), the Federal Circuit noted that

... brand-consciousness not only can be expected to lead a consumer who already has a favorite brand of tequila to be loyal to that brand, but it also should compel a consumer who enjoys "RED BULL"-brand malt liquor but has not yet developed a taste for a particular brand of tequila to purchase "RED BULL"-brand tequila in the mistaken belief that it is manufactured or sponsored by the same entity. It seems to us that that is precisely the mistake that §2(d) of the Lanham Act seeks to prevent.

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<sup>22</sup> See generally *In re Research and Trading Corp.*, 793 F.2d 1276, 1279, 230 USPQ 49, 50 (Fed. Cir. 1986) ("That the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods. 'Human memories even of discriminating purchasers ... are not infallible.'")

*In re Majestic Distilling Co.*, 65 USPQ2d 1201 at 1205. See also *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719 at 1720 (“While some may have preferred brands, there are just as likely to be purchasers who delight in trying new taste treats.”).

Applicant has presented voluminous and detailed evidence concerning the strict regulatory environment governing the marketing of alcoholic beverages in the United States, including tequila and wine. (Applicant’s NOR Exh. 3-22.) In particular, applicant relies on evidence (applicant’s NOR Exh. 12) showing that various federal regulations require that certain information must be set forth on the labels of wine bottles, including the brand name, the class and type of wine, the alcohol content, and the name and address of the entity responsible for the bottling and packing of the wine or the importation of the wine into the United States. Applicant also has submitted evidence (applicant’s NOR Exh. 11) showing that federal regulations require that similar information must be set forth on the labels of bottles of distilled spirits such as tequila, including the class of spirit, the brand name, the alcohol content, the name and address of the bottler and importer, and the country of origin. Applicant argues that these labeling requirements ensure that purchasers will not

encounter applicant's tequila and opposer's wines "without the aforementioned accompanying information which clearly distinguishes the wine product from the tequila product, and which also clearly distinguishes the source of each product." (Applicant's brief at 21.)

We are not persuaded by this argument. First and as a factual matter (and as discussed above under the first *du Pont* factor regarding the sun design element in applicant's mark), it is likely that restaurant and bar patrons often will not even see the bottle labels when they order or call for the respective alcoholic beverages by the glass or by the cocktail. See *Guinness United Distillers & Vintners B.V. v. Anheuser-Busch Inc.*, 64 USPQ2d 1039 at 1044 (noting "the often chaotic conditions under which alcoholic beverages are purchased in bars"). Second, even if purchasers see the bottle label, it is unlikely that they would use the purely informational matter on the label (usually printed in a very small and/or inconspicuous manner), rather than the product's trademark itself, as their means of determining and distinguishing the source of the product. See *Somerset Distilling, Inc.*, 14 USPQ2d 1539 at 1542 (finding that purchasers are unlikely to use informational matter on the bottle label "such as the generic name of the product, the quantity and where it is made" as an indication of source). See also *Monarch Wine*

*Co. v. Hood River Distillers, Inc.*, 196 USPQ 855 at 856 (finding likely source confusion as to distilled spirits and wines sold under similar marks despite the fact that "the origin of both applicant's and opposer's goods must, by law, be clearly stated on the labels of their respective products").

For all of these reasons, we find that the conditions under which applicant's broadly-identified "tequila" and opposer's broadly-identified "wines" are purchased would tend to increase the likelihood of source confusion arising from the use of similar marks on such goods. In our likelihood of confusion analysis, this finding (under the fourth *du Pont* factor) supports a conclusion that confusion is likely.<sup>23</sup>

***Du Pont* Factors 7 and 8: Actual Confusion.**

There is no evidence of actual confusion. However, neither is there any evidence (especially any evidence as to the extent of the distribution and sales of the parties' respective products) which would show that there has been any significant opportunity for confusion to have occurred in the actual marketplace. Absent such evidence, the

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<sup>23</sup> At best, the fourth *du Pont* factor is neutral because the conditions of sale clearly do not necessarily mitigate the likelihood of confusion. Contrary to applicant's contention, this *du Pont* factor certainly does not favor applicant.

apparent absence of actual confusion has little or no probative value. See *Brown Shoe Co. v. Robbins*, 90 USPQ2d 1752 at 1756; *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007). In any event, "it is unnecessary to show actual confusion in establishing likelihood of confusion." *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 at 1843 (Fed. Cir. 1990); see also *Carefirst of Maryland Inc. v. FirstHealth of the Carolinas Inc.*, 77 USPQ2d 1492, 1511 (TTAB 2005).

On this record, and contrary to applicant's argument, we find that the seventh and eighth *du Pont* factors pertaining to actual confusion are neutral in this case.

**Likelihood of Confusion: Conclusion.**

In *Schieffelin & Co. vs. The Molson Companies Ltd.*, the Board found:

While we have no doubt that purchasers are not likely to consume a malt liquor thinking that it is Cognac brandy, in view of the similarities in the marks it is reasonable to assume that purchasers may believe that BRADOR malt liquor is another premium imported alcoholic beverage sold by the same company which sells the expensive BRAS D'OR Cognac brandy. Those consumers who do recognize the differences in the marks may believe that applicant's mark is a variation of opposer's mark that opposer has adopted for use on a different product.

9 USPQ2d 2069 at 2073.

**Opposition No. 91188401**

Likewise in the present case, we find that alcoholic beverage consumers who are familiar with GRAN SOL tequila, upon encountering GRAN VIÑA SOL wine, are likely to assume, based on the similarity of the marks and goods, that the maker of the tequila also is marketing wine (either its own wine or through a license or other marketing arrangement with a wine producer) under a variant of its GRAN SOL mark. Additionally or alternatively, consumers familiar with GRAN VIÑA SOL wine are likely to assume, upon encountering tequila sold under applicant's GRAN SOL (and design) mark, that the maker of the wine also is marketing tequila (either its own tequila from Mexico or through a license or other marketing arrangement with a Mexican tequila producer) under a variant of its GRAN VIÑA SOL mark.

We have considered all of the evidence of record as it pertains to the relevant *du Pont* factors. Applicant's and opposer's respective marks and goods are not identical but, as discussed above, they need not be identical in order to find that confusion is likely. We find that the marks are sufficiently similar, and the goods are sufficiently related, that source confusion is likely. Moreover, the trade channels and classes of purchasers for the respective goods are the same, and the goods would include inexpensive products that can be purchased without a great deal of care.

**Opposition No. 91188401**

For all of the reasons discussed above, we conclude that a likelihood of confusion exists. We have carefully considered all of applicant's arguments to the contrary (including any arguments not specifically discussed in this opinion), but we are not persuaded by them. To the extent that any doubts might exist as to the correctness of our conclusion that confusion is likely, we resolve such doubts, as we must, against applicant. See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992); *Baseball America Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1849 (TTAB 2004); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1663 (TTAB 2002).

**SUMMARY AND DECISION.**

In summary, we find that opposer has established its standing to oppose registration of applicant's mark, as well as its pleaded Section 2(d) ground of opposition.

**Decision: The opposition is sustained.**