

This Opinion is not a  
Precedent of the TTAB

Mailed: November 9, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

—  
*Del Monte Foods, Inc.*  
*v.*  
*Yordan Bojidarov Dabov*

—  
Opposition No. 91233082

—  
Hara K. Jacobs of Ballard Spahr LLP  
for Del Monte Foods, Inc.

Yordan Bojidarov Dabov, *pro se*.

—  
Before Ritchie, Kuczma and Adlin,  
Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Yordan Bojidarov Dabov filed a request for extension of protection of International Registration No. 1304742 for mark shown below



for “tea.”<sup>1</sup> In its notice of opposition, Del Monte Foods, Inc. alleges prior use and

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<sup>1</sup> Application Serial No. 79189894, filed April 14, 2016 under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a). The application indicates that “[t]he wording ‘DELMARTE’ has no

registration of DEL MONTE and many variations thereof, including some with designs, such as



<sup>2</sup> and

<sup>3</sup>

for fruits, vegetables, soft drinks, fruit juice and other products.<sup>4</sup> Many of Opposer's registrations are over five years old. As grounds for opposition, Opposer alleges that use of Applicant's mark would be likely to cause confusion with, and dilute, Opposer's marks. Opposer did not pursue its dilution claim, however, so it has been given no consideration. In his answer, Applicant denies the salient allegations in the notice of opposition.

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meaning in a foreign language," and includes this description of the mark: "[t]he mark consists of stylized lotus flower appearing above the literal elements 'DELMARTE' appearing above two curved lines."

<sup>2</sup> Registration No. 827921, issued April 25, 1967 for, among other things, "soft drinks"; renewed.

<sup>3</sup> Registration No. 3886446, issued December 7, 2010 for, among other things, "canned fruit and vegetable juices and drinks consisting primarily of fruit juice and water;" Sections 8 and 15 affidavit accepted and acknowledged. This registration includes a disclaimer of QUALITY and this description of the mark: "[t]he mark consists of a shield shape with a fleur de lys flower shape on the top and the wording 'DEL MONTE' in the center of the shield with the word 'QUALITY' centered below that." According to the registration, "[t]he English translation of the word 'DEL MONTE' in the mark is 'FROM THE MOUNTAIN'."

<sup>4</sup> Opposer also pleads ownership of Registration Nos. 881339, 2295935, 2302024, 1455602, 2124077, 2287404, 2581586, 2612039, 2754865, 3340830, 3509392, 3573799, 3604514, 3681547, 3785950, 3880077, 4077270, 4437510 and 4445181.

## I. The ACR Record

The parties agreed to resolve this case through Accelerated Case Resolution (“ACR”), including by stipulating to a number of facts (“Stipulation I”).<sup>5</sup> 19 TTABVUE.<sup>6</sup> The parties agreed that the exclusive way to introduce testimony would be through declaration or affidavit, and that “in lieu of submitting notices of reliance and trial briefs, the parties will submit cross-motions for summary judgment ... [and] The TTAB will then make a final determination on the merits based on the cross-motions ... the TTAB can resolve any issues of material fact in making a final determination ....” *Id.* at 6. After the Board approved the stipulation, 20 TTABVUE, the parties filed a second Stipulation, this time that “the documents listed below and produced by the parties are authentic under Federal Rule of Evidence 901 and admissible ....” 22 TTABVUE (“Stipulation II”).

The ACR record consists of the pleadings and, by operation of Trademark Rule 2.122(b), the file of Applicant’s involved application. In addition, Opposer introduced with its ACR Brief, 24 TTABVUE:

Declaration testimony of Liam Farrell, Opposer’s Vice  
President of Marketing.

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<sup>5</sup> The parties agreed “to reserve the right to object to the [Stipulated] facts on the basis of relevance, materiality, and/or weight.” While allowing “objections” to stipulated facts seems to at least partly defeat the purpose of stipulating, neither party objected to any of the stipulated facts.

<sup>6</sup> Citations to the record reference TTABVUE, the Board’s online docketing system. Specifically, the number preceding “TTABVUE” corresponds to the docket entry number(s), and any number(s) following “TTABVUE” refer to the page number(s) of the docket entry where the cited materials appear.

Documents, some of which were produced in discovery and subject to Stipulation II, and others of which were prepared for trial, including: third party reports on national and global “top brands;” Opposer’s Product Guide; printouts from an Office database of Opposer’s pleaded registrations; an Office Action issued in connection with a third-party application; printouts of third-party registrations; and website printouts showing third-party trademark use.

Applicant indicates in his ACR Brief (in letter form) that he sent certain evidence to Opposer, but he never filed it with the Board, and therefore it has not been properly introduced. In any event, based on Applicant’s description of the evidence in his ACR Brief, as well as the list of Applicant’s documents submitted with Stipulation II, none of the materials would change the result in this proceeding. In fact, the materials are either related to Applicant’s International Registration or are website printouts which may not be considered for the truth of the matters asserted therein. *Safer Inc. v. OMS Inv. Inc.*, 94 USPQ2d 1031, 1037 n.14 (TTAB 2010).

## **II. Standing and Priority**

Opposer attached to its notice of opposition printouts from an Office database showing the current status and title of its pleaded registrations. 1 TTABVUE 22-63. In addition, Applicant stipulates that Opposer owns its pleaded registrations and that they are “valid and in full force and effect.” 19 TTABVUE 3 (Stipulation I ¶¶ 5-7). Opposer’s pleaded registrations establish its standing. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). In any event, Applicant stipulates that Opposer has standing. 19 TTABVUE 5 (Stipulation I ¶ 24).

Moreover, because Applicant has not counterclaimed to cancel any of Opposer's pleaded registrations, priority is not at issue with respect to the marks and goods identified therein. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). In any event, Applicant stipulates that "Opposer has priority for its DEL MONTE® Marks." 19 TTABVUE 5 (Stipulation I ¶ 23).

### **III. Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, 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). Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848. We consider the likelihood of confusion factors about which there is evidence or argument, and treat the remaining factors as neutral.

We focus on Opposer's pleaded Registration No. 3886446. If we find confusion likely between the mark in this registration and Applicant's involved mark, we need not consider the likelihood of confusion between Applicant's mark and Opposer's other pleaded marks. On the other hand, if we find no likelihood of confusion between Applicant's mark and the mark in Opposer's pleaded '446 Registration, we would not

find confusion likely between Applicant's mark and Opposer's other pleaded marks, which are less similar to Applicant's mark in overall commercial impression. *In re Max Capital Grp.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

**A. Strength/Fame of Opposer's Mark**

Applicant stipulated that "[t]he DEL MONTE® Marks [which include the mark in the '446 Registration] are famous in the United States." 19 TTABVUE 3 (Stipulation I ¶ 9). We therefore find that Opposer's marks, including the mark in the '446 Registration, are famous.

The fame of Opposer's marks "plays a 'dominant role in the process of balancing the *DuPont* factors." *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) (quoting *Recot, Inc. v. Benton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000)). In fact, famous marks "enjoy a wide latitude of legal protection." *Id.* Stated differently, a strong mark "casts a long shadow which competitors must avoid." *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).<sup>7</sup> This factor therefore weighs heavily in favor of a finding of likelihood of confusion.

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<sup>7</sup> Opposer also introduced evidence that its pleaded marks are famous. For example, Opposer has "sold DEL MONTE® branded food and beverage products in the United States" for more than 125 years. 24 TTABVUE 30 (Farrell Dec. ¶ 2). While the figures are designated confidential, Opposer's sales of juice products alone under the DEL MONTE® Marks over the past three years have been substantial. The DEL MONTE brand is ranked among the top 100 in the United States and the world by several sources. 24 TTABVUE 34-151.

**B. Similarity of the Marks**

We consider the marks “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). In doing so, we are mindful that “the Lanham Act’s tolerance for similarity between competing marks varies inversely with the fame of the prior mark. As a mark’s fame increases, the Act’s tolerance for similarities in competing marks falls.” *Kenner Parker Toys*, 22 USPQ2d at 1456. In this case, given the fame of Opposer’s DEL MONTE marks, the Act’s tolerance for similarity between the marks is low.

The marks are quite similar, however. Applicant’s mark is



and Opposer’s mark is



. The marks’ literal elements are highly similar, as they are each comprised of eight letters beginning with “d-e-l-m” and ending in “t-e.” While the literal portion of Applicant’s mark is written as one word and Opposer’s is written as two, this difference is unlikely to be remembered especially given that the literal elements of both marks begin and end with the same letters. The marks also sound alike, as they begin and end with the same syllables. It is particularly significant that the marks begin with the same four letters, as consumers often focus on the first part of marks. *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). *See also, Palm Bay*

*Imps., Inc.*, 73 USPQ2d at 1692; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

While the design elements of the marks are obviously different, they are also similar in important ways. Specifically, Opposer's mark is described as featuring a "fleur de lys flower shape on the top." A fleur de lys is defined as "a heraldic device somewhat resembling three petals or floral segments of an iris,"<sup>8</sup> in other words a flower. According to the involved application, Applicant's mark "consists of stylized lotus flower appearing above the literal elements 'DELMARTE.'" Therefore, not only do both parties depict three petals of a flower above the literal portions of their marks, but in both marks the flower petals are immediately above the "M" in each term. When consumers encounter such similar terms depicted under similar design elements, confusion will be likely.

As for the marks' meaning, Applicant argues — without supporting evidence, and notwithstanding that his application does not include a translation statement — that DELMARTE is Spanish for "tea from the sea," which he points out is different from the meaning of Opposer's mark, "from the mountain." Even if we were to assume that consumers would assign to Applicant's mark the meaning Applicant proffers, that meaning is analogous to the meaning of Opposer's mark in a way which could lead to

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<sup>8</sup> <https://www.dictionary.com/browse/fleur-de-lys>. We may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).



confusion, especially given the other similarities between the marks. That is, according to Applicant, its products and Opposer's products are all identified by terms which indicate the type of geographic area from which they originate. If that is the case, some consumers familiar with Opposer's fruit, vegetable and juice products which are identified as coming "from the mountain" could perceive Applicant's mark as an extension or modified version of Opposer's mark, indicating a new product, tea, which comes "from the sea" instead. In any event, even assuming the marks convey completely different meanings, their similarities in appearance and sound outweigh differences in meaning, especially given the fame of Opposer's mark.

In considering the marks in their entireties, the differences between them become less significant when we consider that consumers generally do not encounter competing marks side-by-side. In fact, the test is not whether marks can be distinguished side-by-side, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Serv. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *San Fernando Elec. Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977). Here, the marks are more than similar enough for confusion to occur, given that the literal terms in the marks are much more similar than different and in both marks the similar literal terms are depicted beneath flower

designs each featuring three petals.<sup>9</sup> Accordingly, the similarity between the marks weighs in favor of finding a likelihood of confusion.

### C. The Goods, Channels of Trade and Classes of Consumers

Applicant's identification of "tea" encompasses the beverage tea. *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 (TTAB 2013) ("Indeed, tea encompasses 'beverages made of tea.'"). Opposer made of record third-party registrations which establish that third-party marks have been registered to different owners for both tea and fruit juice:

ARIZONA (Stylized) (Reg. No. 4465548) is registered for "tea-based beverages" and "iced tea" on the one hand and "fruit drinks" on the other.

BAI in standard characters (Reg. Nos. 3869115 and 5005124) is registered for "non-alcoholic beverages containing fruit juices" on the one hand and "beverages made of tea; tea-based beverages also containing fruit flavoring enhanced with antioxidants; tea-based beverages with fruit flavoring" on the other.



(Reg. No. 3857890) is registered for "tea; beverages made of tea; iced tea; tea-based beverages with fruit flavoring" on the one hand and "fruit-based soft drinks flavored with tea; fruit flavored soft drinks; fruit juices and fruit drinks" and "mixed fruit juices" on the other.

EVOLUTION FRESH in standard characters (Reg. No. 4766690) is registered for "tea and herbal tea; tea and herbal tea-based beverages; tea and herbal tea-based concentrates, with fruit flavoring" on the one hand and

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<sup>9</sup> To the extent Applicant argues that confusion is unlikely because the mark in Opposer's '446 Registration is sometimes depicted in color, the argument is unpersuasive. Opposer's registration does not include a color claim, and therefore could be depicted in any color, or in black and white.

“fruit juices; fruit and juice based beverages; fruit drinks and soft drinks containing fruit juices” on the other.



(Reg. No. 5426965) is registered for “tea; tea-based beverages also containing boba, fruit or fruit-based ingredients; tea-based beverages with fruit flavoring; fruit teas” on the one hand and “fruit beverages; fruit drinks and fruit juices; fruit flavored drinks” on the other.

HONEST in standard characters (Reg. No. 4076733) is registered for “tea and tea-based beverages; herbal teas” on the one hand and “nonalcoholic beverages containing fruit juices” on the other.

POM WONDERFUL in standard characters (Reg. No. 3687491) is registered for “iced tea and tea-based beverages with fruit flavoring” on the one hand and “preparations for making fruit drinks; fruit flavored beverages; non-alcoholic beverages containing fruit juices” on the other.



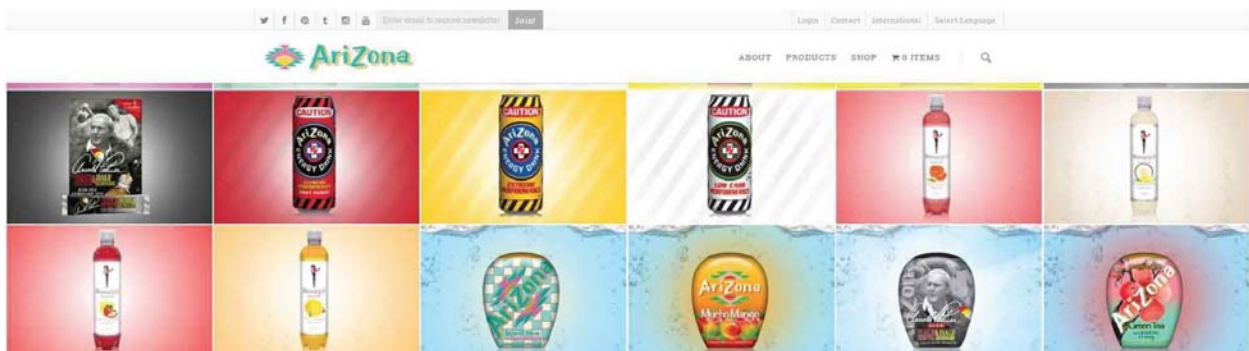
(Reg. No. 2031642) is registered for “iced tea” on the one hand and “fruit drinks, fruit juices and lemonades” on the other.

SWEGS in standard characters (Reg. No. 5397338) is registered for “teas” on the one hand and “beverages, namely, flavored water, fruit and vegetable juices” on the other.

WAWA (Reg. No. 1299708) is registered for “iced tea” on the one hand and “carbonated and non-carbonated non-alcoholic beverages — namely ... orange juice, and fruit juice drinks containing water” on the other.

*Id.* “Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source.” *See, In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1998); *see also In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009).

In addition, Opposer introduced evidence that many of the third-party owners of these registrations, and other third-parties, are actually using the same marks for fruit juice on the one hand and tea on the other, further establishing a relationship between the goods. For example the marks ARIZONA, BAI, COCO, EVOLUTION FRESH (Stylized), HONEST, POM WONDERFUL, SNAPPLE and SSIPS are all used for tea and fruit juice:





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 by Europe Standard  
**\$22<sup>00</sup>**  
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Lemonade with Sago



Mango Green Tea



Sweetened Star Fruit Juice



Fresh Lemon Black Tea



Lemon Juice with Kumquat



Korean Citron Green Tea



**Pom Wonderful Pomegranate Honey Green Tea, 12 Fluid per case.**  
 by POM Wonderful  
**\$37<sup>63</sup>** (\$6.27/Count)  
 FREE Shipping on eligible orders

Product Description  
 ... Pom Wonderful Pome  
 Green Tea, 12 Fluid Oun  
 986 ...



**POM Wonderful 100% Pomegranate Juice, 48 oz**  
 by POM Wonderful  
**\$10<sup>49</sup>** (\$0.22/Fl Oz)

Product Description  
 ... POM Wonderful 100%  
 Juice. A little sweet, a lit



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 (21)  
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 (5)  
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**\$1.28**  
**Snapple Kiwi Strawberry, 16 fl oz**  
 (58)  
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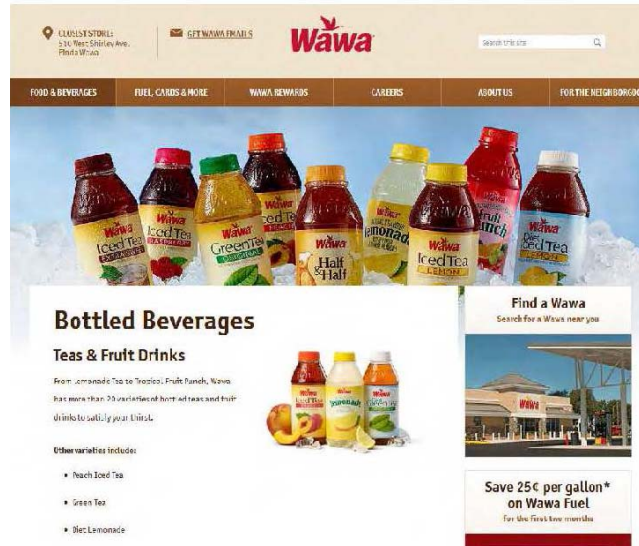
**Ssips Lemon Iced Tea - 60.0 oz - 10 Boxes**  
 Case of 4 - \$5.82 Each  
**\$23.28**  
 per case

Add to Cart  
 Add to Shopping list  
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**Ssips Fruit Punch - 60.0 oz - 10 Boxes**  
 Case of 4 - \$5.82 Each  
**\$23.28**  
 per case

Add to Cart  
 Add to Shopping list  
 Add to Compare



24 TTABVUE 239-309.

This evidence establishes that the goods are related, so much so that tea is often mixed with fruit juice such as in Honest’s “pomegranate herbal tea,” Arizona’s “peach tea,” Bai’s “Paraguay Passionfruit” tea and Coco’s “mango green tea.”<sup>10</sup> The fairly extensive third-party use and registration of the same marks for tea on the one hand and fruit juices on the other establishes a relationship between the goods.<sup>11</sup>

As for channels of trade, the evidence from Wawa depicts tea and fruit juices being sold in the same store. Moreover, the evidence reveals that tea and fruit juices bearing the ARIZONA, BAI, COCO, EVOLUTION FRESH, HONEST, POM WONDERFUL,

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<sup>10</sup> Applicant’s argument that the goods are not related because they reside in different International Classes is misplaced. *Jean Patou Inc. v. Theon Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993) (classification is for the convenience of the Office and “wholly irrelevant to the issue of registrability under section 1052(d), which makes no reference to classification”).

<sup>11</sup> Contrary to Applicant’s argument, there is no need for Opposer to establish “that the consumers will *always* assume that tea and fruit juice come from the same commercial source” as a general matter. 26 TTABVUE 3 (emphasis added). Rather, the test is whether consumers are likely to perceive the specific goods bearing the parties’ involved and pleaded marks as deriving from a single source.

SNAPPLE and SSIPS marks are sold on the same websites, with the tea products and fruit juice products being sold on the same specific webpages, sometimes side-by-side. In any event, because Applicant's and Opposer's identifications of goods contain no trade channel limitations, the goods are presumed to move in all normal channels of trade therefor and to be available to all classes of consumers. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) ("An application with 'no restriction on trade channels' cannot be 'narrowed by testimony that the applicant's use is, in fact, restricted to a particular class of purchasers.'"); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Here, the evidence establishes that fruit juices and tea travel in the same channels of trade. Furthermore, Applicant stipulated that "[t]he parties' respective goods are intended to be sold to overlapping classes of purchasers." 19 TTABVUE 5 (Stipulation I ¶ 20). These factors also weigh in favor of finding a likelihood of confusion.

Finally, Applicant's argument that confusion is unlikely because Opposer's goods "are relatively inexpensive items subject to impulse purchasing while Applicant's tea is a high quality product and is more expensive than regular tea products," 23 TTABVUE 3, is not well taken. Because there are no price or similar limitations in either Opposer's or Applicant's identifications of goods, we must presume that ordinary and unsophisticated consumers will purchase Applicant's and Registrant's beverages, which could be sold at any price, and we must base our decision on the "least

sophisticated potential purchasers” for the goods as identified. *Stone Lion*, 110 USPQ2d at 1163.

#### **IV. Conclusion**

Considering all of the evidence of record, we find that Applicant’s mark is quite similar to Opposer’s famous mark, and the parties’ beverage products are related and sold in overlapping channels of trade. Confusion is likely.

**Decision:** The opposition is sustained on Opposer’s likelihood of confusion claim under Section 2(d) of the Trademark Act, and registration of Applicant’s mark is refused.