

This Opinion is Not a  
Precedent of the TTAB

Mailed: November 18, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Blacklands Malt, LLC*

*v.*

*M Distillery, Inc.*

—  
Opposition No. 91243647  
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Richard J. Groos and Samantha Porphy Ade of King & Spalding LLP,  
for Blacklands Malt, LLC.

Scott H. Davison of Musick Davison LLP,  
for M Distillery, Inc.

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Before Cataldo, Ritchie and Pologeorgis,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, M Distillery, Inc., seeks registration on the Principal Register of the mark BLACKLAND DISTILLERY (standard characters, “DISTILLERY” disclaimed), identifying “distilled spirits” in International Class 33.<sup>1</sup>

Opposer, Blacklands Malt, LLC, opposes registration, asserting the following

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<sup>1</sup> Application Serial No. 87731387 was filed December 21, 2017, based on Applicant’s assertion of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

claims:

1. Priority and Likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d); and
2. Geographic descriptiveness under Trademark Act Section 2(e)(2), 15 U.S.C. § 1052(e)(2).

Opposer pleaded the following applications:

Application Serial No. 87859068 for the mark BLACKLANDS MALT (standard characters, “MALT” disclaimed), and



Application Serial No. 87859071 for the mark  (“MALT” disclaimed), both identifying “malt for brewing and distilling” in International Class 31.<sup>2</sup>

Applicant denied the salient allegations of the notice of opposition.<sup>3</sup>

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<sup>2</sup> Both applications were filed on April 2, 2018, based upon an assertion of use in commerce since December 2013 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

Applicant describes the mark in Application Serial No. 87859071 as follows: The mark consists of two concentric circles, the outer circle having a stylized scalloped edge, around a picture of a farm scene with a barn and a cultivated field, and a shovel at the front left and stalks of cereal grains at the front right, with the words “BLACKLANDS MALT” between the two concentric circles in all caps, with “BLACKLANDS” across the top and “MALT” across the bottom, with a single seed on either side of the word “MALT.”

<sup>3</sup> Answer, 4 TTABVue. Applicant asserted seven affirmative defenses. In a November 16, 2018 interlocutory order, the Board struck Applicant’s second through sixth affirmative defenses on the ground that they were insufficiently pleaded, and construed Applicant’s first and seventh affirmative defenses as mere amplifications of its denials.

## I. Accelerated Case Resolution

The parties agreed to try this case via the Board's Accelerated Case Resolution ("ACR") procedure.<sup>4</sup> Specifically, they agreed to forego a traditional trial, and to proceed on the summary judgment model of ACR, in which each party may submit a brief with accompanying evidentiary submissions. In addition to stipulating, *inter alia*, to certain facts and the use of limited evidence and discovery,<sup>5</sup> their stipulation provides that the Board may resolve any genuine disputes of material facts that may be found to exist based on the record. *See generally Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1602 (TTAB 2018) (describing summary judgment ACR model); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 702.04(b) (2019).

The case is fully briefed.<sup>6</sup> As in a traditional Board proceeding, the burden of proof remains with Opposer, which must establish its case by a preponderance of the evidence. TBMP § 702.04(a). As noted above, under the terms of the stipulation the Board may resolve any and all issues of material fact in the course of issuing a final ruling. *See TPI Holdings, Inc. v. TrailerTrader.com, LLC*, 126 USPQ2d 1409, 1411

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<sup>4</sup> See stipulation to proceed via ACR, 9 TTABVUE, clarified and approved by the Board, 10 TTABVUE; and subsequent ACR stipulation, 15 TTABVUE.

<sup>5</sup> Stipulations, 9 TTABVUE 2; 15 TTABVUE 2-3.

<sup>6</sup> On November 16, 2018, Opposer notified the Board of a state court action brought in Tarrant County, Texas involving the parties and marks at issue herein. 6 TTABVUE. In a November 27, 2018 interlocutory order, the Board deferred consideration of whether to suspend this opposition pending the outcome of the Texas court action. 8 TTABVUE. The parties subsequently have informed the Board in their stipulation for ACR that no trial date had been set in the Tarrant County litigation. 9 TTABVUE. Accordingly, we see no reason to delay the determination of this opposition pending the outcome of the Tarrant County state court action.

(TTAB 2018); *Bond v. Taylor*, 119 USPQ2d 1049, 1051 (TTAB 2016) (“In order to take advantage of any form of ACR, the parties must stipulate that the Board may resolve any genuine disputes of material fact in the context of something less than a full trial.”). *See generally* TBMP §§ 528.05(a)(2), 702.04, 705.

## II. The Record and Stipulations of Fact

The parties introduced the following evidence by stipulation:<sup>7</sup>

- The pleadings, including any exhibits and attachments thereto;
- Opposer’s pleaded applications, including any documents in the file histories for the applications;
- Applicant’s Opposed application, including all documents in the file history for the application; and
- Opposer’s application Serial No. 87898729 for the mark BLACKLANDS BREWING (standard characters, “BERWING” disclaimed), identifying “beer” in International Class 32.<sup>8</sup>

The parties further submitted the following testimony and evidence:

- Testimony declaration of Mr. Brandon Ade, founder and managing partner of Opposer, with exhibits (18 TTABVUE);
- Testimony declaration of Mr. Thomas Mote, Distillery Manager of third-party Balcones Distilling, with exhibits (20 TTABVUE);
- Testimony declaration of Mr. Jeffrey Stuffings, co-founder of third-party Jester King Brewery, with exhibits (21 TTABVUE);
- Testimony declaration of Mr. Tim Matthews, Vice President of Global Brewing for third-party Canarchy Craft Collective and Brewmaster of third-party Oskar Blues Brewery, with exhibits (22 TTABVUE);

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<sup>7</sup> 15 TTABVUE 9-225.

<sup>8</sup> Filed April 28, 2018 based upon an assertion of a bona fide intent to use intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

- Opposer's notice of reliance upon internet materials, with exhibits (14 TTABVUE);
- Opposer's notice of reliance upon discovery responses, with exhibits (16 TTABVUE);
- Testimony declaration of Mr. Markus Kypreos, CEO and President of Applicant, with exhibits (25 TTABVUE);
- Applicant's notice of reliance upon internet materials, including exhibits (26 TTABVUE);
- Applicant's notice of reliance upon discovery responses, including exhibits (27 TTABVUE).

The parties stipulated to the authenticity of all produced documents.<sup>9</sup>

In addition, the parties stipulated to the following facts:<sup>10</sup>

1. Opposer manufactures and sells, among other things, raw and malted grains.
2. Opposer's manufacturing facility is located in Leander, Texas.
3. Opposer's first sale of products bearing the BLACKLANDS MALT mark was in December 2013.
4. Opposer has continuously offered for sale products bearing the BLACKLANDS MALT mark since 2013.
5. Opposer receives orders for its raw and malted grains primarily via e-mail or telephone.
6. Approximately ninety-eight (98) percent of Opposer's sales to-date were to commercial entities.
7. Malt is an ingredient in beer, some distilled spirits, non-alcoholic beverages and food products.

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<sup>9</sup> 9 TTABVUE 2; 15 TTABVUE 1-2.

<sup>10</sup> 15 TTABVUE 3-7.

8. Opposer's craft malt and raw grains have been sold to and used by brewers and distillers to make products such as beer, whisky, vodka, bourbon, and other spirits. Opposer also sold grain to a bakery in 2015.

9. Opposer has used the following logo in connection with sales of goods since December 2013:



10. Opposer filed application Serial No. 87859068 on April 2, 2018 for a BLACKLANDS MALT word mark in Class 31.

11. Opposer filed application Serial No. 87859071 on April 2, 2018 for a BLACKLANDS MALT stylized mark in Class 31.

12. Opposer filed application Serial No. 87898729 on April 28, 2018 for a BLACKLANDS BREWING word mark in Class 32.

13. Opposer filed application Serial Nos. 87859068 for the BLACKLANDS MALT word mark and 87859071 for the BLACKLANDS MALT stylized mark as in-use applications reflecting a first-use date of December 2013. Opposer filed Application Serial No. 87898729 for the BLACKLANDS BREWING word mark as intent-to-use.

14. Applicant filed application Serial No. 87731387 for a BLACKLAND DISTILLERY word mark on December 21, 2017 in Class 33.

15. Applicant disclaimed the exclusive right to the term "DISTILLERY" apart from the BLACKLAND DISTILLERY mark.

16. Applicant's application Serial No. 87731387 was filed as intent-to-use.

17. Applicant's distillery and tasting room is located in Fort Worth, Texas.

18. Applicant sells distilled spirits including bourbon, gin, rye whiskey and vodka, as well as mixed drinks and food items.

19. Applicant first became aware of Blacklands Malt on December 19, 2017.

20. Other than applications filed by Applicant and Opposer, there are no other applications or registrations for “Blackland” or “Blacklands” that reference brewing or distilling.

21. Applicant has used the following logo in connection with the sale of its goods:



22. The term “Blackland” in the BLACKLAND DISTILLERY mark was derived from the Blackland Prairies Ecoregion of Texas.

23. The term “Blackland” in the BLACKLANDS MALT name was inspired by the Blackland Prairies Ecoregion of Texas.

24. Many of Applicant’s customers have inquired about the meaning of the name “Blackland.”

25. Many of Opposer’s customers have inquired about the meaning of the name “Blacklands.”

26. Among other places, distilled spirits are sold in bars, grocery stores, restaurants, and liquor stores.

27. Among other places, beer is sold in bars, grocery stores, restaurants, and liquor stores.

28. Malt is not sold in bars, grocery stores, restaurants or liquor stores.

29. Purchasers of malt are not the type of consumers who purchase on impulse.

30. Malt and distilled spirits are not sold through the same channels of trade.

31. Applicant is located near the Blackland Prairies Ecoregion of Texas.

32. Applicant is located in Tarrant County, Texas, portions of which are in the Blackland Prairies Ecoregion of Texas.

33. Opposer is located near the Blackland Prairies Ecoregion of Texas.

34. Opposer is located in Williamson County, Texas, portions of which are in the Blackland Prairies Ecoregion of Texas.

35. The boundaries of the Blackland Prairies Ecoregion of Texas are unclear.

For efficiency, we focus on Opposer's pleaded application Serial No. 87859068 for the mark BLACKLANDS MALT in standard characters with "MALT" disclaimed, identifying "malt for brewing and distilling," in Class 31. We consider the mark and goods in this application most relevant to the likelihood of confusion analysis. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

### III. Standing

Opposer must prove standing by showing a real interest in the outcome of the proceeding and a reasonable basis for believing that it would suffer damage if the mark is registered. *See* 15 U.S.C. § 1063; *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). In order to meet the standing requirement, a plaintiff need only show that it has a real interest, i.e., a personal stake, in the outcome of the proceeding. *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1026 (Fed. Cir. 1999); *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2012, 2023-24 (Fed. Cir. 1987).

In this case, the Examining Attorney assigned to Opposer's pleaded applications cited Applicant's involved application as a potential bar to registration.<sup>11</sup> Thus, Opposer has standing based on the Trademark Examining Operation's action taken in regard to its pleaded applications. *Fiat Group Automobiles S.p.A. v. ISM Inc.* 94 USPQ2d 1111 (TTAB 2010). *See also Life Zone Inc. v. Middleman Group Inc.*, 87

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<sup>11</sup> 15 TTABVUE 13-18; 39-45; 76-81; 102-107.

USPQ2d 1953 (TTAB 2008) (standing found based on opposer's ownership of pending trademark application and Office action which resulted in suspension of its application due to involved application being cited as a potential bar to registration).

#### IV. Priority

The question of priority is an issue in this case because Opposer has asserted ownership of two prior trademark applications for the mark BLACKLANDS MALT and does not own an existing registration upon which it can rely under Section 2(d). *Cf., e.g., King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). A party may establish prior proprietary rights in a mark through an earlier constructive filing date accorded to the party's own registration or application, actual use, or through use analogous to trademark use that creates a public awareness of the designation as a trademark identifying the party as a source. *See Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009).

To establish priority on its likelihood of confusion claim under Section 2(d) of the Trademark Act, Opposer must prove that, vis-à-vis Applicant, it owns "a mark or trade name previously used in the United States . . . and not abandoned." Here, Opposer must prove prior proprietary rights based on prior common-law use.

To establish priority, the petitioner must show proprietary rights in the mark that produce a likelihood of confusion. *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 1320, 209 USPQ 40, 43 (CCPA 1981). These proprietary rights may arise from . . . prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights.

*Herbko Int'l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002).

A party challenging registration of a trademark due to a likelihood of confusion with its own unregistered term cannot prevail unless it shows that its term is distinctive of its services, whether inherently, through the acquisition of secondary meaning, or through “whatever other type of use may have developed a trade identity.” *Towers v. Advent Software Inc.*, 913 F.2d 942, 16 USPQ2d 1039, 1041 (Fed. Cir. 1990) (quoting *Otto Roth*, 209 USPQ at 43). Thus, in order to prevail, Opposer must establish that its mark BLACKLANDS MALT is distinctive, either inherently or through acquired distinctiveness, and that its use and acquisition of distinctiveness predates Applicant’s acquisition of proprietary rights.

Applicant does not appear to contest Opposer’s priority. The parties have stipulated above that “Opposer’s first sale of products bearing the BLACKLANDS MALT mark was in December 2013;” and that “Opposer has continuously offered for sale products bearing the BLACKLANDS MALT mark since 2013.”<sup>12</sup> Applicant did not argue that BLACKLANDS MALT lacks inherent distinctiveness and, as discussed below, we find it to be suggestive and, thus inherently distinctive.<sup>13</sup>

Furthermore, it is well-settled that in the absence of any evidence of earlier use, the earliest date upon which an applicant may rely is the filing date of its challenged application. *See* Trademark Act Section 7(c), 15 U.S.C. §1057(c). *See also Syngenta*

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<sup>12</sup> 15 TTABVUE 3.

<sup>13</sup> Opposer argues that its BLACKLANDS MALT mark is inherently distinctive and, in the alternative, that it has acquired distinctiveness. 24 TTABVUE 11-16.

*Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009) (“applicant may rely without further proof upon the filing date of its application as a ‘constructive use’ date for purposes of priority.”); *Larami Corp. v. Talk to Me Programs, Inc.*, 36 USPQ2d 1840 (TTAB 1995). Applicant filed the involved application on December 21, 2017 based upon its claim of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), and has not asserted an earlier date of first use.

Therefore, we find that Opposer has met its burden of showing by a preponderance of the evidence that it first used the mark BLACKLANDS MALT in connection with its goods prior to Applicant’s constructive first use.

#### V. Likelihood of Confusion

The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)); *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (even within *DuPont* list, only factors that are “relevant and of record” need be considered). Two key

considerations are the similarities between the marks and the similarities between the goods and/or services. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018).

#### A. Similarity or Dissimilarity of the Marks

We compare the parties' marks "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imps. 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). The test assesses not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012). Similarity in any one of the elements of sound, appearance, meaning, or commercial impression suffices to support a determination of likelihood of confusion. *See Krim-Ko Corp. v. The Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion"); *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) ("Similarity in any one of these elements may be sufficient to find the marks confusingly similar.").

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *see also In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (“marks must be considered in light of the fallibility of memory”) (citation, internal quotation marks, and ellipsis omitted).

Opposer’s mark is BLACKLANDS MALT in standard characters, and Applicant’s mark is BLACKLAND DISTILLERY, in standard characters. The marks are similar to the extent they share the word “BLACKLAND[S].” As between BLACKLANDS and BLACKLAND, we see little viable distinction. If the term BLACKLANDS in Opposer’s mark is perceived to be a plural form of BLACKLAND, the distinction is not sufficient to prevent likely confusion. *Wilson v. Delaunay*, 114 USPQ 339, 341 (CCPA 1957); *In re Pix of America, Inc.*, 225 USPQ 691, 692 (TTAB 1985); *In re Sarjanian*, 136 USPQ 307, 308 (TTAB 1962). If BLACKLANDS is perceived as a possessive form of BLACKLAND, that too is not a sufficient distinction. *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009); *In re Curtice-Burns, Inc.*, 231 USPQ 990, 992 (TTAB 1986); *Winn’s Stores, Inc. v. Hi-Lo, Inc.*, 203 USPQ 140, 143 (TTAB 1979).

The dominant part of both marks is the word “BLACKLAND[S].” The term “BLACKLAND” in Applicant’s mark “was derived from the Blackland Prairies Ecoregion of Texas.”<sup>14</sup> The term “BLACKLANDS” in Opposer’s mark also “was

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<sup>14</sup> 15 TTABVUE 5-6.

inspired by the Blackland Prairies Ecoregion of Texas.”<sup>15</sup> Thus, the term BLACKLAND[S] common to both marks is nearly identical in appearance and sound, as well as meaning.<sup>16</sup> The word “DISTILLERY” in Applicant’s mark is, at best, highly descriptive and has been disclaimed.<sup>17</sup> Likewise, the word “MALT” in Opposer’s mark is, at best, highly descriptive and has been disclaimed.<sup>18</sup> It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1305, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching

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<sup>15</sup> 15 TTABVUE 6.

<sup>16</sup> In consequence of the parties’ stipulation, we are not convinced by Applicant’s arguments in its brief (29 TTABVUE 11) that the term BLACKLAND[S] possesses different connotations in the marks at issue.

<sup>17</sup> 15 TTABVUE 5; April 3, 2018 Examiner’s Amendment in the prosecution history of Applicant’s involved application. We hereby take judicial notice that the word “distillery” is defined as “a place or establishment where distilling, especially the distilling of liquors, is done.” Dictionary.com based on the RANDOM HOUSE UNABRIDGED DICTIONARY (2019) accessed November 7, 2019.

The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. *See In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014); *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002). *See also University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

<sup>18</sup> Examining Attorney’s July 20, 2018 Office Action in the prosecution history of Opposer’s pleaded application Serial No. 87859068. We hereby take judicial notice that the word “malt” is defined, *inter alia*, as “germinated grain, usually barley, used in brewing and distilling.” Dictionary.com based on the RANDOM HOUSE UNABRIDGED DICTIONARY (2019) accessed November 7, 2019.

a conclusion on the likelihood of confusion.”) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *In re Dixie Rests. Inc.*, 41 USPQ2d at 1533-34; *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”). There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Nat’l Data Corp.*, 224 USPQ at 751; see also *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012).

Further, the significance of the word “BLACKLAND[S]” in the parties’ marks as the dominant element is enhanced by its position as the first word in both. See *In re Detroit Athletic Co.*, 128 USPQ2d at 1049 (finding “the identity of the marks’ two initial words is particularly significant because consumers typically notice those words first”); *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Fondée En 1772*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word); *In re Integrated Embedded*, 120 USPQ2d 1504, 1513 (TTAB 2016) (noting that the dominance of BARR in the mark BARR GROUP is reinforced by its location as the first word in the mark); *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”).

The marks BLACKLANDS MALT and BLACKLAND DISTILLERY share the dominant word “BLACKLAND[S],” which the parties agree was “derived from” (in the case of Applicant’s mark) or “inspired by” (in the case of Opposer’s mark) a Texas ecoregion of unclearly defined borders. In both marks, BLACKLAND(S) is followed by a highly descriptive term denoting Opposer’s goods and the place where Applicant’s goods are distilled. Thus, they are more similar than dissimilar in appearance, sound, meaning and commercial impression. Where, as here, “the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral differences.” *In re Denisi*, 225 USPQ 624, 624 (TTAB 1985). The peripheral differences in this case fail to distinguish the marks. Consumers familiar with Opposer’s BLACKLANDS MALT mark, upon encountering the mark BLACKLAND DISTILLERY, may mistakenly believe that BLACKLAND DISTILLERY is a variation or new line of distilled spirits emanating from the same source as BLACKLANDS MALT.

Accordingly, this *DuPont* factor weighs in favor of finding that there is a likelihood of confusion.

#### B. Strength of the BLACKLANDS MALT Mark

In determining the strength of a mark, we consider both its inherent or conceptual strength, based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark. *See Top Tobacco, L.P. v. North*

*Atlantic Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006). Market strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Id.* For purposes of analysis of likelihood of confusion, a mark's renown may "var[y] along a spectrum from very strong to very weak." *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (internal quotations omitted). The proper standard is the mark's "renown within a specific product market," *id.*, and "is determined from the viewpoint of consumers of like products," *id.* at 1735, and not from the viewpoint of the general public.

As discussed above, the parties have stipulated that the wording BLACKLANDS MALT, used in connection with "malt for brewing and distilling," was "inspired by" the Blackland Prairie region of Texas. Accordingly, Opposer's BLACKLANDS MALT mark appears to be suggestive of Opposer's goods.

With respect to the commercial strength of the BLACKLANDS MALT marks, Applicant introduced into the record a list of

at least 43 business names in the State of Texas which utilize the name "Blackland" in its name, including several with goods similar to Opposer's raw and malted grain products, examples of which include "Blackland Prairies Mix 'Seeds' Native American Seed," "Blackland Cotton & Grain Producer's Association," "Blackland Bakery," "Blacklands Café," "Blackland Smokehouse," "Blackland Water Supply Co.," "Blackland Farm & Cattle," and "Blacklands Ranch." 27 TTABVUE 32-36. Applicant is also including a publicly-available corporate tax profile of Blackland Cotton & Grain Producer's Association showing its recent tax activity as further evidence of its business

activity. 26 TTABVUE 61-63. All of these businesses could potentially offer raw or malted grain products or any food or beverage product which uses raw or malted grain as an ingredient, such as bread, vinegar, malt shakes, etc. Thus, Opposer's common law rights in BLACKLANDS MALT are commercially weak, as consumers have been exposed to numerous grain, farming and food production companies which utilize the term "BLACKLAND."<sup>19</sup>

However, the list of business submitted by Applicant includes only a business name, address and telephone number. A representative sample consisting of the first five businesses is reproduced below:<sup>20</sup>

Blackland Building Supply  
1701 S. Kaufman Street  
Ennis, TX 75119  
(972) 878-0995

Blackland Research & Extension Center – Texas A&M University  
720 East Blackland Road  
Temple, TX 76502  
(254) 774-6000

Blackland Community Development Corporation  
1902 E 22nd Street  
Austin, TX 78722  
(512) 220-8751

Blackland Prairie Raptor Center  
1625 Brockdale Park Road  
Allen, TX 75002  
(469) 964-9696

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<sup>19</sup> Applicant's brief, 31 TTABVUE 20.

<sup>20</sup> Applicant's notice of reliance, 27 TTABVUE 32.

There is no testimony or evidence in the record regarding the nature or extent of the activities in which any of these third parties are engaged. Thus, we can only infer from the names of the forty-three businesses that they involve, e.g., building supply, community development, Native American “seed,” home inspections, cemeteries, hardware, publication and an association of grain producers.<sup>21</sup> Based upon the very scant information in the record, we find insufficient support for Applicant’s speculative contention that any of these third parties could potentially offer products similar to Opposer’s malt. *See Gemtron Corp. v. Saint-Gobain Corp.*, 572 F.3d 1371, 91 USPQ2d 1409, 1415 (Fed. Cir. 2009) (reasoning that a party’s “unsworn attorney argument ... is not evidence” and thus cannot rebut record evidence); *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005) (“Attorney argument is no substitute for evidence.”); *cf. In re Simulations Publ’ns, Inc.*, 521 F.2d 797, 187 USPQ 147, 148 (CCPA 1975) (where appellant argued that the magazines at issue deal with unrelated subject matter, the court held that “[s]tatements in a brief cannot take the place of evidence.”).

Opposer, on the other hand, introduced testimony that it is the first modern craft malt house in Texas, and has sold its goods to over ninety commercial breweries, distillers and individual consumers.<sup>22</sup> Opposer has introduced evidence that its goods under the BLACKLANDS MALT mark have received unsolicited printed and online media coverage in local and regional magazines, newspapers, trade journals,

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<sup>21</sup> 27 TTABVUE 32-36.

<sup>22</sup> Declaration of Brandon Ade, 18 TTABVUE 4.

websites, blogs and social media postings, including *Austin Chronicle*, *Houston Chronicle*, *San Antonio Express* and *Beer & Brewing Magazine*.<sup>23</sup> Opposer has also introduced testimony and evidence that its goods under the BLACKLANDS MALT mark are advertised by some of the brewers and distillers who are its customers on labels and packaging as an ingredient of the distilled spirits and beers they produce.<sup>24</sup>

Opposer's testimony and evidence shows that Opposer is commercially successful as indicated by the fact that it has been rendering its services since at least 2013, and has received regional and local attention in the mainstream media as well as national and regional attention in niche publications relating to brewing and distilling. However, the record does not necessarily show that Opposer's mark is commercially strong. For example, Opposer has not introduced any testimony or other evidence placing Opposer's success in context with other producers of malt operating at a comparable scale.

Considering the record as a whole, we find that Opposer's BLACKLANDS MALT mark is appropriately placed in the middle of the spectrum of "very strong to very weak." *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 122 USPQ2d at 1734 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)); *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d at 1059 ("The commercial strength of Petitioner's TAO mark outweighs any conceptual weakness.").

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<sup>23</sup> Opposer's notice of reliance, see generally 14 TTABVUE.

<sup>24</sup> Declaration of Jeffrey Stuffings, 21 TTABVUE 3-25.

C. The Similarity or Dissimilarity and Nature of the Goods

This *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration . . . .” *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014). The analysis of this factor is premised on the identifications of goods in Applicant’s involved application and Opposer’s pleaded application. *Id.* at 1161-63; *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Relatedness may be shown on the basis of those identifications alone, without resort to extrinsic evidence. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004-05 (Fed. Cir. 2002).

In this regard “likelihood of confusion can be found ‘if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Opposer contends that “consumers of distilled spirits and beer encounter the BLACKLANDS MALT mark on and advertised in connection with finished beers and spirits.”<sup>25</sup> There is no evidence of record that at the time of trial, Opposer itself produces beer or distilled spirits. Rather, Opposer introduced evidence that third-party brewers and distillers indicate in their advertising, packaging and labels that

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<sup>25</sup> Opposer’s brief, 24 TTABVUE 18.

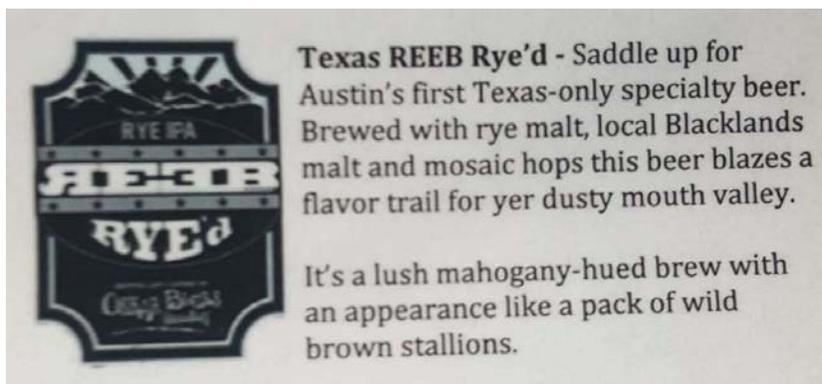
their beers and spirits are produced with Opposer's malt. The following examples are illustrative.

Balcones Distilling released an All-Texas Single Malt Whisky....Blacklands Malt and Balcones Distilling have teamed up and are proud to announce their groundbreaking project of creating a single malt whisky made from Texas-grown barley....Named the first malthouse in modern Texas history, Blacklands Malt has been the driving force behind the revitalization of Texas-grown malting barley statewide, providing brewers with access to local malt for the first time in Texas history....Together the two companies have created High Plains Texas Single Malt, which features aromas of stewed apples, sauternes, honeycomb, and light mink oil.<sup>26</sup>

Two locals launched Banner Distilling a few years in a small building in rural Manor with the goal of bottling up a Texas-made wheat whiskey. But it was only earlier this year that their dream was realized.

Simpson and Jimenez decided to play with wheat as the dominant grain in the whiskey, rather than the more commonly used corn or rye, because of their desire to keep ingredients as local as possible. Their distillery is located in an area where farmers told them, early on, that they'd be willing to grow whatever Banner needs.

In addition to winter wheat grown in nearby New Sweden, the 92-proof whiskey also features malted barley from Leander's Blacklands Malt and rainwater harvested from Smithville's Texas Rain. "We literally use Texas air, sun, soil and rain to make the whiskey," Simpson said in a recent email. "We like to say it has Texas in the bottle, not just on it."<sup>27</sup>



<sup>26</sup> Opposer's notice of reliance, 34 TTABVUE 38-41.

<sup>27</sup> Ade Declaration, 18 TTABVUE 61-62.

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Opposer also introduced evidence that it licenses use of its mark and portions thereof to third-party brewers for use in such beers as “Smok on the Blacklands.”<sup>30</sup>

Opposer’s Managing Partner, Brandon Ade, states as follows in his declaration:

30. Through the Craft Maltsters Guild, I am aware of numerous manufacturers that produce both malt and beer or spirits, including, among others, Admiral Maltings (malt and beer), Bentley Heritage (malt and spirits); Colorado Malting Company (malt and beer), Eckert Malting & Brewing (malt and beer), Leopold Brothers (malt and spirits), and West Branch Malts (malt and spirits).<sup>31</sup>

In response, Applicant argues in its brief:

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<sup>28</sup> Ade Declaration, 18 TTABVUE 59.

<sup>29</sup> 18 TTABVUE 68.

<sup>30</sup> 18 TTABVUE 5.

<sup>31</sup> 18 TTABVUE 17.

As Opposer offered no evidence to support this statement, Applicant investigated and determined that neither Admiral Maltings, Bently Heritage, Colorado Malting Company, Leopold Brothers or West Branch Malts actually *sell* both malt and beer/spirits, as they instead either produce their own malt without selling it or sell malt and beer/spirits under separate trademark names. 26 TTABVUE 38-59. Therefore, it would appear that only one company in the entire United States – Eckert Malting and Brewing – is engaged in the production *and sale* of both malt and beer.

However, the contents of Applicant’s notice of reliance at 26 TTABVUE are not present in the record. While Opposer appears to have received the documents associated with this notice of reliance, they are absent from the record before the Board. Further, Opposer introduced evidence that third party craft distiller Leopold Bros. was in the process of opening one of the largest malting facilities in the world (shankenewsdaily.com).<sup>32</sup> Opposer also introduced into the record copies of four use based, third-party registrations for marks identifying both “malt for brewing and distilling” and various beers.<sup>33</sup>

To be clear, none of the evidence points to Opposer or its marks as the source of beer or distilled spirits. As a result, we disagree with Opposer’s statement in its reply brief that “Opposer’s common law rights extend to alcoholic beverages.”<sup>34</sup> The evidence of record clearly establishes that third parties credit Opposer as the source

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<sup>32</sup> 34 TTABVUE 7-9.

<sup>33</sup> 33 TTABVUE 115-151. We have considered only those marks which were shown to be registered and based on actual use. The marks that have been registered under the provisions of the Madrid protocol (Section 66A) or pursuant to Section 44(e) have no probative value because they do not require use in commerce to be registered and therefore are not evidence that the marks therein have ever been encountered by consumers in the marketplace. *See In re 1st USA Realty Professionals, Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

<sup>34</sup> 35 TTABVUE 2.

of the local malt used in their distilled spirits and beer both on the products themselves and marketing therefor. However, this evidence does not indicate Opposer's BLACKLANDS MALT as the source of the distilled spirits and beer produced by third parties under their respective marks and trade names.

Nonetheless, the evidence of record does support Opposer's claim that "Opposer and its goods are inextricably entwined in the alcoholic-beverages industry."<sup>35</sup> The packaging, advertisements and labelling of record demonstrates that third parties tout Opposer's "malt for brewing and distilling" under its BLACKLANDS MALT mark as an ingredient in their beers and spirits. As discussed above, "malt" is defined, inter alia, as "germinated grain, usually barley, used in brewing and distilling."<sup>36</sup> The evidence of record, including the examples of packaging and advertising displayed above, demonstrates that Opposer's malt under its BLACKLANDS MALT mark is a necessary and, in some cases, sought-after primary ingredient in beers and certain distilled spirits.<sup>37</sup> We recognize that malt is not an ingredient in all distilled spirits. However, Opposer's malt, especially intended for use in brewing and distilling, is used, inter alia, in various vodkas, whiskeys and bourbons.<sup>38</sup> Indeed, the parties have stipulated that "Malt is an ingredient in beer, some distilled spirits, non-alcoholic beverages and food products."<sup>39</sup>

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<sup>35</sup> 35 TTABVUE 2.

<sup>36</sup> Dictionary.com based on the RANDOM HOUSE UNABRIDGED DICTIONARY (2019) accessed November 7, 2019.

<sup>37</sup> 18 TTABVUE 4, 15-18, 37-68.

<sup>38</sup> 18 TTABVUE 4.

<sup>39</sup> 15 TTABVUE 4.

As a result, the parties' goods are related inasmuch as Opposer's malt is a necessary and primary ingredient in distilled spirits, including distilled spirits of the types produced by Applicant. It is not necessary that the goods under consideration be identical or even competitive in nature in order to support a finding of likelihood of confusion. The goods need only be "related in some manner or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source." *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). We find on this record that Applicant's "distilled spirits" are related to Opposer's "malt for brewing and distilling." Accordingly, this *DuPont* factor weighs in favor of finding that there is a likelihood of confusion.

#### D. Channels of Trade and Classes of Consumers

The parties have stipulated as follows:<sup>40</sup>

Opposer receives orders for its raw and malted grains primarily via e-mail or telephone.

Approximately ninety-eight (98) percent of Opposer's sales to-date were to commercial entities.

Among other places, distilled spirits are sold in bars, grocery stores, restaurants, and liquor stores.

Malt is not sold in bars, grocery stores, restaurants or liquor stores.

Malt and distilled spirits are not sold through the same channels of trade.

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<sup>40</sup> 15 TTABVUE 6.

We find as a result of the parties' stipulations that the channels of trade and classes of consumers are different, and this *DuPont* factor weighs in favor of finding that there is no likelihood of confusion.

E. The Conditions under Which Sales Are Made

With regard to Opposer's goods, the parties have stipulated as follows:<sup>41</sup>

Purchasers of malt are not the type of consumers who purchase on impulse. With regard to Applicant's goods, because the "distilled spirits" are not limited by price point or quality, we must presume that purchasers for Applicant's goods include ordinary consumers who may not exercise a high degree of purchasing care. *See Stone Lion Capital Partners v. Lion Capital*, 110 USPQ2d at 1163-64 (recognizing Board precedent requiring consideration of the "least sophisticated consumer in the class"); *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (finding that all purchasers of wine may not be discriminating because while some may have preferred brands, "there are just as likely to be purchasers who delight in trying new taste treats."). Thus, while purchasers of Opposer's goods may exercise a heightened degree of care, purchasers of Applicant's goods may or may not be discriminating in their tastes. Accordingly, this *DuPont* factor appears neutral or weighs slightly against a finding of likelihood of confusion.

F. Actual Confusion

Opposer's only asserted instance of actual confusion consists of "a telephone call inquiring if Opposer was starting a distillery in Fort Worth. At the time of the call,

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<sup>41</sup> 15 TTABVUE 6.

there had been only a single brief mention that there would be a distillery opening in Fort Worth”<sup>42</sup> However, an inquiry regarding whether there is a relationship between the parties, as we have here, is not evidence of confusion. *See Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1479 (TTAB 2014) (inquiry is not evidence of confusion because the inquiry indicates that the prospective customer had a reason to suspect that there were two different companies); *Marshall Field & Co. v. Mrs. Field’s Cookies*, 25 USPQ2d 1321, 1334 (TTAB 1992) (inquiries indicate that the declarants were aware that there may be two different entities); *Elec. Water Conditioners, Inc. v. Turbomag Corp.*, 221 USPQ 162, 164 (TTAB 1984) (“That questions have been raised as the relationship between firms is not evidence of actual confusion of their trademarks.”); *Toys “R” Us, Inc. v. Lamps R Us*, 219 USPQ 340, 346 (TTAB 1983) (“The fact that questions have been raised as the possible relationship between firms is not by itself evidence of actual confusion of their marks.”).

This *DuPont* factor is neutral.

#### G. Applicant’s Intent in Adopting Its Mark

Opposer asserts that because Applicant knew of Opposer prior to filing the

involved application, adopted a circular logo  similar to that of Opposer, refers to itself as “Blackland,” and emphasizes its use of local Texas grains in

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<sup>42</sup> 24 TTABVUE 21; 18 TTABVUE 15.

producing its spirits,<sup>43</sup> “there is significant circumstantial evidence that Applicant intends to cause consumer confusion.”<sup>44</sup> However, this asserted “circumstantial evidence” falls short of establishing that Applicant intended to create confusion with Opposer and its marks.

We will not infer bad faith under circumstances in which the party asserting it has submitted insufficient evidence thereof. *Cf. L.C. Licensing Inc. v. Berman*, 86 USPQ2d 183, 1891 (TTAB 2008) (bad faith adoption of a mark is strong evidence that confusion is likely because an inference may be drawn from the imitator’s expectation of confusion); *Broadway Catering Corp. v. Carla Inc.*, 215 USPQ 462, 465 (TTAB 1982) (“One’s wrongful intent to trade on the trademark or trade name of another is strong evidence that confusion is likely. Such inference is drawn from the imitator’s own expectation of confusion as to the source of his product”).

This *DuPont* factor is neutral.

#### H. Summary of Likelihood of Confusion

We have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. We do not rely on any evidence not discussed in this decision. We have found that the marks at issue are similar, and that Applicant’s distilled spirits are related to Opposer’s malt for brewing and distilling. Although the channels of trade and classes of consumers of the goods differ, we note that the consumers of the end product created from Opposer’s goods are the same as Applicant’s consumers. We

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<sup>43</sup> 14 TTABVUE 528, 635; 15 TTABVUE 4; 16 TTABVUE 9; 18 TTABVUE 9.

<sup>44</sup> 23 TTABVUE 55.

further note that Opposer's goods are not purchased on impulse and are likely subject to a higher degree of deliberation than Applicant's goods, the consumers of which include ordinary consumers who may not exercise a high degree of purchasing care. On balance, the relevant factors favor a finding of a likelihood of confusion.

## VI. Geographic Descriptiveness

Section 2(e)(2) of the Trademark Act, 15 U.S.C. §1052(e)(2), prohibits registration on the Principal Register of a mark that is primarily geographically descriptive of the goods or services named in the application. To establish a prima facie case that the BLACKLAND DISTILLERY mark is primarily geographically descriptive, Opposer must prove that:

1. the primary significance of the mark is a generally known geographic location;
2. purchasers would be likely to believe that the goods or services originate in the geographic place identified in the mark; and
3. the source of the goods or services is the geographic region named in the mark.

*See In re Newbridge Cutlery Co.*, 776 F.3d 854, 113 USPQ2d 1445 (Fed. Cir. 2015); *In re Joint-Stock Co. "Baik"*, 80 USPQ2d 1305 (TTAB 2006). *See also In re Societe Generales des Eaux Minerales de Vittel S.A.*, 824 F.2d 957, 3 USPQ2d 1450, 1452 (Fed. Cir. 1987) ("a prima facie case of unregistrability cannot be made out simply by evidence showing that the mark sought to be registered is the name of a place generally known to the public; it is also necessary to show that the public would make a goods/place association, i.e., believe that the goods for which the mark is sought to be registered originate in that place."); *In re Spirits of New Merced LLC*, 85 USPQ2d

1614, 1616 (TTAB 2007) (“Provided that these conditions are met and the goods from the place named by in or in the mark, the mark is primarily geographically descriptive.”).

A. Whether the primary significance of BLACKLAND MALT is a generally known geographic location?

Turning to the question of whether BLACKLAND is the name of a place generally known to the public, we look to the *Vittel* decision wherein our primary reviewing Court, the Court of Appeals for the Federal Circuit, held that “it is necessary that the purchasers perceive the mark as a place name and this is where the question of obscurity or remoteness comes to the fore.” 3 USPQ2d at 1452. Based upon the record in that case, the Federal Circuit found “Vittel” is the name of a small town in France, and posed the question, “how many people in this country know that?” and ultimately found the evidence “insufficient to show the likelihood of [the relevant consuming public] thinking that Vittel refers to a place where the goods come from.” *Id.* In *Newbridge*, the Federal Circuit stated

Regarding the first prong of the test, that the population of the location is sizable and/or that members of the consuming public have ties to the location (to use the example in *Loew’s*: that Durango, Mexico, would be recognized by “the Mexican population of this country”) is evidence that a location is generally known. *See Loew’s*, 769 F.2d [764] at 766, 768 [226 USPQ 865 (Fed. Cir. 1985)]. By contrast, that the geographic meaning of a location is “minor, obscure [or] remote” indicates that the location is not generally known. *See Nantucket*, 677 F.2d [95] at 99 [213 USPQ 889 (CCPA 1982)] (internal quotations omitted). Of course, there are many probative factors to the question of whether a location is generally known, and these are just a few examples.

113 USPQ2d at 1449.

A mark is not “primarily” geographic where the geographic meaning is minor, obscure, remote, or unconnected with the goods. *In re Wada*, 194 F.3d 1297, 52 USPQ2d 1539, 1540 (Fed. Cir. 1999); *In re Loew’s Theatres, Inc.*, 769 F.2d 764, 226 USPQ 865, 867 (Fed. Cir. 1985) (use of a geographic term in a fictitious, arbitrary or fanciful manner, is not “primarily” as a geographic designation).

A geographic nickname (e.g., “Big Apple” or “Motown”), or an abbreviation or other variant of the name of a geographic location, is treated the same as the actual name of the geographic location, if it is likely to be perceived as such by the purchasing public. *See In re Spirits of New Merced, LLC*, 85 USPQ2d 1614 (holding that “Yosemite” – a well-recognized and frequently used shorthand reference to Yosemite National Park and the Yosemite region in general – conveys a readily recognizable geographic significance); *In re Carolina Apparel*, 48 USPQ2d 1542 (TTAB 1998) (CAROLINA APPAREL primarily geographically descriptive of retail clothing store services, where the evidence showed that “Carolina” is used to indicate either the state of North Carolina or the state of South Carolina). *Cf. In re Trans Cont’l Records, Inc.*, 62 USPQ2d 1541 (TTAB 2002) (O-TOWN found to be a “relatively obscure term” that would not be perceived by a significant portion of the purchasing public as a geographic reference to Orlando, Florida).

With regard to the significance of the term BLACKLAND[S], the parties have stipulated as follows:<sup>45</sup>

The term “Blackland” in the BLACKLAND DISTILLERY mark was derived from the Blackland Prairies Ecoregion of Texas.

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<sup>45</sup> 15 TTABVUE 3-7.

The term “Blackland” in the BLACKLANDS MALT name was inspired by the Blackland Prairies Ecoregion of Texas.

Many of Applicant’s customers have inquired about the meaning of the name “Blackland.”

Many of Opposer’s customers have inquired about the meaning of the name “Blacklands.”

Applicant is located in Tarrant County, Texas, portions of which are in the Blackland Prairies Ecoregion of Texas.

Opposer is located near the Blackland Prairies Ecoregion of Texas.

Opposer is located in Williamson County, Texas, portions of which are in the Blackland Prairies Ecoregion of Texas.

The boundaries of the Blackland Prairies Ecoregion of Texas are unclear.

In addition, the labels for certain of Applicant’s distilled spirits note that they are “Handmade on the Blackland Prairie” and explain that “The Blackland Prairie runs from the Red River to the North down to San Antonio in the South. Lightning fires cleared the land for native tallgrass to thrive in the rich dark soil.”<sup>46</sup>

Upon review of the totality of the record, we find the evidence does not support Opposer’s contention that the Blackland Prairie in Texas is generally known to the relevant consuming public, namely, purchasers of distilled spirits. The parties stipulate that the boundaries of the Blackland Prairie Ecoregion are unclear. The labels on Applicant’s bottles, certainly not authoritative but to the extent accurate, describe only a Northern geographical boundary and a municipal Southern boundary therefor. There is little, if any, additional evidence in the record that establishes any

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<sup>46</sup> 16 TTABVUE 59-63.

recognized boundaries for the Blackland Prairie. Opposer states in its reply brief that “Applicant admits it operates in a county in the ecoregion and is, at a minimum, near the ecoregion.”<sup>47</sup> It thus is unclear from the parties’ stipulation to what extent Applicant is located within the vaguely defined boundaries of the Blackland Prairie. The parties further stipulate that many of their own customers, presumably including local brewers, distillers and consumers living in or near the Blackland Prairie, are not familiar with the significance of the term, calling into question whether people living in the region may be viewed as having ties to the area. *See Newbridge*, 113 USPQ2d at 1449. Furthermore, there is no evidence of the size of the population of this area. *Id.*

The scant evidence in this case, along with the parties’ stipulations, do not necessarily evidence that the Blackland Prairie is a geographic location known generally to the relevant American purchasing public. As such, the term does not convey a readily recognizable geographical significance to the average American consumer, but rather simply denotes the name of an obscure or vaguely defined geographic area. *See, e.g., Newbridge*, 113 USPQ2d at 1450; *In re Bavaria St. Pauli Brauerie Ag*, 222 USPQ 926 (TTAB 1984); *In re Brauerie: Aying Franz Inselkammer KG*, 217 USPQ 73 (TTAB 1983).

In sum, the record does not establish that the relevant American consumer is generally aware of the Blackland Prairie Ecoregion in Texas, and, thus, we find that the consumer, upon encountering the mark BLACKLAND DISTILLERY on distilled

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<sup>47</sup> 35 TTABVUE 11.

spirits, would not believe this term is a geographic reference to the origin thereof. The first part of the test for primarily geographically descriptive marks is therefore not met. Accordingly, we need not and do not separately consider whether a goods/place association exists.

## VII. Decision

The opposition to registration of the mark BLACKLAND DISTILLERY is sustained on the ground of likelihood of confusion under Section 2(d), and registration to Applicant is refused.

The opposition to registration of the mark BLACKLAND DISTILLERY is dismissed on the ground that the mark is primarily geographically descriptive of the goods under Trademark Act Section 2(e)(2).