

This Opinion is not a
Precedent of the TTAB

Mailed: April 8, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Spoetzl Brewery, Inc.
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Serial No. 86129909
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Cline H. White of Jackson Walker LLP,
for Spoetzl Brewery, Inc.

Midge Fae Butler, Trademark Examining Attorney, Law Office 107,
Leslie Bishop, Managing Attorney.

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Before Cataldo, Greenbaum and Goodman,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Spoetzl Brewery, Inc. (“Applicant”) seeks registration on the Principal Register of
the mark:



Shiner
—RUBY—
Redbird

for “Ale; Beer” in International Class 32.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark under Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the ground that Applicant’s mark, when used in connection with Applicant’s goods, so resembles the previously registered marks, REDBIRD ALE (ALE disclaimed) (in typed form), for “beer (ale),” and RUBY (in typed form) for “draft microbrewed ale sold through pubs and brewpubs,” each in International Class 32.² The marks are owned by two different entities.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register with regard to the ‘729 Registration, and reverse the refusal to register with regard to the ‘470 Registration.

¹ Application Serial No. 86129909 was filed on November 26, 2013, based upon Applicant’s claim of first use anywhere and use in commerce on March 31, 2011. The mark is described as follows: “The mark consists of [t]hree lines of words; the word ‘SHINER’ in old English font larger sized letters that are slightly tilted upwards on the right side, above the word ‘RUBY’ that has two short lines on either side of the word, followed on the next line by the word ‘REDBIRD’ in different font just below the word ‘RUBY.’” Color is not claimed as a feature of the mark.

² Respectively, Registration No. 2133729, issued February 3, 1998, renewed (‘729 Registration), and Registration No. 1986470, issued July 16, 1996, renewed (‘470 Registration). Effective November 2, 2003, Trademark Rule 2.52, 37 C.F.R. § 2.52, was amended to replace the term “typed” drawing with “standard character” drawing. A mark depicted as a typed drawing is the legal equivalent of a standard character mark. *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1236 n.5 (TTAB 2015) (citing Trademark Manual of Examining Procedure § 807.03(i)).

I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. In an attempt to demonstrate that the marks in the cited registrations are weak, Applicant listed, in the body of its November 5, 2014 Response to Office Action, several third-party registrations and applications for marks that include the words BIRD or RUBY.³ However, Applicant did not provide status and title copies or printouts from the USPTO electronic database showing current status and title of these registrations or applications. Generally, a mere listing is insufficient to make such registrations of record. *In re Dos Padres Inc.*, 49 USPQ2d 1860, 1861 n.2 (TTAB 1998). The Examining Attorney, however, did not object to this evidence, but rather treated the registrations and applications as if properly made of record. In her brief,⁴ the Examining Attorney recognizes that she waived any objection, and we will treat

³ Applicant listed the following BIRD-inclusive marks: Reg. No. 2807582, SNOWBIRD for beer; Reg. No. 2157120, WHITE BIRD WHEAT for beer; Reg. No. 2237359, BIRDMAN for beer; Reg. No. 2964144, WAR BIRD for beer; Reg. No. 3286597, MOTLEY BIRD for beer; Reg. No. 4200545, ANGRY BIRDS for alcoholic beverages except beer; Reg. No. 4180255, BIRDSONG BREWERY for beer, and Reg. No. 2807582 SNOWBIRD for beer, and LISTEN TO THE BIRD, Application No. 85220712 for malt liquor (allowed). Applicant also listed cancelled registration, Reg. No. 1859254 for BB BIRDS BREW for beer. Applicant listed the following RUBY and RUBY inclusive marks: Reg. No. 1043089, ROYAL RUBY RED for canned fruit juice, Reg. No. 1612266, RUBY for carbonated soft drinks; Reg. No. 1631048, RUBY KISS for fruit juices; Reg. No. 1863300, RUBY RED SQUIRT for soft drinks; Reg. No. 2158987, RUBY MOUNTAIN for bottled drinking water; Reg. No. 2214712, RUBY RED GRAPEFRUIT BURST for soft drinks and fruit drinks. Applicant identified cancelled Reg. No. 2633794, COAST BREWING COMPANY, RUBY RED LAGER and abandoned Application No. 85775148, RUBY TANGO for beer. The cancelled registrations and abandoned application are of no probative value. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 n.2 (Fed. Cir. 2007) (Board did not assign any probative value to abandoned application in affirmance); *Action Temporary Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) (“[A] cancelled registration does not provide constructive notice of anything.”).

⁴ 9 TTABVUE 9.

Applicant's listing of registrations as being of record and considered for "whatever limited probative value [the listing] may have" *In re District of Columbia*, 101 USPQ2d 1588, 1592 n.5 (TTAB 2012) quoting *In re Broyhill Furniture Industries Inc.*, 60 USPQ2d 1511, 1513 n. 3 (TTAB 2001).

With regard to the listing, the intent-to-use application for LISTEN TO THE BIRD has virtually no probative value on the issue of registrability as it is only evidence of the fact that the application has been filed. *See In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016) (pending intent-to-use applications are evidence only that the applications were filed on a certain date; and are not evidence of use of the mark). Further, the probative value of the submission of a small number of registrations or applications showing use of the term for beer or ale is limited. *Id.* (citing by analogy *Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1135-36 (Fed. Cir. 2015) and *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)) ("Those decisions highlighted that a "considerable" or extensive" number of third-party registrations may well have, in the aggregate, evidentiary value. Here, in stark contrast, we have one registration and one application and no indication of the impact of its use on consumers.").

II. Applicable Law

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA

1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (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 (CCPA 1976). These factors, and the other relevant *du Pont* factors now before us, are discussed below.

III. Discussion

A. Relatedness of the Goods, Channels of Trade and Conditions of Purchase

We begin with the *du Pont* factors of the relatedness of the goods, channels of trade and conditions of purchase with regard to both cited registrations. We base our evaluation on the goods as they are identified in the application and each cited registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002).

In this case, the “Ale; Beer” identified in the application are legally identical to the “beer (ale)” identified in the ‘729 Registration. Furthermore, because the goods are identical, the channels of trade and classes of purchasers for such goods are presumed to be the same. *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994).

As to the '470 Registration, Registrant's "draft microbrewed ale" in the cited registration is encompassed by Applicant's more broadly identified goods, "ale; Beer." *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (broadly identified goods in application that are unrestricted as to channels of trade and unlimited as to classes of purchasers are presumed to encompass all of the goods described); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992) (unrestricted and broad identifications are presumed to encompass all services of the type described). Although Registrant in the '470 Registration has limited its channels of trade to "pubs and brewpubs," there is no such restriction in Applicant's identification of goods, and Applicant's goods must be presumed to move through this same trade channel to the same end users. In other words, we must presume that Applicant and Registrant sell their ale and beer through the same "pubs and brewpubs" and to the same classes of purchasers. *See In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012).

Applicant does not dispute any of the foregoing. However, Applicant contends that customers of beer and ale are sophisticated purchasers who are not subject to impulse purchases, exercise high standards of care, and are "careful loyal customers to specific brands," "carefully choos[ing] products based upon their specific qualities."⁵

Although Applicant did not submit evidence to support this contention, we recognize that some of the prospective consumers of Applicant's and Registrants' goods may indeed be highly discerning and relatively knowledgeable about beer and ale and exercise some degree of care in their purchasing decisions. However, this does

⁵ 7 TTABVUE 8.

not mean that all customers for beer and ale are knowledgeable and careful. Because these items, as identified, may be inexpensive and purchased by the public at large, we must assume that the purchasers include casual consumers purchasing relatively inexpensive items. *See In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1413 (TTAB 2015) (if the identification of goods is not limited to a particular price point we must treat the goods as being both inexpensive and high end, and presume purchasers would include both sophisticated and ordinary purchasers). *See also In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016). (“[B]eer is often relatively inexpensive, subject to impulse purchase, and often ordered orally in a bar or restaurant.”).

As to each of the cited registrations, we find that the goods, channels of trade, and classes of purchasers favor a finding of likelihood of confusion, and the factor of purchasing conditions, i.e., consumer sophistication, is neutral.

B. Comparison of the Marks

We next compare the marks “in their entirety as to appearance, sound, connotation and commercial impression” to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). The focus is on the recollection

of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Our analysis cannot be predicated on dissection of the involved marks. *Stone Lion*, 110 USPQ2d at 1161. Rather, we consider the marks in their entireties. *Id.* *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). Nonetheless, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161. For instance, as our principal reviewing court has observed, “[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 the mark.” *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).



Applicant argues that its six-syllable *Shiner Ruby Redbird* mark is different in appearance and vocalized differently from each of the cited registrations because Applicant’s mark is three separate words and contains “unique fonts, [of] varying size, varying tilt orientation, and horizontal line accents.” In addition, Applicant contends that the term RUBY in its mark “comes from the Texas Ruby Red Grapefruit (which is an

ingredient in the beer)[,]”⁶ and that REDBIRD refers to “the nickname of a long-term custodian at the brewery.”⁷ Applicant argues that its mark connotes an “old-fashioned beer coming from an old, rural Texas brewery”⁸ and points to the “non-common” SHINER portion of its mark as the most dominant,⁹ given its size, placement and “top position,” and Applicant’s use of SHINER on “multiple different beers” as well as its ownership of multiple trademark applications and registrations for SHINER and SHINER composite marks.¹⁰ Applicant argues that RUBY and REDBIRD are weak because they “refer to [the] color” of the beer or ale and “there are actual uses in the marketplace of the term RUBY” as well as the term RED BIRD in connection with beer and ale.¹¹ Applicant further argues that the weakness of REDBIRD is “evidenced by the PTO’s practice of allowing multiple ‘BIRD’ marks, regardless of the goods,”

⁶ 7 TTABVUE 4; November 5, 2014 Response to Office Action.

⁷ 7 TTABVUE 4.

⁸ *Id.*

⁹ 7 TTABVUE 3.

¹⁰ November 5, 2014 Response to Office Action.

Applicant states in its brief that it is not “just relying on a ‘family-of-marks’ argument.” 7 TTABVUE 6. We note in any event that “[a] family of marks argument is not available to an applicant seeking to overcome a likelihood-of-confusion refusal.” *In re Cynosure Inc.*, 90 USPQ2d 1644, 1645 (TTAB 2009).

¹¹ 7 TTABVUE 6. In its brief, and in its June 3, 2015 Request for Reconsideration, Applicant mentions third-party marketplace use of RUBY and RED BIRD in connection with beer and ale; however, Applicant did not put any evidence in the record to reflect this use. We note that the Examining Attorney provided in her May 7, 2014 Office Action a webpage listing for Samuel Adams “Ruby Mild” beer. However, we do not find this single reference to support a finding that the terms “RUBY” and “REDBIRD” or “RED BIRD” are weak as applied to the goods identified in the involved application and cited registrations.

referencing the list of BIRD composite registrations Applicant provided with its November 5, 2014 Response to Office Action.¹²

The Examining Attorney argues, on the other hand, that Applicant's mark and the cited marks are identical in part, in that Applicant's mark shares one term with each of the cited marks, and that the additional terms in Applicant's mark do not avoid confusion with either registered mark.¹³

To the extent that Applicant argues the stylization sufficiently distinguishes its mark from those of the cited registrations, we do not find the stylized lettering of Applicant's mark to be so distinctive that Applicant's mark is distinguishable from either of the registered marks on this basis. Because the cited marks are both presented in standard characters (or the typed equivalent), neither Registrant is limited to any particular depiction of its mark. Thus, each Registrant is entitled to all depictions of its mark regardless of the font style, size, or color; each of the registered marks could at any time be displayed in a manner similar to Applicant's mark, that is, the words RUBY and REDBIRD could be displayed in the same font style, size and depiction amid horizontal lines as those words appear in Applicant's mark. *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-10 (Fed. Cir. 2012); *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253,

¹² 7 TTABVUE 6.

¹³ We note that on appeal, the Examining Attorney has argued several other factors or responded to points that were raised during prosecution but were not pursued by Applicant on appeal. We have not addressed these factors or arguments as we consider them waived by Applicant. *In re Gibson Guitar Corp.*, 61 USPQ2d 1948, 1950 n.2 (TTAB 2001) (Applicant's arguments during prosecution regarding the inherent distinctiveness of its mark were not pursued at the appeal stage, and the Board noted that it need not consider them).

1259 (Fed. Cir. 2011). *See also Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (rejecting argument that a mark in standard character format (typed) is distinct from a mark in a logo format; “[b]y presenting its mark in a typed drawing, a *difference* cannot legally be asserted by that party”) (emphasis in original).

Because the marks in the cited registrations are different from each other, we address each registration separately.

1. REDBIRD ALE – the ‘729 Registration



We first consider the similarity or dissimilarity of the marks  and REDBIRD ALE in their entireties. *See Stone Lion*, 110 USPQ2d at 1160; *Palm Bay*, 73 USPQ2d at 1691. Moreover, in comparing the marks, we are mindful that where, as here, the goods are legally identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs.*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

The marks are similar because they both contain the word REDBIRD, which appears to have no meaning or significance with respect to the identified goods. The word REDBIRD is the dominant element in the cited registration because it is the word that consumers will use to identify the “beer (ale)” covered in the registration and to distinguish it from other beers/ales. While we do not ignore the word ALE in Registrant’s mark, there is no question that word is generic for the identified goods, and indeed has been disclaimed. The word ALE therefore is less significant than the

word REDBIRD in creating the mark's commercial impression. *In re National Data Corp.*, 224 USPQ at 751 (it is not improper to give more or less weight to a particular feature of a mark). The placement of REDBIRD in the initial position of Registrant's mark further persuades us that REDBIRD is the dominant term in the mark REDBIRD ALE. *See Palm Bay*, 73 USPQ2d at 1692; *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (noting that "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 In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (finding JOSE GASPAR GOLD "nearly identical" to GASPAR ALE once the commercial significance of the descriptive and otherwise non-dominant terms JOSE, GOLD and ALE are properly discounted).

Applicant asserts in its brief that the term REDBIRD in its mark refers to the long-term custodian of Applicant's brewery as featured in a TV commercial and YouTube clip and on page 184 of the book "Shine On One Hundred Years Shiner Beer, 1909-2009, Spoetzl Brewery Shiner, Texas" by Mike Renfro, none of which was made of record.¹⁴ Nor is there any indication or evidence to support Applicant's contention that the term REDBIRD would be understood or so perceived by consumers encountering Applicant's mark. Further, although Applicant maintains REDBIRD is a weak term, nothing in the record establishes that REDBIRD is a weak or suggestive term as used in connection with beer or ale. Again, Applicant's list of third-party

¹⁴ 7 TTABVUE 4; November 5, 2014 Response to Office Action. We note that Applicant only provided a copy of the cover page of the book.

registrations and applications is of limited probative value, and none of the marks included therein contain the word REDBIRD (or RED BIRD). We find on this record that REDBIRD is an arbitrary, distinctive term when used in connection with beer and ale and REDBIRD ALE is a strong mark. *Palm Bay*, 73 USPQ2d at 1692 (“an arbitrary mark [is] ‘a known word used in an unexpected or uncommon way’ [as applied to the goods or services]... such marks are typically strong”) (citation omitted); *In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1479 (TTAB 2007) (completely unique and arbitrary, if not coined, nature of mark in relation to goods entitles the registered mark to a broad scope of protection, and significantly increases the likelihood that the marks, when used in connection with the identical goods would cause confusion) (citations omitted).

As to Applicant’s arguments concerning the term RUBY in Applicant’s mark, we find the term at most suggestive of a type of red grapefruit that has been added as an ingredient to Applicant’s beer.¹⁵ The term RUBY also modifies REDBIRD and further reinforces the connotation of color, i.e., a red bird and a beer or ale that is deep in color.

With respect to the term SHINER in Applicant’s mark, in its November 5, 2014 Response to Office Action, Applicant states that SHINER is a geographical reference to the location of its brewery in Shiner, Texas.¹⁶ To the extent Shiner is geographically descriptive, it is entitled to less weight in the likelihood of confusion analysis. *Tea*

¹⁵ 7 TTABVUE 4.

¹⁶ November 5, 2014 Response to Office Action.

Board of India v. Republic of Tea Inc., 80 USPQ2d 1881, 1899 (TTAB 2006) (“Geographically descriptive terms are generally regarded as inherently weak and entitled to less protection than arbitrary or suggestive marks.”). As an exception to this general proposition, the addition of a geographically descriptive term may be sufficient to distinguish marks containing highly suggestive or descriptive terms. Compare *In re Hartz Hotel Services, Inc.*, 102 USPQ2d 1150, 1154 (TTAB 2012) (due to the highly suggestive nature of “Grand Hotel”, the marks GRAND HOTEL and GRAND HOTEL NYC not confusingly similar due to the addition of NYC, a geographically descriptive term) with *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715, 1717 (TTAB 1991) (NORTH AMERICAN CHICAGO CORP. and design (NA) confusingly similar to THE CHICAGO CORPORATION; addition of geographical term and design feature insufficient to avoid confusion).

In this case, the addition of the geographically descriptive term SHINER is insufficient to distinguish Applicant’s mark from the ‘729 registration for REDBIRD ALE because although ALE is generic, on this record, REDBIRD has no meaning or significance as used in connection with ale or beer.

The term SHINER also appears to be Applicant’s trade name. The addition of a house mark or trade name to one of two otherwise confusingly similar marks generally does not serve to avoid a likelihood of confusion. *Menendez v. Holt*, 128 U.S. 514, 521 (1888); *In re Fiesta Palms LLC*, 85 USPQ2d 1360 (TTAB 2007). Exceptions are made to this general rule if (1) there are some recognizable differences in the conflicting product marks, or if (2) the product marks are merely descriptive or highly

suggestive or play upon commonly used or registered terms, so that the addition of the house mark or trade name may be sufficient to render the marks as a whole distinguishable. See *In re S. D. Fabrics, Inc.*, 223 USPQ 54, 55 (TTAB 1984); *In re C.F. Hathaway Company*, 190 USPQ 343, 345 (TTAB 1976).

Neither exception applies in this case. The differences between the marks (i.e., the addition of RUBY in Applicant's mark and the addition of the generic term ALE in the registered mark) are not so significant in themselves that the addition of the SHINER trade name in Applicant's mark renders the marks as a whole distinguishable. As mentioned above, on this record REDBIRD has no meaning or significance as used in connection with ale or beer.

Applicant's mark incorporates the dominant portion of Registrant's mark, and Applicant's addition of the geographic term (or trade name) SHINER and the term RUBY to this distinctive arbitrary wording does not distinguish the marks as a whole. In view of the foregoing, we find that, when Applicant's mark and the mark in the '729 Registration are compared in their entirety, they are sufficiently similar in appearance, sound, connotation and commercial impression that, if used in connection with related goods, confusion would be likely to occur. As such, this *du Pont* factor favors a finding of likelihood of confusion.

2. RUBY – the ‘470 Registration

Keeping in mind the aforementioned legal principles, and viewing the marks in their entireties, we reach the opposite conclusion as to Applicant’s  mark and RUBY, the mark in the ‘470 Registration.

When we compare the marks in their entireties, we find that they are more different than similar in appearance, sound, connotation, and commercial impression. Obviously, the additional terms SHINER and REDBIRD in Applicant's mark give the marks a different appearance and sound. As for the meaning of RUBY, we have already found that RUBY might be suggestive of the red grapefruit in Applicant’s mark, or the color of the beer or ale, although we do not know if RUBY has any meaning in connection with the cited mark. Also, as previously discussed, RUBY modifies REDBIRD in Applicant’s mark to further connote a red bird. Registrant’s mark does not have this specific connotation as it consists of RUBY alone. Thus, when

viewed in their entireties,  and RUBY convey different connotations and commercial impressions. Although Applicant incorporates in its entirety the cited mark, RUBY, the similarity of the shared term RUBY in Applicant’s mark is outweighed by the differences in appearance, sound, connotation and commercial impression when combined with the other terms in Applicant’s mark.

Moreover, we find this *du Pont* factor to be pivotal in that, even considering the other *du Pont* factors, this factor of the dissimilarities of the marks outweighs the

other *du Pont* factors making confusion unlikely. See *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1460-61 (Fed. Cir. 1998) (Federal Circuit affirmed Board finding of no likelihood of confusion between mark CRYSTAL CREEK for wine and marks CRISTAL for wine and CRISTAL CHAMPAGNE for champagne, where Board relied solely on dissimilarity of marks); *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (“We know of no reason why, in a particular case, a single *du Pont* factor may not be dispositive”).

C. Conclusion

We have carefully considered all evidence of record and Applicant’s arguments, even if not specifically discussed herein, as they pertain to the relevant *du Pont* factors. We treat as neutral any *du Pont* factors for which there is no evidence or argument of record.



We find that confusion is likely between Applicant’s mark  and the mark in Reg. No. ‘729, REDBIRD ALE, because when viewed in their entirety, the marks are more similar than they are different, the goods are identical and the channels of trade and consumers overlap, and the factor of the sophistication of purchasers is neutral.



However, we find that confusion is unlikely between Applicant’s mark  and the mark in Reg. No. ‘470, RUBY, because when viewed in their entirety, the

similarities are outweighed by the dissimilarities, and this factor is dispositive.

Kellogg Co. v. Pack'em Enterprises Inc., 21 USPQ2d at 1145.

Decision: The refusal to register under Section 2(d) is affirmed as to Registration No. 2133729 and is reversed as to Registration No. 1986470.