

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

High Water Brewing, Inc.

v.

Jackson Hole Distillery, LLC d/b/a Jackson Hole Still Works

Cancellation No. 92063924

Karen Kreider Gaunt and Leanthony Edwards Jr. of
Dinsmore & Shohl LLP for High Water Brewing, Inc.

Mark J. Longfield of Teton Law Group, LLC
for Jackson Hole Distillery, LLC d/b/a Jackson Hole Still Works.

Before Wolfson, Adlin and Goodman, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Jackson Hole Distillery, LLC d/b/a Jackson Hole Still Works (“Respondent”) owns a registration for the mark HIGHWATER in standard characters for “aperitifs with a distilled alcoholic liquor base; blended spirits; distilled spirits; liquor; potable spirits; prepared cocktails consisting primarily of distilled spirits and also including beer; spirits; spirits and liqueurs” (the “Registration”). In its petition for cancellation, High Water Brewing, Inc. (“Petitioner”) alleges prior use and registration of HIGH

WATER BREWING, in standard characters (with BREWING disclaimed),¹ and ownership of an application to register the mark shown below



(also with BREWING disclaimed)², both for “beer.” Petitioner further alleges that its pleaded application was suspended based on a finding that Petitioner’s design mark could be confused with the mark in Respondent’s involved Registration.³ As grounds for cancellation, Petitioner alleges that use of Respondent’s mark is likely to cause confusion with Petitioner’s marks. In its answer, Respondent admits that its goods and Petitioner’s goods “travel in similar sales channels,” but otherwise denies the salient allegations in the petition for cancellation. Respondent also asserted affirmative defenses which it did not pursue at trial, and which are accordingly waived. *Miller v. Miller*, 105 USPQ2d 1615, 1616 n.3 (TTAB 2013); *Baroness Small Estates Inc. v. Am. Wine Trade Inc.*, 104 USPQ2d 1224, 1225 n.2 (TTAB 2012).

¹ Registration No. 4425448, issued October 29, 2013.

² Application Serial No. 86740606, filed August 28, 2015 under Section 1(b) of the Trademark Act based on an alleged intent to use the mark in commerce.

³ The petition for cancellation alleges that the application “was refused registration,” but in its Trial Brief Petitioner clarified that the application was suspended. 16 TTABVUE 5 (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).

The Record

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), the file of Respondent's involved Registration. In addition, Petitioner introduced: (1) a notice of reliance ("NOR") on Office records, official records, printed publications and Internet printouts (12 TTABVUE); and (2) the testimony declaration of Steve Altimari, its President, and the exhibits thereto (13 TTABVUE). Respondent did not take any testimony or submit any evidence. Both parties filed trial briefs.

Standing

Petitioner failed to properly introduce its pleaded registration into evidence, because it only submitted a "plain" or "soft" copy of the registration certificate, 12 TTABVUE 14, rather than evidence establishing that the registration remains valid and that Petitioner currently owns the registration. *Cf.* Trademark Rule 2.122(d)(2). Nevertheless, Petitioner's pleaded application is of record, as is the Office Action suspending action on that application pending the registration or abandonment of the application which matured into Respondent's involved Registration. 12 TTABVUE 39, 48-53. This establishes Petitioner's standing. *Weatherford/Lamb Inc. v. C&J Energy Servs. Inc.*, 96 USPQ2d 1834, 1837 (TTAB 2010) ("Inasmuch as petitioner has made of record the USPTO Office action suspending its pleaded application pending the possible refusal to registration under Section 2(d) of the Lanham Act based on an alleged likelihood of confusion with respondent's registration, there is no question that petitioner has standing ..."); *LifeZone Inc. v. Middleman Grp., Inc.*, 87 USPQ2d 1953, 1959 (TTAB 2008). *See also Lipton Indus.*,

Inc. v. Ralston Purina Co., 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) and *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). In any event, Petitioner also established that it uses HIGH WATER BREWING for beer, and that also establishes its standing. 13 TTABVUE 2-28, 31-45; *Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009) (“Petitioner has established his common-law rights in the mark DESIGNED2SELL, and has thereby established his standing to bring this proceeding.”); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (testimony that opposer uses its mark “is sufficient to support opposer’s allegations of a reasonable belief that it would be damaged ...” where opposer alleged likelihood of confusion).

Priority

Having failed to introduce any evidence, Respondent may only rely on the filing date of the application which matured into the involved Registration (February 3, 2015). See *Brewski Beer Co. v. Brewski Bros. Inc.*, 47 USPQ2d 1281, 1284 (TTAB 1998) (a party “may rely on its registration for the limited purpose of proving that its mark was in use as of the application filing date”). Petitioner has established use of HIGH WATER BREWING for beer well prior to that, and thus that it has priority of use. 13 TTABVUE 2-4, 30-35, 42 (Altimari Dec. ¶ 2 and Exs. 57, 62, 65).

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) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). Petitioner bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000); *West Florida Seafood, Inc. v. Jet Rest., Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1662 (Fed. Cir. 1994). Indeed, “a presumption of validity attaches to” Respondent’s involved Registration. *West Florida Seafood*, 31 USPQ2d at 1662; *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1105-06 (TTAB 2007). We consider the likelihood of confusion factors about which there is evidence or argument, and treat the remaining factors as neutral.

Similarity of the Marks

Respondent’s mark HIGHWATER and Petitioner’s mark HIGH WATER BREWING are quite similar “in their entirety as to appearance, sound, connotation and commercial impression,” because they both contain HIGHWATER/HIGH WATER. *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). Indeed, Respondent’s “telescoping” of the words “high” and “water” into

HIGHWATER without a space does not result in a meaningful difference, because HIGHWATER and HIGH WATER are virtually identical in how they look and sound, and in the meaning they convey. *See e.g., Stockpot, Inc. v. Stock Pot Rest., Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff'd* 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (finding STOCKPOT and STOCK POT confusingly similar); *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (BEEFMASTER and BEEF MASTER found “practically identical”).

While Petitioner’s mark also includes the merely descriptive (if not generic) term BREWING, it is settled that descriptive and disclaimed terms such as this are entitled to less weight in our analysis. *Cunningham*, 55 USPQ2d at 1846 (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching 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.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (BINION’S, not disclaimed word ROADHOUSE, is dominant element of BINION’S ROADHOUSE); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”).

Moreover, HIGH WATER is also the dominant portion of Petitioner’s mark because it comes first. *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).

Respondent concedes that there are “visual and contextual similarities between Respondent’s Registration and Petitioner’s Application.” 17 TTABVUE 7 (Respondent’s Trial Brief at 6). While we accept that Petitioner’s mark conveys that Petitioner is a brewery which offers beer, this difference is not substantial given the significant similarities between the marks and the fact that Respondent offers cocktails which include beer. Indeed, those familiar with Respondent’s mark for alcoholic beverages, some of which include beer as an ingredient, may very well, upon encountering Petitioner’s mark, assume that Respondent adopted a new version of its mark, or expanded its operations into brewing beer. This factor weighs heavily in favor of finding a likelihood of confusion.⁴

Goods and Channels of Trade

Respondent concedes that the goods “travel in similar trade channels.” 10 TTABVUE 4 (Answer ¶ 17). Moreover, the following advertisement from “bevmo.com”

⁴ Petitioner’s argument that its mark is “distinctive and strong” is unsupported by any evidence of record. Printed publications and websites introduced through notice of reliance alone are not competent to establish the truth of the matters asserted therein. *See Safer Inc. v. OMS Invests. Inc.*, 94 USPQ2d 1031, 1039-40 (TTAB 2010) (“... the documents have little probative value. They are admissible only to show what has been printed, not the truth of what has been printed.”); *Research in Motion Ltd. v. NBOR Corp.*, 92 USPQ2d 1926, 1929 (TTAB 2009). And mere advertising, promotion and use of a mark, without information about public exposure thereto, is generally not sufficient to establish strength. *See generally Bose Corp. v. QSC Audio Products, Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002) (“some context in which to place raw statistics is reasonable”); *Lebanon Seaboard Corp. v. R&R Turf Supply Inc.*, 101 USPQ2d 1826, 1831 (TTAB 2012) (“[w]e have no context for opposer’s advertising and sales figures,” or its other evidence of fame, “such as how the figures for the [HIGH WATER BREWING products] compare with that for other brands of” competing products).

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reveals that Petitioner's beer is promoted with other types of alcoholic beverages, including "spirits" such as those Respondent offers:



12 TTABVUE 138. Thus, the channels of trade weigh heavily in favor of finding a likelihood of confusion.

As for the goods, they need not be identical or even competitive in order to support a finding of likelihood of confusion. The respective goods need only be "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that the goods emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). See also *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991). The issue is not whether purchasers would confuse the goods, but rather whether

there is a likelihood of confusion as to the source of the goods. *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).

Here, while Petitioner failed to introduce any evidence that the goods are related, they are related on the face of Respondent's identification of goods, to the extent that both parties offer alcoholic beverages. Furthermore, Respondent offers "prepared cocktails consisting primarily of distilled spirits and also including beer," meaning that Petitioner's goods are an ingredient of Respondent's goods. This case is therefore analogous in several ways to *In re Davia*, 110 USPQ2d 1810, 1815 (TTAB 2014), in which we found agave sweeteners and pepper sauce related, in part because they "are functionally related," in part because they are "commonly used together" and in part because they are "often called for as ingredients in the same recipes." Similarly, here, beer and other alcoholic beverages can be said to be "functionally related" to the extent that alcoholic beverages are used in celebrations and rituals, and are sometimes purchased to produce particular desired effects. And Respondent's identification of goods itself reveals that Petitioner's product, beer, is "used together" with and an "ingredient in the same recipe" as Respondent's "prepared cocktails." *Id.* Finally, here, as in *Davia* and *Majestic Distilling*, we must consider the overlapping channels of trade in considering the relationship between the goods:

If two ingredients, however, are found to be complementary in that they are sold in the same stores to the same consumers for the same, related or complementary end use, consumers are likely to be confused upon encountering the goods under the same or similar marks even though the goods may be found in different areas within a store. Here, the recipes submitted by the examining attorney show that pepper sauce and agave nectar are complementary since,

in preparing certain foods and beverages, where the combination of sweet and hot flavors is common, pepper sauce and agave nectar are frequently blended together for flavor.

In re Davia, 110 USPQ2d at 1816. In this case, Respondent's admission and Petitioner's trade channel evidence tell us that the parties' goods may be "sold in the same stores to the same consumers." Respondent's identification tells us that the goods are sometimes sold for "related or complementary end use" or "blended together." It is settled that complementary goods may be found related. *See In re Martin's Famous*, 223 USPQ at 1290 (bread and cheese); *Gen. Mills, Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1597-98 (TTAB 2011), *judgment set aside on other grounds*, 110 USPQ2d 1679 (TTAB 2014) (cereal and yogurt); *In re Toshiba Medical Sys. Corp.*, 91 USPQ2d 1266, 1272 (TTAB 2009) (medical magnetic resonance imaging diagnostic apparatus and medical diagnostic apparatus, namely, medical ultrasound device); *In re Vienna Sausage Mfg. Co.*, 230 USPQ 799 (TTAB 1986) (sausage and cheese).⁵

This case is also analogous to *Majestic Distilling*, which involved a refusal to register RED BULL for tequila based on a prior registration of RED BULL for malt liquor.

⁵ While each case must be decided on its own merits, we and our primary reviewing court have repeatedly and consistently found different alcoholic beverages related. *See e.g., In re Chatham Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (beer and tequila); *In re Majestic Distilling Co.*, 65 USPQ2d at 1201 (malt liquor and tequila); *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816 (TTAB 2015) (beer and wine); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261 (TTAB 2011) (beer and wine); *Somerset Distilling Inc. v. Speymalt Whisky Distrib. Ltd.*, 14 USPQ2d 1539 (TTAB 1989) (vodka, gin and scotch); *Schieffelin & Co. v. The Molson Cos. Ltd.*, 9 USPQ2d 2069 (TTAB 1989) (malt liquor and brandy).

The PTO responds, and we agree, that malt liquor and tequila are similar by virtue of the fact that both are alcoholic beverages that are marketed in many of the same channels of trade to many of the same consumers. Although the PTO apparently found no evidence of any manufacturer who both brews malt liquor and distills tequila, Majestic has not shown that the PTO's lack of evidence in that regard is relevant. Unless consumers are aware of the fact, if it is one, that no brewer also manufactures distilled spirits, that fact is not dispositive. The *DuPont* factors require us to consider only "trade channels," which may be, but are by no means necessarily, synonymous with manufacturing channels. In this case, Majestic has not demonstrated that consumers distinguish alcoholic beverages by manufacturer rather than brand name. Because substantial evidence supports the Board's conclusions that malt liquor and tequila are similar goods and are sold in many of the same established and likely-to-continue trade channels, we conclude that the second and third *DuPont* factors, respectively, weigh against Majestic, as well as the first.

Majestic Distilling, 65 USPQ2d at 1204. Here, the likelihood of confusion may be greater, given that as identified Respondent's prepared cocktails comprise beer.⁶ These factors also weigh in favor of finding a likelihood of confusion.

Lack of Actual Confusion

Respondent's reliance on the lack of actual confusion is misplaced, because Respondent has been using its mark for only two years, and there is no evidence that would allow us to assess the extent to which there has been a meaningful opportunity for confusion to occur if it were likely to occur. See *Nina Ricci S.A.R.L. v. E.T.F.*

⁶ Respondent is correct that its goods and Petitioner's goods are in different international classes, but this is irrelevant to whether there is a likelihood of confusion. *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").

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Enters. Inc., 889 F.2d 1070, 12 USPQ2d 1901, 1903 (Fed. Cir. 1989) (“The absence of any showing of actual confusion is of very little, if any, probative value here because (1) no evidence was presented as to the extent of ETF’s use of the VITTORIO RICCI mark on the merchandise in question in prior years ...”). In any event, “it is unnecessary to show actual confusion in establishing likelihood of confusion.” *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983). This factor is neutral.

Conclusion

The parties’ marks are quite similar, and their alcoholic beverages are related and sold in similar channels of trade. Confusion is likely.

Decision: The petition is granted under Section 2(d) of the Act and Respondent’s Registration will be cancelled in due course.