This Opinion is Not a
Precedent of the TTAB

Mailed: September 11, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Twin Peaks Winery, Inc.
v.
Nocturnal Vodka, LLC

Opposition No. 91288135

J. Scott Gerien, Joy L. Durand, and Allison N. Berk of Dickenson, Peatman & Fogarty, for Twin Peaks Winery, Inc.

Sam Pierce of Pierce Patent Law,
for Nocturnal Vodka, LLC.

Before Goodman, Casagrande, and Bradley,
Administrative Trademark Judges.

Opinion by Bradley, Administrative Trademark Judge:

Nocturnal Vodka, LLC ("Applicant") seeks to register the standard-character mark TASTE THE POETRY[1] on the Principal Register for "vodka" in International Class 33.

Twin Peaks Winery, Inc. ("Opposer") opposes registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), asserting priority and

[1] Application Serial No. 97100260, filed on October 29, 2021, claiming first use and first use in commerce on May 19, 1999 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

a likelihood of confusion[2] with Opposer's previously used and registered mark POETRY (in standard characters) for "wine" in International Class 33.[3]

In its Answer, Applicant admitted that "[Opposer] is the owner of a federally registered mark for POETRY in association with Class 033 of Wine articles" and that Opposer's "registration for 'POETRY' is incontestable."[4] However, most of Applicant's Answer is unclear because it contains 32 numbered paragraphs that do not correspond to, or directly respond to, the eight numbered paragraphs in Opposer's Notice of Opposition.[5] Given that one of the paragraphs in the Answer appears to be

[2] 1 TTABVUE 3-5.

[3] Registration No. 2913639 issued on December 21, 2004, and renewed.

Citations in this opinion to the briefs and other materials in the case docket refer to TTABVUE, the Board's online docketing system. The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

[4] 9 TTABVUE 1-2, 4 ¶¶ 2, 4, 8, 22. Applicant also admitted the address of each of the parties and that it is the owner of the opposed Application Serial No. 97100260. *Id.* at 1, 4 ¶¶ 1, 17-18.

[5] *Compare* Answer, 9 TTABVUE with Notice of Opposition, 1 TTABVUE. Federal Rule of Civil Procedure 8(b) and Trademark Rule 2.106(b)(2) require Applicant to admit or deny each specific allegation in the notice of opposition, and such responses should be made in numbered paragraphs corresponding to the numbered paragraphs in the notice of opposition. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 311.02(a). Applicant's Answer failed to do so and also appears to respond to allegations that Opposer did not assert in the Notice of Opposition. *See, e.g.*, 9 TTABVUE 3 ¶ 13 (response regarding "extensive media coverage" that was not asserted in the opposition), 4 ¶ 19 (response contesting that Applicant's mark "is not used in commerce" which was not alleged in the opposition).

a general denial,[6] we treat the remainder of the Answer as denying the salient allegations of the Notice of Opposition.[7]

Only Opposer filed a brief.[8] Applicant did not file a brief, take testimony, or introduce any evidence during its testimony period, but it is not required to do so. *See Yazhong Investing Ltd. v. Multi-Media Tech. Ventures, Ltd.*, Can. No. 92056548, 2018 TTAB LEXIS 168, at *12 n.13 (TTAB 2018) ("Because Respondent, as defendant herein, is under no obligation to submit evidence or a brief, we do not construe Respondent's failure to do so as a concession of the case."); *see also* Trademark Rule 2.128(a)(1), 37 C.F.R. § 2.128(a)(1).

For the reasons discussed below, we sustain the opposition.

[6] 9 TTABVUE 4 ¶ 20 ("None of the allegations is found to be convincing enough; hence, all the allegations are denied.").

[7] Applicant's Answer also contains improper arguments and references to alleged evidence including third-party registrations. 9 TTABVUE 5-11. *See Thrifty Corp. v. Bomax Enters.*, Opp. No. 91070763, 1985 TTAB LEXIS 146, at *5 (TTAB 1985) (answer improper where it "it is basically argumentative rather than a proper responsive pleading to the notice of opposition"). We do not consider any arguments Applicant made in its answer, or any references to USPTO records or other documents. Statements made in pleadings are not evidence and must be established by competent evidence submitted during a party's testimony period, and here, Applicant did not file anything during its testimony period. *See Kellogg Co. v. Pack'Em Enters.*, Opp. No. 91080586, 1990 TTAB LEXIS 3, at *4 n.6 (TTAB 1990) ("statements made in pleadings cannot be considered as evidence in behalf of the party making them, . . . but rather must be proved in the normal manner") *aff'd*, 951 F.2d 330 (Fed. Cir. 1991).

[8] 13 TTABVUE.

I. Trial Record

The record consists of the pleadings, and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's involved application. In addition, Opposer also filed a Notice of Reliance[9] on:

- A Trademark Status and Document Retrieval ("TSDR") printout of Opposer's pleaded Registration No. 2913639 for the mark POETRY (Exhibit A, 11 TTABVUE 14-20);
- Website printouts from third-party online retailers offering wine and vodka (Exhibits B-G, 11 TTABVUE 21-96);
- Website printouts from third-party vodka companies; (Exhibits H-O, 11 TTABVUE 97-141);
- Website printouts from third-party companies showing use of the same mark for wine and vodka (Exhibits P-AA, 11 TTABVUE 142-253);
- TSDR printouts of third-party registrations (Exhibit BB, 11 TTABVUE 254-335); and
- Website printouts of cocktail recipes with wine and vodka as ingredients (Exhibits CC-LL, 12 TTABVUE 2-19, 11 TTABVUE 354-381).

As noted previously, Applicant did not file any evidence or testimony.

II. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action is an element of the plaintiff's case in every inter partes proceeding.[10] *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298,

[9] 11-12 TTABVUE. Although Opposer did not provide an explanation, it appears that several of its exhibits failed to upload correctly when it originally filed its Notice of Reliance and were partially illegible. 11 TTABVUE 336-353 (Exhibits CC-FF). Accordingly, Opposer appears to have refiled legible versions of these exhibits the following day. 12 TTABVUE 2-19.

[10] Opposer argues that it has "standing" to challenge the registration of Applicant's application. 13 TTABVUE 8. "We now refer to standing as entitlement to a statutory cause of action." *Univ. of Ky. v. 40-0, LLC*, Opp. No. 91224310, 2021 TTAB LEXIS 68, at *11 (TTAB 2021). However, "there is no meaningful, substantive difference between the analytical frameworks in the prior 'standing' case law, . . . and the current 'entitlement' case law." *Id.*

1304-05 (Fed. Cir. 2020); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1373-74 (Fed. Cir. 2020) (*citing Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014)). Opposer, as the plaintiff in the action, must show its entitlement to a statutory cause of action by demonstrating (i) an interest falling within the zone of interests protected by the statute, and (ii) a reasonable belief in damage proximately caused by the registration of the mark. *Corcamore*, 978 F.3d at 1305-06; *Mars Generation, Inc. v. Carson*, Opp. No. 91224726, 2021 TTAB LEXIS 386, at *8 (TTAB 2021). Here, Opposer established its entitlement to oppose Applicant's mark by making of record its pleaded registration, which forms the basis for a plausible Section 2(d) likelihood of confusion claim. *See Conopco, Inc. v. Transom Symphony OpCo, LLC*, Opp. No. 91256368, 2022 TTAB LEXIS 194, at *11 (TTAB 2022).

III. Priority

Opposer's pleaded registration showing active status and Opposer's ownership is of record,[11] and Applicant has not filed a counterclaim to cancel the registration. Accordingly, priority is not at issue with respect to the mark and goods covered by Opposer's registration. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1402 (CCPA 1974); *Nkanginieme v. Appleton*, Opp. No. 91256464, 2023 TTAB

(citation omitted). Accordingly, "our prior decisions and those of the Federal Circuit assessing a party's 'standing' under Sections 13 and 14 remain applicable despite the change in nomenclature of the inquiry to entitlement to a statutory cause of action." *Spanishtown Enters., Inc. v. Transcend Res., Inc.*, Can. No. 92070340, 2020 TTAB LEXIS 481, at *5 (TTAB 2020) (citation omitted).

[11] 11 TTABVUE 15-20.

LEXIS 64, at *11-12 (TTAB 2023) ("unless there is a counterclaim against the opposer's pleaded and proven registration, priority is not at issue in a likelihood of confusion dispute").

IV. Likelihood of Confusion

To prevail on its Section 2(d) claim, Opposer "has the burden of proving a likelihood of confusion by a preponderance of the evidence." *Stratus Networks, Inc. v. UBTA-UBET Communs. Inc.*, 955 F.3d 994, 998 (Fed. Cir. 2020). Our determination under Section 2(d) of the Trademark Act involves an analysis of all of the probative evidence of record that is relevant to the factors bearing on a likelihood of confusion. *See In re E.I. DuPont DeNemours & Co.,* 476 F.2d 1357, 1361 (CCPA 1973) ("*DuPont*"); *see also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772,* 396 F.3d 1369, 1371 (Fed. Cir. 2005).

We must consider "each *DuPont* factor for which there is evidence and argument." *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (citing *In re Guild Mortg. Co.*, 912 F.3d 1376, 1380 (Fed. Cir. 2019)). "Not all of the *DuPont* factors are necessarily relevant or of equal weight in a given case, and any one of the factors may control a particular case." *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1362 (Fed. Cir. 2022) (internal quotation marks omitted). "In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods." *Keystone Consol. Indus., Inc. v. Franklin Inv. Corp.*, Can. No. 92066927, 2024 TTAB LEXIS 290, at *32 (TTAB 2024) (*citing Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (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."). These factors and the other *DuPont* factors argued by Opposer are discussed below.

A. Similarity of the Goods

We begin by assessing the "similarity or dissimilarity and nature of the goods or services." *DuPont*, 476 F.2d at 1361. We must base our analysis on "the applicant's goods as set forth in its application, and the opposer's goods as set forth in its registration." *M2 Software, Inc. v. M2 Communs., Inc.*, 450 F.3d 1378, 1382 (Fed. Cir. 2006). Under this factor we "consider[] whether the consuming public may perceive the respective goods . . . of the parties as related enough to cause confusion about the source or origin of the goods." *Naterra Int'l, Inc. v. Bensalem*, 92 F.4th 1113, 1117 (Fed. Cir. 2024) (citation omitted).

Opposer's registration for the mark POETRY identifies its goods as "wine," and Applicant's application for the mark TASTE THE POETRY identifies its goods as "vodka." Opposer argues that the parties' goods are related based on evidence of third-party use-based registrations covering both wine and vodka, websites showing third-party companies using the same mark for wine and vodka, vodka companies marketing that their vodka is derived from wine grapes, and cocktail recipes that

"incorporate both vodka and wine as essential ingredients."[12] We address each category of evidence below.[13]

1. Third-Party Trademark Registrations

"[U]se-based, third-party registrations . . . have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark." *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, Opp. No. 91197659, 2013 TTAB LEXIS 314, at *27-28 (TTAB 2013). "Evidence of relatedness may include . . . copies of prior use-based registrations of the same mark for both applicant's goods and the goods listed in [opposer's] registration." *In re Embiid*, Ser. No. 88202890, 2021 TTAB LEXIS 168, at *30 (TTAB 2021) (citation omitted)).

Opposer submitted evidence of 25 third-party use-based registrations which it asserts "include both vodka and wine under a single mark."[14] We discount nine of these registrations as having low or no probative value for the following reasons:

- Two of the registrations do not cover both wine and vodka;[15]

[12] 13 TTABVUE 10-12.

[13] Opposer also argues that "[t]he Federal Circuit and the Board have repeatedly found that different types of alcoholic beverages are related goods for purposes of the likelihood of confusion analysis." 13 TTABVUE 10. However, "[t]here is no per se rule that holds that all alcoholic beverages are related." *In re White Rock Distilleries, Inc.*, Ser. No. 77093221, 2009 TTAB LEXIS 601, at *7 (TTAB 2009). "As so often said, each case must be decided on its own facts. There is no litmus rule which can provide a ready guide to all cases." *DuPont*, 476 F.2d at 1361.

[14] 13 TTABVUE 10-11; 11 TTABVUE 254-335 (Exhibit BB).

[15] 11 TTABVUE 267 (Reg. No. 7368000 covers "alcoholic beverages, **except** beer or wine") (emphasis added), 278 (Reg. No. 4498235 covers only "mixed alcoholic drinks and wine, namely . . . vodka tonic").

- Six of the registrations show that "vodka" and/or "wine" have been deleted from the registration;[16] and
- One registration has been cancelled.[17]

We find the remaining 16 registrations support that Registrant's wine and Applicant's vodka are related.

2. Third-Party Websites

"[I]t is settled that evidence of third-party use of the same mark for an applicant's identified goods . . . on the one hand, and an opposer's . . . identified goods . . . on the other, may establish a relationship between those goods." *Ricardo Media Inc. v. Inventive Software, LLC*, Opp. No. 91235063, 2019 TTAB LEXIS 283, at *8 (TTAB 2019); *see also Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (evidence that "a single company sells the goods . . . of both parties, . . . is relevant to a relatedness analysis").

[16] 11 TTABVUE 273 (Registration No. 4769673 deleted "vodka" and "wine"), 293 (Registration No. 4506302 deleted "vodka"), 297 (Registration No. 5458257 deleted "vodka"), 304 (Registration No. 3703348 deleted "vodka"); 324 (Registration No. 4990647 deleted "vodka" and "wine"), 327 (Reg. No. 4681686 deleted "wine"). As explained on the face of the TSDR print-outs Opposer submitted in the "Goods and Services" section: "The following symbols indicate that the registrant/owner has amended the goods/services: Brackets [..] indicate deleted goods/services." *See*, *e.g.*, 11 TTABVUE 273, 293. *See also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1402.12 ("The Post Registration Section of the USPTO uses single square brackets to indicate that goods/services have been deleted from a registration.").

[17] 11 TTABVUE 329 (Reg. No. 5576126). *See Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, Opp. No. 91194148, 2015 TTAB LEXIS 260, at *37 (TTAB 2015) ("three of the third-party registrations . . . have been cancelled, and cannot be used for this purpose [i.e., as evidence that the goods are related]").

Opposer provided the following evidence of nine third-party uses showing companies throughout the country offering wine and vodka under the same mark:[18]

- **Davidsons Beer, Wine & Spirits:** located in Highlands Ranch, CO, and offers KIRKLAND vodka and KIRKLAND cabernet sauvignon wine in its retail store and online;[19]
- **Charbay Distillery:** offers CHARBAY cabernet sauvignon wine for shipping to California, and also advertising CHARBAY vodka;[20]
- **Skinnygirl Cocktails:** advertising on its website SKINNYGIRL vodka, and SKINNYGIRL wine (pinot noir, chardonnay, cabernet sauvignon, California red blend, Moscato, California white blend, and pinot grigio); [21]
- **Knapp Winery:** located in Romulus, NY and offers KNAPP wine for sale on its website, and at its winery tasting room and restaurant, and also offers KNAPP cucumber vodka for sale online;[22]
- **Deer Run Winery:** offers DEER RUN vodka and DEER RUN red wine for sale on its website;[23]
- **Fiore Winery & Distillery:** located in Pylesville, MD and offers FIORE cabernet franc wine and FIORE blue crab vodka for sale on its website and at its physical location;[24]

[18] We do not include the uses in Exhibits S, X and AA. Exhibit S from No Bad Days does not show use of vodka, but rather a canned mixed cocktail, and as such has low probative value in showing the relatedness of wine and vodka. 11 TTABVUE 189-192. Exhibit X shows vodka being offered under the mark GERVASI SPIRITS, while the wine is being offered under the mark GERVASI VINEYARD. 11 TTABVUE 229-232. For Exhibit AA, it is not clear that the uses are offered by the same entity as the products are being offered for sale on different websites, and the vodka is identified as "Roth California Vodka from the esteemed USA distiller" and the wine states that it is offered by "Roth Estate." 11 TTABVUE 249-253.

[19] 11 TTABVUE 142-146 (Exhibit P).

[20] 11 TTABVUE 147-155 (Exhibit Q).

[21] 11 TTABVUE 156-188 (Exhibit R).

[22] 11 TTABVUE 198-214 (Exhibit T).

[23] 11 TTABVUE 215-218 (Exhibit U).

[24] 11 TTABVUE 219-224 (Exhibit V).

- **River Bend Winery & Distillery:** located in Chippewa Falls, WI and offers a variety of RIVER BLEND wines as well as RIVER BEND maple vodka for sale on its website;[25]

- **Nashoba Valley Winery, Distillery and Brewery:** offers NASHOBA vodka and NASHOBA cabernet sauvignon wine for sale on its website;[26] and

- **St. Julian Winery:** offers ST. JULIAN pumpkin spice latte dessert wine and ST. JULIAN lemonade flavored vodka for sale on its website.[27]

This evidence of third-party use supports that Opposer's and Applicant's goods are related. *See, e.g.*, *In re Detroit Ath. Co.*, 903 F.3d 1297, 1306-07 (Fed. Cir. 2018) (third-party evidence demonstrated "consumers are accustomed to seeing a single mark associated with a source that sells both" the goods of the applicant and registrant).

3. Vodka Companies Using Grapes

Opposer asserts that, "vodka is often derived from wine grapes, which creates a natural association between the two goods in the marketplace, such that consumers would expect wine and vodka to emanate from the same source."[28] However, Opposer cites only a non-precedential opinion in support which "is not binding upon the Board" and "[g]enerally, the practice of citing non-precedential opinions is not encouraged." *In re Tapio GmbH*, Ser. No. 87941532, 2020 TTAB LEXIS 483, at *26 n.30 (TTAB 2020).[29] The non-precedential opinion is also distinguishable because the evidence

[25] 11 TTABVUE 225-228 (Exhibit W).

[26] 11 TTABVUE 233-243 (Exhibit Y).

[27] 11 TTABVUE 244-248 (Exhibit Z).

[28] 13 TTABVUE 12.

[29] Opposer failed to identify that many of the Board cases it cites in its brief are non-precedential. *See* TBMP § 101.03(a)(2) ("Any nonprecedential cases must be clearly identified as nonprecedential."). Opposer cites six non-precedential cases in its discussion of the parties'

there showed that wine and agave wine was often "used as a substitute for tequila in margarita cocktails, to create a cocktail known as a 'wine margarita'" and accordingly, the Board held in that case, in conjunction with other evidence, this supported relatedness of the tequila and wine. *Miguel Torres, S.A. v. Complejo Indus. RM, S.A. de C.V.*, Opp. No. 91188401, 2011 TTAB LEXIS 171, at *30 (TTAB 2011). Opposer has not presented similar evidence regarding wine being a substitute for vodka here.

We find Opposer's evidence regarding some vodka being made from wine grapes only minimally probative here regarding the relatedness of wine and vodka. We do not consider that the use of a similar ingredient in making a good necessarily equates to consumers perceiving a relatedness between the finished products in the marketplace, and Opposer has not provided evidence demonstrating such a connection.[30]

4. Complementary Use in Cocktail Recipes

"[C]omplementary use has long been recognized as a relevant consideration in determining a likelihood of confusion." *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567 (Fed. Cir. 1984) (recognizing that "'bread' and 'cheese' are often used in combination"). Accordingly, where goods are "commonly used together . . .

goods and fourteen non-precedential cases in total in its brief. We highlight that "[c]iting nonprecedential cases should be done judiciously and rarely." *DC Comics v. Cellular Nerd LLC*, Opp. No. 91246950, 2022 TTAB LEXIS 453, at *11 (TTAB 2022).

[30] Additionally, one of Opposer's examples is only referenced in an online article that Opposer submitted without any accompanying testimony. As such it is hearsay, and may not be considered for the truth of the matter asserted (i.e., that the vodka discussed in the article is in fact made with wine grapes). *See Schiedmayer Celesta GmbH v. Piano Factory Grp., Inc.*, Can. No. 92061215, 2019 TTAB LEXIS 334, at *22 n.14 (TTAB 2019) (disregarding argument regarding third party use because it "appear[s] to be based only on printed publications and Internet printouts, which are not admissible for the truth of the matters asserted therein").

[such] conjoint use is a fact proper to be considered." *In re Davia*, Ser. No. 85497617, 2014 TTAB LEXIS 214, at *15 (TTAB 2014) (citation omitted); *see also McDonald's Corp. v. McSweet, LLC*, Opp. No. 91178758, 2014 TTAB LEXIS 351, at *36 (TTAB 2014) (goods were complementary where "[a]pplicant's identified pickled vegetables can be used as toppings in connection with [opposer's] sandwiches").

Opposer provided evidence of recipes for the following 12 cocktails posted on nine different websites that feature wine and vodka as the primary ingredients:

- Call Me A Cab Vodka Lemonade Wine Cocktail: featuring vodka and cabernet sauvignon (posted on foodwinesunshine.com);[31]
- White Wine Vodka Lemonade Chiller: featuring dry white wine and vodka (posted on prettyplainjanes.com);[32]
- Red, White & Night: featuring vodka and cabernet sauvignon (posted on liquor.com);[33]
- Simply Sunshine Vodka Wine Cocktail: featuring vodka and sauvignon blanc (posted on foodwinesunshine.com);[34]
- Sangria with Vodka: featuring white wine and vodka (posted on apaigeofpositivity.com);[35]
- TGIF Spritzer | White Wine + Vodka Spritzer: featuring vodka and dry white wine (posted on rachelrayshow.com);[36]
- Vodka Sangria: featuring red wine and vodka (posted on plattertalk.com);[37]

[31] 12 TTABVUE 2-5 (Exhibit CC).

[32] 12 TTABVUE 6-12 (Exhibit DD).

[33] 12 TTABVUE 13-14 (Exhibit EE).

[34] 12 TTABVUE 15-19 (Exhibit FF).

[35] 11 TTABVUE 354-356 (Exhibit GG).

[36] 11 TTABVUE 357-358 (Exhibit HH).

[37] 11 TTABVUE 359-363 (Exhibit II).

- Wine and Vodka Punch: featuring vodka and dry white wine (posted on lovetoknow.com);[38]
- Vodka Champagne Punch: featuring rosé champagne and vodka (posted on lovetoknow.com);[39]
- Cranberry Wine Punch: featuring burgundy wine or pinot noir and vodka (posted on lovetoknow.com);[40]
- White Wine Peach Sangria with Vodka & Mint: featuring white wine and vodka (posted on redwinedragons.com);[41] and
- Lemonade Wine Spritzer: featuring lemonade wine and vodka (posted on fatassranch.com).[42]

Such evidence supports that consumers will view wine and vodka to be related. *See Martin's Famous Pastry Shoppe*, 748 F.2d at 1567; *see also In re Vienna Sausage Mfg. Co.*, Ser. No. 73401682, 1986 TTAB LEXIS 85, at *3 (TTAB 1986) ("recipes for dishes having cheese and sausage as principal ingredients" supported that goods were related).

Based on the evidence of third-party trademark registrations and website use as well as the evidence of complementary use in cocktails, we find that Opposer's wine and Applicant's vodka are highly similar and the similarity of the goods weighs strongly in favor of a likelihood of confusion.

[38] 11 TTABVUE 367-368 (Exhibit JJ).

[39] 11 TTABVUE 368-369 (Exhibit JJ).

[40] 11 TTABVUE 370 (Exhibit JJ).

[41] 11 TTABVUE 372-374 (Exhibit KK).

[42] 11 TTABVUE 381 (Exhibit LL).

B. Trade Channels, Classes of Consumers, and Purchaser Care

We next examine similarity or dissimilarity of the trade channels in which the parties' goods are sold, the consumers to whom the parties' goods are marketed, and the conditions under which sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing. *DuPont*, 476 F.2d at 1361; *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1370-71 (Fed. Cir. 2012). We must base our analysis on the identifications in Opposer's registration and Applicant's application. *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014); *Detroit Ath. Co.*, 903 F.3d at 1308 (factor "must be evaluated with an eye toward the channels specified in the application and registration"). Additionally, where, as here, there are no limitations as to channels of trade or classes of purchasers in Opposer's and Applicant's identifications of goods, we must presume that the goods "travel in all normal channels and to all prospective purchasers for the relevant goods." *Coach Servs.*, 668 F.3d at 1370.

Opposer provided evidence of the following six online retailers offering both wine and vodka for sale on their websites and thus demonstrating that the parties' trade channels are the same: BevMo! (bevmo.com), Total Wine & More (totalwine.com), CWSpirits (cwspirits.com), Tower Beer, Wine & Spirits (towerwinespirits.com), Wine.com (wine.com), and Spec's Wines, Spirits & Finer Foods (specsonline.com).[43] *See also Monarch Wine Co. v. Hood River Distillers, Inc.*, 1977 TTAB LEXIS 129, at *6 (TTAB 1977) ("products of both parties are alcoholic beverages which flow through

[43] 11 TTABVUE 21-96 (Exhibits B-G).

the same channels of trade"); *In re Kysela Pere et Fils*, Ltd., Ser. No. 77686637, 2011 TTAB LEXIS 70, at *16 (TTAB 2011) ("common knowledge that [wine] can be purchased in liquor stores and, in some cases, supermarkets and other retail outlets"). Additionally, other evidence Opposer submitted demonstrates that the normal trade channels for wine and vodka include liquor stores and wineries and distilleries.[44] *See In re Majestic Distilling Co.*, 315 F.3d 1311, 1316 (Fed. Cir. 2003) ("malt liquor and tequila . . . both are alcoholic beverages that are marketed in many of the same channels of trade to many of the same consumers").

Further wine and vodka are "general consumer goods that are sold to adult members of the general public." *Kysela Pere et Fils*, 2011 TTAB LEXIS 70, at *16 ("there is no dispute that beer and wine are general consumer goods that are sold to adult members of the general public"). As such, the parties' consumers are identical or at least overlap. *See Schieffelin & Co. v. Molson Cos.*, Opp. No. 91069312, 1989 TTAB LEXIS 1, at *13 (TTAB 1989) ("A typical consumer of alcoholic beverages may drink more than one type of beverage and may shop for different alcoholic beverages in the same liquor store.").

Purchasers of "relatively inexpensive, comestible goods subject to frequent replacement . . . have been held to a lesser standard of purchasing care." *Specialty Brands, Inc. v. Coffee Bean Distribs.*, 748 F.2d 669, 672 (Fed. Cir. 1984). Opposer's evidence shows vodka and wine being offered for sale for prices as low as $10 per

[44] 11 TTABVUE 143-146, 216-218, 220-224, 226-228, 234-243.

bottle or less.[45] Because wine and vodka "can be sold at low price points, many customers will not exercise great care in their purchases." *Anheuser-Busch*, 2015 TTAB LEXIS 260, at *38-39 ("[wine and beer] can -- especially at low price points -- be an impulse purchase, making it more likely that a hurried customer would assume a connection between the source of such products sold under similar trademarks"); *see also Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000) ("When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care."). And while some purchasers of wine and/or vodka may be more discerning and purchase higher end products, we must base our decision on "the least sophisticated potential purchasers." *Stone Lion*, 746 F.3d at 1325.

Accordingly, the identity in the channels of trade, overlap in classes of consumers and the low degree of purchase care strongly support that confusion is likely.

C. Strength of Opposer's Mark

Before we compare the parties' marks, we consider the strength, including any fame, of Opposer's mark POETRY, as that may affect its scope of protection. Analysis of the fifth and sixth *Dupont* factors address the strength of a mark. *Spireon*, 71 F.4th at 1362 ("Two of the *DuPont* factors (the fifth and sixth) consider strength."). "A mark's strength is measured both by its conceptual strength (distinctiveness) and its

[45] 11 TTABVUE 22-23 (wine for $8.99 and $9.99), 25 (vodka for $7.99), 32 (vodka for $9.99), 64-65 (wine for $8.99 and $8.49), 71-72 (vodka for $9.98), 91 (wine for $8.99 and $9.46), 95 (vodka for $7.34).

marketplace strength ….” *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (citations omitted).

Marketplace strength is relevant because “similar marks tend to be more readily confused with a mark that is already known to the public.” *Opryland USA Inc. v. Great Am. Music Show, Inc.*, 970 F.2d 847, 851 (Fed. Cir. 1992). However, Opposer has not provided any evidence of marketplace strength here such as advertising and marketing information or sales.

The strength factor also considers conceptual strength. *See, e.g.*, *Spireon*, 71 F.4th at 1362. For conceptual strength, we evaluate where Opposer’s mark POETRY falls along the “range of increasing distinctiveness: (1) generic, (2) descriptive, (3) suggestive, (4) arbitrary, or (5) fanciful.” *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1339 (Fed. Cir. 2004). At a minimum, Opposer’s mark is inherently distinctive, i.e., at least suggestive, “as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act.” *New Era Cap Co. v. Pro Era, LLC*, Opp. No. 91216455, 2020 TTAB LEXIS 199, at *29 (TTAB 2020); *see Chippendales*, 622 F.3d at 1351 (“marks that are arbitrary, fanciful, or suggestive are inherently distinctive”); 15 U.S.C. § 1057(b). We agree with Opposer that its mark POETRY is arbitrary because “‘POETRY’ does not describe or suggest any quality or characteristic of wine.”[46] *See Nautilus Grp.*, 372 F.3d at 1340 (“an arbitrary mark is a known word used in an unexpected or uncommon way”). Accordingly, we find that Opposer’s POETRY mark

[46] 13 TTABVUE 20.

is conceptually strong. *See Palm Bay Imps.*, 396 F.3d at 1372 ("an arbitrary term . . . [is] conceptually strong as a trademark"). This weighs in Opposer's favor, but its impact is reduced by the absence of evidence of marketplace strength.

D. Similarity of the Marks

We now turn to the analysis of "[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imps.*, 396 F.3d at 1371 (*citing DuPont*, 476 F.2d at 1361). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *Look Cycle Int'l v. Kunshan Qiyue Outdoor Sports Goods Co.*, Can. No. 92079409, 2024 TTAB LEXIS 289, at *19 (TTAB 2024) (citation omitted).

"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.*, 668 F.3d at 1368 (citation omitted). Additionally, the marks "must be considered … in light of the fallibility of memory …." *In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014) (citation omitted). "The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks." *Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, Opp. No. 91263919, 2022 TTAB LEXIS 383, at *52 (citation omitted) (TTAB 2022).

"It is well-established that it is improper to dissect a mark, and that marks must be viewed in their entireties." *Coach Servs.*, 668 F.3d at 1368; *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1341 (Fed. Cir. 2015) ("It is the mark in its

'entiret[y]' that must be assessed.) (*citing DuPont*, 476 F.2d at 1361). However, "[t]here 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 consideration of the marks in their entireties." *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985).

Considering the appearance of the parties' marks, Opposer's mark is POETRY, and Applicant applied to register the mark TASTE THE POETRY. Where, as here, "one mark incorporates the entirety of another mark, it has been found to be similar." *Bureau Nat'l Interprofessionnel DU Cognac v. Cologne*, 110 F.4th 1356, 1370 (Fed. Cir. 2024) (citation omitted); *see also Stone Lion*, 746 F.3d at 1322 (affirming TTAB's finding that applicant's mark STONE LION CAPITAL was similar to opposer's marks where it incorporated the entirety of the registered marks LION CAPITAL and LION); *Anheuser-Busch*, 2015 TTAB LEXIS 260, at *20 ("To state the obvious, [a]pplicant's WINEBUD mark is similar to [o]pposer's BUD mark in that it incorporates the entirety of [o]pposer's mark."). Additionally, we find that "POETRY" is the dominant portion of Applicant's mark as it is arbitrary for Applicant's vodka (as well as for Opposer's wine), whereas "taste the" is less distinctive and does not distinguish the marks given that both parties products are alcoholic beverages which are "tasted" when consumed. *Double Coin Holdings Ltd. v. Tru Dev.*, Can. No. 92063808, 2019 TTAB LEXIS 347, at *21 (TTAB 2019) ("presence in [respondent's] ROAD WARRIOR mark of the term 'Road,' which is weak as a source identifier in connection with tires, does not distinguish the parties' marks"). Moreover, "[b]ecause

both marks are presented in typed or standard character form, each could be used in any typeface, color, or size, including the same stylization actually used or intended to be used by the other party, or one that . . . emphasizes the similarities between the marks." *Anheuser-Busch*, 2015 TTAB LEXIS 260, at *20.

Similarly, the marks sound similar given the use of the identical and distinctive term POETRY. *See M.C.I. Foods, Inc. v. Bunte*, Can. No. 92045959, 2010 TTAB LEXIS 381 (TTAB 2010) (petitioner's marks CABO CLASSICS, CABO PRIMO and design and LOS CABOS and design and opposer's mark CABO CHIPS similar in sound "to the extent that they share the [dominant] word 'Cabo'"). While we recognize that the marks sound partially different given "TASTE THE" in Applicant's mark, the "shared '[poetry]' element will have the same impact when spoken or heard as it does when seen. The risk here is that consumers will believe that Opposer and Applicant are connected because of their shared use of the word '[poetry],' featured so prominently in their marks used for similar [goods]." *Sage Therapeutics, Inc. v. SageForth Psychological Servs., LLC*, Opp. No. 91270181, 2024 TTAB LEXIS 139, at *16 (TTAB 2024).

Finally, given that the dominant term in Applicant's mark is identical to Opposer's mark POETRY, the meaning and overall impression conveyed by the two marks are similar when considered in relation to the parties' respective alcoholic beverages. *See Tao Licensing, LLC v. Bender Consulting Ltd.*, Can. No. 92057132, 2017 TTAB LEXIS 437, at *57 (TTAB 2017) ("shared term, TAO, results in a similar . . . meaning, and commercial impression" and addition of the term "VODKA" to respondent's mark did

not "change[] the meaning of TAO in the context of the mark as a whole, or create[] a basis on which consumers would distinguish source").

Overall, while the marks when viewed in their entireties are not identical, we find that they are similar in sound, appearance, meaning, and commercial impression, and that the similarities in the marks outweigh their differences. Accordingly, we find the similarity of the marks factor weighs in favor of a finding of likelihood of confusion.

E. Extent of Potential Confusion

We consider "[t]he extent of potential confusion, i.e., whether de minimis or substantial" under the twelfth *DuPont* factor. *DuPont*, 476 F.2d at 1361. Opposer asserts that the potential for confusion is substantial because the parties' marks are both in standard characters allowing Applicant to use its mark "in any manner whatsoever, including in a style where the term POETRY is used in a larger, more emphasized manner than 'TASTE THE.'"[47] Opposer also argues that "there is a significant risk that consumers encountering Applicant's TASTE THE POETRY mark in the marketplace will incorrectly assume that it is a derivative, off-shoot, or line expansion for the POETRY brand (or vice versa)."[48] "Opposer's arguments concerning the extent of potential confusion under this factor essentially repeat arguments under the other *DuPont* factors, and have been duly considered." *Heil Co.*

[47] 13 TTABVUE 20.

[48] 13 TTABVUE 21.

v. Tripleye GmbH, Opp. No. 91277359, 2024 TTAB LEXIS 494, at *94 (TTAB 2024). Accordingly, we find this factor neutral.

V. Conclusion

After reviewing the evidence of record, and the parties' arguments relating thereto, we conclude that confusion is likely between Opposer's mark POETRY and Applicant's mark TASTE THE POETRY. Applicant's and Registrant's goods are highly similar, the trade channels are identical, the consumers are overlapping and many will not exercise care in purchasing the low-cost goods, and the marks are similar. Additionally, Opposer's mark is conceptually strong, but it has not provided evidence of commercial strength so this weighs slightly in favor of confusion. The extent of potential confusion is neutral and does not alter the conclusion that confusion is likely.

Decision: The opposition is sustained under Section 2(d) of the Trademark Act.