

THIS OPINION  
IS NOT A PRECEDENT OF  
THE T.T.A.B.

Hearing:  
June 5, 2008

Mailed: 9/22/08

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Anheuser-Busch, Incorporated  
v.  
Mambo Seafood #1, Inc.

Opposition No. 91160250  
to application Serial No. 76480309  
filed on January 6, 2003

Douglas N. Masters and Edward G. Wierzbicki of Loeb & Loeb  
for Anheuser-Busch, Incorporated.

James R. Meyer and Bruce A. McDonald of Schnader Harrison  
Segal & Lewis, and Daniel B. Schein of Schein & Cai for  
Mambo Seafood #1, Inc.

Before Quinn, Walters and Bergsman, Administrative Trademark  
Judges.

Opinion by Quinn, Administrative Trademark Judge:

Mambo Seafood #1, Inc. filed an intent-to-use  
application to register the mark MAMBO MICHELADA (in typed  
drawing format) for "beer; [and] syrup for preparing beer  
beverages" in International Class 32, and "restaurant  
services" in International Class 43.

Anheuser-Busch, Incorporated opposed registration of the mark in International Class 32 only. Opposer alleges that applicant's mark, when used in connection with applicant's goods, so resembles opposer's previously used and registered MICHELOB marks, famous for beer, as to be likely to cause confusion under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d).

Applicant, in its answer, denied the salient allegations of likelihood of confusion, and set forth affirmative defenses.

#### Evidentiary Objections

Before turning to the merits of the likelihood of confusion claim, we direct our attention to opposer's assertion that "much of applicant's evidence should not be considered." (Brief, pp. 21-23). Opposer identified three major areas of concern, and applicant, in response, contends that opposer's objections are without merit, and that the evidence should be considered.

Opposer's first objection relates to applicant's registrations introduced by applicant during testimony, opposer arguing that applicant was required to submit status and title copies. Opposer also asserts that applicant failed to move the admission of certain of the exhibits into the record. This objection is overruled. Applicant's witnesses testified regarding the status and title of

applicant's registrations and, thus, it was not necessary for status and title copies to be filed with a notice of reliance. Trademark Rule 2.122(d); and TBMP §704.03(b)(1)(A) (2d ed. rev. 2004). Further, we do not view any failure to technically offer such exhibits into the record as a basis to not consider the evidence. Trademark Rule 2.123(e)(2).

Opposer's second objection relates to certain exhibits accompanying the Ho, McKinley and Mantis depositions. Opposer has objected on a variety of bases, including hearsay and that the exhibits were not produced during discovery. The objection is overruled, and we have considered these exhibits in reaching our decision, and have accorded them appropriate probative value when merited.

Lastly, opposer objects to the Leben testimony on the ground that the witness is not an expert on the subject of likelihood of confusion. The objection is overruled, and we have considered Dr. Leben's testimony, keeping in mind opposer's more specific objections relating to the particulars of some of the testimony.

In summary, we have considered all of the evidence submitted by applicant, giving it whatever probative weight the evidence merits.

The Record

The record consists of the pleadings; the file of the involved application; trial testimony, with related exhibits, taken by each party; certified status and title copies of opposer's pleaded registrations, and applicant's responses to certain of opposer's interrogatories, all introduced by way of opposer's notices of reliance.<sup>1</sup> The parties filed briefs,<sup>2</sup> and an oral hearing was held before this panel.

The Parties

Opposer is the nation's largest brewer. Since 1896, opposer has sold beer under the mark MICHELOB in the United States. Over the years, opposer developed different lines of beer under the MICHELOB mark, including MICHELOB LIGHT and MICHELOB ULTRA, among several others. Opposer has sold collateral products under the MICHELOB mark, including clothing items, key chains, clocks and the like. Opposer also has used MICH in connection with its beer. Since 1993, opposer has sold more than \$16 billion of beer under the

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<sup>1</sup> Certain portions of the record were designated "confidential." However, to the extent that any of this information appears in the briefs, we note that the briefs were neither marked "confidential" nor redacted. Accordingly, we have referred to some of this information in this opinion.

<sup>2</sup> Opposer, in its reply brief, objected to certain photographs reproduced in applicant's brief. To the extent that any of the photographs were not introduced during trial, they have not been considered. We hasten to add that, in any event, these pictures have no probative value on the specific likelihood of confusion issue before us.

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MICHELOB marks in the United States, with sales in 2006 exceeding \$800 million. Beers sold under the MICHELOB brand have ranked in the top-15 selling beers in this country since 1977. Opposer's beers are sold through the customary trade channels for alcoholic beverages, including liquor stores, grocery and convenience stores, restaurants and bars. Opposer extensively advertises its beer on television and radio, as well as through print media, the Internet, billboards and point of sale materials. Opposer also has sponsored a professional golfer, Sergio Garcia, and a professional golf tournament under the mark MICHELOB. In addition, MICHELOB is the "official beer" of the Champions and LPGA golf tours. Other sporting events, as well as music and art festivals, have served as vehicles to promote opposer's MICHELOB beers. Since 1993, opposer has spent about \$800 million to promote its MICHELOB beers, with the most recent year showing \$50 million in advertising expenditures. Opposer's MICHELOB beers have garnered awards for taste. Opposer's beer sells in the range of \$5-\$7 at retail for a six-pack.

Applicant operates six restaurants in Houston, Texas (five operating under "Mambo Seafood" and one operating under "Mambo Parrilla") at which it sells beer, including opposer's BUDWEISER brand beer (but not MICHELOB). Since 1996, applicant has used the mark MICHELADA in connection

with beer and restaurant services. Applicant owns a registration of the mark MICHELADA for restaurant services, but does not own a registration of the mark MICHELADA for beer. Applicant also owns registrations of the marks MICHELADA and MAMBO MICHELADA for bottle openers, beverage glassware and clothing items. Applicant has advertised its beer on flyers, signs and menus. The mark sought to be registered identifies a specific type of beer beverage sold at applicant's restaurants. A customer orders any beer sold at the restaurant (usually CORONA) and then spicy syrup is added to the beer, along with fresh lime, to create a MICHELADA brand beer beverage. Customers may also buy the syrup in a bottle so that they may prepare the beverage at home. Beer sales account for 15% of applicant's revenues, and of that amount, 30%-50% comprise sales of applicant's MICHELADA brand beer beverage.

#### Standing

Opposer has established its standing to oppose registration of the involved application. In particular, opposer has properly made its pleaded registrations of record (see infra) and, further, has shown that it is not a mere intermeddler. Opposer's use and registrations of its marks establish that opposer has standing. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023

(Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Opposer has introduced status and title copies of several registrations for its MICHELOB mark.<sup>3</sup> The registrations are as follows: MICHELOB for "draft-beer";<sup>4</sup> and "beer";<sup>5</sup> MICHELOB (stylized) for "beer";<sup>6</sup> WEEKENDS WERE MADE FOR MICHELOB for "beer";<sup>7</sup> MICHELOB LIGHT ("LIGHT" disclaimed) for "beer";<sup>8</sup> MICHELOB DRY ("DRY" disclaimed) for "beer";<sup>9</sup> MICHELOB SPECIALTY ALES AND LAGERS (and design) for "beer";<sup>10</sup> MICHELOB MARZEN ("MARZEN" disclaimed) for "beer and ale";<sup>11</sup> MICHELOB GOLDEN LIGHT ("GOLDEN LIGHT" disclaimed) for "beer";<sup>12</sup> MICHELOB AMBER BOCK and design ("AMBER BOCK" disclaimed) for "beer";<sup>13</sup> MICHELOB AMBER BOCK

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<sup>3</sup> Opposer, in its brief, alluded to its "family" of MICHELOB marks. However, only a few of the beers, and mostly in pairs (e.g., MICHELOB and MICHELOB LIGHT, or MICHELOB ULTRA and MICHELOB ULTRA AMBER), have been promoted together. Further, the mere ownership of multiple registrations of marks having a common characteristic does not show a family of marks. Accordingly, based on the record before us, we find that opposer has not established a family of marks. See *J&J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991).

<sup>4</sup> Registration No. 120157, issued January 15, 1918; renewed.

<sup>5</sup> Registration No. 1257788, issued November 15, 1983; renewed.

<sup>6</sup> Registration No. 513140, issued August 2, 1949; renewed.

<sup>7</sup> Registration No. 1215119, issued November 2, 1982; renewed.

<sup>8</sup> Registration No. 1257070, issued November 8, 1983; renewed.

<sup>9</sup> Registration No. 1542798, issued June 6, 1989; Section 8 affidavit accepted, Section 15 affidavit acknowledged.

<sup>10</sup> Registration No. 2130587, issued January 20, 1998; Section 8 affidavit accepted, Section 15 affidavit acknowledged. Office records do not show a renewal.

<sup>11</sup> Registration No. 2714116, issued May 6, 2003.

<sup>12</sup> Registration No. 2727067, issued June 17, 2003.

<sup>13</sup> Registration No. 2878373, issued August 31, 2004.

for "beer";<sup>14</sup> MICHELOB ULTRA for "beer";<sup>15</sup> MICHELOB ULTRA AMBER ("AMBER" disclaimed) for "beer";<sup>16</sup> MICHELOB for "clothing, namely, caps, hats, jackets, jerseys, shirts, shorts, slacks, socks, athletic suits, sweatshirts, sweaters, uniforms, and visors";<sup>17</sup> MICHELOB for "key chains, playing cards, pens, pencils, paper napkins, coasters, paper pennants, tote bags, umbrellas, mirrors, plaques, drinking vessels, trays, bottle openers, beer carriers, coolers, towels, pennants not of paper, ornamental pins, matches and ashtrays";<sup>18</sup> MICHELOB for "neon signs";<sup>19</sup> MICHELOB ULTRA for "clothing, namely shirts and headwear";<sup>20</sup> for "drinking vessels";<sup>21</sup> and for "entertainment in the nature of golf tournaments";<sup>22</sup> MICH GOLDEN DRAFT ("GOLDEN DRAFT" disclaimed) for "beer";<sup>23</sup> and MICH LIGHT ("LIGHT" disclaimed) for "beer."<sup>24</sup>

#### Priority

In view of opposer's ownership of valid and subsisting registrations, there is no issue regarding opposer's

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<sup>14</sup> Registration No. 2888244, issued September 28, 2004.

<sup>15</sup> Registration No. 3068566, issued March 14, 2006.

<sup>16</sup> Registration No. 3168734, issued November 7, 2006.

<sup>17</sup> Registration No. 1354391, issued August 13, 1985; renewed.

<sup>18</sup> Registration No. 1443860, issued June 23, 1987; renewed.

<sup>19</sup> Registration No. 2802094, issued January 6, 2004.

<sup>20</sup> Registration No. 2739178, issued July 15, 2003.

<sup>21</sup> Registration No. 2748948, issued August 5, 2003.

<sup>22</sup> Registration No. 3112127, issued July 4, 2006.

<sup>23</sup> Registration No. 1926629, issued October 10, 1995; renewed.

<sup>24</sup> Registration No. 2785242, issued November 25, 2003.



priority. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Thus, the only issue to decide herein is likelihood of confusion.

Likelihood of Confusion

We accordingly turn to the issue of likelihood of confusion. Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Opposer must establish that there is a likelihood of confusion by a preponderance of the evidence. The relevant *du Pont* factors in the proceeding now before us are discussed below.

The Goods, Trade Channels and Purchasers

The goods involved in this case are, in part, identical, and applicant does not contend otherwise. Both parties list "beer" in their respective identifications of goods. Neither opposer's nor applicant's identification of goods is restricted as to trade channels or classes of purchasers. Accordingly, we must presume that the parties' goods are marketed in all of the normal trade channels for such goods (restaurants, bars, liquor stores and the like), and that the goods are bought by the usual classes of purchasers. Thus, it is presumed that the beer moves in the same trade channels to the same classes of purchasers. In

view of the nature of the goods, these purchasers would include ordinary consumers, who would be expected to exercise nothing more than ordinary care in their purchasing decisions. Moreover, purchasers of the parties' goods would include Spanish-speaking consumers. Opposer has run advertisements in the Spanish language specifically targeted to Spanish-speaking consumers, and applicant's restaurants, with a Mexican theme, obviously would appeal to Spanish-speaking patrons. Further, the goods are relatively inexpensive, and are capable of being purchased on impulse.

The *du Pont* factors of the identity of the goods and trade channels, as well as the identity of the conditions under which and buyers to whom sales are made, weigh heavily in favor of a finding of likelihood of confusion.

#### Fame

Inasmuch as opposer introduced evidence bearing on the fame of its marks, we now turn to consider this *du Pont* factor. Fame of the prior mark plays a dominant role in likelihood of confusion cases featuring a famous mark. *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000); and *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). Fame for likelihood of confusion purposes arises "as long as a significant portion

of the relevant consuming public...recognizes the mark as a source indicator." *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005). The relevant consuming public herein comprises the general public.

As indicated earlier, opposer's sales under its MICHELOB marks exceed \$16 billion, with annual sales in the hundreds of millions. Commensurate with the impressive sales are opposer's extensive promotional efforts surrounding the MICHELOB marks. Opposer's advertising expenditures to promote its MICHELOB beers since 1993 are approximately \$800 million. Opposer's MICHELOB brand beer has been the recipient of numerous awards. Further, opposer's latest market research (2005) to evaluate the popularity and recognition of its MICHELOB mark shows that opposer's MICHELOB mark has a brand awareness of 96% among adults.

By the standards established by the Federal Circuit, opposer's mark MICHELOB is famous for beer, a point not disputed by applicant. (Brief, p. 18). The Federal Circuit has stated repeatedly that there is no excuse for even approaching the well-known trademark of a competitor inasmuch as "[a] strong mark...casts a long shadow which competitors must avoid." *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 22 USPQ2d at 1456.

Applicant points to the existence of two third-party registrations of the marks MICKEY'S and MICKEY FINN'S for beer, and argues that opposer's likelihood of confusion claim "is belied by its failure to take action against third parties whose trademarks for beer are more similar to MICHELOB than applicant's mark." (Brief, p. 19). These two third-party registrations certainly do not diminish the distinctiveness of opposer's famous mark. The registrations are not evidence of use of the marks shown therein. Thus, they are not proof that consumers are familiar with such marks so as to be accustomed to the existence of purportedly similar marks in the marketplace. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); and *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982). Further, neither of these marks is as close to opposer's mark as is applicant's mark.

We find the *du Pont* factor focusing on fame weighs heavily in favor of finding a likelihood of confusion herein.

#### The Marks

We now turn to compare the marks MICHELOB and MAMBO MICHELADA. In considering the marks, we initially note that when marks are used in connection with identical goods, as is the case herein (at least with respect to "beer"), "the degree of similarity [between the marks] necessary to

support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Further, as the fame of a mark increases, the degree of similarity between the marks necessary to support a conclusion of likely confusion declines. *Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1309.

With respect to the involved marks, we examine the similarities and dissimilarities of the marks in their appearance, sound, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

In considering applicant's mark, the parties argue whether the term MAMBO or MICHELADA is the dominant part of the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ["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 consideration of the marks in their entireties."]. In connection with their respective arguments over the similarities/dissimilarities between the marks, each party offered a linguistics expert to testify on its behalf. Opposer took the testimony of Rafael Núñez-Cedeño, Ph.D, a professor of linguistics at the University of Illinois, who has training in Hispanic linguistics.<sup>25</sup> Applicant took the testimony of William Leben, Ph.D, retired professor emeritus of linguistics at Stanford University.

Contrary to the contentions of the respective experts, we do not view either term as dominant in applicant's mark. Although an English-speaking consumer may be more likely to focus on the first word in the mark, as argued by Dr. Leben, while a Spanish-speaking consumer may be more likely to focus on the second word in the mark, as argued by Dr. Núñez-Cedeño, we find it just as likely that a consumer will give equal attention to each word. We acknowledge, however, that the MAMBO portion of applicant's mark is not part of opposer's mark.

In terms of appearance, we find that opposer's mark MICHELOB is similar to applicant's mark MAMBO MICHELADA in

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<sup>25</sup> Applicant contends that Dr. Núñez-Cedeño's testimony constitutes improper rebuttal. We disagree, and we view the testimony as being offered in rebuttal to the testimony of applicant's expert.

that MICHELOB and the MICHELADA portion of applicant's mark look somewhat similar. Although we acknowledge that the MAMBO portion of applicant's mark bears no resemblance to opposer's mark, MICHELOB and MICHELADA share the same first six letters, M-I-C-H-E-L.

As to sound, again the linguistic experts differ in their opinions. Dr. Leben testified that the "OB" ending of MICHELOB leads one to pronounce M-I-C-H as "mik," while the "ADA" ending of MICHELADA leads one to pronounce M-I-C-H as "meech." (Leben dep., pp. 27-28).

Dr. Núñez-Cedeño, drawing on his Hispanic linguistic background, testified as follows:

The "che" syllable in *Michelada* is normally pronounced in Spanish as the "ch" in church. Spanish speakers who do not know English or have not heard the word *Michelob* will abide by the Spanish pronunciation and will say it exactly as in *Michelada*. However, given that Spanish and English are in close contact in this country, one would expect that by analogy the "che" in *Michelada* may be pronounced as the "che" in *Michelob*. Pronounced either way, speakers will still be guided by the spelling and thus will associate *Michelada* with *Michelob*. (Nunez-Cedeno dep., p. 41, ex. no. 1).

Thus, according to the experts, the term MICHELADA is capable of being pronounced two different ways, with one of the pronunciations of applicant's mark being similar to the sound of opposer's mark. The expert's differing opinions on pronunciation highlight the often stated maxim that there is

no "correct" pronunciation of a trademark because it is impossible to predict how the public will pronounce a particular mark. Thus, "correct" pronunciation cannot be relied upon either to avoid or establish likelihood of confusion. See, e.g., *Centraz Industries Inc. v. Spartan Chemcial Co. Inc.*, 77 USPQ2d 1698 (TTAB 2006); and *Kabushiki Kaisha Hattori Tokeiten v. Scuotto*, 228 USPQ 461 (TTAB 1985). Further, the presence of MAMBO in applicant's mark adds to the differences in how the marks sound.

Each party also has explained the derivation and meaning of its mark. Opposer's mark MICHELOB was coined by Adolphus Busch, opposer's founder, "to express a brand that meant something unique and to kind of highlight a unique product that he was introducing in 1896." (Pereda dep., p. 12).

Applicant has offered various meanings and derivations of its mark. "Mi" means "my" or "mine" in Spanish, and "Helada" is the Spanish word for "freezing cold" or "frost." Thus, according to applicant, the term MICHELADA may be understood to mean "my freezing one," or "my frosty one" in Spanish.<sup>26</sup> We agree with applicant that the marks have different meanings.

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<sup>26</sup> Applicant curiously argues that the term MICHELADA is descriptive due to its English translation, and also because the term has been used as a slang term for "beer" in Mexico. Further, there is some evidence to the effect that the term "chelada" also means "beer" in Mexico. Applicant goes on to



As to commercial impression, Dr. Núñez-Cedeño testified about the construction of the involved marks. He explained that Spanish words rarely end in the letter "b" and, therefore, this final consonant would be rarely articulated in speech. He further testified that it is commonplace in the Spanish language to form an adjective out of a noun by adding a suffix, such as "ada," which means "in the manner of" or "like." When a word ends in a consonant, the suffix is added directly to the end of the word, while if the word ends in a vowel, the vowel is dropped and the suffix is added to the stem. Thus, Dr. Núñez-Cedeño contends, when the final "b" in MICHELOB is not pronounced, the suffix "ada" is added to the "MICHEL" portion to form MICHELADA. (Núñez-Cedeño dep., pp. 12-15). Accordingly, Spanish-speaking consumers might draw a connection between MICHELOB and MICHELADA.

We find that the marks, while having obvious differences, also share sufficient similarities as to engender similar overall commercial impressions.

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assert, however, that if the term "michelada" is merely descriptive, the term has acquired distinctiveness for beer emanating from applicant. (Brief, pp. 16-17). Michael Ho, applicant's president, testified that there are no dictionary listings of "michelada." (Ho dep., p. 32). Suffice it to say, such issues were not raised in the pleadings, and there has been no trial of such issues, either explicit or implied. Opposer has considered throughout this proceeding the term MICHELADA to be inherently distinctive. Because the issue of descriptiveness of the term MICHELADA was neither pleaded nor tried in this proceeding, we likewise have considered the term to be inherently distinctive for purposes of our likelihood of confusion analysis.

So as to be clear, in comparing the marks MICHELOB and MAMBO MICHELADA, we have considered the entirety of applicant's mark. In sum, the similarities between the marks in appearance, sound and commercial impression outweigh the differences.<sup>27</sup>

#### Actual Confusion

The record includes a likelihood of confusion survey commissioned by opposer and conducted by George Mantis, founder and president of The Mantis Group. Mr. Mantis has designed and conducted over 1000 market research studies used in trademark litigation, including 200 likelihood of confusion studies. Mr. Mantis is no stranger to Board proceedings; by his count, Mr. Mantis has testified in twenty-five cases.

In the present case, Mr. Mantis conducted a shopping mall intercept survey "to determine whether, and if so, to what extent consumers are likely to mistakenly believe that [opposer] makes, puts out or has approved or sponsored beer using the name Mambo Michelada." (Mantis dep., ex. no. 2). The survey was conducted in eight different cities, two each in the nation's four census regions. The survey was taken of 296 individuals, 200 of whom were exposed to applicant's mark, with the remaining 96 persons comprising a control

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<sup>27</sup> Although opposer has only briefly referred to its MICH mark, we also note the similarities between this mark and applicant's mark in terms of appearance, sound and commercial impression.

group that was exposed to the fictitious mark MAMBO MANTANADA. Eligible respondents comprised those individuals who had purchased beer within the preceding 30 days or who were likely to purchase beer within the following 30 days.

Before the questioning commenced, respondents were instructed: "For each of my questions, if you don't know or don't have an answer, please don't guess. Just tell me you don't know or don't have an answer and we'll go on to the next question."

Respondents were then handed a card on which either the name MAMBO MICHELADA or MAMBO MONTANADA appeared. Below either of these names the word "beer" appeared, which according to the interviewer's instructions, "tell[s] us the kind of product on which this name is used."

Respondents were asked two sets of questions, the first set being designed to assess whether source confusion is likely. The primary questions were as follows: "What company do you believe makes or puts out the beer using the name shown on this card?" Respondents who identified a company then were asked, "Why do you say that?" Then, "Do you believe that the company that makes or puts out the beer shown on this card makes or puts out any other products or brands?"

The second set of questions was designed to determine whether the respondents believed that the named beer shown

on the card is approved or sponsored by opposer. The key questions included the following: "If you have an opinion, do you believe that the beer shown on this card is or is not made or put out with the approval or sponsorship of any other company or brand? With which other company or brand?" Respondents who answered "Yes" were asked, "Whether or not you know the name of the other company or brand that approved or sponsored the beer shown on this card, what, if anything can you tell me about that company or brand?"

Mr. Mantis testified, and the survey report confirms that there was a net confusion level (after subtracting the appropriate level of "noise") of 43%. Respondents who expressed confusion between the marks stated that it is the MAMBO MICHELADA name itself that caused them to believe that the MAMBO MICHELADA beer is a MICHELOB product sponsored or approved by opposer. Typical responses included: "The Michelada makes it sound like Michelob is responsible."; "It's got the word MICH in the last name of the product."; "Michelada is a similar word to Michelob."; "The one word looks like Michelob."; "Pretty much what is spelled there. It looks like the brand name Michelob."; and "Just the word association Michelada to Michelob. It could be a Spanish distributor or have a relation with Latin America, or it's just a special holiday brew for Cinco de Mayo." These explanations provided an additional control to separate

meaningful confusion from a "confusion" response based on any reason unrelated to the name at issue.

Mr. Mantis concluded that confusion between the marks is likely based on the fact that "[a]n appreciable percentage, 43.0%, of purchasers and likely purchasers of beer mistakenly believe that MAMBO MICHELADA beer is made, put out or approved or sponsored by Anheuser-Busch because of the MAMBO MICHELADA name."

Although courts and this Board long have recognized that there is no such thing as a perfect survey, opposer's survey follows the often approved *Ever-Ready* format discussed in *Union-Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 188 USPQ 623 (7th Cir. 1976) [The survey asked "Who do you think puts out the lamp shown here?" and "What makes you think so?"].

Inasmuch as the survey follows the format of the *Ever-Ready* likelihood of confusion survey, we find it reliable and, thus, probative on the issue of likelihood of confusion between the parties' marks. See *Starbucks U.S. Brands LLC v. Ruben*, 78 USPQ2d 1741 (TTAB 2006); and *Carl Karcher Enterprises Inc. v. Stars Restaurants Corp.*, 35 USPQ2d 1125 (TTAB 1995). The level of confusion shown by the survey results is significant and certainly weighs in opposer's favor.

Applicant has urged that we disregard the survey due to a "profound defect." Applicant contends that the threshold question "What company do you believe makes or puts out the beer using the name shown on this card?" is "blatantly leading," and presupposes "that each respondent knows or should know who makes the product, thereby ruling out the candidacy of applicant, who is unknown to the respondents, and instituting a guessing game peculiarly calculated to identify the leading U.S. beer brewer." (Brief, pp. 22-23).

We disagree with applicant's assessment of the survey. Before the questions were asked, respondents were instructed to not guess, but rather to state, if appropriate, "I do not know." Further, the answers to the follow-up question "Why do you say this?" persuade us that the respondents were not merely guessing. Moreover, the responses to the control questions buttress our view that the respondents were not merely guessing. Applicant's attempts to discredit the survey based on factual distinctions between the marks in prior cases in which Mr. Mantis' similar surveys have been credited, and the marks involved herein, are ill founded for the reasons indicated in opposer's reply brief.

Notwithstanding the survey results, the record shows that neither party is aware of any instances of actual confusion despite over a decade of contemporaneous use in the marketplace. The absence of actual confusion, as

reported by the parties, does not compel a different result in the likelihood of confusion analysis. We note that while applicant has enjoyed success with its beer product, applicant's use of its mark has been limited to its six restaurants in Houston, Texas. Thus, while there has been an opportunity for confusion to occur in that limited geographic area, we do not view the opportunity as truly meaningful in that most consumers, even in Houston, have not been exposed to applicant's mark. In any event, although each party is unaware of any actual confusion, evidence of actual confusion is not essential to proving a case of likelihood of confusion. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983).

Although we have considered the lack of actual confusion, we greatly discount it due to the fairly limited exposure of applicant's product. We find the survey to be more probative, and the survey certainly weighs in opposer's favor.

#### Other Factors

Finally, applicant alleges that "[t]his opposition is part of a larger controversy between the parties involving an unsuccessful attempt by Opposer to register CHELADA for beer." Applicant goes on to detail its theory about opposer's plan "to destroy Applicant's valuable rights in

the MICHELADA mark for the purpose of appropriating the CHELADA mark for itself." (Brief, pp. 1-2). Suffice it to say, that these allegations about a larger controversy brewing between the parties have no place in our analysis. The issue before us is likelihood of confusion between the marks MICHELOB and MAMBO MICHELADA, and whatever ulterior motives, if any, opposer may have based on the use of other marks not at issue herein, such motives are of no consequence in our analysis.

#### Conclusion

We find that the *du Pont* factors, on balance, weigh in favor of a finding of likelihood of confusion.

Lastly, to the extent that there may be any doubt on our finding of likelihood of confusion, we resolve that doubt, as we must, in favor of opposer as the prior user and registrant of a famous mark. See *Giant Food, Inc. v. Nation's Foodservice, Inc.*, supra.

**Decision:** The opposition is sustained on the ground of likelihood of confusion, and registration to applicant in International Class 32 is refused. The application will proceed for "restaurant services" in International Class 43.