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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91178682
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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Fransican Vineyards, Inc.

Opposer

Mark: DOMAINE PINNACLE and
design

v.

Opposition No. 91178682

Domaine Pinnacle, Inc.

Serial No.: 78783236

Applicant
-----X

OPPOSER'S TRIAL BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. PROCEDURAL HISTORY / EVIDENCE OF RECORD	1
A. Procedural History	1
B. Opposer's Evidence of Record	2
C. Applicant's Evidence of Record	4
II. BACKGROUND OF THE PARTIES AND THEIR GOODS	4
A. Opposer's Background	4
B. The Applicant	6
III. ARGUMENT (LIKELIHOOD OF CONFUSION)	7
A. Opposer Has Priority	7
B. Analysis Of The DuPont Factors Demonstrates That Confusion Is Likely	7
<u>1st duPont Factor.</u> The Similarity Or Dissimilarity Of The Marks In Their Entireties As To Appearance, Sound, Connotation and Commercial Impression	8
<u>2nd duPont Factor.</u> The Similarity Or Dissimilarity and Nature Of The Parties' Respective Goods	10
<u>3rd duPont Factor.</u> The Similarity or Dissimilarity Of Established, Likely-To-Continue Trade Channels..... and	14
<u>4th duPont Factor.</u> The Conditions Under Which And Buyers To Whom Sales Are Made	14
<u>5th duPont Factor.</u> The Fame Of Opposer's Marks	15
<u>6th duPont Factor.</u> The Number and Nature of Similar Marks In Use on Similar Goods	16

<u>7th duPont Factor.</u>	The Nature And Extent Of Any Actual Confusion	16
and		
<u>8th duPont Factor.</u>	The Length of Time During And Conditions	
	Under Which There Has Been Concurrent Use Without	
	Evidence Of Actual Confusion	16
<u>10th duPont Factor.</u>	Market Interface Between The Parties	16
<u>12th duPont Factor.</u>	The Extent Of Potential Confusion Is Substantial	17
III. CONCLUSION		18

TABLE OF CASES

<u>Case</u>	<u>Page</u>
<i>Black & Decker Mfg. Co., v. Bright Star Industries</i> 220 USPQ 891 (TTAB 1983)	7
<i>Century 21 Real Estate Corp. v. Century Life of America</i> 23 USPQ2d 1698 (CAFC 1992)	17
<i>Coca Cola Bottling Co. v. Joseph E. Seagram & Sons, Inc.</i> 188 USPQ 105, 526 F.2d 556 (CCPA 1975)	13
<i>In re Concordia International Forwarding Corp.</i> 222 USPQ 355 (TTAB 1983)	10
<i>In re Dixie Restaurants Inc.</i> 41 USPQ2d 1531 (CAFC 1997)	7
<i>In re E.I. duPont de Nemours & Co.</i> 177 USPQ 563 (CCPA 1973)	7
<i>Federated Foods, Inc. v. Fort Howard Paper Co.</i> 192 USPQ 24 (CCPA 1976)	11
<i>General Foods Corp. v. Monarch Wine Co. of Georgia</i> 142 USPQ 521 (TTAB 1964)	13
<i>Guardian Products Co., Inc. v. Scott Paper Co.</i> 200 USPQ 738 (TTAB 1978)	14
<i>In re Jack Daniel Distillery</i> 171 USPQ 312 (TTAB 1971)	12
<i>In re Jakob Demmer KG</i> 219 USPQ 1199 (TTAB 1983)	11-13
<i>Miles Laboratories v. Naturally Vitamin Supplements</i> 1 USPQ2d 1445 (TTAB 1987)	14, 15
<i>Octocom Systems Inc. v. Houston Computers Services Inc.</i> 16 USPQ2d 1783 (CAFC 1990)	10

<i>Oxford Pendaflex Corp. v. Anixter Bros. Inc.</i> 201 USPQ 851 (TTAB 1978)	7, 10
<i>Pink Lady Corp. v. L.N. Renault & Sons, Inc.</i> 121 USPQ 465 (CCPA 1959)	12
<i>In re Rola Weinbrennerei Und Likorfabrik GmbH & Co. KG</i> 223 USPQ 57 (TTAB 1984)	14
<i>Schieffelin & Co. v. The Molson Companies Ltd.</i> 9 USPQ2d 2069 (TTAB 1989)	10
<i>Tektronix, Inc. v. Daktronics, Inc.</i> 534 F.2d 915, 189 USPQ 693 (CCPA 1976)	9
<i>United Rum Merchants Limited v. Fregal, Inc.</i> 216 USPQ 217 (TTAB 1982)	13
<i>Warnaco, Inc. v. Adventure Knits, Inc.</i> 210 USPQ 307 (TTAB 1981)	10, 14

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OPPOSER'S TRIAL BRIEF

TO THE HONORABLE BOARD:

Opposer, Franciscan Vineyards, Inc. ("Opposer"), through its undersigned attorneys, Baker and Rannells, PA, respectfully requests that its opposition to application Serial No. 78783236 be granted on the basis of likelihood of confusion.

I. PROCEDURAL HISTORY / EVIDENCE OF RECORD

A. Procedural History

The Notice of Opposition was filed on August 1, 2007. Applicant filed its Answer and Affirmative Defenses on September 10, 2007. The case was then suspended for settlement negotiations. The case was resumed and Opposer filed a motion to amend its pleadings which was granted on January 13, 2009.

On April 20, 2009 Applicant's attorney moved to be removed as counsel.

On July 14, 2009, the Applicant advised the Board that it would be appearing pro se.

The case was thereafter suspended for settlement discussions for an extended period. The parties have been and are involved in a concurrent proceeding in Canada and were attempting to settle a number of issues. The parties were unable to reach a settlement and on March 21, 2012 proceedings resumed.

On May 14, 2012, Opposer filed its First Notice of Reliance (certified status and title copies of Opposer's U.S. trademark registrations for PINNACLES for wine and PINNACLES RANCHES for wines) following which the parties renewed settlement discussions and the case was again suspended and thereafter again renewed.

On October 2, 2012, Opposer filed its Second and Third Notices of Reliance – (i.e., file wrapper for Applicant's abandoned Ser. No. 76596876 for the mark DOMAINE PINNACLE and design, and Dictionary and Wine Glossary definitions of the terms "domaine" and "estate.").

On November 14, 2012, Opposer took the testimony deposition of Juan Fonseca (Director of Marketing for the Estancia and Mark West wine brands of Opposer's parent company, Constellation Brands).

On December 13, 2012, Opposer took the testimony deposition of Lou Applebaum (Senior Vice President of Strategy and Business Development of Opposer's parent company, Constellation Brands, Inc.).

On December 14, 2012, Opposer filed its Fourth Notice of Reliance (pages from Applicant's website).

Applicant did not file any evidence or take any testimony depositions.

B. Opposer's Evidence of Record:

Opposer filed the following as evidence which is of record:

1. Opposer's First Notice of Reliance: certified status and title copies of Opposer's U.S. trademark registrations for PINNACLES for wine (Reg. No. 997378 registered on November 5, 1974) and PINNACLES RANCHES for wines (Reg. No. 4072330 registered December 20, 2011).

2. Opposer's Second Notice of Reliance: Applicant's application file wrapper for abandoned Ser. No. 76596876 for the mark DOMAINE PINNACLE and design.

3. Opposer's Third Notice of Reliance: Dictionary and Wine Glossary definitions of the terms "domaine" and "estate."

4. Opposer's Fourth Notice of Reliance: Pages from Applicant's website found at www.domainepinnacle.com.

5. Testimony Deposition of Juan Fonseca with exhibits 1-8.

Ex. 1: Amended Notice of Taking Testimony

Ex. 2: Opposer's Amended PreTrial Disclosures

Ex. 3: Printout from Applicant's Website

Ex. 4: Estancia "Pinnacles" and "Pinnacles Ranches" wine labels

Ex. 5: Photograph of Opposer's wine product

Ex. 6: Opposer promotional materials

Ex. 7: Opposer Sales Sheets

Ex. 8: Opposer annual Sales Figures (Fiscal Years 2001 – 2013 to said date)

6. Testimony Deposition of Lou Applebaum with exhibits 1-9.

Ex. 1: Amended Notice of Taking Testimony

Ex. 2: Photocopy of a bottle of Estancia 2008 PINNACLES RANCHES

Chardonnay

Ex. 3: Printout of pages from Applicant's Website

Ex. 4: Website screen shots from Opposer's parent's website (cbrands.com)

Ex. 5: Copies of website pages - hotlinks to the various brand/winery websites –
from Ex. 4.

Ex. 6: Copies of pages from the "Jackson-Triggs" winery website.

Ex. 7: Copies of screenshots from the "Inniskillin" winery website.

Ex. 8: Copies of screenshots from the "Grower's Cider" website

Ex. 9: Chart of Annual Sales of Estancia PINNACLES / PINNACLES
RANCHES wine (fiscal years 2001 – 2013 to said date).

C. Applicant's Evidence of Record:

None.

II. BACKGROUND OF THE PARTIES AND THEIR GOODS

A. Opposer's Background

Opposer, Franciscan Vineyards, Inc., is a wholly-owned subsidiary of Constellation Brands, Inc. ("CBI"). *See*, Test. Applebaum 9:25 and 10:2. *See also* Test. Fonseca *at* 10:6-7.

CBI is the world's largest premium wine company; the leading beer importer in the US through a joint venture with Grupo Modelo; and a leading spirits manufacturer and distributor. *See*, Test. Applebaum *at* 8:15-19. A representative list of brands that fall under the umbrella of CBI includes Robert Mondavi, Estancia, Simi, Jackson-Triggs, Arbor Mist, and Corona beer. *See*, Test. Applebaum *at* 8:20-24. *See also*, Test. Applebaum *at* 15:17-22; 16:4-8; 16:22-25; and 17:2-3; and Exhibits 4 and 5 thereto (listing/screenshots/copies of webpages of alcoholic beverage holdings of CBI).

The “Estancia” wine brand is a division of FVI within the overall CBI portfolio. The Estancia Winery is located in Soledad California (as well as Estancia’s “Pinnacles Ranches” vineyard). Estancia Winery produces Opposer’s PINNACLES / PINNACLES RANCHES wines. *See, Test. Fonseca at 10:8-17.*

The PINNACLES trademark for wine dates back to the early 1970’s when it was owned by Paul Masson who later sold to Vintners and consequently to Opposer. *See, Test. Fonseca at 12:21-25; and 13:1-4.*

Sales of PINNACLES / PINNACLES RANCHES wines by Opposer have been continuous from their dates of first use to the present date. *See, Test. Fonseca at 19:2-8.* Further in that regard, *see:*

Fonseca Exhibit 4: A representative sampling of “PINNACLES” and “PINNACLES RANCHES” labels from 1991 – 2008, including PINNACLES labels beginning 1991, and PINNACLES RANCHES labels beginning 2002. All of the labels in the exhibit were in use on Opposer’s wines. *See Fonseca Test. 13:20-24.* For some time now, Opposer’s wines bear the mark PINNACLES RANCHES on the front and back label and the mark PINNACLES in repeat pattern around the bottle capsule/foil. *See Fonseca Test. 14:8-22 and Exhibit 5 thereto (photo of 2008 vintage bottle as an example).* *See also, Applebaum Test. 12:11-25 and 13:2-8 and Exhibit 2 thereto (photo of bottle).*

See also Fonseca Exhibit 6 (Estancia Pinnacles/Pinnacles Ranches promotional materials); and Fonseca Exhibit 7 *and* Fonseca Test. *at* 17:4-6. 17:21-25; 18:1-7 (Accolades for PINNACLES and PINNACLES RANCHES wines, including without limitation, from the *New York Times, Wine Spectator, Wine Enthusiast, Food and Wine Magazine, Washington Post*).

B. The Applicant

The Applicant, Domaine Pinnacle, Inc., is located in Canada.

The only product shown on its website bearing the mark in issue “DOMAINE PINNACLE” is apple ice wine. *See*, Test. Fonseca at 11: 13-19. *See also*, Test. Applebaum at 14:19-25. *See also*, pages from Applicant’s website found at Test. Applebaum and at Test. Fonseca, Ex. 3; *See also* Opposer’s Fourth Notice of Reliance (pages from Applicant’s website). The “Products” section of the Applicant’s website lists the products sold by Applicant bearing the Domaine Pinnacle mark only as: “Ice Apple Wine”.

The Board is advised that the Applicant’s original/prior U.S. trademark App. Ser. No. 76596876 lists, inter alia, the following: “apple-based alcoholic beverages namely ice cider, ice apple wine” (Class 033). Said application was refused registration under Section 2(d) citing Opposer’s PINNACLES registration for wine, including the statement that “[t]he applicant’s mark, “DOMAINE PINNACLE” and design is highly similar to the registered mark “PINNACLES.”” *See*, Opposer’s Second Notice of Reliance (Applicant’s application file wrapper for abandoned Ser. No. 76596876 for the mark DOMAINE PINNACLE and design).

While the new application (i.e., the one in issue herein) deletes the Class 033 product, the evidence indicates that Applicant’s primary and only product bearing the mark that any consumer could be aware of anywhere would be apple-based ice wine. Any intended or future use of the mark on the non-alcoholic beverages recited in the application in issue would simply be an add-on or extension of Applicant’s primary product, namely “ice wine.” Consumers would still associate the mark with ice wine.

II. ARGUMENT (LIKELIHOOD OF CONFUSION)

A. Opposer Has Priority

Opposer is the owner of Reg. No. 997378 for the mark PINNACLES for “wine,” registered November 5, 1974.¹ Use of Opposer’s mark on wine has been continuous since the early 1970’s (i.e. for over 40 years). *See*, Test. Fonseca at 12:21-25; and 13:1-4.

The application in issue is an Intent-to-Use application for the mark DOMAINE PINNACLE and design for “apple juices and apple-based non-alcoholic beverages.” The application in issue was filed on December 30, 2005. There is no evidence that Applicant has made any use of the mark on said goods in the 7 ½ years since the application was filed.

Priority is not an issue in this proceeding. *See Oxford Pendaflex Corp. v. Anixter Bros. Inc.*, 201 USPQ 851, 853 (TTAB 1978) (“priority is not a factor in an opposition proceeding wherein opposer has established ownership of [an] existing registration for the mark on which it relies in support of its claim of damage”); *see also, Black & Decker Mfg. Co., v. Bright Star Industries*, 220 USPQ 891 (TTAB 1983). As such, and this being an opposition proceeding, Opposer has priority as a matter of law.

B. Analysis Of The DuPont Factors Demonstrates That Confusion Is Likely

In *In re E.I. duPont de Nemours & Co.*, 177 USPQ 563, 567 (CCPA 1973), the CCPA established a decisional process for determining likelihood of confusion in trademark cases. Thirteen (13) factors were propounded which are to be considered when there is sufficient evidence of record and where the same are relevant. Any one or more of the factors may control a particular case. *See In re Dixie Restaurants Inc.*, 41 USPQ2d 1531, 1533 (CAFC 1997).

¹ See Opposer’s First Notice of Reliance.

In this case the primary and controlling factors of record are: (1) the marks in issue (i.e., PINNACLES and PINNACLES RANCHES v. DOMAINE PINNACLE and design) are highly similar in look, meaning and commercial impression, (2) the goods recited in the application and in the registrations being relied upon are related, (3) for purposes of this proceeding, the parties' respective goods are considered sold to and through many of the same channels of trade, and to many of the same potential users and/or customers, and (4) for purposes of this proceeding, Opposer's mark must be considered strong.

These primary factors, as well as the remaining relevant factors of record overwhelmingly favor Opposer to such a degree that there must be a finding of likelihood of confusion.

1st duPont Factor. The Similarity Or Dissimilarity Of The Marks In Their Entireties As To Appearance, Sound, Connotation and Commercial Impression.

The marks in issue are as follows:

Opposer's mark is: **PINNACLES and PINNACLES RANCHES** (the term "Ranches" being disclaimed)

Applicant's mark is **DOMAINE PINNACLE and design**. The term "domaine" is disclaimed in Applicant's mark.

The translation of the term "domaine" as indicated in the application in issue is "estate."

Opposer's PINNACLES marks are used on Opposer's Estancia wines. When asked for the meanings of the terms "estancia," "domaine," and "ranches," Mr. Fonseca, Opposer's Director of Marketing for the Estancia line, stated that:

"Estancia" is Spanish for "estate."

"Domaine" when used in an association with wine means estate.

"Ranches" means . . . "a place where . . . crops are grown and it could include grapes."

See Test. Fonseca 20:15-25; 21:1

In further support thereof, Opposer submitted dictionary and wine glossary definitions of the terms "domaine" and "estate," namely:

1. *Merriam-Webster's French-English Dictionary*
domaine *nm* 1 estate, property
estate 2 LAND, PROPERTY: domaine f
2. *Wine Dictionary from "The Wine Buyer @ Bottle King"*
(www.thewinebuyer.com/main.asp?request=ARTICLES&article=17 [and 18])
Domaine
Term used on both German and French labels meaning "a wine estate." Now, also used in the U.S. as part of the names of some wineries.
3. *Wine Glossary from WineEducation.com*
(www.wineeducation.com/glosd.html and [glose.html](http://www.wineeducation.com/glose.html))
Domaine
The French term for "estate."

"Domaine," "Estancia," and "Ranches" share the same or very similar meanings.

When asked what the word "pinnacles" conveys to the consumer, Mr. Fonseca testified: "The top, the peak, the best." See, Test. Fonseca 21:2-5. In other words, the standard meanings associated with the term.

Given the display of Applicant's mark, and taking into consideration the descriptive nature and disclaimer of the term "Domaine" in Applicant's mark, the term "PINNACLE" is the dominant portion of its mark. It is well established that while marks must be considered in their entirety, one feature of a mark may be more significant in creating commercial impression.

See, *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976).

Further in that regard, Applicant's mark, as shown in its application, displays the term "PINNACLE" 6 times larger than the disclaimed term "Domaine." Applicant's mark as shown

on its website and on the packaging shown on its website for its apple-based ice wine also displays and features the term “PINNACLE” 6 times larger than the term “Domaine.” Also, the design feature of the mark always appears separate and apart from the word mark on the product and packaging. *See* Test. Applebaum Ex. 3 thereto; Test. Fonseca, Ex. 3 thereto; and *See also* Opposer’s Fourth Notice of Reliance (pages form Applicant’s website).

As such, the parties’ respective marks look alike and share the same meanings and convey the same commercial impressions. This primary *duPont* factor favors Opposer.

2nd duPont Factor. The Similarity Or Dissimilarity and Nature Of The Parties’ Respective Goods

The Board must assess this factor (i.e., similarity of the goods) by comparing Applicant’s goods as recited in his application (i.e., “Apple juices and apple-based non-alcoholic beverages”) with Opposer’s goods as recited in Opposer’s registration of record (i.e., “wine”). *See Warnaco, Inc. v. Adventure Knits, Inc.*, 210 USPQ 307, 314-315 (TTAB 1981). *See also; Oxford Pendaflex Corp. v. Anixter Bros. Inc.*, 201 USPQ 851, 855 (TTAB 1978); and *Octocom Systems Inc. v. Houston Computers Services Inc.*, 16 USPQ2d 1783, 1787-1788 (CAFC 1990).

The following proposition is well established: When “the marks [of the parties] are the same or almost so, it is only necessary that there be a viable relationship between the goods or services in order to support a holding of likelihood of confusion.” *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). In this case, as discussed below, the parties’ respective goods are closely related.

Further, the issue is not whether a consumer will purchase Opposer’s wine thinking it is apple ice-wine or a non-alcoholic apple-based beverage, or vice versa. As ruled in *Schieffelin & Co. v. The Molson Companies Ltd.*, 9 USPQ2d 2069 (TTAB 1989):

While we have no doubt that purchasers are not likely to consume a malt liquor thinking that it is Cognac brandy, in view of the similarities in the marks it is reasonable to assume that purchasers may believe that BRADOR malt liquor is another premium imported alcoholic beverage sold by the same company which sells the expensive BRAS D'OR Cognac brandy. Those consumers who do recognize the differences in the marks may believe that applicant's mark is a variation of opposer's mark that opposer has adopted for use on a different product. . . .

The closely analogous case, *In re Jakob Demmer KG*, 219 USPQ 1199, at 1200-1202 (TTAB 1983), is quite instructive.

The marks in issue therein were:



For apple cider



For wine

The TTAB ruled therein as follows:

The Board's agreement with the Examining Attorney's conclusions is not based merely on the fact that wine and apple cider are sold in the many supermarket and food specialty shops which purvey both light alcoholic beverages and non-alcoholic fruit juices and fruit beverages; nor do we subscribe to the proposition that wines and non-alcoholic beverages are per se to be deemed related goods as to which the use of similar marks sets the scene for confusion to arise. . . . Our conclusion rests on the view that the particular products before us do indeed bear such a relationship that purchasers confronted with the same or similar marks thereon would be likely to assume a common source or origin. To the same extent that there is and should be no per se rule that alcoholic and non-alcoholic beverages are related products, it is clear that there is and should be no rule that, by their nature, they are to be deemed unrelated. Facts in Section 2(d) cases must be assessed individually, and the predominant consideration is whether similarities in goods and in marks are such that consumer confusion or mistake would be likely to occur. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 192 USPQ 24, 29 (CCPA 1976).

In this case, we believe such a likelihood is clear. This is because cider is a beverage which can be produced and marketed in alcoholic as well as non-alcoholic form. Indeed, cider is an appellation connoting not only non-alcoholic apple juice but fermented apple juice with an alcohol content not significantly less than many wines. This is confirmed by dictionary definition of “cider” as to which the Board may take judicial notice:

The expressed juice of apples (or formerly of some other fruit) used for drinking, either before fermentation (sweet cider) or after fermentation (hard cider) or for making apple jack, vinegar, etc. [Random House Dictionary of the English Language (unabridged 1981) at p. 266; see also Webster's Third New International Dictionary (unabridged 1976), definitions of cider and hard cider at p. 406 and 1032]

Further, the fruit from which cider is made can also be used to make wines and the cider or apple juice itself can serve as a mixer in punches and cocktails featuring wines, brandy and cordials. Applicant's application is for “wines” and not “wines made from grapes,” it being common knowledge that wines can be produced from a variety of other fruits (see “wine” definition in Webster's Third New International Dictionary, *supra*). This admixture of commonalities, in the Board's judgment, makes it quite likely that consumers would assume a common source for fruit juices and wines which it encounters in the same food, specialty or beverage stores bearing highly similar marks. As the Court of Customs and Patent Appeals (predecessor to the Court of Appeals for the Federal Circuit) observed in *Pink Lady Corp. v. L.N. Renault & Sons, Inc.*, 121 USPQ 465 (CCPA 1959), a case involving, like this one, common word matter marks (one of which featured a picture) for fruit juices on the one hand and wines on the other:

It does not seem unreasonable to assume that citrus fruit juices and wines are likely to be sold in the same stores over the same counters to the same customers. [121 USPQ at 466]

And

There can be no doubt, if opposer's and applicant's products are sold in the same stores, that purchaser confusion is likely. [121 USPQ at 466]

Fn. 2: Supporting Board decisions in this area, cited by the Examining Attorney, include *In re Jack Daniel Distillery*, 171 USPQ 312 (TTAB 1971) (“BLACK JACK” for whiskey and “BLACK JACK” for whiskey and “BLACK JACK” plus other matter for lemon juice drink and syrup);

General Foods Corp. v. Monarch Wine Co. of Georgia, 142 USPQ 521 (TTAB 1964) (“TWIST” on wines and soft drink mix).

...

since apples and their juice can be and frequently are used to make wines and brandies as well as cider, and since even sophisticated wine buyers would know this, we believe it is not unlikely that confronted with highly similar marks on wines³ and on non-alcoholic cider, a buyer might well assume that the maker of the non-alcoholic beverage also produced fruit wines. . . . of course, not necessary that similarly branded products be of the same character or competitive with each other to give rise to Section 2(d) confusion but rather that they be so related and marketed as to be likely to come to the attention of common purchasers under circumstances where mistake or confusion as to source could occur. *United Rum Merchants Limited v. Fregal, Inc.*, 216 USPQ 217, 220 (TTAB 1982). Moreover, without tangible evidence, the Board cannot take judicial notice that wine makers would never use the same mark on both alcoholic and non-alcoholic beverages, as applicant asserts; nor are we confident that many American consumers would know or assume this.

Further in that regard, it is noted that the parties hereto are competitors (as concerns wine and ice wine) in Canada² and that the brand umbrella of Opposer’s parent, includes:

(1) Jackson-Triggs, a world renowned brand which is also the number one selling wine brand in Canada. The Jackson-Triggs label produces table wines, icewines and sparkling wines. *See Test. Applebaum* at 18:13-17 and Exhibit 6 thereto (pages from the Jackson-Triggs web site).

(2) Inniskillin, which is the number one brand Icewine in the world. *See Test. Applebaum* at 19:2-11 and Exhibit 7 thereto (pages from the Inniskillin web site).

(3) Growers Cider, which is the number one alcoholic cider produced and sold in Canada. *See Test. Applebaum* at 20:2-14 and Exhibit 8 thereto (pages from the Grower’s Cider web site).

As further precedent, *see also*, the following cases where likelihood of confusion was found: *Coca Cola Bottling Co. v. Joseph E. Seagram & Sons, Inc.*, 188 USPQ 105, 526 F.2d 556

² *See Test. Applebaum* 13:21-24 and 20:15-22.

(CCPA 1975)(BENGAL for gin v. BENGAL LANCER and design for non-alcoholic carbonated soft drinks); and *In re Rola Weinbrennerei Und Likorfabrik GmbH & Co. KG*, 223 USPQ 57 (TTAB 1984) (SUN-APPLE stylized claiming color red for apple flavored alcoholic liqueur v. SUNAPPLE stylized for powdered apple flavored soft drink).

The evidence of record in this case supports a finding that Opposer's and Applicant's goods are related. This primary *duPont* factor favors Opposer.

**3rd duPont Factor. The Similarity or Dissimilarity Of
Established, Likely-To-Continue Trade Channels**
**4th duPont Factor. The Conditions Under Which And Buyers
To Whom Sales Are Made**

It is established rule that where goods are recited in a registration, without any restriction as to classes of purchasers or trade channels, it creates the following legal presumptions: (1) that the description encompasses all goods or types of goods embraced by the broad terminology; (2) that the goods move through all of the channels of trade suitable for goods of that type; and (3) that they reach all potential users or customers for such goods. See *Warnaco, supra*, at 210 USPQ 314-315; and *Guardian Products Co., Inc. v. Scott Paper Co.*, 200 USPQ 738, 741 (TTAB 1978).

There are no limitations or restrictions recited in the application in issue or in Opposer's registrations of record. Accordingly, the Board must find, as a matter of law, that Opposer's and Applicant's goods move (or will move) in all channels of trade that are appropriate for the goods identified. See *Miles Laboratories v. Naturally Vitamin Supplements*, 1 USPQ2d 1445,1450 (TTAB 1987).

Further, as testified to by Opposer, Opposer's Estancia wines (including its PINNACLES / PINNACLES RANCHES wines) are sold through all standard channels of trade for the sale of

wine, including without limitation, on premise (e.g., restaurants) and off premise (e.g., grocery store, liquor stores, wholesale and club outlets). *See* Test. Fonseca at 18:9-14.

Accordingly, the “established, likely-to-continue trade channels” are in part legally identical for purposes of this proceeding and the “conditions under which and buyers to whom sales are made” are in part legally identical for purposes of this proceeding. The Board must find that Applicant’s goods and Opposer’s goods are provided under all marketing conditions, and are provided to and purchased by all classes of consumers appropriate to the goods identified and that those conditions and consumers would be, in many instances, the same for both parties’ products. *See, Id.*; *See also Miles Laboratories v. Naturally Vitamin Supplements*, 1 USPQ2d 1445, 1450 (TTAB 1987).

These primary *duPont* factors (i.e., the 3rd and 4th *duPont* factors) favor Opposer.

5th duPont Factor. The Fame Of Opposer’s Marks

As discussed above, Opposer’s PINNACLES mark has been in continuous use for over 40 years. Opposer’s mark and wines are well-known and have achieved substantial recognition. *See*, for example, evidence of accolades attached as Exhibit 7 to the Testimony of Fonseca.

Opposer has enjoyed enviable sales over a long period of time. For example, worldwide sales (2001 – 2013) at wholesale for Opposer’s PINNACLES / PINNACLES RANCHES wines are as follows:

<u>Year</u>	<u>Net Sales USD (wholesale)</u>
FY 2001	\$20,468,000
FY 2002	\$23,306,000
FY 2003	\$26,316,000
FY 2004	\$25,843,000
FY 2005	\$26,058,000

FY 2006	\$27,320,738
FY 2007	\$30,072,050
FY 2008	\$32,025,294
FY 2009	\$41,676,834
FY 2010	\$34,619,050
FY 2011	\$32,469,284
FY 2012	\$27,131,564
FY 2013	\$17,131,565 (partial year)

See Test, Applebaum at 22:9-25 and 23:2-15, and Exhibit 9 thereto.

6th duPont Factor. The Number and Nature of Similar Marks In Use on Similar Goods

There is no evidence of record of a single third party use of the term PINNACLE or PINNACLES or PINNACLES RANCHES for wine, or apple-based beverages, or any other related goods or services. Accordingly, for purposes of this proceeding, Opposer’s mark must be considered to be “strong.”

This *duPont* factor favors Opposer.

7th duPont Factor. The Nature And Extent Of Any Actual Confusion; and
8th duPont Factor. The Length of Time During And Conditions Under Which There Has Been Concurrent Use Without Evidence Of Actual Confusion

The application in issue is an “Intent-to-Use” application and there is no evidence of record of a single sale by Applicant under its mark.

Accordingly, for purposes of this proceeding, *duPont* factors 7 and 8 are not relevant.

10th duPont Factor. Market Interface Between The Parties

The application in issue and any use or intended use by the Applicant of its mark is without the consent or permission of Opposer. See Amended Notice of Opposition, ¶10. There are no agreements or understandings between the parties to the contrary.

Accordingly, this *duPont* factor favors Opposer.

12th duPont Factor. The Extent Of Potential Confusion Is Substantial

When one considers:

- a) The fact that the parties' marks are highly similar in look, meaning and commercial impression;
- b) That the goods involved are closely related;
- c) That by law the channels of trade and ultimate consumers necessarily overlap;
and
- d) The fame of Opposer's marks and the lack of evidence of any third party uses of the marks for any goods or services --

the Board can only conclude, based upon the evidence of record, that there is a likelihood of confusion.

Finally, "any doubts about likelihood of confusion ... must be resolved against ... the newcomer." *Century 21 Real Estate Corp. v. Century Life of America*, 23 USPQ2d 1698, 1701 (CAFC 1992) (and cases cited therein).

III. CONCLUSION

For the foregoing reasons, the opposition should be granted and registration refused to the Applicant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposer's Trial Brief in re: Franciscan Vineyards, Inc. v. Domaine Pinnacle, Inc., Opp. No.91178682, was served on Applicant (appearing pro se), this 26th day of June, 2013, by sending same via First Class Mail, postage prepaid, to:

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