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

Proceeding	91181755
Party	Plaintiff Franciscan Vineyards
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

FRANCISCAN VINEYARDS, INC.,	Opposition No. 91181755
Opposer,	Mark: BLACK RAVEN BREWING COMPANY
v.	Serial No. 77223446
BEAUXKAT ENTERPRISES, LLC	Filed: January 8, 2008
Applicant.	

**OPPOSER'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY
JUDGMENT**

Opposer, Franciscan Vineyards, Inc. ("FVI") replies to Applicant's Beauxkat Enterprises, LLC's ("Beauxkat") response to Opposer's motion for summary judgment denying registration of Applicant's application Ser. No. 77/223,446 for the mark BLACK RAVEN BREWING COMPANY for beer on the basis of priority and likelihood of confusion.

The crux of Applicant's argument is that despite controlling precedent beer and wine are unrelated, and that despite the use of the word RAVEN in both marks, and use of raven graphics by both parties, that the marks at issue could not be confusingly similar.

Case law currently holds that beer and wine are related goods for trademark registration purposes. See *Fruit Industries, Ltd. v. Ph. Schneider Brewing Co.*, 146 F.2d 310, 46 USPQ 487 (Commr. of Patents 1940) (La Fiesta for beer likely to cause confusion with La Fiesta for wine); *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719 (TTAB 1992) (confusion is likely between "Christopher Columbus," for beer, and "Cristobal Colon," for sweet wine); and *Krantz Brewing Corporation v. Henry Kelly*

Importing & Distributing Co. Inc., 215 F.2d 284, 96 USPQ 219 (Patent Office Examiner in Chief 1953) (Old Dutch for wine likely to cause confusion with Old Dutch for beer).

Applicant mis-cites the facts and holding of *In re Coors Brewing Co.*, 343 F. 3d 1340, 68 USPQ2d 1059 (CAFC 2003) to argue that beer and wine are not related. That issue was not before the Court. Rather, the matter involved restaurant services and beer. *Id.* Applicant states, “the Board, with the backup of the Federal Circuit, found that beer and wine were specifically not related products, despite the commonality found in the *Coors* matter.”¹ This makes no sense. The Court reversed the Board’s refusal to register the Coors mark for beer, finding that not only were restaurant services unrelated to beer, but that the marks themselves were distinguishable because of their different graphic designs, not their word mark portions. *Id.* at 1064.

The Court did not hold that beer and wine are unrelated. The Court merely noted the Board’s statement that beer and wine were unrelated. *Id.* at 1061. However, dicta is dicta, and the caselaw still holds that beer and wine are related. To that end, Opposer cited *In re Saviah Rose Winery, LLC*, 2006 TTAB LEXIS 319 (TTAB 2006) to show that the Board itself noted that the *Sailerbrau* precedent was not diminished by the fact that the Federal Circuit in *Coors* stated in dicta that beer and wine are unrelated, and that precedential authority of the Board specifically holds that beer and wine are related products. *Id.* at *12. While unpublished and not binding precedent, Applicant is wrong that we cannot bring it to the Board’s attention as reflecting the current state of the law.

Further, the goods of the parties need not be identical to find a likelihood of confusion. Instead, they need only be related in some manner, or the conditions

¹ See Applicant’s Response, page 8.

surrounding their marketing be such that they COULD be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. See *On-line Careline Inc. v. American Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000), *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984). TMEP § 1207.01(a)(i). Opposer provided undisputed evidence showing that wine and beer may both be sold in grocery stores and/or supermarkets in thirty-five states plus the District of Columbia; in drug stores in thirty-five states; and in liquor stores in forty-four states.² Applicant admits that beer and wine are sold together in liquor stores, that consumers purchase both beer and wine simultaneously, that Applicant intends to sell wine at its brewery, and that both parties use the word RAVEN and the symbol of a raven on their labels. The foregoing demonstrates circumstances that could easily give rise to a mistaken belief that the goods at issue emanate from a common source.

The declaratory evidence on which Applicant relies does not show that the goods are unrelated or that consumers would not believe that they come from a common source. The so-called “study” to which Applicant refers makes absolutely no mention of beer whatsoever.³ Moreover, it is completely irrelevant and makes absolutely no mention of the relatedness of beer and wine. It is puzzling why Applicant submitted it. As to the declaration of Mr. Engler, he admits that he sells both beer and wine, as well as serves both beer and wine, at his store.⁴ His personal opinion that a person is either a ‘beer guy’ or a ‘wine guy’ and that beer and wine have two different customers is irrelevant and

² Decl. Kurth ¶ 12, Exh. “9.”

³ See Bowman Decl., Exh. D.

⁴ See Engler Decl., ¶ 4.

clearly inaccurate. It is a gross over-exaggeration to state as fact that consumers drink or purchase beer but never wine, or vice versa. Arguably, not only do many consumers acquire beer and wine during a single purchase, but many individuals drink beer on some occasions, like while watching a football game, and drink wine on others, with their dinners, for example. Further, even if a theoretical “beer guy” existed, it does not negate the strong possibility that this consumer, after purchasing Applicant’s BLACK RAVEN beer, with the raven graphic on the label, would be confused on seeing Opposer’s RAVENS wine with the raven graphic on the label and believe that it comes from the same source.

As to similarity, Applicant admits that both Marks contain the identical word RAVEN and that both parties use ravens logos on their labels in conjunction with their respective Marks. Applicant argues that the dominant portion of both marks, namely the identical word RAVEN, is only “sometimes” used in case law to determine similarity, then states that Opposer may not dissect the marks to compare only parts of them. This is clearly erroneous.

While marks are compared in their entireties, one feature of a mark may be recognized as more significant in creating a commercial impression. Greater weight is given to that dominant feature in determining whether there is a likelihood of confusion. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed Cir. 1985); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (C.C. P. A. 1976); *In re J. M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987); TMEP § 1207.01(b)(viii). Here, the term BLACK RAVEN is the dominant feature of Applicant’s Mark. This dominant feature is

nearly identical to Opposer's RAVENS and RAVENSWOOD marks and its black raven and black ravens logos.

Applicant again mis-cites the facts and holding in *Coors* for Applicant's confusing premise that, "any similarity found is less important in the likelihood of confusion analysis than [sic] other factors because the marks do have significant differences, even if they share a word."⁵ In *Coors*, the conflicting marks were not simple word marks as is the case here. *In re Coors* at 1062. The Court supported the Board's finding that the words "Brewing Company" had been disclaimed by Coors and did not distinguish the Marks. *Id.* The Court found that the design marks included graphics which distinguished them from each other (one a moon wearing sunglasses and the other a moon rising over a forest scene). *Id.* The Court also held that if the Marks were NOT distinguishable because of differences in the *designs*, the similarity in the word portions of the marks would have had greater significance. *Id.*

Here, Opposer has both word marks using the word RAVEN, design marks showing three black ravens in a circle, and common law marks depicting single black ravens. As Applicant readily admits, Opposer uses its marks on its wines as well as its other goods, including clothing and sauces. Such additional use enhances the likelihood of confusion where Applicant has applied for a word mark using the words BLACK RAVEN, and admits that it intends to place it on a label with a single raven graphic. Applicant's use of the raven logo significantly enhances the likelihood of confusion. In the end, a raven is a raven whether referred to by word or drawing. Mr. Engler grossly misstates that Constellation Brands and FVI are both more famous than Opposer's

⁵ See Applicant's Response, page 3.

Marks.⁶ Constellation Brands is a parent corporation of FV1, and it is the RAVENS and RAVENSWOOD Marks and labels for which Opposer has demonstrated recognition, and those are the Marks most likely to be remembered by consumers.⁷

Because there are no remaining genuine issues of fact, and likelihood of confusion is an issue of law, Opposer respectfully requests that its motion for summary judgment denying registration of Applicant's Mark be granted.

Dated: January 14, 2009
Raritan, New Jersey

Respectfully submitted,
BAKER AND RANNELLS, PA

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⁶ See Engler Decl., ¶ 8 .

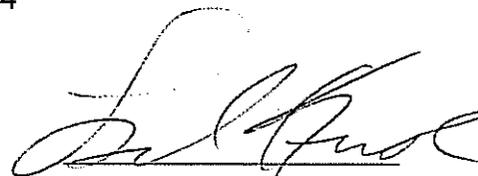
⁷ See Peterson Decl, ¶ 5-7,9,12,14,nd 16-17 and Exh. 1,3,5,6,and 7.

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Opposer's REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT In re Franciscan Vineyards, Inc. v. Beauxkat Enterprises, LLC, was served on counsel for Applicant, this 14th day of January, 2009 by sending same via EMAIL and First Class Mail, postage prepaid, to:

Justin D. Park
Romero Park & Wiggins P.S.
155-108th Avenue NE, Suite 202
Bellevue, WA 98004

DATED: January 14, 2009

A handwritten signature in black ink, appearing to read "Linda Kurth", written in a cursive style.

Linda Kurth