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

Proceeding	91181755
Party	Defendant BeauxKat Enterprises LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

FRANCISCAN VINEYARDS)	
)	Mark: BLACK RAVEN BREWING COMPANY
Opposer)	Opposition No.: 91181755
v.)	Serial No.: 77223446
)	
BEAUXKAT ENTERPRISES LLC)	
)	
Applicant)	

**APPLICANT’S RESPONSE TO OPPOSER’S MOTIONS TO STRIKE APPLICANT’S
NOTICES OF RELIANCE**

I. INTRODUCTION

Opposer Franciscan Vineyards, Inc. (“FVI”) makes objections to each and every Notice of Reliance filed by Applicant. Most of these objections are not the proper issues for a motion to strike, but are arguments about what weight should be given to certain evidence, arguments that should properly be made in FVI’s briefing. While a notice of reliance is supposed to show the relevance of the evidence, the true context and use of any piece of evidence is how it fits into the case presented by a party. While BeauxKat Enterprises, LLC (“BeauxKat”) acknowledges that some of its Notices of Reliance presented evidence may have less than dispositive weight (mainly due to the fact that the evidence presented by FVI, which BeauxKat’s Notices of Reliance are intended to rebut, is extremely weak as well), it does not follow that it should be stricken. The Court should deny Applicant’s six motions to strike and allow the parties to address the relative strengths and weaknesses of the evidence in their briefing.

II. ARGUMENT

A. Motion to Strike Standard.

TBMP §532 governs motions to strike notices of reliance. The applicable section of that rule is as follows:

If, upon motion to strike a notice of reliance on the ground that it does not meet the procedural requirements of the rule under which it was filed, the Board finds that the notice is defective, but that the defect is

curable, the Board may allow the party which filed the notice of reliance time within which to cure the defect, failing which the notice will stand stricken.

Objections to a notice of reliance on substantive grounds, such as objections on the grounds that evidence offered under a notice of reliance constitutes hearsay or improper rebuttal, or is incompetent, irrelevant, or immaterial, normally need not and should not be raised by motion to strike. Rather, such objections should be raised in the objecting party's brief on the case, unless the ground for objection is one that could have been cured if raised promptly by motion to strike. (footnotes omitted).

As shown below, most, if not all, of the objections raised by FVI in their motions to strike are either baseless, curable, or address the issue of how much weight should be given to the evidence—an issue properly taken up in the briefing of the parties.

B. FVI's 1st motion – Written responses to Requests for Production.

FVI's first motion seeks to strike the written responses FVI provided to BeauxKat's Requests for Production. While BeauxKat does not agree with the position stated in the motion to strike, at this point, BeauxKat will withdraw pages 23-31 of its First Notice of Reliance and voluntarily strike the second paragraph from the written portion of said First Notice of Reliance.

However, without altering that withdrawal, we do state for the record, that FVI seems to be exploiting a loophole in the rules which allows them to make written responses, but not have them be subject to becoming evidence under a Notice of Reliance. Written responses to Requests for Production are signed by counsel, and have essentially the same guarantees of authenticity as responses to Interrogatories, Requests for Admission, or even responses to written Deposition questions, all of which can be offered via Notice of Reliance under the TBMP. It seems odd that written responses to Requests for Production (not the documents themselves, for which a procedure exists) should be exempt.

C. FVI's 2nd motion – TESS search results.

FVI's motion to strike BeauxKat's 2nd Notice of Reliance is somewhat surprising, as all the bases set forth therein would apply equally to FVI's own 6th Notice of Reliance as well. In that Notice, FVI presents TESS search results and states that these result show 267 records, and then provides 50 representative printouts of particular marks. However, under the analysis in their motion, only the actual registrations could be considered by the Board.

In the context in which they are offered, the printouts in BeauxKat's 2nd Notice of Reliance are neither irrelevant (a basis which should have been discussed in FVI's briefing rather than this motion according to TBMP§532), nor hearsay. FVI offers TESS printouts and a few actual registrations in an attempt to show that wine and beer are related products because there are "numerous" registrations for both wine and beer. *See* FVI's 6th Notice of Reliance. They have therefore made the number of records for wine and beer in the TESS database an issue.

BeauxKat's 2nd Notice of Reliance provides the context in which FVI's evidence is properly viewed. The information is not offered for the truth of the matter asserted, i.e., that there are "X" number of registrations for beer and wine, but merely to put the evidence offered by FVI, and its allegation that they are "numerous" into proper context. As such, the evidence is neither hearsay nor irrelevant and should be admitted.

Once again, BeauxKat acknowledges that this evidence may not have much weight, but that is because the evidence to which it responds, FVI's 6th Notice of Reliance, does not have much weight either. However, any perceived lack of probative value or dispositive weight does not make BeauxKat's evidence inadmissible under a Notice of Reliance.

Moreover, to submit TESS printouts themselves under a Notice of Reliance, and then to claim that such readouts are not "official records" is inconsistent. TESS is the US PTO's official database of Trademark registrations and applications. These records are as official as any.

Finally, a look at the cases cited by FVI in favor of their motion shows that they are not applicable here. *Reynolds* deals with listings in a private database being used for far different reasons, and *Raccioppi* excluded TRAM database listings that sought to be a replacement for the complete record. *See RJ Reynolds Tobacco Co. v. Brown & Williamson Tobacco Corp.*, 226 USPQ 169, 174-5 (TTAB 1985); *Raccioppi v. Apogee Inc.*, USPQ2d 1368, 1370 (TTAB 1998). Here, we have printouts that show numbers needed by the Board to put FVI's evidence in its 6th Notice of Reliance in proper perspective, if it is to be considered at all. The evidence should be admitted for this relevant, although limited, purpose, and FVI's 6th Notice should be subject to the same limitation.

D. FVI's 3rd Motion – Statues and Regulations.

BeauxKat's 3rd Notice submits regulations from Washington State, the State of California, and the Code of Federal Regulations. FVI alleges that these printouts are not official records merely because they were printed from the Internet.

These items are provided for the Board's information. They could just as easily be cited to without being submitted as Notices of Reliance. However, these items are most assuredly official records and meet the *Raccioppi* court's requirement of referring back to a hard copy document as opposed to being an internet-only publication. *See Raccioppi, supra*. The *Raccioppi* court makes the critical statement that the trend in such evidentiary issues is to "to admit information obtained from the Internet into evidence, without requiring further authentication, but at the same time to carefully evaluate the probative weight to be given to this evidence." *Id.* at 1371. The case cited by FVI does not call for a blanket prohibition on Internet documents.

E. FVI's 4th motion – excerpt from magazines cited by FVI.

In its 4th Notice of Reliance, BeauxKat offers further excerpts from the very magazines offered by FVI in its 2nd Notice of Reliance. The only objection thereto is relevance, which should not be argued at this stage, but in the briefing as set out in TBMP §532.

The excerpts show that the channels of trade identified as "common" to beer and wine by FVI are in fact so common that it is meaningless to say that they are used by both products. While FVI is correct that the *DuPont* factor that applies to this evidence is similarity of trade channels, without context the information cannot be given its proper weight. The *DuPont* factors are weighing factors, not black-and-white questions that are answered with yes and no answers. The fact that a common trade channel is used means little if the channel is so common that almost any product can use it.

This is a classic question of weight versus admissibility and so the motion to strike should be denied so that the parties can argue the weight of the evidence in their briefing.

F. FVI's 5th motion – Internet posting of articles about Black Raven.

BeauxKat's 5th Notice of Reliance is internet printings of articles about Black Raven, showing the relative fame of the mark. As noted above, just because these documents are taken from the Internet is not a blanket prohibition on their submission via Notice of Reliance. *See*

Raccioppi, supra. BeauxKat submits that these items are the type of article that should be admitted under Rule 2.122(e) as submitted, but if not, under TBMP §532, BeauxKat should be given leave to cure by submitting additional information about the location and printing of these articles.

G. FVI's 6th motion – Internet-based postings re: colored ravens

BeauxKat, in response to FVI's 9th Notice of Reliance that submits the dictionary definition of raven to support their claim that all ravens are black and therefore "Black Raven" is indistinguishable in meaning from "Raven", submitted internet-based postings showing that ravens come in a variety of earth-toned colors, including brown, white and black-white mixtures.

Frankly, this is the sort of evidence that the Court is may to take on judicial notice rather than notice of reliance, but given the trend to accept this sort of evidence with a limited purpose (as it is certainly offered for one here), the Court should deny this motion. In the event that the Court grants this motion, BeauxKat will request that the Court take judicial notice of the fact that ravens appear in nature in colors other than black.

III. CONCLUSION

Most of the arguments raised in FVI's motions to strike are really about the proper weight to be given to certain evidence. BeauxKat agrees that this evidence should be given its proper weight, just as FVI's submitted evidence, to which BeauxKat's evidence responds, should be given its proper weight. Because a motion to strike is not the proper forum for the discussion on how much weight any of this submitted evidence should given, and as otherwise set forth herein, these motions to strike should be denied.

DATED this 9th day of September, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Applicant's Response to Opposer's Motions to Strike Applicant's Notices of Reliance was forwarded by first class, postage pre-paid mail by depositing the same with the U.S. Postal Service on this 9th day of September, 2009 to the Opposer at the following address:

Linda Kurth
Baker & Rannells
575 Route 28, Suite 102
Raritan, NJ 08869

A copy of the same was sent via e-mail on this 9th day of September, 2009 to the Opposer at the following e-mail addresses:

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