

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

DUNN

Mailed: November 14, 2009

Opposition No. 91181755

Franciscan Vineyards

v.

BeauxKat Enterprises LLC

Elizabeth A. Dunn, Attorney (571-272-4267):

This case comes up on opposer's six motions to strike applicant's six notices of reliance. The motion is contested, and the Board held a phone hearing on November 12, 2009. The participants were Linda Kurth, attorney for opposer, Justin Park, attorney for applicant, and Elizabeth Dunn, attorney for the Board.¹

Franciscan Vineyards opposes registration of applicant's mark BLACK RAVEN BREWING COMPANY for beer on the ground of priority and likelihood of confusion with opposer's pleaded registrations for the marks RAGIN RAVEN for wine and sauces, RAVENS for wine and clothing, RAVENSWOOD for clothing, wine, and sauces, and a stylized

¹ Attorney for opposer John Rannells attended the conference but did not participate.

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raven design for wine. On August 10, 2009, during its testimony period, applicant submitted six notices of reliance. Opposer now seeks to strike each notice as procedurally defective. As discussed at the hearing, the ability to cure a defect in a notice of reliance is limited to the notice itself, and does not extend to curing defects in the attached evidence. See *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992).

MOTION TO STRIKE NOTICE OF RELIANCE NO. 1 DENIED AS MOOT

The Board notes that in its response to the motion, applicant voluntarily withdrew pages 24-32 of Notice of Reliance No. 1, which included opposer's responses to requests for production of documents.²

MOTION TO STRIKE NOTICE OF RELIANCE NO. 2 GRANTED

With Notice of Reliance No. 2, applicant submitted a TESS printout of the opposed application, and six TESS searches comprising the search and a listing of the applications and registrations which met the search

² While the Board's rules are silent as to the submission of responses to document requests, the responses have been allowed when providing substantive information regarding the documents in applicant's possession. See *NASDAQ Stock Market Inc. v. Antartica S.r.l.*, 69 USPQ2d 1718, 1722 n.6 (TTAB 1998) (Trademark Rule 2.120(j)(3)(ii) does not prohibit introduction of a response to a request for production that States that no responsive documents exist).

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criteria. With respect to the opposed application, submission was unnecessary. Trademark Rule 2.122(b)³. With respect to the search results from the Trademark Electronic Search System (TESS) in the form of a list of applications and registrations meeting specified criteria, the search is not an official record maintained by the Office but was created by applicant. The TESS listing does not make the third-party applications and registrations of record. *Black & Decker Corp. v. Emerson Electric Co.*, 84 USPQ2d 1482, 1494 (TTAB 2007).

MOTION TO STRIKE NOTICE OF RELIANCE NO. 3 DENIED

With Notice of Reliance No. 3, applicant submitted copies of federal statute, and statutes from the State of Washington and the State of California, obtained by online sources maintained by those governmental entities. Such submission was unnecessary, because federal and state statutes are properly the subject of judicial notice by the Board. *In re Juleigh Jeans Sportswear Inc.*, 24 USPQ2d 1694, 1699 fn 15 (TTAB 1992). The submission of the relevant text

³ Trademark Rule 2.122(b) states "The file of each application or registration specified in a notice of interference, of each application or registration specified in the notice of a concurrent use registration proceeding, of the application against which a notice of opposition is filed, or of each registration against which a petition or counterclaim for cancellation is filed forms part of the record of the proceeding without any action by the parties and reference may be made to the file for any relevant and competent purpose."

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of the statutes is convenient to the Board, and will be considered.

MOTION TO STRIKE NOTICE OF RELIANCE NO. 4 DENIED

With Notice of Reliance No. 4, applicant submitted excerpted pages from magazines. On its face, the notice of reliance specifies the printed publication, indicates its relevance to this proceeding, and attaches the referenced publication page, and thus complies with the Board's rules.⁴ While applicant may ultimately prevail in its arguments regarding relevance, that argument goes to the substantive weight to be accorded the evidence, and not its admissibility under a notice of reliance. See *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1263 (TTAB 2003) ("[I]t has long been the policy of the Board not to read trial testimony and review evidence prior to submission of the case to a panel of judges for final decision, and motions to strike which involve substantive matters are deferred until final decision.").

⁴ Trademark Rule 2.122(e) provides that "The notice [of reliance] shall specify the printed publication (including information sufficient to identify the source and the date of the publication) or the official record and the pages to be read; indicate generally the relevance of the material being offered; and be accompanied by the official record or a copy thereof whose authenticity is established under the Federal Rules of Evidence."

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MOTION TO STRIKE NOTICE OF RELIANCE NOS. 5 and 6 GRANTED

With Notice of Reliance Nos. 5 and 6, applicant submitted articles from print and Internet sources. With respect to the articles from print sources, applicant's submission is defective as incomplete because in no instance does the submission include a way of verifying publication. With respect to the articles from Internet sources, those pages are not self-authenticating in nature and, thus, are not admissible by notice of reliance. *Raccioppi v. Apogee Inc.*, 47 USPQ 1368, 1370 (TTAB 1998).

CONCLUSION

In sum, opposer's motion to strike is denied with respect to Notice of Reliance Nos. 1, 3 and 4, and is granted with respect to Notice of Reliance Nos. 2, 5 and 6.

Pursuant to the Board's order of August 3, 2009, the brief of opposer is due not later than sixty days after September 28, 2009. In view of the two month pendency of this motion to strike, the Board sua sponte extends briefing periods so that opposer's trial brief is due no later than November 27, 2009.⁵

Pursuant to Trademark Rule 2.128(a), the brief of the party in the position of defendant, if filed, shall be due not later than thirty days after the due date of the first

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brief. A reply brief by the party in the position of plaintiff, if filed, shall be due not later than fifteen days after the due date of the defendant's brief.

⁵ Of course, opposer may choose to file its trial brief under the August 3, 2009 schedule.