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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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TRADEMARK TRIAL AND APPEAL BOARD

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Franciscan Vineyards, Inc.,	)	<b>Opposition No. 91181755</b>
Opposer,	)	
	)	Serial No.: 77223446
v.	)	
	)	
Beauxkat Enterprises, LLC	)	Mark: BLACK RAVEN BREWING
Applicant.	)	COMPANY
-----X	)	

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## OPPOSER'S TRIAL BRIEF

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TO THE HONORABLE BOARD:

Opposer, Franciscan Vineyards, Inc., through its undersigned attorneys, Baker and Rannells, PA, respectfully requests that its opposition to application Serial No. 77/223,446 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 January 8, 2008. Applicant filed its Answer on February 15, 2008. On December 4, 2008, Opposer filed a motion for summary judgment. Applicant filed a response on January 5, 2009 and Opposer filed a reply on January 14, 2009. Opposer's motion was denied by Board Order dated April 3, 2009.

Opposer did not take any testimony depositions, and filed nine (9) Notices of Reliance on June 1, 2009. Applicant consented to Opposer submitting a declaration of one of its principals, Joel Peterson, in lieu of taking his live testimony, which Opposer submitted as its fifth (5th) Notice of Reliance.

On July 30, 2009 and August 6, 2009, Applicant took live testimony of Douglas M. Engler. On August 6, 2009, Applicant took live testimony of Kathryn Gillespie and Robert P. Bowman, Jr. Opposer did not take any rebuttal testimony depositions.

On August 26, 2009 Opposer filed motions to strike Applicant's Notices of Reliance. Applicant responded on September 9, 2009 in which it consented to partially withdraw part of its First Notice of Reliance, namely the submission of Opposer's written answers to requests for documents. Opposer filed a reply in support of its motions on September 14, 2009. On

November 14, 2009, the Board issued its order granting Opposer’s Motions to Strike Applicant’s Second, Fifth and Sixth Notices of Reliance, and denying the remainder.

**B. Opposer’s Evidence of Record:**

Opposer filed the following as evidence which is of record:

1. Opposer’s 1<sup>st</sup> Notice of Reliance: The Notice of Reliance is comprised of certified status and title copies of Opposer’s registrations (hereinafter “Opposer’s Registrations”) for the marks RAVENSWOOD, RAVENS WOOD, RAVENS, RAGIN’ RAVEN (hereinafter “Opposer’s Marks”) as shown in the table below:

Trademark	Registration No
RAVENSWOOD	2,118,152
	2,118,153
	2,130,653
RAVENSWOOD	2,132,719
RAVENS	2,888,963
RAVENS	3,134,833
RAGIN’ RAVEN	3,153,731
RAGIN’ RAVEN	3,336,587
RAVENS WOOD	3,457,923

2. Opposer’s 2nd Notice of Reliance: The Notice of Reliance is comprised of excerpts from representative magazines evidencing advertisements and/or articles appearing in the same issue for or concerning “wine” and “beer.”

3. Opposer's 3rd Notice of Reliance: The Notice of Reliance is comprised of excerpts from representative magazines evidencing advertisements and/or articles of and about Opposer's goods under its Marks.

4. Opposer's 4th Notice of Reliance: The Notice of Reliance is comprised of an excerpt from a book in general public circulation titled *Fact Book 2005, Beverage Alcohol State Facts and Regulations*, containing data demonstrating that beer and wine are sold together in the same retail stores in most of the states in the United States.

5. Opposer's 5<sup>th</sup> Notice of Reliance: The Notice of Reliance is comprised of a declaration of Joel Peterson, co-founder of Ravenswood Winery and Senior Vice President of Constellation Brands, Inc. filed on stipulation, testifying to the annual sales of the RAVENS wines by Opposer over the past seven years and sales of branded gift items.

6. Opposer's 6<sup>th</sup> Notice of Reliance: The Notice of Reliance is comprised of representative examples (i.e., 267 registrations) of "live" third party trademark registrations that recite both "wine(s)" and "beer" in the identification of goods.

7. Opposer's 7<sup>th</sup> Notice of Reliance: The Notice of Reliance is comprised of Applicant's answer to a request for admission stating the Applicant sells wine at its brewpub, Applicant's responses to Opposer's First Set of Interrogatories stating that Applicant intends to use its mark in commerce on goods other than beer that are the same or similar to Opposer's goods under Opposer's Marks, Applicant's Document Number BKE001 showing Applicant's label with a raven design, and downloads from Applicant's website showing how Applicant is using its Mark in commerce using the terms RAVEN, BLACK RAVEN, RAVEN'S NEST and drawings of ravens all of which are used separately from Applicant's Mark.

8. Opposer's 8<sup>th</sup> Notice of Reliance: The Notice of Reliance is comprised of excerpts from printed publications downloaded and printed from Nexis, 1990–2009 (*i.e.*, representative examples of English language third party articles that reference Opposer and/or Opposer's goods and services).

9. Opposer's 9<sup>th</sup> Notice of Reliance: The Notice of Reliance is comprised of an excerpt from a printed dictionary in general public circulation stating the definition of the word raven as a large, black bird.

**C. Applicant's Evidence of Record:**

The Applicant filed six Notices of Reliance. As addressed in the "Procedural History" section above, Opposer filed motions to strike each of Applicant's Notices of Reliance. Applicant opposed, but withdrew a portion of its First Notice of Reliance. The Board granted three of Opposer's motions, namely striking Applicant's second, fifth, and sixth Notices of Reliance. Accordingly, Applicant's evidence of record is as follows:

1. The Application In Issue. The opposed application is Ser. No. 77/234,446 for the word mark BLACK RAVEN BREWING COMPANY (hereinafter "Applicant's Mark") for "beer." The application was filed on July 6, 2007. The application is an Intent-to-Use application.

2. Applicant's 1<sup>st</sup> Notice of Reliance. The Notice of Reliance is comprised of copies of Opposer's responses to Applicant's First Set of Interrogatories and written responses to Applicant's Request for the Production of Documents. Paragraph 2 of the Notice and the written responses to Applicant's Request for the Production of Documents were withdrawn in Applicant's Response to Opposer's Motion to Strike, and accordingly may not be considered.

3. Applicant's 2nd Notice of Reliance (Stricken).

4. Applicant's 3rd Notice of Reliance (See motion to strike the Notice in its entirety).

The Notice of Reliance is comprised of print outs from Internet sites [www.access.gpo.gov](http://www.access.gpo.gov) and [edocket.access.gpo.gov](http://edocket.access.gpo.gov) allegedly showing pages from the Code of Federal Regulations, Title 27, alleged print outs from an Internet site allegedly showing pages of the revised Code of Washington, and alleged copies of pages from an Internet site, [www.leginfo.ca.gov](http://www.leginfo.ca.gov), allegedly showing pages from the California Business and Professions Code. Opposer maintains that these documents should not be considered part of Applicant's evidence or record.

5. Applicant's 4th Notice of Reliance (See motion to strike the Notice in its entirety).

The Notice of Reliance is comprised of excerpts from three magazines in general circulation. Objected to. *See* Appendix "A."

6. Applicant's 5th Notice of Reliance (Stricken).

7. Applicant's 6th Notice of Reliance (Stricken).

8. Trial testimony of Douglas Engler, owner of retail establishment "Malt & Vine," which sells beer and wine and owner of a wine cellaring business called "Premium Sellers LLC". To the extent that Mr. Engler's testimony is offered as an expert, Opposer objects thereto and reiterates the objections made during his testimony. *See* Appendix "A."

9. Trial testimony of Kathryn Gillespie and exhibits 1-12 thereto. Objected to. *See* Appendix "A."

10. Trial testimony of Robert Bowman, Jr. and exhibits 1-12 thereto. Objected to. *See* Appendix "A."

## **II. ARGUMENT (LIKELIHOOD OF CONFUSION)**

This is a case involving confusingly similar marks (i.e., RAVENS and RAVENSWOOD v. BLACK RAVEN BREWING COMPANY) used on and in association with closely related

goods, namely “wines” and “beer.” The channels of trade and ultimate consumer are legally identical. As demonstrated below, confusion is likely, thereby a registration to Applicant would irreparably damage Opposer.

**A. Opposer Has Priority**

Opposer is the owner of the marks RAVENSWOOD, RAVENS, and variations thereof as a trademark, trade name, and as a service mark, as well as various logos of a raven and/or ravens, as applied to wines, sauces, clothes and related and complementary goods and services.

Opposer’s owns the following design mark of a raven and/or ravens and other graphics that it uses in its advertising<sup>1</sup>:



Opposer is also the owner of, and is relying upon, the following registrations in support of the opposition proceeding:

Trademark	Registration No.	Registration Date	Class	Goods
RAVENSWOOD	2118152*	12/2/97	25	Clothing, namely, aprons, bandanas, caps, gym shorts, hats, jeans jackets, polo shirts, tank tops, T-shirts, and sweatshirts

<sup>1</sup> See Opposer’s Third Notice of Reliance

Mark Consists of the design of 3 Black Ravens In a Circle 	2118153*	1/20/98	25	Clothing, namely, aprons, bandanas, caps, gym shorts, hats, jeans jackets, polo shirts, tank tops, T-shirts, and sweatshirts
Mark Consists of the design of 3 Black Ravens In a Circle 	2130653*	1/20/98	33	Wine
RAVENSWOOD	2132719*	1/27/98	33	Wine
RAVENS	2888963*	9/28/04	33	Wine
RAVENS	3134833	8/29/06	25,33	Aprons, Shirts, T-shirts, Caps, Jackets, Wines
RAGIN' RAVEN	3153731	10/10/06	30	Barbecue sauce, Picante sauce, Ready-made sauces, Sauces, Sauces for barbecued meat
RAGIN' RAVEN	3336587	11/13/ 07	33	Wine
RAVENS WOOD	3457923	07/01/08	30	Barbecue sauce, Picante sauce, Ready-made sauces, Sauces, Sauces for barbecued meat

\*denotes incontestable status

Said registrations are in full force and effect on the Principal Register and four of them have become incontestable. Opposer's marks (i.e., the marks disclosed in the above registrations as well as Opposer's common law rights in the above Marks and variations thereof) are referred to hereinafter collectively as the "RAVENS Marks".

The application in issue is an Intent-to-Use application for the mark BLACK RAVEN BREWING COMPANY for “beer.” The application in issue was filed on July 6, 2007.

Priority is not an issue in this proceeding. First, Opposer may rely upon the filing date of its applications for its registrations, which filing dates predate the filing date of the application in issue. *See, Gor-Ray Ltd. v. Garay & Co., Inc.*, 167 USPQ 694, 695 (TTAB 1970).

Secondly, Opposer has proven ownership of its trademark registrations. *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).

In this case the primary and controlling factors of record are: (1) the marks in issue (i.e., RAVENS and RAVENSWOOD v. BLACK RAVEN BREWING COMPANY) are very similar in look, sound, meaning, use, and commercial impression, (2) the goods recited in the application and in the registration being relied upon are closely related (i.e., “wine” and “beer”), (3) for purposes of this proceeding, the parties’ respective goods are considered sold in, to, and

through the same channels of trade, and to 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.

**1<sup>st</sup> 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 marks are: **RAVENS, RAVENSWOOD,** and **RAVEN** design mark for wine and various logos of ravens.
- Applicant's mark is **BLACK RAVEN BREWING COMPANY** for beer (with **BREWING COMPANY** disclaimed).

In this analysis, the focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Comparison of the marks is done in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée E*, 73 USPQ2d 1689 (Fed. Cir. 2005) .

However, with respect to Applicant's mark, it is also well settled that one feature of a mark may be more significant than another, i.e. "RAVEN" or "BLACK RAVEN", and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *In re National Data Corp.*, 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. Indeed, this type of analysis appears to be unavoidable."). *See Hewlett-*

*Packard Company v. Packard Press Inc.*, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (“the dominant portion of Packard Press’s mark [PACKARD TECHNOLOGIES] is identical to a prominent portion of HP’S HEWLETT PACKARD marks”); and, *Presto Products, Inc. v. Nice Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”).

In its application to the Patent and Trademark Office, Applicant disclaimed the words “BREWING COMPANY.” While it still forms a part of the mark and cannot be ignored in determining likelihood of confusion under the anti-dissection rule, disclaimed matter is less significant in creating the mark's commercial impression. *See Venture Out Properties LLC v. Wynn Resorts Holdings LLC*, 81 USPQ2d 1887 (TTAB 2007); *CBS Inc. v. Mercandante*, 23 USPQ.2d 1784, 1785 (TTAB 1992) (non-disclaimed portion of the mark is dominant); *see also Country Floors, Inc. v. Partnership Composed of Gepner and Ford*, 18 USPQ.2d 1577 (3d. Cir. 1991) (disclaimed matter generally not regarded as the dominant part of the mark). “When the dominant portions of the two marks are the same, confusion is likely.” *Id.*

Here, the dominant portion of each of the parties’ respective marks is the word RAVEN. This dominant portion is identical in sight, sound, meaning and commercial impression. The “BLACK RAVEN” portion of Applicant’s mark is identical in meaning and commercial impression with Opposer’s RAVENS word marks and Opposer’s RAVENS design marks. The differences between the marks are the addition of the disclaimed phrase BREWING COMPANY to Applicant’s Mark. BREWING COMPANY is a generic, descriptive term, disclaimed by Applicant for registration purposes. “When a portion of a mark is descriptive or generic, that portion may, of course, be afforded less significance.” *Uncle Ben's Inc. v. Stubenberg International Inc.*, 47 USPQ2d 1310, 1312 (TTAB 1998). Further, the term BLACK in

Applicant's Mark does not result in a distinguishing difference between Applicant's Mark and Opposer's RAVENS Marks as ravens are black in color.<sup>2</sup> What remains is its word RAVEN.

In a conversation between two consumers, they would likely refer to Applicant's beer and brewpub as "Ravens" using the dominant terms only. *See Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1571 (Fed. Cir. 1983) (noting that consumers typically refer to applicant's hamburger restaurant by the term GIANT alone omitting the disclaimed term hamburgers). Hence, Applicant's disclaimed portion would not serve to avoid confusion. *See, also In re Dixie Restaurants Inc.*, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (holding that the dominant portion for the mark THE DELTA CAFE (CAFÉ disclaimed) for restaurant services is the word DELTA and would be called that by consumers).

The Board should take judicial notice of the fact that marks for beer that include BREWING COMPANY as disclaimed parts, as commonly referred to by the dominant, remaining portion. For example, MICHELOB BREWING CO., Reg. Number 77757425 for beer ("Brewing CO." disclaimed) is universally referred to and known as 'MICHELOB,' just as the beer brand "COORS BREWING CO. · A ROCKY MOUNTAIN TRADITION SINCE 1873," Reg. No. 3467665 ("Brewing CO." disclaimed) is called a 'COORS,' and a BLUE MOON BREWING COMPANY beer, Reg. No. 2147341 (BREWING COMPANY disclaimed) is a 'BLUE MOON' to consumers. Similarly, consumers here will refer to Applicant's beer as RAVEN or at the most a BLACK RAVEN. Thus, the dominant portion of Applicant's mark is the only portion that will be remembered and used, making confusion between RAVEN beer and RAVENS wines more than a bit likely.

Further, the meaning and definition of a term controls, in large part, a term's commercial impression. However, while ordinarily for a word mark a court does not consider trade dress, it

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<sup>2</sup> See Opposer's 9<sup>th</sup> Notice of Reliance.

“may nevertheless provide evidence of whether the word mark projects a confusingly similar commercial impression.” *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 223 USPQ 1281, 1284 (Fed. Cir. 1984).

Here, Applicant provided documents showing that it intends to use its Mark on a label for beer with the drawing of a raven as shown:<sup>3</sup>



In his testimony, Applicants admitted that the label shows a raven sitting on a tree branch.<sup>4</sup> Applicant uses this graphic on advertising flyers shown below as well as on promotional banners.<sup>5</sup>



<sup>3</sup> See Opposer's 7<sup>th</sup> Notice of Reliance.

<sup>4</sup> See Bowman Testimony Transcript, page 56, lines 19-20, Gillespie Testimony Transcript, page 31, lines 1-2.

<sup>5</sup> See Gillespie Testimony Transcript, page 18, lines 15-25 and Exhibit 10 attached thereto, page 34 lines 10-16 and Opposer's cross-examination exhibit O-6, page 2; see also Bowman testimony page 68, lines 17-19 stating that Applicant intends to use the banner in the future.

Applicant's intended use of its mark as shown above reveal that it plans to use it and has used it in a way in which the term BLACK RAVEN is emphasized. This factor supports a determination that the marks are similar. *See In re Nationwide Industries*, 6 USPQ2d 1882, 1884 (TTAB 1984) ("Thus, it is settled that evidence of the context in which a mark is used on labels, packaging, advertising, etc., is probative of the significance which the mark is likely to project to purchasers").

When compared with Opposer's design mark of three ravens in a circle in Registration No. 2130653 that it uses on all of its labels for its wines and on its merchandise, as well as Opposer's single raven logos that it uses in its advertising<sup>6</sup>, (see below),



the similarity in commercial impressions is unavoidable and inevitable. Opposer uses the image of a raven sitting on a branch and another of a raven resting on a pole in its advertising just as Applicant intends to or already has used its word mark on its label. Furthermore, Opposer's three ravens in a circle design mark that it uses on its labels is a design that is very well known if not famous.<sup>7</sup>

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<sup>6</sup> See Opposer's 3<sup>rd</sup> Notice of Reliance

<sup>7</sup> See Opposer's 8<sup>th</sup> Notice of Reliance including third-party articles in which the three ravens logo is mentioned.

Further, it is fundamental trademark law that a pictorial representation is the legal equivalent of words which describe that pictorial representation. See *In re Duofold*, 184 USPQ 638 (TTAB 1974) and *In re Eight Ball, Inc.*, 217 USPQ 1183 (TTAB 1983). Purchasers often do not have an opportunity for side-by-side comparison of marks but must rely on their memories of past experiences in which case a pictorial representation might spark a recollection of the word or vice versa. See *Spaulding Bakeries, Inc. v. Interstate Brands Corp.*, 209 USPQ 355 (TTAB 1980). Here, Opposer owns and uses pictorial representations of both singular and multiple ravens, and Applicant intends to use its mark in conjunction with its drawing of a raven. The result is an even stronger likelihood of confusion between Opposer's many well-known marks and Applicant's mark. Consumers will inevitably believe that the source of Applicant's beer is Opposer or that Opposer endorses the beer or is otherwise associated with it.

Applicant has also provided documents admitting that it intends to use its mark and raven graphic not only on beer but on its seasonal products, general merchandise, glassware, t-shirts and coasters.<sup>8</sup> Among Opposer's registrations are RAVENSWOOD, RAVENS, and its design mark (Reg. Number 2,118,153) for clothes including t-shirts. Applicant's intended use, sales, promotions and marketing of its mark on clothing and other merchandise will cause even further confusion. The fact that Applicant also uses its mark as a service mark for its retail establishment wherein Applicant sells and services both wine and beer is further cause for confusion. Accordingly, it must be presumed that the commercial impressions will be the same.

The similarity in commercial impression is further exacerbated by the fact that Applicant admitted that it chose its design on the logo to attempt to give the public the commercial impression that its mark was an old and "established brand."<sup>9</sup> Applicant thus admits that it

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<sup>8</sup> See Opposer's 7<sup>th</sup> Notice of Reliance.

<sup>9</sup> See Bowman Testimony, page 62, lines 9-16.

purposefully chose its new logo with an old look so that the consumer would have the impression that this was an established brand, not a newcomer to the beer industry. The only conclusion to be drawn from this statement is the Applicant wanted consumers to believe that its brand was in fact Opposer's very well established brand.

When word marks are very similar and neither suggestive nor descriptive of the goods associated with them, the first *DuPont* factor weighs heavily against an Applicant. *See, e.g., In re Martin's Famous Pastry Shoppe, Inc.*, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

This primary *duPont* factor favors Opposer.

**2<sup>nd</sup> 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., "beer") with Opposer's goods as recited in Opposer's registration of record (i.e., "wines"). *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).

There are no restrictions or limitations in the Applicant's recitation of goods in the application in issue and there are no restrictions or limitation in Opposer's recitation of goods in its registrations made of record. As such, for purposes of this proceeding the following legal presumptions apply: (1) Applicant's "beer" encompasses all types of beer embraced by the broad terminology, and Opposer's "wines" encompass all types of wine embraced by the broad terminology; (2) the parties' goods move or will move through all of the same channels of trade suitable for the offering and sale of beer and wine; and (3) the parties' products reach or will reach the same potential users and/or customers. *See Warnaco, Inc. v. Adventure Knits, Inc.*, 210

USPQ 307, 314-315 (TTAB 1981); and *Guardian Products Co., Inc. v. Scott Paper Co.*, 200 USPQ 738, 741 (TTAB 1978).

It is not necessary that the respective goods be competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. The issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originated from the same producer. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

Applicant's and Opposer's goods obviously are similar to the extent that wine, beer and ale are alcoholic beverages. While wine and beer/ale are different products which might not be confused for each other, that is not the test for likelihood of confusion for the trademarks. *See Melville, supra.*

Numerous cases have found that different alcoholic beverages are related products which are sold in the same trade channels to the same classes of purchasers, including to ordinary consumers, and that confusion is likely to result if the goods were to be sold under similar marks. *See, e.g., In re Chatam International Inc.*, 71 USPQ2d 1944 (Fed. Cir. 2004) [beer and tequila]; and *In re Majestic Distilling Co.*, 65 USPQ2d 1201 (Fed. Cir. 2003). Indeed, when the proper evidence has been made of record, the Board's precedential authority, still in effect today, specifically holds that beer and wine are related products. *See In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719 (TTAB 1992).

Wine and beer are highly related.<sup>10</sup> In fact, it is common knowledge, and the Board may take judicial notice of the fact that wine and beer are generally offered for sale to the same ultimate consumers in the same type establishments and are served together at gatherings and parties. Even without the above legal presumptions, it is common knowledge that wine and beer are both alcoholic beverages sold to consumers in all channels of trade suitable for the offering and sale of such goods (e.g., liquor stores, bars, restaurants, et al). Wine and beer are both served at bars and restaurants and are served by consumers at home for personal use and while entertaining. Wine and beer are also the type of product that is ordered verbally in bars and restaurants. In fact, here, Applicant intends to and does in fact offer both wine and beer for sale at its establishment.<sup>11</sup>

This is similar to *Schieffelin & Co. v. The Molson Companies Ltd.*, 9 USPQ2d 2069 (TTAB 1989), wherein the Board stated:

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. . . .

**A typical consumer of alcoholic beverages may drink more than one type of beverage and may shop for different alcoholic beverages in the same liquor store. Moreover, a person may serve more than one kind of alcoholic beverage before or during a meal or at a party.**

(emphasis added). See also, *Martini & Rossi Corp. v. Jose Marques Agostinho, Filhos & Ca.*, 205 USPQ 722 (TTAB 1979) (wines v. wines, vermouth and other alcoholic beverages);

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<sup>10</sup> See *In re E. & J. Gallo Winery*, Serial No. 77458162 (August 13, 2009) [not precedential because it did not change case law] where the Board recently reaffirmed that beer and wine are related goods.

<sup>11</sup> See Opposer's 7<sup>th</sup> Notice of Reliance. (Applicant's Admission #9); also see testimony of Bowman Page 24, lines 6-10.

*Monarch Wine Co. v. Hood River Distillers, Inc.*, 196 USPQ 855 (TTAB 1977) (Scotch whiskey, rum, brandy and vodka v. wines and champagne); and *In re AGE Bodegas Unidas, S.A.*, 192 USPQ 326 (TTAB 1976).

Insofar as the trade channels and classes of purchasers are concerned, there are no trade channel limitations in either Applicant's or Opposer's identification of goods. Applicant describes its goods as "beer" in its application, without any restriction as to classes of purchasers or trade channels. As such, the legal presumptions apply that Applicant's goods will move through the same trade channels as those of other beer makers, namely, retail liquor stores and restaurants. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Also, the presumption applies that Applicant's beer will reach all potential customers of beer, which include customers that purchase beer in retail liquor stores and restaurants. Further, wine and beer may be the subject of an impulse purchase made by an ordinary consumer without a great degree of sophistication. These presumptions demonstrate that Opposer's goods, namely wines, will overlap with those of Applicant especially in the context of Applicant's intended use, namely a pub selling both beer and wine, not to mention because both Applicant and Opposer's goods would be available to the relevant, consuming public through retail liquor stores and restaurants.

As further evidence of the relatedness of the goods in issue in this case, Opposer's Notices of Reliance No. 6 is comprised of representative examples (i.e., 267 registrations) of "live" third party trademark registrations that recite both "wine(s)" and "beer" in the identification of goods. The following table is comprised of registrations from the referenced 6<sup>th</sup> Notice of Reliance all of which include both *inter alia* wines and beer :

<u>Registration Number</u>	<u>Mark</u>
1286155	HONG MEI
1553878	SPORTSERVICE

1560078



1560079

JINRO

1562475

BROADWAY

1609717

CRAFTY COCKNEY

1679551

SONOMA COUNTY CALIFORNIA SELECT

1736692

EDGEFIELD

1804984

I

1861111

SELECT SONOMA COUNTY

1890019

SUTTON PLACE GOURMET

1995010

ALL SAINTS

2162683

CYBAR

2219064



2304424

BIOLUME

2341577

QUEEN MARY

2431892

HOOPER'S HOOCH

2595289

TTL

2601490

AIOLI

2637911

VOC

2644893

NUTRIVINE

2653120

CYBERSPIRITS

2676707

FU GE

2764973

FORNI & FATTORIE

2772818

VOYAGER ESTATE

2776133

ESPERYA

2789035

DO & CO

2793519

THE "TRESKILLING" YELLOW

2907510

VOLKER

2911802

OCHAKOVA

2963588

TYMBARK

2965356

AL CAPONE

2978316

SCROOGE & MARLEY GIFTS, GOODS AND

PROVISIONS

3000630

LAURENT-PERRIER

3005606

LP

3016529

VESPA

3057118



3057119



3064034	AFA
3081329	CANADA SNOW JUICE
3099373	SCHILLINGBRIDGE
3105436	THE VOYAGE OF THE ARCTIC TERN
3115035	PRIMER
3224004	DR. LOOSEN BLUE SLATE
3237848	AFA AUTHENTIC FOOD ARTISAN
3396347	UNCLE SAM
3456841	DEFENDERS OF FREEDOM CHOICE
3457878	CLAIR DE FRANCE FRENCH DELIGHTS
3508797	TESCO
3522339	WORK TRUCK

While the above registrations are not evidence, per se, that the marks are currently in use or that the public is necessarily familiar with them, they are probative to show that the listed goods (i.e., wine and beer) are of a type which may emanate from a single source. See, *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993) (stating that where only five third-party registrations evidenced the relatedness of the differing goods involved therein, “although third-party registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, nevertheless third-party registrations which individually cover a number of different items and which are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods and/or services are of a type which may emanate from a single source”).

Additionally, attached to Opposer’s 2<sup>nd</sup> Notice of Reliance are pages from various publications showing that wine, vodka and other distilled spirits are marketed, advertised and/or promoted in the same publications.

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

**3<sup>rd</sup> duPont Factor.    The Similarity or Dissimilarity Of  
Established, Likely-To-Continue Trade Channels**

**4<sup>th</sup> duPont Factor.    The Conditions Under Which And Buyers  
To Whom Sales Are Made**

Again, there are no limitations or restrictions set forth in the application in issue. The application in issue is an Intent-to-Use application. As a matter of law, the following legal presumptions apply: (1) Applicant's "beer" encompasses all types of beer embraced by the broad terminology, and Opposer's "wines" encompass all types of wine embraced by the broad terminology; (2) the parties' goods move or will move through all of the same channels of trade suitable for the offering and sale of vodka and wine; and (3) the parties' products reach or will reach the same potential users and/or customers. *See Warnaco, supra*, 210 USPQ at 314; and *Guardian Products, supra*, 200 USPQ at 741.

Additionally, attached to Opposer's 3rd Notice of Reliance are pages from various publications showing that wine, vodka and other distilled spirits are marketed, advertised and/or promoted in the same publications. There is ample evidence that wine and beer are all sold through the same channels of trade, in the same establishments, and to the same ultimate consumer.

Opposer's 4<sup>th</sup> Notice of Reliance comprises an excerpt from the *Adams Business Media Fact Book 2005, Beverage Alcohol State Facts and Regulations* reference book. The book demonstrates the sale and distribution of alcoholic beverages, including wine, beer, spirits, and related products occurs in liquor stores in forty-four states, grocery stores and/or supermarkets in thirty-five states plus the District of Columbia; and in drug stores in thirty-five states. The foregoing demonstrates beer and wine may be and are actually sold together in the same establishments to the same ultimate consumers.

In fact, the Applicant both sells and serves both beer and wine in its own establishment.<sup>12</sup> The owner of Applicant, Mr. Bowman, testified that he worked for three breweries before opening his establishment and that two of these breweries also sold wine.<sup>13</sup> Further, Mr. Bowman testified that beer and wine are sold in the same kinds of stores.<sup>14</sup> He also testified that in his own Black Raven establishment he has had customers sit down at a table where one person orders a beer and one person orders a glass of wine.<sup>15</sup> Mr. Bowman admitted that he sells his own beer and ale to restaurants that sell and service both beer and wine.<sup>16</sup> He further admitted that he plans to sell beers under its mark to bars and nightclubs as well as to grocery stores.<sup>17</sup> After first conjecturing that beer and wine are merchandised differently to customers, Mr. Bowman then admitted that the customers to his taproom are craft beer or beer consumers, beer enthusiasts.<sup>18</sup>

Ms. Gillespie likewise testified that their intended future sales include sales to bars and restaurants.<sup>19</sup> Ms. Gillespie also testified that Applicant intends to sell wines that were not expensive,<sup>20</sup> and Applicant's witness, Mr. Engler, testified that Opposer's wines are just such inexpensive wines.<sup>21</sup> Moreover, Mr. Bowman and Ms. Gillespie, the co-Applicants, verified that both parties promote and or intend to promote their goods using the same types of merchandise on which Opposer uses its word marks and design marks of three ravens in a circle.<sup>22</sup>

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<sup>12</sup> See Bowman Testimony, Page 24, lines 6-10.

<sup>13</sup> See Bowman Testimony, Page 46, lines 1-5.

<sup>14</sup> See Bowman Testimony, Page 52, lines 5-11.

<sup>15</sup> See Bowman Testimony, Page 52, lines 12-15.

<sup>16</sup> See Bowman Testimony, Pages 63-66.

<sup>17</sup> See Bowman testimony, page 23, lines 18-22, page 24, lines 4-5.

<sup>18</sup> See Bowman testimony, page 26, lines 2-25.

<sup>19</sup> See Gillespie Testimony, Page 21, lines 9-22.

<sup>20</sup> See Gillespie Testimony, Page 23, lines 7-18.

<sup>21</sup> See Engler Testimony Page 14 lines 17-25 and page 15 lines 1-9.

<sup>22</sup> See Bowman Testimony, page 62, line 23-25 (glassware), page 63, lines 1-2 (t-shirts), Page 63 lines 3-6 (coasters); Gillespie Testimony, page 32, lines 20-22 (website, business cards, coasters, t-shirts), and Exhibit 4 attached thereto showing use of the label on its website; see also Opposer's Registration 2118153 in its First Notice of Reliance.

Mr. Engler testified similarly. He testified that beer and wine use the same distributors,<sup>23</sup> and can be transported together by distributors.<sup>24</sup> Mr. Engler testified that he was aware of some boutique wineries that also manufacture and sell beer.<sup>25</sup> Mr. Engler testified that when he entertains, he serves beer, wine, hard spirits and soft drinks.<sup>26</sup> Further, Mr. Engler testified that his own customers purchase both beer and wine together.<sup>27</sup> Mr. Engler also admitted that his customer types are limited because he runs a specialty store in a location that is not easily visible.<sup>28</sup>

The Board should be able to take judicial notice that wine and beer are in fact served to consumers in restaurants and that often they are served to the same table, certain patrons choosing wine and certain patrons choosing beer.

Accordingly, the “established, likely-to-continue trade channels” are legally identical for purposes of this proceeding and the “conditions under which and buyers to whom sales are made” are 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 are 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 3<sup>rd</sup> and 4<sup>th</sup> *duPont* factors) favor Opposer.

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<sup>23</sup> See Engler Testimony, page 13, Line 3-8.

<sup>24</sup> See Engler Testimony, page 13, Line 12-18.

<sup>25</sup> See Engler Testimony, page 14, lines 5-10.

<sup>26</sup> See Engler Testimony, page 24, lines 3-6.

<sup>27</sup> See Engler Testimony, page 35, lines 18-21.

<sup>28</sup> See Engler Testimony, page 40, lines 20-25.

**5<sup>th</sup> duPont Factor**      **The Fame Of Opposer's Marks  
(Sales, Advertising, Length Of Use)**

Opposer's products are well-known and have achieved great recognition. Opposer enjoys enviable sales. For example, U.S. sales at wholesale for the RAVENS wines is as follows:<sup>29</sup>

<u>Period</u>	<u>Annual Wholesale Sales (rounded off)</u>
FY ending 2/28/03	\$56,824,000
FY ending 2/29/04	\$58,126,000
FY ending 2/28/05	\$73,615,000
FY ending 2/28/06	\$72,786,000
FY ending 2/28/07	\$67,481,000
FY ending 2/29/08	\$68,633,000
FY ending 2/29/09	\$60,090,000

Thus, the average wholesale sales of the RAVENS wines over the above-referenced period are in excess of \$65 million per year. The retail value (i.e. the dollar value of the annual sales at retail) is approximately double the wholesale figures set forth above. Further, in Fiscal Year 2008, FVI made net sales with a value of approximately \$1.6 million at the Ravenswood Winery's tasting room in Sonoma, California in addition.<sup>30</sup>

Opposer has also sold branded gift items under the RAVENS Marks since 1981 including, without limitation, various articles of clothing apparel and accessories, glassware, carafes, corkscrews, coasters, pepper grinders, crumb scrapers, BBQ sauce, olive oil, picnic bags, watches, bumper stickers, Christmas tree ornaments, totes, aprons, hand towels, and pendants.<sup>31</sup> Aggregate sales of gift items for the five year period 1999-2003 were approximately \$666,000. In Fiscal Year 2008, the aggregate sales of gift items were approximately \$453,000.<sup>32</sup>

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<sup>29</sup> See Opposer's 5<sup>th</sup> Notice of Reliance

<sup>30</sup> See Opposer's 5<sup>th</sup> Notice of Reliance

<sup>31</sup> See Opposer's 5<sup>th</sup> Notice of Reliance

<sup>32</sup> See Opposer's 5<sup>th</sup> Notice of Reliance

Opposer's advertising and promotional costs and expenses for its RAVENS wines have been well in excess of \$400,000 per year.<sup>33</sup>

The overall press coverage that Opposer enjoys is phenomenal which is apparent from Opposer's 8<sup>th</sup> Notices of Reliance (numerous representative articles referring to RAVENSWOOD from 1990-2009 downloaded from NEXIS).

Applicant's witness, Mr. Engler, himself confirmed that the RAVENSWOOD wine enjoyed with a "substantial reputation" and is "well known," a wine that "everybody knows," because "they are all over the place" and "have a market breadth and depth" so that "people recognize it."<sup>34</sup> He testified that an individual consumer is more likely to know the name RAVENSWOOD for wines than the name of Opposer.<sup>35</sup> Mr. Engler further stated that "Ravenswood is a significant winery," and stated that he believes "they do 100,000 plus cases [annually] which is ...that's 1.2 million bottles."<sup>36</sup> Applicant also admitted that he was aware of Opposer's RAVENSWOOD wine when he did a trademark search for its mark.<sup>37</sup>

The record in this proceeding establishes that Opposer enjoys remarkable prestige and reputation and that its mark and name are well-known and famous throughout the United States.

This *duPont* factor strongly favors Opposer.

**6<sup>th</sup> duPont Factor.    The Number and Nature of Similar  
Marks In Use on Similar Goods**

There is no evidence of record of one other single third party registration of the English term RAVEN for wine or beer or related goods or services or a record for a statement of use filed

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<sup>33</sup> See Opposer's 5<sup>th</sup> Notice of Reliance

<sup>34</sup> See Testimony of Doug Engler, page 48, lines 8-19.

<sup>35</sup> See Testimony of Doug Engler, page 47, lines 21-25.

<sup>36</sup> See Testimony of Doug Engler, page 14, lines 20-23.

<sup>37</sup> See Bomwan Testimony, page 37, lines 14-21.

for a pending intent to use application incorporating the term RAVEN. Accordingly, for purposes of this proceeding, Opposer’s mark must be considered to be “strong.”

This *duPont* factor favors Opposer.

**7<sup>th</sup> duPont Factor.    The Nature and Extent of Any Actual Confusion; and**  
**8<sup>th</sup> 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. Applicant admits to selling beer under other marks and using its Mark on its brewpub. However, when asked if any of his beers were labeled Black Raven, Applicant’s owner stated, “Not as the name of the beer.”<sup>38</sup> There is no evidence of record of a single sale of beer by Applicant under Applicant’s Mark.

In fact, it is not even clear that Applicant intends to use its mark for beer at all. When asked how he intended to use the mark, Mr. Bowman stated, “This is who we are. . . To identify the brewery.”<sup>39</sup> Ms. Gillespie confirmed this, stating, “[The meaning of the mark], it’s our name. . .It’s the name of the business”<sup>40</sup>

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

**10<sup>th</sup> 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* Notice of Opposition, ¶9. There are no agreements or understandings between the parties to the contrary. Thus, there is no market interface between the parties.

Accordingly, this *duPont* factor favors Opposer.

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<sup>38</sup> See testimony of Robert Bowman, page 54, lines 22-24.

<sup>39</sup> See Bowman testimony, page 56, lines 6-10.

<sup>40</sup> See Gillespie testimony, page 32, lines 14-17.

**11<sup>th</sup> duPont Factor. The Extent To Which Opposer Has A Right To Exclude Others From Use Of Its Marks**

The marks of the parties are similar in look, sound, meaning and commercial impression. The parties' respective goods are closely related. Opposer is the owner of numerous incontestable registrations for the mark RAVENS, RAVENSWOOD and variations thereof for wines.

Opposer is entitled to all the presumptions that flow from such ownership, including that its registration is *prima facie* evidence of the validity of the registered marks and of the registration of the marks, of Opposer's ownership of the marks, and of Opposer's exclusive right to use the registered marks in commerce on or in connection with wine. See 15 U.S.C. §§ 1057(b), 1115(a), and 1115(b). Opposer is also entitled to the factual presumptions that the parties' channels of trade overlap, and that the ultimate consumers overlap.

This *duPont* factor favors Opposer.

**12<sup>th</sup> duPont Factor. The Extent of Potential Confusion Is Substantial**

When one considers:

- a) The fact that the most significant parts of the parties' marks are identical in look and are identical in sound, meaning and commercial impression (i.e. RAVEN);
- b) That the goods involved are closely related (beer and wine);
- c) That by law the channels of trade and ultimate consumers necessarily overlap;  
and
- d) 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). To the extent that any of Applicant’s arguments raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the Opposer and its prior registrations. *See In re Martin’s Famous Pastry Shoppe, Inc.*, 223 USPQ 1289 (Fed. Cir. 1984).

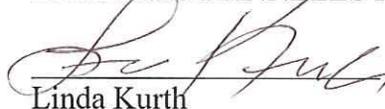
### III. CONCLUSION

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

DATED: November, 24, 2009

Respectfully submitted,

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## APPENDIX "A" TO OPPOSER'S TRIAL BRIEF

### Opposer's Objections to Evidence Submitted by Applicant and Exhibits Introduced by Applicant During Testimony of its Witnesses

#### A. Applicant's Fourth Notice of Reliance.

The documents attached to Applicant's Fourth Notice of Reliance are comprised of three magazine excerpts, namely:

1. Wine Spectator, March 31, 2008, pages: cover, 3-4 (reproduced over three pages in copy), 39, 40, 61, and rear cover.
2. Bon Appetit, November 2008, pages: cover, 3-4, 47, 105, and rear cover.
3. Food & Wine, May 2009, pages: cover, 8-9, 24, 47, and 55.

Applicant states that these excerpts are relevant in that they demonstrate that the usage of this trade channel or marketing method is not exclusive to beer, wine or any other product.

These documents do not stand for, are not relevant to show, and are not admissible for the purposes, conjectures and/or presumptions offered by the Applicant. In *In re E. I. du Pont de Nemours & Co.*, 177 USPQ 563, 567 (CCPA 1973), the United States Court of Customs and Patent Appeals established a thirteen factor test to be followed by courts in determining likelihood of confusion in trademark cases. The third *du Pont* factor is the similarity or dissimilarity of established likely-to-continue trade channels. Exclusivity of a channel of trade or marketing method for the goods at issue is not one of the *du Pont* factors, and is completely irrelevant to the issue of likelihood of confusion between two similar marks being used for related goods.

B. Opposer's Objections to the Testimony of Douglas M. Engler

1. Opposer objects to the testimony of Mr. Engler in its entirety to the extent that Applicant intends to rely on it and offers it as expert testimony. Opposer was not provided with nor did it receive disclosure for expert testimony as required under Federal Rule of Civil Procedure 26 (a) (2). Further, no foundation was laid during his testimony that demonstrates either that Mr. Engler is an expert in the marketing and sales of wine and beer or that he has expert knowledge on the buying or drinking habits of consumers of beer and wine. His lack of expert knowledge is shown from the following facts he offered during his testimony:
  - a. An uncompleted degree in computer science and four years of work as a software programmer with Microsoft. (Pg 5, lines 16-25).
  - b. Owner of small liquor store (1600 square feet, Pg 26, lines 20-23) from 2007 to the present (Pg 6, lines 23-25).
  - c. Collector of wines and specialty beers from the mid-1990's (Pg 5, lines 1-5).
  - d. Never worked for a brewery, winery or distillery (Pg. 19, lines 16-21).
2. Opposer's other objections made during testimony
  - a. Hearsay objection made to statement regarding knowledge of distributors about brand owners (See Kurth objection, Pg. 43, lines 11-18).
  - b. Objection to personal bias of Mr. Engler based on the fact that he conducts business with the Applicant (See Kurth objections, Pg. 50, lines 9-14, Pg. 21 lines 21-25, Pg. 22 lines 1-18).

C. Opposer's Objections to the Testimony of Kathryn Gillespie and Applicant's Exhibits Attached Thereto

a. Objections to Exhibits

i. **Exhibit 5**

1. All four (4) pages of this exhibit are web page screen shots as follows:
  - Page 1 is from Applicant's website
  - Page 2 is from seattlepi.com and is an online article mentioning Applicant's brewpub.
  - Page 3 is from seattlest.com and is an online article titled, "The New Breweries Keep Coming," and mentions Applicant's brewpub.
  - Page 4 is from seattlest.com and is an online article titled, "The Eastside – Beer Wasteland?" and mentions Applicant's brewpub.
2. The person who allegedly accessed and downloaded the web pages shown below was not identified and was not called as a witness by Applicant for authentication or other purposes, and Opposer was therefore unable to cross-examine this unidentified person. Applicant's attorney did not offer any information on how the search/access to the web pages was conducted, what pages the searches were conducted from, or any other relevant or substantive information. As such these pages lack foundation, are

unauthenticated and constitute hearsay (especially here, where Applicant appears to be attempted to rely upon the documents for the truth of matters set forth in the documents). Internet materials are not self-authenticating in nature. *See, Raccioppi v. Apogee, Inc.* , 47 USPQ2d 1368, 1370 (TTAB 1998).

3. Exhibit 5 was timely and properly objected to by Opposer's counsel during Ms. Gillespie's testimony. *See* Gillespie Testimony, Kurth objection, Pg. 16, lines 1-16. Applicant also stated that she was not involved in the interviews behind the articles and did not help to create them.
  4. Accordingly, the exhibit and all testimony concerning the same should be stricken and the Board should not consider this exhibit in reaching its decision herein.
- ii. **Exhibit 8** – objected to as inadmissible hearsay and unauthenticated, Page 16, lines 18-21
1. All nine (9) pages of this exhibit contain information from sources not in general circulation.
    - a. Page 1 is an article from a local paper, the Redmond Reporter
    - b. Pages 2-9 are a Redmond Chamber of Commerce bulletin.
  2. Exhibit 8 was timely and properly objected to by Opposer's counsel during Ms. Gillespie's testimony. *See* Gillespie Testimony Kurth objection, Pg. 16, lines 18-21.

3. Accordingly, the exhibit and all testimony concerning the same should be stricken and the Board should not consider this exhibit in reaching its decision herein.

iii. **Exhibit 11** - objected to as inadmissible hearsay and unauthenticated,

Page 25, lines 16-20

1. Nine (9) pages from [www.northamericanbrewers.org](http://www.northamericanbrewers.org).
2. The person who allegedly accessed and downloaded the web pages shown below was not identified and was not called as a witness by Applicant for authentication or other purposes, and Opposer was therefore unable to cross-examine this unidentified person. Applicant's attorney did not offer any information on how the search/acces to the web pages was conducted, what pages the searches were conducted from, or any other relevant or substantive information. As such these pages lack foundation, are unauthenticated and constitute hearsay (especially here, where Applicant appears to be attempted to rely upon the documents for the truth of matters set forth in the documents). Internet materials are not self-authenticating in nature. *See, Raccioppi v. Apogee, Inc.* , 47 USPQ2d 1368, 1370 (TTAB 1998).
3. Exhibit 11 was timely and properly objected to by Opposer's counsel during Ms. Gillespie's testimony. See Gillespie Testimony Kurth objection, Pg. 25 lines 16-20.

4. Accordingly, the exhibit and all testimony concerning the same should be stricken and the Board should not consider this exhibit in reaching its decision herein.

b. Objections to other portions of testimony

- i. Objection to hearsay statement regarding background of co-Applicant Bowman, See Kurth objection, Pg. 7 lines 9-12, 15-23
- ii. Objection to leading the witness regarding how the trademark application form was filled out, See Kurth objection, Pg. 13, lines 6-10.
- iii. Objection to leading the witness regarding plans for outside sales and given an example of what type of retail establishments intended to be used See Kurth objection, Pg. 21, lines 9-14.

D. Opposer's Objections to the Testimony of Robert P. Bowman Jr. and Applicant's Exhibits Attached Thereto

a. Objections to Exhibits

i. Exhibit 5 (Same Exhibit as in Gillespie Testimony). Objection repeated on grounds of hearsay.

1. All four (4) pages of this exhibit are web page screen shots as follows:

- Page 1 is from Applicant's website
- Page 2 is from [www.seattlepi.com](http://www.seattlepi.com) and contains an online article mentioning Applicant's brewpub.

- Page 3 is from seattlest.com and is an online article titled, “The New Breweries Keep Coming,” and mentions Applicant’s brewpub.
  - Page 4 is from seattlest.com and is an online article titled, “The Eastside – Beer Wasteland?” and mentions Applicant’s brewpub.
2. The person who allegedly accessed and downloaded the web pages shown below was not identified and was not called as a witness by Applicant for authentication or other purposes, and Opposer was therefore unable to cross-examine this unidentified person. Applicant’s attorney did not offer any information on how the search/access to the web pages was conducted, what pages the searches were conducted from, or any other relevant or substantive information. As such these pages lack foundation, are unauthenticated and constitute hearsay (especially here, where Applicant appears to be attempted to rely upon the documents for the truth of matters set forth in the documents). Internet materials are not self-authenticating in nature. *See, Raccioppi v. Apogee, Inc.* , 47 USPQ2d 1368, 1370 (TTAB 1998).
3. Exhibit 5 was repeated and timely and properly objected to by Opposer’s counsel during Mr. Bowman’s testimony. See Bowman Testimony, Kurth objection, Pg. 17, lines 9-14.

4. Accordingly, the exhibit and all testimony concerning the same should be stricken and the Board should not consider this exhibit in reaching its decision herein.
- ii. **Exhibit 9.** Objection on failure to lay a proper foundation for photograph on page 1.
1. The person who allegedly accessed and copied the pages shown below was not identified and was not called as a witness by Applicant for authentication or other purposes, and Opposer was therefore unable to cross-examine this unidentified person. Applicant's attorney did not offer any information on how the search/access of this document was conducted, what pages the searches were conducted from, or any other relevant or substantive information. As such these pages lack foundation, are unauthenticated and constitute hearsay (especially here, where Applicant appears to be attempted to rely upon the documents for the truth of matters set forth in the documents).
  2. Exhibit 9 was timely and properly objected to by Opposer's counsel during Mr. Bowman's testimony. See Bowman Testimony, Kurth objection, Pg. 29, lines 24-25 and Pg. 30, lines 1-15, Pg. 31, lines 17-33, Pg. 32, lines 1-12.
  3. Accordingly, the exhibit and all testimony concerning the same should be stricken and the Board should not consider this exhibit in reaching its decision herein.

iii. **Exhibit 11** - objected to as inadmissible hearsay and unauthenticated, Page 34, lines 2-11. (Same exhibit referred to in Gillespie testimony).

1. Nine (9) pages from [www.northamericanbrewers.org](http://www.northamericanbrewers.org).
2. The person who allegedly accessed and downloaded the web pages shown below was not identified and was not called as a witness by Applicant for authentication or other purposes, and Opposer was therefore unable to cross-examine this unidentified person. Applicant's attorney did not offer any information on how the search/access to the web pages was conducted, what pages the searches were conducted from, or any other relevant or substantive information. As such these pages lack foundation, are unauthenticated and constitute hearsay (especially here, where Applicant appears to be attempted to rely upon the documents for the truth of matters set forth in the documents). Internet materials are not self-authenticating in nature. *See, Raccioppi v. Apogee, Inc.* 47 USPQ2d 1368, 1370 (TTAB 1998).
3. Exhibit 11 was timely and properly objected to by Opposer's counsel during Mr. Bowman's testimony. See Bowman Testimony Transcript, Kurth objection, Pg. 34, lines 2-11.
4. Accordingly, the exhibit and all testimony concerning the same should be stricken and the Board should not consider this exhibit in reaching its decision herein.

iv. **Exhibit 12** - objected to as inadmissible hearsay and unauthenticated,

Page 36, lines 13-17.

1. Six (6) pages from www.yelp.com
2. The person who allegedly accessed and downloaded the web pages shown below was not identified and was not called as a witness by Applicant for authentication or other purposes, and Opposer was therefore unable to cross-examine this unidentified person. Applicant's attorney did not offer any information on how the search/acces to the web pages was conducted, what pages the searches were conducted from, or any other relevant or substantive information. As such these pages lack foundation, are unauthenticated and constitute hearsay (especially here, where Applicant appears to be attempted to rely upon the documents for the truth of matters set forth in the documents). Internet materials are not self-authenticating in nature. *See, Raccioppi v. Apogee, Inc.* , 47 USPQ2d 1368, 1370 (TTAB 1998).
3. Exhibit 12 was timely and properly objected to by Opposer's counsel during Mr. Bowman's testimony. See Bowman Testimony Transcript, Kurth objection, Pg. 36, lines 13-17.
4. Accordingly, the exhibit and all testimony concerning the same should be stricken and the Board should not consider this exhibit in reaching its decision herein.

b. Objections to Testimony

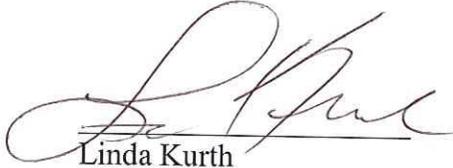
- i. Objection on failure to lay a proper foundation. Testimony regarding how beer and wine are merchandised in a store. *See* Bowman testimony transcript and Kurth Objection Pg. 26, lines 2-10.
- ii. Objection on failure to lay a proper foundation. Testimony regarding photograph on page 1 of Exhibit 9. *See* Bowman Testimony, Kurth objection, Pg. 29, lines 24-25 and Pg. 30, lines 1-15., Pg. 32, lines 1-2.

**CERTIFICATE OF SERVICE**

I hereby certify a copy of the foregoing Opposer's TRIAL BRIEF in re Franciscan Vineyards, Inc. v. Beaukat Enterprises, LLC, was served on counsel for Applicant, this 24<sup>th</sup> day of November, 2009, by sending same via Email and First Class Mail, postage prepaid, to:

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

DATED: November, 24, 2009



Linda Kurth