

ESTTA Tracking number: **ESTTA337165**

Filing date: **03/15/2010**

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

Proceeding	91181755
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Attachments	Opposers Trial Reply Brief.pdf (38 pages)(938787 bytes)

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

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

-----X
OPPOSER'S REPLY BRIEF
-----X

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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. On page 26 of its brief proper, Applicant admits, "...eventually...if BeauxKat should ever sell its beer in restaurants where Ravenswood is sold, a customer might see both and wonder if they come from the same place."

Opposer filed its Trial Brief on November 4, 2009. On February 26, 2010, Applicant filed its responsive Trial Brief. Opposer now submits its trial reply brief, objecting to various statements made by Applicant in Applicant's Trial Response Brief, replying to certain issues raised by the Applicant, and addressing certain errors made by Applicant in Applicant's Trial Response Brief.

At the outset, Opposer objects to Applicant's brief as being in violation of 37 CFR § 2.126(a)(1) for not being double spaced. Opposer, however, will respond to each section of Applicant's Trial Brief as that brief is organized and numbered.

I. INTRODUCTION

In the last sentence of the first paragraph of its introduction, page 6 of his brief proper, Applicant states, "... Franciscan does not own a mark for simply 'RAVEN.'" In fact, Opposer has submitted evidence of record in its First Notice of Reliance of its incontestable registrations not only for the mark "RAVENS," U.S. Registration Number 2888963 for wine but also for design marks of ravens as well as the others shown below:

Trademark	Registration No
RAVENSWOOD	2,118,152
	2,118,153

Trademark	Registration No
	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

Not only does Opposer own a registration for RAVENS for wine, but for RAGIN' RAVEN for wine and RAVENS WOOD for wine, as well as RAVEN for other goods. Pluralization does not distinguish two marks. “[W]e cannot attribute much trademark significance to the difference in the plural and singular form of [a] word.” *Chicago Bears Football Club Inc. v. 12TH Man/Tennessee LLC*, 83 USPQ2d 1073, 1077 (TTAB 2007). “An inconsequential difference does not change the meaning or commercial impression engendered by the marks as applicant's letter substitution does.” *In re Nielsen Business Media Inc.*, 93 USPQ2d 1545, 1548 (TTAB 2010) (holding that pluralization is an immaterial difference between two marks).

In the introduction, Applicant misstates the law when it states that the fact that the two marks at issue both have RAVEN as the dominant portion of each mark is an insufficient basis for a finding of likelihood of confusion because the products are not identical. Applicant also mistakenly argues in the introduction that the actual markets for beer and wine are relatively distinct. Case law holds to the contrary on both of these incorrect statements as does its own evidence of record in this proceeding.

II. PROCEDURAL HISTORY/DESCRIPTION OF RECORD

Miscellaneous Statements and Applicant's Notices of Reliance

B. Evidence of Record:

The Applicant sets forth its own listing of Applicant's alleged "Evidence of Record" on pages 6-11 of Applicant's Brief proper and objections to Opposer's evidence of record.

1. Re: Applicant's Objections to Opposer's Evidence

a. Opposer's 6th Notice of Reliance [Registrations the recite both "beer" and "wine"].

Applicant moves to strike Opposer's 6th Notice of Reliance. Applicant is apparently miffed that the Board granted Opposer's motion to strike Applicant's Second Notice of Reliance because Applicant improperly submitted TESS "search list" results without attaching registrations as required. In comparison, Opposer submitted TESS "search list" results and attached 50 representative registrations (TESS/TARR database records) from that list as required by Rule 2.122(e). *See also R. J. Reynolds Tobacco Co. v. Brown & Williamson Tobacco Corp.*, 226 USPQ 169, 174-75 (TTAB 1985); *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368 (TTAB 1998).

"Third party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source." *In re Mucky Duck Mustard Co.*, 6 USPQ3d 1467, 1470 n. 6 (TTAB 1988). (See Exhibit 1 for a condensed list from the 50 registrations provided under notice of reliance that are based on use in commerce – Section 1(A)).

Applicant admits that it plans to expand its sales beyond its brewpub possibly into restaurants and liquor stores.¹ These are the most common sources wherein beer and wine are offered and sold together. The registrations that Opposer submitted 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).

¹ See Bowman Testimony, Pages 63-66

Applicant makes the erroneous argument that because some of the registrations also contain goods other than beer and wine, relatedness of goods would have to extend to those. That is patently absurd. Applicant notably neglects to address the same source issue raised by Opposer. The Board should thus find as admitted that beer and wine are the types of products that may emanate from a common source, and that they are sold and offered for sale in the same venues.

b. Opposer's 9th Notice of Reliance [Dictionary Pages].

Applicant moves to strike Opposer's 9th Notice of Reliance which contained pages from Webster's Dictionary in accordance with 37 C.F.R. § 2.122(e) and T.B.M.P. § 707.08 showing that the dictionary defines the word "raven" to include the color black, namely "glossy black" and "a large, black, omnivorous and occasionally predatory bird" (emphasis added). Applicant's motion to strike must be denied because Opposer has a right under the rules to submit just such an exhibit. Opposer offered the exhibit to show that Applicant's BLACK RAVEN mark would be redundant to the average consumer who likely equates the term raven with the color black, such as the word is used in the common phrase, 'raven haired beauty.' Further, Applicant's label and testimony clearly show that Applicant actually uses a black colored raven in its logo on its beer label and merchandise. Even if the Board were to take judicial notice, as requested by Applicant, that ravens may vary in color, Applicant does not use a white or brown raven. It uses a black raven very similar to the raven graphics use in Opposer's design marks and advertising.

2. Applicant's Evidence of Record

a. Applicant's 4th Notice of Reliance

Applicant argues that its submission of advertising excerpts from periodicals demonstrates that magazines that advertise both beer and wine together in the same issue also contain advertisement for other products. Opposer admits this is true. But so what? The fact that other products are advertised as well is legally irrelevant to the issue of likelihood of confusion in the

present case. Instead, Applicant's own notice of reliance bolsters the fact of relatedness of the goods as it adds to the evidence that beer and wine are advertised through the same channels of trade.

b. Engler Testimony

Throughout its trial brief, Applicant places great weight on the testimony of Mr. Engler. Opposer opposes this testimony to the extent that Applicant intends for it to be considered "expert" testimony. Applicant completely disregarded the rules regarding expert testimony yet offers it as expert testimony regardless. Therefore this testimony can only, at best, be considered personal opinion.

Rule 2.121 requires a party who wishes to use an expert to timely disclose its planned use of its expert witnesses. To meet the burden of proper disclosure, a party planning to use experts must follow the requirements outlined in Rule 2.121(a), (d) and (e) and Federal Rule of Civil Procedure 26(a)(2) including the required disclosure of the identity of the expert. Further, according to Federal Rule 26(2)(b), before an expert witness can offer testimony, that person must provide a written summary opinion discussing the testimonial subject matter, substance of facts and opinion, basis for opinion, reports, a list of all publications authored by the witness in the preceding ten years, a record of all previous testimony including depositions for the last four years, disclosure statement, report signed by the expert, and disclosing attorney. The disclosure statement generally includes the following information regarding the expert: qualifications; scope of engagement; information relied upon in formulating opinion; summary of opinion; qualifications and publications; compensation; and signature of both expert and disclosing attorney.

At no time did Applicant identify Mr. Engler as an expert witness nor did it provide a written report. Exhibit 2, attached hereto, contains orders issued by the Board during the course

of this Opposition. The Board set the initial due date for expert disclosures as August 15, 2008. Applicant made no such disclosures. After discovery was extended, the Board reset this date to September 15, 2008. Again, Applicant made no such disclosures. Opposer filed a motion for summary judgment on December 8, 2008, well after the time for expert disclosures passed. Applicant's claim that it only became aware that channels of trade was an issue upon receiving Opposer's summary judgment motion is disingenuous.²

When the Board issued its order denying the summary judgment motion, it again reset the time periods, noting that discovery was closed, and resetting the time for pretrial disclosures. Applicant claims on page 9 of its Trial Brief that Mr. Engler was properly noted as an expert in Applicant's Pretrial Disclosures. That is not true. Applicant merely named him as a person who would provide testimony. (See Exhibit 3). No such designation was made and Applicant at no time filed a motion to allow late expert testimony.

During Mr. Engler's testimony, Opposer immediately objected to Mr. Engler as an expert and to his testimony as "expert" testimony. Opposer reiterated its objection in its trial brief. Even if Applicant decided to use his testimony later on for expert witness purposes, Applicant again did not comply with the rules regarding the late use of experts.

A party must inform the TTAB that it has satisfied its expert disclosure requirement. "The Board may []suspend proceedings to allow for discovery limited to experts" and "[t]he Office recognizes that there may be cases in which a party may not decide that it needs to present an expert witness at trial until after the deadline for expert disclosure. In such cases, disclosure must be made promptly when the expert is retained and a motion for leave to present testimony by the expert must be filed." No motion was ever filed.

² In fact, the issue was raised in the Notice of Opposition at Paragraph 6.

Moreover, Mr. Engler's own testimony negates any possible finding that he could ever be considered to be an expert witness on the subject of the relatedness of beer and wine for any purposes. He is simply not competent to offer this opinion as an expert. Whether a witness is qualified as an expert is determined by comparing the area in which the witness has alleged expertise with the subject matter of his testimony. An expert witness may be qualified through knowledge, skill, practical experience, training, education, or a combination of these factors. Minimally, the expert witness must know underlying methodology and procedures employed and relied upon as a basis for the opinion. The background knowledge includes state of art technology, literature review, and experience culminating in an opinion based upon a reasonable degree of scientific certainty.

Here, Mr. Engler's admissions clearly show his lack of competency on the subject matter at issue. He is a college drop-out who took some classes in computer science, not marketing or business.³ He opened his first liquor store as recently as May 2007.⁴ His retail store is a small business of only 1600 square feet, and only generates about half a million dollars per year in beer and wine revenues.⁵ Mr. Engler has not published anything regarding the alcoholic beverage industry, nor has he ever testified as an expert before.⁶ He stated that he was 'starting to' know about the alcoholic beverage industry.⁷ Prior to opening his store, he had never worked in the wholesale beer or wine business, nor ever worked for a brewery or a distiller.⁸ He stated that he could not speak to the 'mass of consumers' or 'what they know or don't know.'⁹ He also stated

³ See Engler Transcript, page 5, lines 16-20.

⁴ See Engler Transcript, page 22, lines 19-23.

⁵ See Engler Transcript, page 26, lines 9-21.

⁶ See Engler Transcript, page 18, lines 7-22.

⁷ See Engler Transcript, page 19, lines 1-3.

⁸ See Engler Transcript, page 19, lines 12-21.

⁹ See Engler Transcript, page 46, lines 14-15

that his opinions are merely based on his observations in his store and others.¹⁰ He stated that the Malt and Vine is a specialty store with very specific kinds of consumers.¹¹

In summary, it is quite clear that Mr. Engler does not have the educational or professional experience to be considered an expert in the alcoholic beverage industry in any regard. He has less than four years of actual experience in a very small store that has a narrow band of customers and products, he has never published expert articles on the subject of marketing or sales of liquors, and he even admitted that he was only starting to know his own industry. Mr. Engler's apparent bias toward the Applicant further emphasizes the lack of impartiality in proffering even his lay opinion in this matter.

c. Gillespie Exhibits/Testimony

Opposer maintains its objections to the Internet downloads presented as exhibits to Ms. Gillespie's testimony. TBMP 704.08 provides:

Materials that do not fall within 37 CFR § 2.122(e), that is, materials that are not self-authenticating in nature and thus not admissible by notice of reliance, may nevertheless be introduced into evidence through the testimony of a person who can clearly and properly authenticate and identify the materials, including identifying the nature, source and date of the materials. (emphasis added).

This material must be stricken as neither Ms. Gillespie nor Mr. Bowman testified as to the source or date of the downloaded material. Neither witness testified that he or she was the person who accessed this information on the Internet, neither testified to the date of the download, or where it came from. This material has not been properly authenticated, and cannot be considered for any purpose. *See Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1371 (TTAB 1998).

Opposer maintains its objections to the other exhibits as stated in its trial brief.

¹⁰ See Engler Transcript, page 33-34, lines 13-25, 1-8

¹¹ See Engler Transcript, page 40, lines 20-25.

d. Bowman Exhibits/Testimony

Opposer maintains its objections to the Internet download presented as exhibits to Mr. Bowman's testimony and to its objections based on lack of foundation.

III. STATEMENT OF ISSUES

Opposer disagrees with Applicant's statement of the issues. The only issue here is whether, under applicable law and the facts of record, a likelihood of confusion exists. Applicant incorrectly states as an issue that likelihood of confusion cannot be found because there is no evidence of actual confusion. Evidence of actual confusion is not a prerequisite for this opposition. Applicant also incorrectly states as fact that beer and wine are not related.

IV. RECITATION OF FACTS

A. FRANCISAN'S MARKS

On page 12 of its brief proper, Applicant erroneously states as a fact that "beer and wine have at their core a different target market." There is no competent evidence of record in support of this statement, and Opposer objects to the same.

Applicant states that Opposer's marks cover goods other than wine. This is true. Opposer, like Applicant, uses its mark on clothing and barware, to promote itself and its primary product wine.¹² Applicant testified that it has used and plans to use its mark and black colored raven logo on goods other than beer, specifically glassware and clothing.¹³ These are the exactly the types of goods on which Opposer also uses its mark and raven designs.¹⁴ This is further evidence that the parties use the same marketing and promotional methods.

Applicant also erroneously states as a fact that for merchandising purposes, "beer and wine are treated completely differently." There is no competent evidence of record in support of this statement as a given fact, and Opposer objects to the same.

¹² See Opposer's 1st Notice of Reliance and Opposer's Registration Nos. 3134833, 2118152 and 2118153.

¹³ See Opposer's 7th Notice of Reliance.

¹⁴ See Opposer's 1st Notice of Reliance

B. BEAUXKAT'S BACKGROUND

On page 13 of his brief proper,, Applicant states, "BeauxKat sought and obtained registration of the word mark 'BLACK RAVEN BREWING COMPANY.'" Clearly, a registration has not issued to the Applicant. This is an opposition proceeding.

III. (sic) ARGUMENT (erroneously re-labeled Section III)

Throughout its brief, Applicant puts forth arguments that reveal a fundamental misunderstanding of the body of law regarding likelihood of confusion. Applicant misstates the courts' holdings taking phrases out of context, arguing that the law requires identity between goods and/or identity between marks. If this were the case, almost all new trademark applications for marks confusingly similar to others would be granted registration for related but not identical goods. As the Board is well aware, the law does not support Applicant. "In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services." *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1244 (TTAB 2010)(emphasis added). Similarity, relatedness of goods and services, is the test, not identity. Applicant's theories would make the DuPont factors irrelevant. "In order to find that there is a likelihood of confusion, it is not necessary that the goods or services....be identical or even competitive. It is enough if there is a relationship between them such that the persons encountering them under their respective marks are likely to assume that they originate at the same source or that there is some association between their sources." *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1898 (TTAB 1989).

A. STANDARDS FOR OPPOSITION

In contradiction of Applicant's statements regarding actual confusion on pages 25-26 of its brief proper, Applicant admits that actual damage is not a standard in an opposition proceeding.

B. DuPont Factors

1. The Marks in their Entireties

Applicant states that deconstruction is not appropriate. Opposer does not argue that the Board should deconstruct or exclude elements of Applicant's mark. "[N]o feature of a mark is ignored...and appropriate weight is given to the effect of features common to both marks...More dominant features will, of course, weigh heavier in the overall impression of a mark." *In re Electrolyte Laboratories, Inc.*, 16 USPQ2d 1230, 1240 (Fed. Cir. 1990)(citing *Massey Junior College v. Fasion Institute of Technology*, 492, F.2d 1399 (CCPA 1974), *In re National Data Corp.*, 224 USPQ749, 751 (Fed. Cir. 1985) and *Giant Foods, Inc. v. National Food-Service, Inc.*, 218 USPQ 390 (Fed. Cir. 1983).

a. Deconstruction

On page 14 of Applicant's Brief proper, Applicant conjectures that deconstruction of the parties' marks is not appropriate because the parties' goods are not identical. Applicant apparently seeks to change the law, and misstates the meaning and holding in *Massey Junior College v. Fasion Institute of Technology*, 492 F.2d 1399 (CCPA 1974). While identity between the goods or services of parties may make the finding of confusion easier when comparing similar marks, identity is not required. In fact, the *Massey* Court made no such finding. Rather, it merely acknowledged that the Board had found similarity of services between the parties before it went on to compare only the dominant features of the marks. The Court found it was error to only consider the dominant features, but did NOT jump to Applicant's misplaced conclusion. Applicant again misinterprets the holding in *Century 21 Real Estate Corporation v. Century Life of America*, 23 USPQ2d 1698 (Fed. Cir. 1992). The actual holding does not require identity between goods, but merely acknowledges that for identical goods the degree of similarity required is lessened to find that confusion between marks is likely.

b. The Marks are not Identical

Obviously, the parties' marks are not identical; however, identity is not required nor ever has been. Applicant's own citing of *In re Coors Brewing*, 68 USPQ2d 1059 (Fed. Cir. 2003) proves this point. "The two *duPont* factors at issue in this appeal are (1) the similarity of the marks, and (2) the similarity of the goods and services." *Id.* at 1061-62 (emphasis added).

The Court in *Coors*, in fact, found that the two design marks at issue were similar but that the goods and services, i.e. beer and restaurant services, were not related.¹⁵ "Evaluating the similarity between a registered mark and an applicant's mark requires examination of the appearance, sound, connotation, and commercial impression of the two marks . . . Applying those criteria in this case, we conclude that the Board's determination that Coors' mark and the registered '568 mark are similar is supported by substantial evidence." *Id.* at 1062. (emphasis added) (noting that because the marks had significant differences in the design, the finding of similarity was a less important factor than the relatedness of the goods and services at issue)(citation omitted).

While comparison of marks is done in their entirety as to appearance, sound, connotation and commercial impression, *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689 (Fed. Cir. 2005) (comparing wine to champagne), it is also well settled that it is not improper to give more weight to a 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 entirety. Indeed, this type of analysis appears to be unavoidable.").

¹⁵ See *In re Opus One Inc.*, 60 USPQ2d 1812, 1814-15 (TTAB 2001)(finding confusion in a case involving restaurant services and wine, referring to the goods and services as complementary, encountered together by the same purchasers, etc.

On page 17 of its brief, Applicant states that Opposer uses a “celtic design.” Opposer objects to this characterization, as its word marks use plain fonts. On page 17, Applicant fails to deny that its raven design and logo depicts a black raven sitting on a tree branch (used in association with Applicant’s retail beer and wine store),¹⁶ or that this logo closely resembles Opposer’s registered design marks of ravens on its wines, food, and merchandise and even more so in comparison to Opposer’s raven graphic depicted sitting on a branch that it uses in its advertising. The Board should take this failure to address its own logo as an admission to the similarities.

Applicant cites *Spaulding Bakeries, Inc. v. Interstate Brands Corp*, 209 USPQ 355, 356 (TTAB 1980) for the proposition that Applicant’s black raven graphics are not equivalent legally to Opposer’s RAVENS marks, and vice versa. A raven is a raven. Applicant misstates the holding of *In re Nationwide Industries*, 6 USPQ2d 1882 (Fed. Cir. 1984) to argue that goods must be identical for the analysis to apply. That Court merely noted that because both the goods and meaning of the marks were identical a finding of likelihood of confusion was appropriate. The Court did NOT state that there must be identity of goods to find similarity in commercial impressions.

As to Mr. Bowman’s admissions that he wished to convey his mark as an established brand, his statement must be taken at face value. If consumers are purposely led to believe Applicant’s mark is an established brand, logic dictates that they would associate it with Opposer’s well-established, well-known brand.

Opposer strongly objects to Applicant’s attempts to rewrite the established body of law by stating on page 19, “It is only when marks or products are identical, not just similar, but identical,

¹⁶ See Bowman testimony, page 56, lines 6-10.

that analyses like those advanced by Franciscan are appropriate.” By this logic, every Court that has used the duPont factors has done so erroneously when identity is not present.

2. Relatedness of the Goods

Precedential case law holds that beer and wine are related goods for purposes of an opposition based on likelihood of confusion. Applicant does not distinguish or even address that the Board’s decision in *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719 (TTAB 1992) specifically holds that beer and wine are related products (finding confusion likely between “CHRISTOPHER COLUMBUS for beer and CRISTOBAL COLON for wine and finding, based upon in part on third party registrations of record that beer and wine may emanate from the same source *Id.*

a. Opposer’s statements of presumption of the law were correct.

Applicant’s claim that Opposer is not entitled to the legal presumptions for unrestricted identification of goods is again mistaken. Applicant does not deny that for purposes of this proceeding 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. Instead Applicant denies the resulting legal corollaries: (1) 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 (2) the parties’ products reach or will reach the same potential users and/or customers.

Opposer did not make these up. “Because there are no limitations as to channels of trade or classes of purchasers in either the application or the registration, it is presumed that the registration and the application encompass all of the goods of the type described in the description of goods, that the goods so identified move in all channels of trade normal for those goods, and that the products are available to all classes of purchasers for the listed products.” *In re SL&E Training Stable Inc.*, 88 USPQ2d 1216, 1218 (TTAB 2008) (emphasis added). Applicant’s interpretation of the phrase consumer of “such goods” means only its beer, rather than related

goods at issue, is unsupported and incorrect. There is in fact a presumption of a crossover by law under these facts.

b. Markets

Opposer objects to Applicant's reliance on Mr. Engler's testimony to the extent that Applicant intends for it to provide expert testimony as to the marketing and types of consumers of beer and wine. Applicant claims that Engler's experience is "ideal." (page 20 of Applicant's brief). Not only does Mr. Engler not qualify as an expert (ideal or otherwise), but his own testimony and the case law negate Applicant's arguments that beer and wine are marketed differently and attract wholly separate consumers and that a person is either a "wine guy" or a "beer guy."

Mr. Engler testified that beer and wine use the same distributors,¹⁷ and can be transported together by distributors.¹⁸ Mr. Engler testified that he was aware of some boutique wineries that manufacture and sell beer.¹⁹ Mr. Engler testified that when he entertains, he serves beer, wine, hard spirits and soft drinks.²⁰ Mr. Engler testified that his own customers purchase both beer and wine together.²¹ Mr. Engler testified that he himself consumes both beer and wine.²² Mr. Engler has no background for an expert opinion that these goods are marketed differently. Just because he places them in different areas of his own store, does NOT prove that they are marketed differently or to different consumers. The case law stands for the opposite.

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." *Schieffelin & Co.*

¹⁷ See Engler Testimony, page 13, Line 3-8.

¹⁸ See Engler Testimony, page 13, Line 12-18.

¹⁹ See Engler Testimony, page 14, lines 5-10.

²⁰ See Engler Testimony, page 24, lines 3-6.

²¹ See Engler Testimony, page 35, lines 18-21.

²² See Engler Testimony, page 36, lines 12-13.

v. Molson Companies, Ltd., 9 USPQ2d 2069, 2073 (TTAB 1989). “[T]he case law recognizes that purchasers of wine are not per se sophisticated purchasers who exercise great care in making their purchasing decisions.” *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Masison Fondée En 1772*, 73 USPQ2d 1689, 1695 (Fed. Cir. 2005).

Applicant admits that beer and wine are sold together, distributed together, and consumed together. Thus, beer and wine are the type of highly related products that are encountered by the same customers in stores and restaurants and in private settings. This factor must be found in favor of Opposer.

c. Actual markets

“It is not necessary to show actual confusion in order to establish likelihood of confusion.” See *Weiss Associates Inc. v. HRL Associates Inc.*, 223 USPQ 1025 (Fed. Cir. 1990). As Applicant identification of its goods is unrestricted, Applicant’s attempts to distinguish its limited market based upon a restricted and limited presentation of its goods is irrelevant.

d. Applicant admits that beer and wine are related goods.

Applicant acknowledges that case law holds that beer and wine are related products. Its arguments that the Board go beyond the unlimited and unrestricted recitation of goods in the application in issue is pointless and bad law. The goods are legally related for trademark purposes. Applicant has cited no case finding that beer and wine are not to be considered related goods for purposes of a trademark opposition for similar marks. Applicant misstates the holding of *In re Coors Brewing Co.*, 343 F. 3d 1340, 68 USPQ 1059 (2003), stating that the court found that beer and wine are not related, and that the only factor for consideration is whether or not the goods at issue herein are similar or dissimilar. Rather, the Court in *Coors* stated in dicta only that beer and wine are unrelated.

Moreover, the Board later affirmed the relationship between beer and wine in the unpublished opinion in *In re Savia Rose Winery, LLC*, 2006 TTAB LEXIS 319 (TTAB 2006). In that matter, the Board held that a likelihood of confusion existed between applicant's mark BIG SKY CUVÉE for wines and the registered mark BIG SKY BREWING COMPANY for beer. *Id.* at *15. The Board disagreed with applicant's argument that the *Sailerbrau* holding was outdated in light of the Board's decision in *Coors*. The Board stated that the *Sailerbrau* precedent was not diminished by the fact that the Federal Circuit in its decision in *Coors* stated in dicta that beer and wine are unrelated. *Id.* "Indeed, precedential authority of the Board specifically holds that beer and wine are related products." *Id.* (citing *In re Sailerbrau Franz Sailer*). Further, in the Board's recent decision in *In re E. & J. Gallo Winery*, Serial No. 77458162 (August 13, 2009) (not precedential because it did not change case law) the Board recently reaffirmed that beer and wine are related goods.

3. Channels of Trade

Applicant does not dispute that 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, but only the legal presumptions that therefore apply. "The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed." *Octocom Systems Inc. v. Houston Computers Services Inc.*, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)(emphasis added). "[T]he legal effect of [unrestricted identifications of related goods] is that the goods and channels of trade are to be considered the same for the purposes of [an] opposition." *International Paper Company v. Valley Paper Company*, 175 USPQ 704, 705 (C.C.P.A. 1972).

Applicant states on page 24, that under the case law for related goods, “every item sold in a supermarket could potentially be subject to trademark cancellation on the basis of likelihood of confusion.” Applicant is correct that confusingly similar marks for related goods sold in grocery stores are vulnerable.

Opposer’s evidence of third-party registrations support the conclusion that the goods at issue share the same channels of trade and are goods that consumers would conclude emanate from a single source. “Third party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source.” *In re Mucky Duck Mustard Co.*, 6 USPQ3d 1467, 1470 n. 6 (TTAB 1988).

Applicant’s statement, “[T]he goods share locations of sale and distribution channels is not at issue” is accurate. Opposer requests that the Board take judicial notice of this admission. Hence this duPont factor must be judged on the side of Opposer.

4. Fame of Opposer’s marks

Applicant cites no case law to support its argument that the reknown of Opposer’s Marks is irrelevant because the parties’ marks and goods are not identical. That is because the case law does not apply only to identical marks and goods. Instead, case law holds that where one mark is widely known and even famous, consumers will be more likely to be confused when confronted with differing products bearing similar names to that of a registrant, and will be likely to conclude that these goods are used or authorized by the registrant. *See UMG Recordings Inc. v. O’Rourke*, 92 USPQ2d 1042, 1050 (TTAB 2009).

Applicant's comparison of Opposer's wine to Yellowtail for degree of fame is unsubstantiated. On the other hand, contrary to Applicant's claim, Opposer did submit evidence of the fame of its marks (see Opposer's stipulated sales figures and Nexis articles).²³ See *Miles Laboratories Inc. v. Naturally Vitamin Supplements Inc.*, 1 USPQ2d 1445, 1453 (TTAB 1986) (finding a mark to be famous based on evidence of record of opposer's extensive advertising, promotion and sale of its ONE A DAY products for almost forty-five years which established a well-documented record that the mark was extremely well known). Opposer's evidence of record establishes that its marks are very well known, if not famous.

Moreover, Applicant's own so-called 'expert' witness, Mr. Engler, admitted that Opposer's wines enjoyed with a "substantial reputation" and are "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."²⁴ Notably, Applicant did not address these statements in its brief.

The fame of an opposer's mark plays a "dominant role in the process of balancing the DuPont factors," *Recot Inc. v. Becton*, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000) and "[f]amous marks thus enjoy a wide latitude of legal protection." *Id.* This is true because famous marks are more likely to be remembered and associated in the public mind than a weaker mark, and are thus more attractive as targets for would-be copyists. *Id.* Indeed, "[a] strong mark ... casts a long shadow which competitors must avoid." *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

5. Similar Marks

On page 25 of Applicant's Brief proper, Applicant states that there are third party uses of forms of the word RAVEN in association with alcohols. There is no evidentiary basis of record to support this statement and Opposer objects to it. This statement should be given no consideration.

²³ See Opposer's 5th and 8th Notices of Reliance.

²⁴ See Testimony of Doug Engler, page 48, lines 8-19.

6. No evidence of actual confusion

Actual confusion is not an issue here. On pages 15-16 of its brief, Applicant admits that none of its currently sold beers would be referred to as a BLACK RAVEN beer as none of them are labeled that way. On page 25, Applicant states that no beer is named BLACK RAVEN BREWING COMPANY, but then inexplicably states that the mark is used on beer. Under these facts, actual confusion could not yet have occurred, there being no opportunity for the same.

7. De minimus confusion

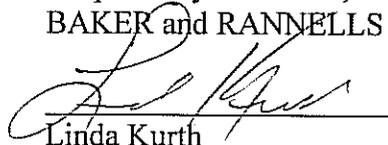
On page 26 of its brief, Applicant states, "...eventually...if BeauxKat should ever sell its beer in restaurants where Ravenswood is sold, a customer might see both and wonder if they come from the same place." Opposer agrees. It should be noted in this regard that Mr. Bowman admitted that he already sells his own beer and ale to restaurants that sell and service both beer and wine.²⁵ This is a perfect example of one kind of customer that is likely to be confused.

III. CONCLUSION

The Board can only conclude, based upon the evidence of record and Applicant's statements, that there is a likelihood of confusion. "[A]ny 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). For the foregoing reasons, the opposition should be granted and registration refused to the Applicant.

March 15, 2010

Respectfully submitted,
BAKER and RANNELLS PA



Linda Kurth

John M. Rannells
Attorneys for Opposer
575 Route 28 / Suite 102
Raritan, New Jersey 08869
(908) 722-5640

²⁵ See Bowman Testimony, Pages 63-66.

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Opposer's TRIAL REPLY BRIEF in re Franciscan Vineyards, Inc. v. Beauxkat Enterprises, LLC, was served on counsel for Applicant, this 15th day of March, 2010, 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: March 15, 2010

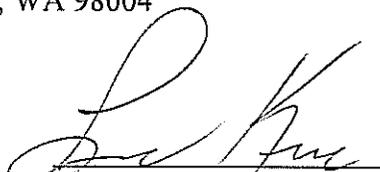

Linda Kurth

EXHIBIT 1

Franciscan Vineyards, Inc. v. BeauxKat Enterprises, LLC

Opposition Number 91181755

Reg. No.	Mark	Goods	Section	Status
3396347	UNCLE SAM	Beer and Wine	1(A)	Live
3224004	DR LOOSEN BLUE SLATE	Beer and Wine	1(A)	Live
3099373	SCHILLINGBRIDGE	Beer and Wine	1(A)	Live
3057119	Q logo	Beer and Wine	1(A)	Live
3057118	Q and other characters Logo	Beer and Wine	1(A)	Live
3115035	PRIMER	Beer and Wine	1(A)	Live
2911802	OCHAKOVO	Beer and Wine	1(A)	Live
2978316	SCROOGE & MARLEY GIFTS, GOODS AND PROVISIONS	Beer and Wine	1(A)	Live
3237848	AFA AUTHENTIC FOOD ARTISAN And design	Beer and Wine	1(A)	Live
3522339	WORK TRUCK	Beer and Wine	1(A)	Live
3457878	CLAIRE DE FRANCE FRENCH DELIGHTS And design	Beer and Wine	1(A)	Live
3456841	DEFENDERS OF FREEDOM CHOICE	Beer and Wine	1(A)	Live
3064034	AFA	Beer and Wine	1(A)	Live
2963588	TYMBARK	Beer and Wine	1(A) & 44(e)	Live
2764973	FORNI & FATTORIE And design	Beer and Wine	1(A)	Live
2776133	ESPERYA and design	Beer and Wine	1(A)	Live

2595289	TTL and design	Beer and Wine	1(A)	Live
2341577	QUEEN MARY	Beer and Wine	1(A)	Live
2789035	DO & CO fanciful	Beer and Wine	1(A)	Live
2219064	Kicking mule logo	Beer and Wine	1(A)	Live
2162683	CYBAR	Beer and Wine	1(A)	Canc. §8
2304424	BIOLUME	Beer and Wine	1(A)	Live
1995010	ALL SAINTS	Beer and Wine	1(A)	Canc. §8
1890019	SUTTON PLACE GOURMET and design	Beer and Wine	1(A)	Canc. §8
1861111	SELECT SONOMA COUNTY and design	Beer and Wine	1(A)	Canc. §8
1736692	EDGEFIELD	Beer and Wine	1(A)	Live
1804984	I and glass design	Beer and Wine	1(A)	Live
1553878	SPORTSERVICE	Beer and Wine	1(A)	Live
1286155	HONG MEI and design	Beer and Wine	1(A)	Live

EXHIBIT 2

Franciscan Vineyards, Inc. v. BeauxKat Enterprises, LLC

Opposition Number 91181755

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

Mailed: January 8, 2008

Opposition No. 91181755
Serial No. 77223446

BEAUXKAT ENTERPRISES LLC

4605 167TH CT NE
REDMOND, WA 98052-5401
beaux@blackravenbrewing.com

Franciscan Vineyards

v.

BeauxKat Enterprises LLC

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575 Route 28, Suite 102
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ESTTA185162

A notice of opposition to the registration sought by the above-identified application has been filed. A service copy of the notice of opposition was forwarded to applicant (defendant) by the opposer (plaintiff). An electronic version of the notice of opposition is viewable in the electronic file for this proceeding via the Board's TTABVUE system: <http://ttabvue.uspto.gov/ttabvue/v?qs=91181755>.

Proceedings will be conducted in accordance with the Trademark Rules of Practice, set forth in Title 37, part 2, of the Code of Federal Regulations ("Trademark Rules"). These rules may be viewed at the USPTO's trademarks page: <http://www.uspto.gov/main/trademarks.htm>. The Board's main webpage (<http://www.uspto.gov/web/offices/dcom/ttab/>) includes information on amendments to the Trademark Rules applicable to Board proceedings, on Alternative Dispute Resolution (ADR), Frequently Asked Questions about Board proceedings, and a web link to the Board's manual of procedure (the TBMP).

Plaintiff must notify the Board when service has been ineffective, within 10 days of the date of receipt of a returned service copy or the date on which plaintiff learns that service has been ineffective. Plaintiff has no subsequent duty to investigate the defendant's

whereabouts, but if plaintiff by its own voluntary investigation or through any other means discovers a newer correspondence address for the defendant, then such address must be provided to the Board. Likewise, if by voluntary investigation or other means the plaintiff discovers information indicating that a different party may have an interest in defending the case, such information must be provided to the Board. The Board will then effect service, by publication in the Official Gazette if necessary. See Trademark Rule 2.118. In circumstances involving ineffective service or return of defendant's copy of the Board's institution order, the Board may issue an order noting the proper defendant and address to be used for serving that party.

Defendant's ANSWER IS DUE FORTY DAYS after the mailing date of this order. (See Patent and Trademark Rule 1.7 for expiration of this or any deadline falling on a Saturday, Sunday or federal holiday.) Other deadlines the parties must docket or calendar are either set forth below (if you are reading a mailed paper copy of this order) or are included in the electronic copy of this institution order viewable in the Board's TTABVue system at the following web address:
<http://ttabvue.uspto.gov/ttabvue/>.

Defendant's answer and any other filing made by any party must include proof of service. See Trademark Rule 2.119. If they agree to, the parties may utilize electronic means, e.g., e-mail or fax, during the proceeding for forwarding of service copies. See Trademark Rule 2.119(b) (6).

The parties also are referred in particular to Trademark Rule 2.126, which pertains to the form of submissions. Paper submissions, including but not limited to exhibits and transcripts of depositions, not filed in accordance with Trademark Rule 2.126 may not be given consideration or entered into the case file.

Time to Answer	2/17/2008
Deadline for Discovery Conference	3/18/2008
Discovery Opens	3/18/2008
Initial Disclosures Due	4/17/2008
Expert Disclosures Due	8/15/2008
Discovery Closes	9/14/2008
Plaintiff's Pretrial Disclosures	10/29/2008
Plaintiff's 30-day Trial Period Ends	12/13/2008
Defendant's Pretrial Disclosures	12/28/2008
Defendant's 30-day Trial Period Ends	2/11/2009
Plaintiff's Rebuttal Disclosures	2/26/2009
Plaintiff's 15-day Rebuttal Period Ends	3/28/2009

As noted in the schedule of dates for this case, the parties are required to have a conference to discuss: (1) the nature of and basis for their respective claims and defenses, (2) the possibility of

ESTTA Tracking number: **ESTTA236642**

Filing date: **09/15/2008**

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

Proceeding.	91181755
Applicant	Plaintiff Franciscan Vineyards
Other Party	Defendant BeauxKat Enterprises LLC

Motion for an Extension of Answer or Discovery or Trial Periods With Consent

The Close of Discovery is currently set to close on 09/15/2008. Franciscan Vineyards requests that such date be extended for 30 days, or until 10/15/2008, and that all subsequent dates be reset accordingly.

Time to Answer :	CLOSED
Deadline for Discovery Conference :	CLOSED
Discovery Opens :	CLOSED
Initial Disclosures Due :	CLOSED
Expert Disclosure Due :	09/15/2008
Discovery Closes :	10/15/2008
Plaintiff's Pretrial Disclosures :	11/29/2008
Plaintiff's 30-day Trial Period Ends :	01/13/2009
Defendant's Pretrial Disclosures :	01/28/2009
Defendant's 30-day Trial Period Ends :	03/14/2009
Plaintiff's Rebuttal Disclosures :	03/29/2009
Plaintiff's 15-day Rebuttal Period Ends :	04/28/2009

The grounds for this request are as follows:

- *Parties are unable to complete discovery/testimony during assigned period*
- *Pend*

Franciscan Vineyards has secured the express consent of all other parties to this proceeding for the extension and resetting of dates requested herein.

Franciscan Vineyards has provided an e-mail address herewith for itself and for the opposing party so that any order on this motion may be issued electronically by the Board.

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Respectfully submitted,
/Stephen L. Baker/
Stephen L. Baker
officeactions@br-tmlaw.com,k.hnasko@br-tmlaw.com
jpark@rpwfirm.com
09/15/2008

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

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

DUNN

Mailed:

Opposition No. 91181755

Franciscan Vineyards

v.

BeauxKat Enterprises LLC

Before Zervas, Cataldo, and Bergsman, Administrative
Trademark Judges:

By the Board:

This case comes up on opposer's motion, filed December 4, 2008, for summary judgment. The motion has been fully briefed.

Franciscan Vineyards opposes registration of applicant's mark BLACK RAVEN BREWING COMPANY (BREWING COMPANY disclaimed) for beer, the subject of Trademark Act Section 1(b) Application Serial No. 77223446, on the ground of priority and likelihood of confusion with opposer's pleaded registrations for the marks RAGIN RAVEN for wine and sauces (Registration Nos. 3336587 and 3153731), RAVENS for wine and clothing (Registration Nos. 2888963 and 3134833), RAVENSWOOD for clothing, wine, and sauces (Registration Nos.

Opposition No. 91181755

2118152, 2132719, and 3457923) and a stylized raven design for wine (Registration No. 2130653). Applicant filed an answer denying the salient allegations of the complaint.

Inasmuch as opposer introduced with its motion for summary judgment copies of its pleaded registrations showing that such registrations are valid, subsisting, and owned by opposer, for purposes of this motion for summary judgment, priority is not in issue. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). However, with respect to likelihood of confusion, the parties take conflicting positions, and each submits, among other evidence, affidavits supporting opposing views on the differences between beer and wine, and the channels of trade for those goods.

The party bringing a motion for summary judgment bears the burden of showing the absence of any genuine issue of material fact, and that it is entitled to judgment as a matter of law. See Fed. R. Civ. Pro. 56(c); and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). In assessing each motion, the evidence must be viewed in a light favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. See *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993).

Upon careful consideration of the arguments and evidence presented by the parties, and resolving all reasonable inferences in the non-movant's favor, the Board finds that opposer has failed to carry its burden of establishing that it is entitled to judgment as a matter of law. At a minimum, opposer has failed to demonstrate the absence of a genuine issue of material fact as to the similarity of the marks, the similarity of the goods, and the similarity of the channels of trade for the parties' respective goods.

In view thereof, opposer's motion for summary judgment is denied.¹

Proceedings herein are resumed, and dates reset below.

Discovery Closes	CLOSED
Plaintiff's Pretrial Disclosures	4/21/09
Plaintiff's 30-day Trial Period Ends	6/5/09
Defendant's Pretrial Disclosures	6/20/09
Defendant's 30-day Trial Period Ends	8/4/09
Plaintiff's Rebuttal Disclosures	8/19/09
Plaintiff's 15-day Rebuttal Period Ends	9/18/09

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served

¹ Although we have only mentioned a few genuine issues of material fact in this decision, that is not to say that there are not other factual issues that may be disputed.

The parties should note that evidence submitted in support of or in opposition to a motion for summary judgment is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced in evidence during the appropriate trial period. See *Levi Strauss & Co. v. R. Joseph Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993).

Opposition No. 91181755

on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

EXHIBIT 3

Franciscan Vineyards, Inc. v. BeauxKat Enterprises, LLC

Opposition Number 91181755

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 PRETRIAL DISCLOSURES

Applicant, BEAUXKAT ENTERPRISES, LLC ("Beauxkat"), by and through its attorneys Romero Park & Wiggins, P.S., hereby makes its Pretrial Disclosures as required by Trademark Rule §2.121 and Fed. R. Civ. P. 26(a)(3):

GENERAL MATTERS

By identifying certain individuals and categories of documents, Beauxkat does not waive or intend to waive, but on the contrary preserves and intends to preserve, all information and documents that are subject to the attorney-client privilege, the work product doctrine and any other privilege available under federal or state statutory, constitutional or common law.

PRETRIAL DISCLOSURES

Per F. R. Civ. P. 26(a)(3)(A)(i):

The name, address and telephone number of each witness:

Robert "Beaux" Bowman
c/o Romero Park & Wiggins, P.S.
155 108th Ave NE, Suite 202
Bellevue, WA 98004
(425) 450-5000

Kathryn Gillespie
c/o Romero Park & Wiggins, P.S.
155 108th Ave NE, Suite 202
Bellevue, WA 98004
(425) 450-5000

Doug Engler
Malt & Vine
16851 Redmond Way
Redmond, WA 98052
(425) 881-6461

Subjects on which witnesses are expected to testify:

The strength, history and use of Applicant's mark; Applicant's products and use thereof; the nature of the market and consumers of beer and wine; the relative strengths of the marks of Opposer and Applicant.

Types of documents which may be introduced as Exhibits during witness testimony and/or at trial:

1. Photographic images depicting Applicant's use of its Marks on products.
2. Documents evidencing Applicant's promotion and sale of its products.
3. Photographic images (or samples) of Applicant's products and the presentation of same.
4. Examples of advertising by third parties.
5. Copies of web pages and industry publications that mention or do not mention Opposer's products.
6. Discovery materials produced by Opposer.

DATED this 19th day of June, 2009.

ROMERO PARK & WIGGINS P.S.

/s/Justin D. Park/
Justin D. Park, WSBA #28340
155 – 108th Avenue NE, Suite 202
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