

ESTTA Tracking number: **ESTTA482926**

Filing date: **07/11/2012**

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

Proceeding	91201070
Party	Defendant Matthew Harnden and Roger Scommegna
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Date	07/11/2012
Attachments	Reply Brief FINAL PDFILL.pdf (11 pages)(3451805 bytes) Trey White Aff Chart.pdf (10 pages)(120745 bytes) 2d Scommegna Dec FINAL ADOBE.pdf (6 pages)(1946046 bytes)

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

PROCEEDING NO. 91201070

Anderson Valley Acquisition Company, LLC

v.

Matthew Harnden and Roger Scommegna

Serial No. 85178395

Mark: BOONVILLE CIDER HOUSE BITE HARD CIDER

**APPLICANTS' REPLY TO OPPOSER'S OPPOSITION TO APPLICANT'S MOTION FOR
SUMMARY JUDGMENT**

As set forth in Applicants' Motion for Summary Judgment, the commercial impression of the two marks in issue is so radically different; it precludes a likelihood of confusion. The only term in common between the two marks is the word "Boonville", a geographically descriptive term that identifies the location where both parties manufacture their products and a term that both parties disclaimed during the prosecution of their respective applications.

BOONVILLE CIDER HOUSE BITE HARD CIDER

v.



The radical differences in commercial impression remain, even when Opposer's registered mark is used in word form, without any significant stylization.

Ignoring the fact that the two marks bear no overall similarity, Opposer spends the vast majority of its brief trying to prove that it has acquired secondary meaning in the term "Boonville." However,

Opposer's claim is not supported by competent evidence and thus, it cannot establish any rights in the term. Moreover, even if it could establish such rights, the vast distinctions between the two marks' commercial impressions warrants summary judgment denying the Opposition. TBMP 528.01 (“[A] dispute over a fact that would not alter the Board’s decision on the legal issue will not prevent entry of summary judgment.”) citing *Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) (single du Pont factor of dissimilarity of marks outweighed all others such that other factors, even if decided in nonmovant's favor, would not be material because they would not change the result).

I. OPPOSER CANNOT ESTABLISH SECONDARY MEANING IN THE TERM “BOONVILLE”

In order to establish secondary meaning, Opposer must show that a substantial segment of the consuming public recognizes that the primary significance of the asserted mark is to identify the source of Opposer’s beer. *Coach Leatherware Co., Inc. v. Ann Taylor, Inc.*, 933 F.2d 162, 168 (2d Cir. 1991). The Board looks to evidence of “copying, advertising expenditures, sales success, length and exclusivity of use, unsolicited media coverage, and consumer studies (linking the name to a source).” *In re Steelbuilding.com*, 415 F.3d 1293, 1300 (Fed. Cir. 2005). In the present case, Opposer offers no evidence of unsolicited media coverage nor consumer studies linking the name to a source. Nor does it make any effort to discount Applicants’ evidence of third party use of “Boonville.” Thus, the only evidence that Opposer attempts to offer is evidence of copying,¹ advertising expenditures, sales success and length of use. And when that “evidence” is examined closely, it is clear that Opposer has virtually no competent evidence of secondary meaning.

A. Opposer Cannot Establish Long and Continuous Use of Boonville as a Trademark

Opposer, relying on the affidavit of its president and owner, Trey White, claims that it has used “Boonville” as a mark since 1987. However, Mr. White is not competent to make such a claim. Mr. White’s only became the owner of Opposer in 2010, although that fact is curiously absent from his

¹ As evidence of copying, Opposer impermissibly points to a single example of Applicants’ proposed use of a similar mark. It does not point to the application in issue thus rendering its “evidence” meaningless.

affidavit. *See* ¶2 of the Second Declaration of Roger Scommegna, hereto.² Perhaps that is why his affidavit states only that, “I have reviewed the records of Anderson Valley and otherwise have knowledge of the relevant facts and statements contained herein.” White Aff. ¶1. Mr. White does *not* state that he makes the statements in his affidavit based on his own personal knowledge.

Virtually every “fact” proffered by Opposer to support its claim to rights in the term “Boonville” derives its sole support from Mr. White’s affidavit. And, virtually every such “fact” has its roots in events that occurred before 2010. In other words, absent some other support, Mr. White cannot provide the necessary evidentiary foundation to permit the Board to accept such facts so as to establish a “genuine issue of material fact.” *See, e.g., Coach Services, Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1380-81 (Fed. Cir. 2012)(affirming the TTAB’s decision to exclude the testimony of Applicant’s Vice President of Marketing with respect to matters prior to her beginning work with the company). Even when Mr. White points to documents that conceivably could have come from the company’s corporate records, no foundation of any kind is laid to establish that the documents are indeed corporate records maintained in the ordinary course of business. *See id.* (excluding the admission of catalogs identified by the witness that were from a time period before the witness was employed by the party, because they were not established as being business records of the party). A point-by-point analysis of the evidentiary deficiencies of the “facts” set forth in Mr. White’s affidavit is attached hereto as Exhibit B.

Even if the Board were to accept Mr. White’s alleged facts, Opposer does not proffer a single example of Opposer’s use of “Boonville” alone as a trademark. Indeed, Opposer does not point to any instance where it used “Boonville” alone as a mark. Rather, Opposer conflates its descriptive and other uses of “Boonville” in connection with other terms, (e.g., *Boonville Beer*, *Boonville Beer Festival*, and *The Legendary Boonville Beer*), as use of Boonville as a trademark. *See e.g.,* White Aff. ¶4 (“Among these efforts to associate BOONVILLE with Anderson Valley, on December 26, 1987, Anderson Valley

² Opposer’s own web site, a page of which is attached to the 2d Scommegna Decl. as Ex. A, states that Mr. White only became a part of the company in 2010.

began to use the mark THE LEGENDARY BOONVILLE BEER ANDERSON VALLEY BREWING CO. in connection with its beer products, including on labels on bottles, cans, and packaging.”).

Further, while Opposer claims and attempts to show use of the standalone phrase, “Boonville Beer” as a trademark in connection with beer, it can point to only three instances where that term is even used – one by a party seeking a product donation, one in a third party board game,³ and one in connection with brewpub and restaurant services. It does not point to a single such use in connection with the sale or offer for sale of its beer products.

Opposer also seeks to bootstrap its purported use of “Boonville Beer Festival” into rights in “Boonville” in connection with beer. However, there are several problems with that effort. First, in each of the only three examples of such use provided by Opposer, the use is actually “The 8th [12th, 13th] Annual Legendary Boonville Beer Festival,” not “Boonville Beer Festival.” *See* Exs. C, F, and H to the White Aff. Second, the event is a festival. In other words, Opposer is using the term in connection with festival services, not beer. Third, the event features myriad brewers who, at least according to the example in Ex. C to the White Aff., are also portrayed as hosts of the event. In other words, Opposer is not even identifying itself as the sole source of the event. Fourth, the use of “Boonville” in the manner identified is consistent with descriptive use of the term “Boonville.” As can be seen in the various “Milwaukee” and “Alexandria” examples submitted with the Second Declaration of Adam Brookman, the use of the city name in which a festival is located to identify the festival is a common practice that should garner the user no exclusive rights in the name of the city. *See* Brookman Decl. ¶2 and Exhibit A, thereto. Finally, even accepting the numbers of attendees claimed by Mr. White (without any substantiation or actual numbers), the amount is so small, no meaningful rights in the descriptive term “Boonville” could be acquired.⁴

³ While the game piece proffered by Opposer does show use of “Boonville Beer”, it also includes a prominent descriptive use of “Boonville,” “Located in the rural town of Boonville, California”

⁴ The festival has occurred each year since 1997, so even using the maximum number of attendees alleged for 2012 (5000 attendees), only a mere 80,000 attendees (5000 attendees per year times 16 years) could be counted. Given

B. Opposer Cannot Demonstrate Sales Success Under the Mark

Opposer, via Mr. White’s affidavit, claims revenue in excess of \$87 million from “sales of goods under or in association with the mark THE LEGENDARY BOONVILLE BEER.” White Aff. ¶ 11. Wholly apart from Mr. White’s lack of personal knowledge of this information and lack of reference to or any foundation laid for any business records to support this claim, the choice of words is telling. In particular, Opposer refers generically to “goods”; not “beer”. This is undoubtedly because Opposer sells a host of other, non-beer products. See Brookman Dec. ¶3, and Ex. B thereto. Still further, this number is highly suspect since, as shown in the photographs below which were taken from Opposer’s website, a number of Opposer’s beer products do not bear “THE LEGENDARY BOONVILLE BEER” logo. See Brookman Dec. ¶4.



that many of those were undoubtedly repeat attendees, and the fact that the numbers were clearly smaller than 5000 in the earlier years (1000 attendees in the first year) the actual number of unique attendee impressions is far less.

Still further, revenue numbers alone cannot establish secondary meaning. Sales figures show only the popularity of Opposer's product, not that the relevant customers of such products (consumers seeking beer) have come to view the term "Boonville" as Opposer's source-identifying mark. *See, In re Candy Bouquet International, Inc.*, 73 USPQ2d 1883, 1889 (TTAB 2004).

C. Opposer Cannot Show Advertising Expenditures in Support of the Mark

Opposer, again via Mr. White, claims to have spent in excess of \$7 million dollars in "advertising and promoting its goods under THE LEGENDARY BOONVILLE BEER." But once again, Mr. White has no personal knowledge of this information nor does he point to any business records to back up this claim. Moreover, this is not advertising in support of "Boonville" alone as a trademark. Even if it were, as the Board has noted many times, advertising figures alone do not establish any association by the public with the mark. *See e.g., In re Semel*, 189 USPQ 285, 287 (TTAB 1975)("in evaluating the significance of advertising figures ..., it is necessary to consider not only the extent of advertising but also whether the use of the designation therein has been of such nature as to create in the minds of the purchasing public an association of the designation with the user and/or his goods."); *see also Target Brands, Inc. v. Hughes*, 85 USPQ2d 1676 (TTAB 2007)(noting that the mere expenditure of substantial sums of money to promote a product under a designation only suggests an effort to acquire distinctiveness, not that the efforts have borne fruit). Opposer's six pictures of portions of beer bottles and some six pack cartons, three Boonville Beer Festival advertisements, three other ads, and the unsupported claims of Mr. White are hardly the kind of proof of meaningful advertising necessary to establish the public's association of Boonville with Opposer's beer products.

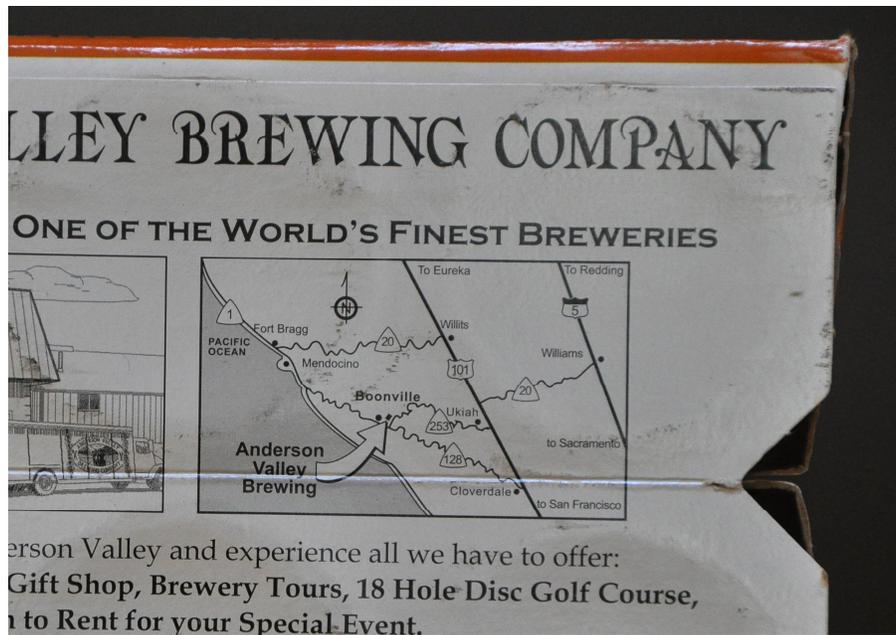
D. Opposer's Own Descriptive Uses of the Mark Demonstrate the Lack of Secondary Meaning

Opposer's own prominent and frequent descriptive uses of "Boonville" cut strongly against its claims of secondary meaning. *See, e.g., In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1112 (Fed. Cir. 1987)(noting that the applicant's own descriptive uses of the mark were the most damaging to its claim that the public would perceive the term as a trademark). Indeed, when viewing Opposer's

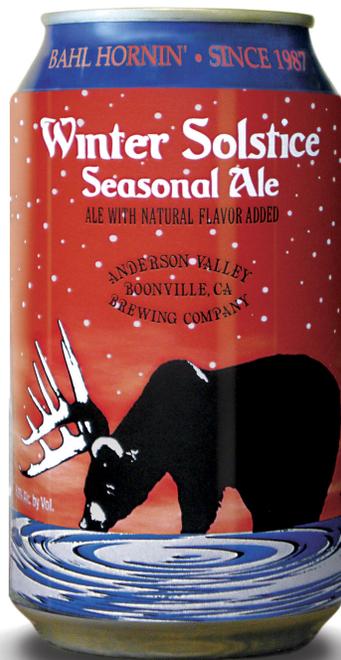
products, consumers are frequently presented with “Boonville” in large letters, adjacent the terms “California” and/or “Mendocino County.” See First Declaration of Roger Scommegna and Exs. B2, B4 and B5 to the White Aff,⁵ and Second Declaration of Roger Scommegna, ¶3 and Exhibit B thereto. There are also often descriptive uses on the side of the front label of Opposer’s beer bottles as well as further descriptive uses on the back label, and the carrying container. See 2d Scommegna Dec. ¶4 and Exhibit C thereto.



⁵ It is likely that Exhibits B1 and B3 to the White Aff. show similar descriptive uses of the mark consistent with those uses shown in the First Scommegna Decl. for those same beer labels. However, Opposer’s submissions are so unclear, the additional descriptive language is obscured.



Even Opposer's cans of beer have prominent descriptive uses of Boonville.



With all these descriptive uses of "Boonville" consumers can only be left with the firm impression that all references to "Boonville" are intended to identify the town of Boonville, California. In other words, "The

Legendary Boonville Beer” conveys the clear impression to a consumer that it is a beer that originates from Boonville, California. Nothing Opposer offers to the public serves to alter that impression.

As a side note, in its Opposition Brief, Opposer questions the authenticity of the photographs of its own goods that are part of Mr. Scommegna’s first declaration stating,

To support his allegation, a series of photographs of Opposer's beer products are attached as Exhibit B to the Declaration. Curiously, none of the photographs accurately depict Opposer's beer products, but instead deceptively obscure Opposer's use of the mark THE LEGENDARY BOONVILLE BEER. The images attached to the Declaration of Scommegna are in direct contrast to those attached to the Affidavit of Trey White, as Exhibits BI-B6.

Opposition Brief at 8. This is a serious charge and, as indicated in the accompanying declaration of Mr. Scommegna is blatantly false. As a careful reading of Applicants’ brief makes clear, Applicants NEVER stated that Opposer’s products do not bear the mark. Rather, Applicants simply point out that Opposer uses “Boonville” on its cans and labels to “prominently and descriptively identify the place where it brews its beer.” The various pictures do not show the entire bottle simply to make it easier for the Board to read the descriptive uses of “Boonville” by Opposer. As can be seen in the new photographs accompanying the Second Scommegna Declaration, the labeling shown in the photographs accompanying the First Scommegna Declaration are present in combination with the stylized logo form of “The Legendary Boonville Beer.”

The images that Opposer points to, provided by Trey White, all show some of the same descriptive uses of Boonville. However, not surprisingly, none of Mr. White’s pictures show the rear labels, carrier side panels, carrier bottom, and small vertical printing that have further descriptive uses of Boonville presented by Applicants via Mr. Scommegna’s declarations. And while Opposer questions Mr. Scommegna’s pictures in its brief, Mr. White does not, anywhere in his affidavit, deny the authenticity and accuracy of Applicants’ photographs nor that the company uses “Boonville” descriptively.

II. CONCLUSION

As set forth in detail above, Opposer cannot demonstrate that it has secondary meaning in the term “Boonville.” First, Opposer has not used “Boonville” alone as a trademark. Second, Opposer’s frequent and prominent descriptive uses of “Boonville” clearly show that the public does not perceive the

term as a trademark. Finally, Opposer has failed to come forward with competent evidence of the various factors necessary to establish secondary meaning. Thus, there is no genuine issue of material fact with respect to Opposer's claim of secondary meaning.

Even if Opposer were able to establish secondary meaning in the term "Boonville", the commercial impressions presented by Applicants' mark and Opposer's mark are radically different. In other words, there is no likelihood of confusion between the two marks. Without any likelihood of confusion, there is no genuine issue of material fact. Accordingly, Applicants' Motion for Summary Judgment should be granted.

Respectfully Submitted,

Dated: July 11, 2012

By: /Adam L. Brookman/
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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing **APPLICANTS' REPLY TO OPPOSER'S OPPOSITION TO APPLICANTS' MOTION FOR SUMMARY JUDGMENT** was served in the manner indicated to the person indicated on the date indicated:

VIA FIRST CLASS U.S. MAIL

Thomas R. Leavens
Leavens, Strand, Glover & Adler, LLC
203 N. LaSalle Street
Suite 203 Floor
Chicago, Illinois 60601

On July 11, 2012.

/Adam L. Brookman/
Adam L. Brookman

EVIDENTIARY ANALYSIS CHART OF TREY WHITE AFFIDAVIT TESTIMONY

<p>1. I am the President and owner of Anderson Valley Acquisition Company, LLC, a California limited liability company ("Anderson Valley"), doing business as Anderson Valley Brewing Company, and I have the authority to act on behalf of Anderson Valley. I have reviewed the records of Anderson Valley and otherwise have knowledge of the relevant facts and statements contained herein.</p>	<ul style="list-style-type: none">• Mr. White does not disclose that he only became affiliated with Anderson Valley in 2010.• There is no statement that Mr. White has “personal” knowledge of the facts alleged
<p>2. Prior to my position at Anderson Valley, I was the Executive Vice-President of United States Beverage, where I was responsible for the management of one-hundred-million dollars (\$100,000,000.00) worth of various malt based beverages sold throughout the U.S., including, but not limited to the following: Grolsch lager; Seagram Coolers; Goose Island ales; Tennents lager; Staropramen lager; Ipswich ales; and SLO ales. I managed a sales force of fifty (50) individuals and called on distributor and retailer accounts across the country. While working at United States Beverage, I evaluated the purchase of Bulmers, a cider company. I was also previously employed as the Manager of the Corporate Group at National Wine and Spirits Indiana and Illinois, where I assisted top management in various general management activities, including, but not limited to the following: category management; financial management; promotional programming; and strategy development amongst other activities. Furthermore, I was the Executive Consultant at Navigant Consulting, where I valued intellectual property assets related to various commercial disputes. I have degrees from the Kelley School of Business at Indiana University and the Owen Graduate School of Management at Vanderbilt University.</p>	<ul style="list-style-type: none">• No issues

<p>3. Since Anderson Valley began doing business in 1987, it has expended significant time, money and resources to associate the term BOONVILLE with its products and company.</p>	<ul style="list-style-type: none"> • Lack of foundation. <ul style="list-style-type: none"> ○ Mr. White was not present and has no way of knowing the scope, if any, of the time, money and resources the company spent allegedly trying to associate BOONVILLE with its products and company. ○ No explanation is proffered of what resources were expended nor the time and money involved. ○ Mr. White neither provides nor points to any records that support this statement. ○ Not one single document, ad or picture shows the use of Boonville.
<p>4. Among these efforts to associate BOONVILLE with Anderson Valley, on December 26, 1987, Anderson Valley began to use the mark THE LEGENDARY BOONVILLE BEER ANDERSON VALLEY BREWING CO. in connection with its beer products, including on labels on bottles, cans, and packaging.</p> <p>5. On December 26, 1987, Anderson Valley began to use the mark THE LEGENDARY BOONVILLE BEER in connection with its beer, ale, lager, stout, porter and malt liquor products, including on labels on bottles, cans, and packaging.</p>	<ul style="list-style-type: none"> • Lack of foundation. <ul style="list-style-type: none"> ○ Mr. White has no personal knowledge to support these claims. ○ Mr. White neither provides nor points to any records that support this statement. ○ No effort has been made to establish that anything Mr. White might have reviewed to make these claims constitutes proper business records.
<p>6. On September 5, 1989, Anderson Valley applied to register its mark THE LEGENDARY BOONVILLE BEER ANDERSON VALLEY BREWING CO. in the United States Patent & Trademark Office, which application matured to registration on December 18, 1990, Registration No. 1628521, International Class 032, for "Beer." Although this registration was cancelled on December 29, 2001, for failure to file the Section 8 Affidavit, Anderson Valley never stopped using the mark.</p>	<ul style="list-style-type: none"> • Lack of foundation <ul style="list-style-type: none"> ○ The identified registration number, 1628521 is for the mark, "FIT & HEARTY" owned by Fink Baking Corporation not the identified mark. ○ There is no showing of any use of the identified mark; a mark which is not the same as the registered mark asserted in this Opposition. ○ Applicants do not challenge the fact that the identified mark was the subject of a registration that was cancelled on December 29, 2001.¹

¹ It is also noted that the applicant for the lapsed registration was not "Anderson Valley Brewing Company," but rather Kenneth D. Allen doing business as Anderson Valley Brewing Company. While this distinction is just a technicality, it is consistent with Opposer's cavalier treatment of the facts supporting its opposition.

7. On January 31, 2008, Anderson Valley applied to register its mark THE LEGENDARY BOONVILLE BEER, which application matured to registration on June 15, 2010, Registration No. 3801569, in International Class 032 for "Beer, ale, lager, stout and porter; Malt liquor."

- Lack of foundation
 - Mr. White has no personal knowledge of the filing of the identified application,
 - Mr. White erroneously implies that the registration is for the words, "THE LEGENDARY BOONVILLE BEER" alone. However, the mark is highly stylized as depicted and described below:



•
“The color(s) red, black, brown, yellow and beige is/are claimed as a feature of the mark. The mark consists of the wording "THE LEGENDARY BOONVILLE BEER" and a design of fanciful figure of a bear with deer horns; the color red appears on the letters of the words "BOONVILLE" and "BEER"; the color black appears on the letters of the words "THE LEGENDARY", the outlining of the wording "BOONVILLE BEER", the hair of the bear, as shading on the bear nose and the deer horns; the color brown appears on the hair of the bear; the color beige appears on the nose of the bear, the deer horns and as background for the wording and the designs of the mark; the color yellow appears on an outer oval design enclosing the wording and designs of the mark.”

<p>8. On April 24, 1995, Anderson Valley created the domain name www.avbc.com to advertise, promote, and sell Anderson Valley's goods. From May 1, 2011 through May 30, 2012, over one-hundred thousand (100,000) people accessed the Anderson Valley web site. The web site features Anderson Valley's products and events that are marketed under or in association with the mark THE LEGENDARY BOONVILLE BEER and BOONVILLE. A true and correct screen capture of the Anderson Valley web site is attached hereto as Exhibit A.</p>	<ul style="list-style-type: none"> • Lack of foundation <ul style="list-style-type: none"> ○ Mr. White neither provides nor points to any records that support this statement. • Irrelevant and potentially erroneous <ul style="list-style-type: none"> ○ It is well known that most records of web site visits do not (and cannot) show the identity of the visitor. In other words, from what are most likely 100,000 hits, Mr. White cannot tell if Applicants and/or their attorney visited the site 50,000 times since the Opposition was filed or whether legitimate potential customers visited the site and saw use of the claimed mark.
<p>9. Currently, Anderson Valley sells its beer under or in association with the mark THE LEGENDARY BOONVILLE BEER and BOONVILLE in twenty-nine (29) states, including: California; Oregon; Washington; Hawaii; Arizona; Nevada; Idaho; New Mexico; Texas; Colorado; Kansas; Oklahoma; Utah; Illinois; Kentucky; Ohio; Michigan; Alabama; Georgia; South Carolina; Florida; North Carolina; Virginia; Maryland; Pennsylvania; New Jersey; New York; Washington D.C.; and Massachusetts.</p> <p>10. As of today's date, Anderson Valley sells the following beer products: Boont Amber Ale; Hop Ottin' India Pale Ale; Summer Solstice Seasonal Ale; Winter Solstice Seasonal Ale; Barney Flats Oatmeal Stout; Poleeko Gold Pale Ale; Boont ESB; and Imperial India Pale Ale. True and correct copies of photographs of Anderson Valley beer products displaying use of the mark THE LEGENDARY BOONVILLE BEER are attached hereto as Exhibits B1-B6.</p>	<ul style="list-style-type: none"> • No issues

<p>11. From 1990 to 2011, Anderson Valley generated over eighty-seven million, five-hundred thousand dollars (\$87,500,000.00) in revenue from sales of goods under or in association with the mark THE LEGENDARY BOONVILLE BEER.</p>	<ul style="list-style-type: none"> • Lack of foundation. <ul style="list-style-type: none"> ○ Mr. White has no personal knowledge to support this claim. ○ Mr. White neither provides nor points to any records that support this statement. ○ No effort has been made to establish that anything Mr. White might have reviewed to make this claim constitutes proper business records. ○ As noted in the Reply Brief and the Second Declaration of Adam Brookman, at least a portion of the company’s sales are not beer products and many do not include any reference to “THE LEGENDARY BOONVILLE BEER.”
<p>12. From 1990 to 2011, Anderson Valley spent over seven million, seven-hundred thousand dollars (\$7,700,00.00) in advertising and promoting its goods under the mark THE LEGENDARY BOONVILLE BEER and associating its beer with the term BOONVILLE.</p>	<ul style="list-style-type: none"> • Lack of foundation. <ul style="list-style-type: none"> ○ Mr. White has no personal knowledge to support this claim. ○ Mr. White neither provides nor points to any records that support this statement. ○ No effort has been made to establish that anything Mr. White might have reviewed to make this claim constitutes proper business records. ○ Mr. White offers nothing that would permit the Board or Applicants to understand the nature of the purported advertising and promotion nor any indication of the timing of the alleged expenditures. Were the expenditures for web site development? Labels? T-shirts? Mugs? Print ads for the festival? Signage for the brewery name? Landscaping? Were the expenditures for ads or promotions that included the asserted mark? If so, in connection with what goods or services?

<p>13. From April 1997 to the present, Anderson Valley has organized, advertised, promoted and hosted the annual BOONVILLE BEER FESTIVAL, an open air festival promoting and selling Anderson Valley's goods, among others, located at the Mendocino County fairgrounds ("Boonville Festival"). In 1997, the Boonville Festival was attended by one-thousand (1,000) people from five (5) states. The number of attendees has increased to five-thousand (5,000) people from twenty (20) states in 2012. A true and correct copy of the poster promoting the 2008 Boonville Festival is attached hereto as Exhibit C.</p>	<ul style="list-style-type: none"> • Lack of foundation. <ul style="list-style-type: none"> ○ Mr. White has no personal knowledge to support this claim. ○ Mr. White neither provides nor points to any records that support this statement. ○ No effort has been made to establish that anything Mr. White might have reviewed to make this claim constitutes proper business records.
<p>14. Anderson Valley has sought to associate its products with the term BOONVILLE through extensive print advertisements such as the following, which are representative of the advertisements Anderson Valley has run over the years:</p> <p>a. From 1998 to the present, Anderson Valley has advertised goods associated with BOONVILLE in the "Mendocino Traveler's Guide" - a print magazine with over 165,000 magazines distributed annually. A true and correct copy of the advertisement from 1998 is attached hereto as Exhibit D</p>	<ul style="list-style-type: none"> • Lack of foundation. <ul style="list-style-type: none"> ○ Mr. White has no personal knowledge to support these claims. ○ Mr. White neither provides nor points to any records that support these statements. ○ No effort has been made to establish that anything Mr. White might have reviewed to make these claims constitutes proper business records. • Irrelevant <ul style="list-style-type: none"> ○ This ad is not an advertisement for beer or even beer products. Instead, it is an advertisement for Brewpub and Restaurant services.
<p>b. From 2002 to the present, Anderson Valley has advertised goods associated with BOONVILLE in the "Celebrator" - a beer news magazine with a national and Internet presence. A true and correct copy of the advertisement from 2002 is attached hereto as Exhibit E. This advertisement is representative of the ads run by Anderson Valley over the years.</p>	<ul style="list-style-type: none"> • Lack of foundation. <ul style="list-style-type: none"> ○ Mr. White has no personal knowledge to support this claim. ○ Mr. White neither provides nor points to any records that support this statement. ○ No effort has been made to establish that anything Mr. White might have reviewed to make this claim constitutes proper business records. ○ There is no cover page of the magazine or anything to indicate that it is what Mr. White represents it to be. ○ There are no other ads showing how the mark is used in this publication, how much the company expended for the ads nor any indication of the publication's distribution.

<p>c. From 2004 to the present, Anderson Valley has advertised goods associated with BOONVILLE in "Real Estate Magazine" - a magazine with national distribution of 75,000 copies annually. A true and correct copy of the advertisement from 2004 is attached hereto as Exhibit F</p>	<ul style="list-style-type: none"> • Lack of foundation. <ul style="list-style-type: none"> ○ Mr. White has no personal knowledge to support this claim. ○ Mr. White neither provides nor points to any records that support this statement. ○ No effort has been made to establish that anything Mr. White might have reviewed to make this claim constitutes proper business records. ○ There are no other ads showing how the mark is used in this publication, how much the company expended for the ads nor any indication of the publication's distribution. ○ There is nothing to indicate that this ad, which appears in connection with an article about the beer festival, was run more than once. • Irrelevant <ul style="list-style-type: none"> ○ The ad is used to advertise the beer festival, not beer.
<p>d. From 2007 to the present, Anderson Valley has advertised goods associated with BOONVILLE in the "San Francisco Bay Guardian." A true and correct copy of the advertisement from 2007 is attached hereto as Exhibit G.</p> <p>e. From 2009 to the present, Anderson Valley has advertised goods associated with BOONVILLE in the "Northwest Brewing News" - a print and Internet based newspaper presenting beer news related to the northwest region of the United States. A true and correct copy of the advertisement from 2009 is attached hereto as Exhibit H.</p>	<ul style="list-style-type: none"> • Lack of foundation. <ul style="list-style-type: none"> ○ Mr. White has no personal knowledge to support these claims. ○ Mr. White neither provides nor points to any records that support these statements. ○ No effort has been made to establish that anything Mr. White might have reviewed to make these claims constitutes proper business records. ○ There are no other ads showing how the mark is used in these publications, how much the company expended for the ads nor any indication of the publications' distribution.

<p>15. Over the years, Anderson Valley has received telephone calls and email messages from consumers requesting "Boonville Beer" for events. A true and correct copy of one such email message dated October 11, 2011, requesting "Boonville Beer" is attached hereto as Exhibit I</p>	<ul style="list-style-type: none"> • Lack of foundation. <ul style="list-style-type: none"> ○ Mr. White has no personal knowledge to support the claim that, "Over the years, Anderson Valley has received telephone calls and email messages from consumers requesting "Boonville Beer" for events," except for the single instance identified herein. ○ Mr. White neither provides nor points to any prior records that support this statement. ○ No effort has been made to establish that anything Mr. White might have reviewed to make this claim constitutes proper business records.
<p>16. Anderson Valley is featured in the nationally sold board game, Brew-opoly, which is a property game that allows players to own and trade their favorite brands of beer. The game piece for Anderson Valley states, "Anderson Valley Brewing Company has been carefully brewing their award winning ' Boonville Beers' since 1987." A true and correct copy of the Brew-opoly game chip is attached hereto as Exhibit J.</p>	<ul style="list-style-type: none"> • Lack of foundation <ul style="list-style-type: none"> ○ The entire context in which "Boonville Beers" is used is not provided. It appears that there are also numerous descriptive uses of "Boonville" associated with the game.
<p>17. As a result of Anderson Valley's substantial advertising, promotion, and sales, consumers associate BOONVILLE with Anderson Valley and its products.</p>	<ul style="list-style-type: none"> • Lack of foundation. <ul style="list-style-type: none"> ○ Mr. White has no personal knowledge to support this claim. ○ Mr. White neither provides nor points to any records that support this statement. ○ No effort has been made to establish that anything Mr. White might have reviewed to make this claim constitutes proper business records.
<p>18. Anderson Valley has won nationally acclaimed awards for its brewery, including, "America's Ten Best Breweries" in 2002 and 2003, and "Top Ten Breweries in America" in 2004, as well as awards for its individually brewed beers.</p>	<ul style="list-style-type: none"> • Lack of foundation. <ul style="list-style-type: none"> ○ Mr. White has no personal knowledge to support this claim. ○ Mr. White neither provides nor points to any records that support this statement. ○ No effort has been made to establish that anything Mr. White might have reviewed to make this claim constitutes proper business records.

<p>19. In my experience marketing, promoting, and working in the alcoholic beverage industry, it is common for a company that manufactures and sells beer to also manufacture and sell hard cider. For example, the Boston Beer Company manufactures and sells Sam Adams beers as well as Hard Core Cider and Angry Orchard Cider.</p> <p>20. In my experience marketing, promoting, and working in the alcoholic beverage industry, the majority of distributors sell hard cider and beer. All of the Anderson Valley distributors located in California distribute both beer and hard cider.</p> <p>21. In my experience marketing, promoting, and working in the alcoholic beverage industry, hard cider is commonly sold in the same manner as beer, including in individual serving-size containers, six-packs, in coolers next to beer, and by means of taps in bars alongside taps for beer.</p> <p>22. In my experience marketing, promoting, and working In the alcoholic beverage industry, hard cider is commonly comparably priced to beer.</p>	<ul style="list-style-type: none">• No issues
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<p>23. Hard cider is often analyzed and discussed In beer trade journals, including the following examples:</p> <ol style="list-style-type: none">a. On February 7, 2012, "Beer Business Daily" published the article "The Year of Cider: MillerCoors and A-B Make Their Moves." The article mentions the demographics of cider drinkers, stating "cider sources majorly from craft drinkers ... " A true and correct copy of the article is attached hereto as Exhibit K.b. On February 8, 2012, "Beer Business Daily" published the article "A Tale of Two Cider Strategies." The article reviews the strategies of two major beer companies for selling cider. A true and correct copy of the article is attached hereto as Exhibit L.c. On February 16, 2012, "Craft Business Daily" published the article "Greg Hall on the Cider Category." The article discusses the son of the owner of Goose Island craft brewery, and his creation of Virtue Cider. A true and correct copy of the article is attached hereto as Exhibit M.	<ul style="list-style-type: none">• No issues
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

PROCEEDING NO. 91201070

Anderson Valley Acquisition Company, LLC

v.

Matthew Harnden and Roger Scommegna

Serial No. 85178395

Mark: BOONVILLE CIDER HOUSE BITE HARD CIDER

**SECOND DECLARATION OF ROGER SCOMMEGNA
IN SUPPORT OF APPLICANT'S MOTION FOR SUMMARY JUDGMENT**

I, Roger Scommegna, based on my own personal knowledge, do hereby declare:

1. I am one of the applicants for the mark, Boonville Cider House Bite Hard Cider (the "Mark").
2. I know Ken Allen, the original owner of the Anderson Valley Brewing Company (the "Company"). It is my understanding that in early 2010, Mr. Allen sold his rights in the Company to Trey White. Attached hereto as Exhibit A is a screen shot of a web page from the Company's current web site that indicates that Mr. Allen sold the business to Mr. White in April of 2010 which is consistent with my understanding.
3. I have read Opposer's Opposition to our Motion for Summary Judgment. In that Opposition I am accused of inaccurately depicting the Company's beer products and "deceptively obscure[ing] Opposer's use of the mark THE LEGENDARY BOONVILLE BEER." These claims are completely false. The pictures attached

to my prior declaration are accurate representations of a number of the Company's bottles, cans and labels. The pictures focused on descriptive uses of "Boonville" on the Company's labels as opposed to the entire bottle to make the printing more legible. Attached as Exhibit B hereto are true and accurate photographs of two of the bottles shown in my prior declaration but now shown with the necker labels that have THE LEGENDARY BOONVILLE BEER logo.

4. Attached as Exhibit C hereto are true and accurate photographs of the side and bottom of two of the Company's six-pack cartons showing further descriptive uses of BOONVILLE.
5. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on July 11, 2012, in Milwaukee, Wisconsin.

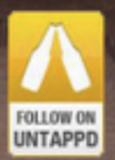


Roger Scommegna



LONG LIVE THE BOONT HARPERS!

It's not just shy sluggin' gorms weemer



Visit The Valley



Our Beer



Events



History of the Brewery

Founded in 1987, the Anderson Valley Brewing Company brewed out of a 10-barrel brewhouse, located in the lower level of its brewpub, The Buckhorn Saloon. Gleaming stainless steel vats brewed and fermented barley and other specialty grains to create outstanding ales, porters, stouts, and wheat beers. These brews began as a dream of Kenneth Allen to create the smoothest tasting ales available anywhere.



When the demand for our award winning ales exceeded the capacity of our 10-barrel brewery below the pub, we built our present 30-barrel facility at the corner of Highways 128 and 253, a mile from the center of Boonville. That was in 1996, and this brewery saw us through a dramatic period of growth, which included the introduction of a 12 ounce bottling line and a production level of 15,000 barrels in 1998, twice the amount brewed in 1997.

Yet, the brewery's growth was outpacing its larger space and expanded capacity. In 1998, construction began on a state-of-the-art, three-story Bavarian-style brewhouse. The centerpieces of the brewhouse are gleaming 100- and 85-barrel copper brew kettles rescued by Ken Allen from a defunct German breweries during a trip to Europe in 1995. The new brewhouse went online in August of 2000.

By 2010 Ken Allen decided to retire and began to search for a successor to continue the Anderson Valley commitment to quality. In April of 2010 the brewery sold to industry veteran Trey White. In September of that year Fal Allen (former general manager 2000 – 2004, no relation to Ken) returned to the brewery as brewmaster. White has focused on innovation and quality, introducing the Bahl Hornin' Series, expanding the barrel aged program, and increasing brewing capacity.



Exhibit B



ANDERSON VALLEY BEER

BARNEY FLATS
OATMEAL
STOUT

Consistently judged one of



BARNEY
OATMEAL
STOUT

Gold
Medal
Winner

ANDERSON
VALLEY
BOONVILLE
BREWING CO.

...some virgin
...west, located
...Oatmeal
...sweet stout,
...crafted from
...and chocolate
...Oats, their
...of our
...rich
...sweet finish,
...dessert, or as
...garnish
...any more!

EXCESSIVE CONSUMPTION OF ALCOHOLIC BEVERAGES DURING PREGNANCY CAN CAUSE BIRTH DEFECTS AND COMPLICATIONS. DRINK RESPONSIBLY. IF YOU ARE DRIVING, DO NOT DRINK. IF YOU DRINK, DO NOT DRIVE. HEALTH PROBLEMS.

MADE IN NY
100% OK+
WISCONSIN

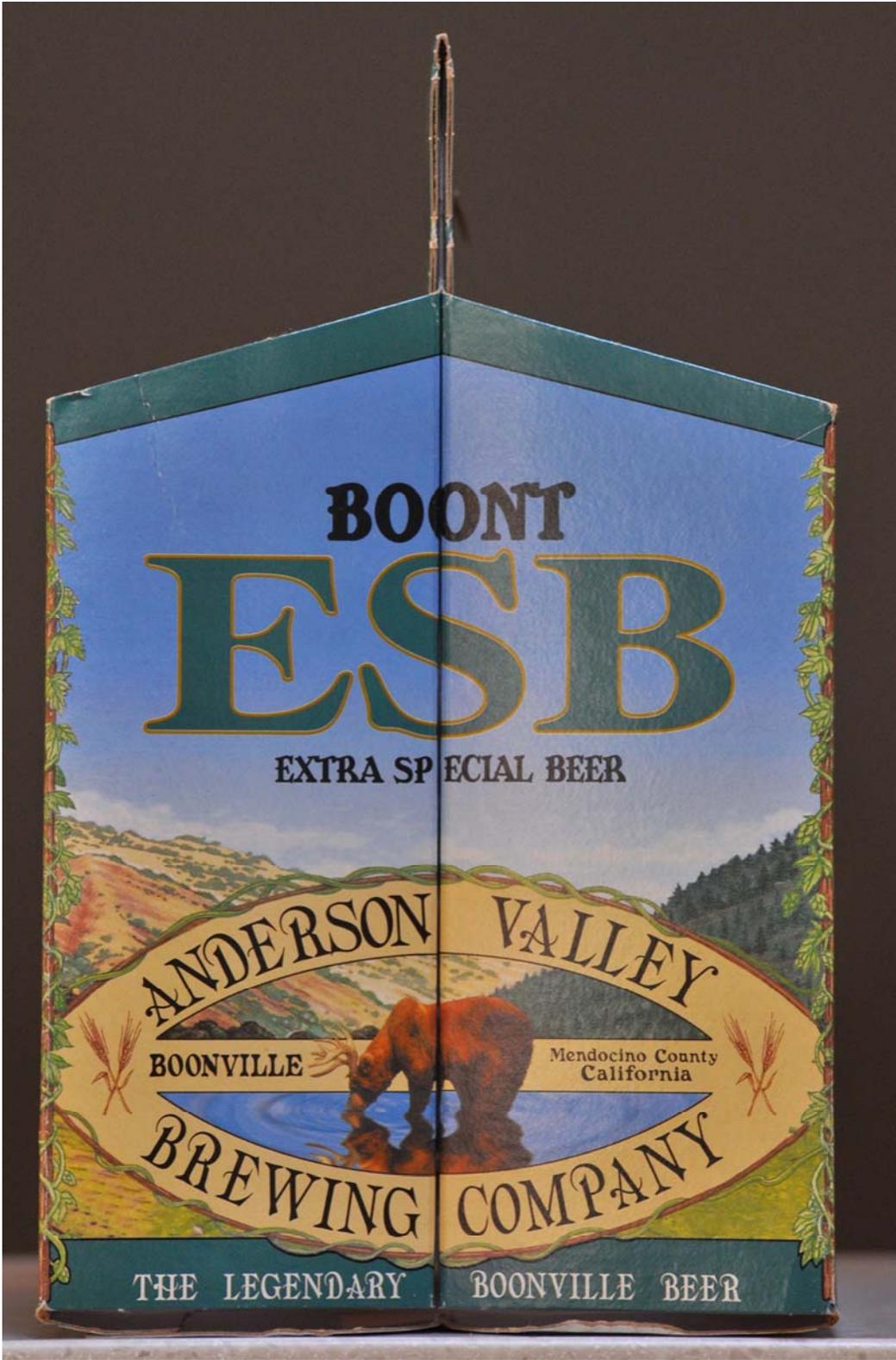


Exhibit C