

ESTTA Tracking number: **ESTTA456736**

Filing date: **02/15/2012**

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

**Notice of Opposition**

Notice is hereby given that the following party opposes registration of the indicated application.

**Opposer Information**

Name	Cain Cellars, Inc. d/b/a Cain Vineyard and Winery		
Entity	Corporation	Citizenship	California
Address	3800 Langtry Road St. Helena, CA 94574 UNITED STATES		

Attorney information	D. Peter Harvey Harvey Siskind LLP 4 Embarcadero Center, 39th Floor San Francisco, CA 94111 UNITED STATES pharvey@harveysiskind.com, ngray@harveysiskind.com, clee@harveysiskind.com Phone:415-354-0100		
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**Applicant Information**

Application No	79101857	Publication date	01/17/2012
Opposition Filing Date	02/15/2012	Opposition Period Ends	02/16/2012
International Registration No.	1088816	International Registration Date	05/28/2011
Applicant	Schmitt SÄ¶hne GmbH Weinkellerei Weinstrasse 8 54340 Longuich GERMANY		

**Goods/Services Affected by Opposition**

Class 033. All goods and services in the class are opposed, namely: Alcoholic beverages except beers; sparkling beverages, namely, champagne; sparkling wines; light sparkling wines; sparkling wines made from fruit; sparkling wines made from berries; Sparkling wine like beverages, namely, wine coolers, wines, wine containing beverages, namely, wine coolers, prepared cocktails and aperitifs made with spirits or wines
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**Grounds for Opposition**

Priority and likelihood of confusion	Trademark Act section 2(d)
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**Marks Cited by Opposer as Basis for Opposition**

U.S. Registration No.	3141106	Application Date	10/27/2003
Registration Date	09/12/2006	Foreign Priority	NONE

		Date	
Word Mark	FIVE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 033. First use: First Use: 1989/05/05 First Use In Commerce: 1989/05/05 Wine		

U.S. Registration No.	2903428	Application Date	10/27/2003
Registration Date	11/16/2004	Foreign Priority Date	NONE
Word Mark	CAIN FIVE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 033. First use: First Use: 1989/05/05 First Use In Commerce: 1989/05/05 Wine		

Attachments	Notice of Opposition + Exhs.120215.FINAL.pdf ( 16 pages )(64236 bytes )
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### 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.

Signature	/Naomi Jane Gray/
Name	Naomi Jane Gray
Date	02/15/2012

1 HARVEY SISKIND LLP  
D. PETER HARVEY (State Bar No. 55712)  
2 pharvey@harveysiskind.com  
3 NAOMI JANE GRAY (State Bar No. 230171)  
ngray@harveysiskind.com  
4 Four Embarcadero Center, 39<sup>th</sup> Floor  
San Francisco, CA 94111  
5 Telephone: (415) 354-0100  
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6

7 Attorneys for Opposer,  
Cain Cellars, Inc. d/b/a Cain Vineyard and Winery  
8

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

11 CAIN CELLARS, INC. d/b/a CAIN VINEYARD  
12 AND WINERY, a corporation,

13 Opposer,

14 v.

15 SCHMITT SÖHNE GMBH WEINKELLEREI,  
16 a Federal Republic of Germany limited liability  
company,

17 Applicant.  
18

**NOTICE OF OPPOSITION**

Opposition No.

Application Serial No. 79101857

Published in the Official Gazette  
on January 17, 2012

19 Opposer CAIN CELLARS, INC. d/b/a CAIN VINEYARD AND WINERY (“Cain” or  
20 “Opposer”) believes it will be damaged by registration of the mark shown in Serial No. 79071627  
21 and hereby opposes the same.  
22

23 Applicant Schmitt Söhne GmbH Weinkellerei (“Applicant”) filed a trademark application for  
24 the mark 5 FÜNF in Class 33 on May 28, 2011 for “Alcoholic beverages except beers; sparkling  
25 beverages, namely, champagne; sparkling wines; light sparkling wines; sparkling wines made from  
26 fruit; sparkling wines made from berries; Sparkling wine like beverages, namely, wine coolers,  
27 wines, wine containing beverages, namely, wine coolers, prepared cocktails and aperitifs made with  
28 spirits or wines.” This application was assigned U.S. Serial No. 79101857. The application was

1 published for opposition in the Official Gazette on January 17, 2012. Applicant does not claim a date  
2 of first use in the United States.

3 As grounds of opposition, Cain alleges that:

4 1. Cain is the owner of incontestable U.S. Trademark Registrations for FIVE and CAIN  
5 FIVE used in connection with wine, including the following:

- 6 • FIVE, U.S. Reg. No. 3141106, for “wine” in Class 33. Cain filed its application to  
7 register this mark on October 27, 2003, and the mark was registered on the Principal  
8 Register on September 12, 2006.
- 9 • CAIN FIVE, U.S. Reg. No. 2903428, for “wine” in Class 33. Cain filed its application  
10 to register this mark on October 27, 2003, and the mark was registered on the Principal  
11 Register on November 16, 2004.

12 2. The foregoing registrations were based upon applications filed in the United States  
13 Patent and Trademark Office (“USPTO”) on dates prior to the date of filing of Applicant’s  
14 application. These registered marks are valid and subsisting and constitute *prima facie* evidence of  
15 Cain’s exclusive right to use the marks in commerce on the goods specified in the registrations. In  
16 view of the parties’ virtually identical marks and the closely related nature of the parties’ respective  
17 goods, Cain alleges that Applicant’s claimed mark so resembles Cain’s registered marks as to be  
18 likely to cause confusion, or to cause mistake, or to deceive existing and potential customers within  
19 the markets for the parties’ products, as to their respective source, sponsorship, or affiliation.

20 3. Over the past 22 years, the public has learned to associate the marks FIVE and CAIN  
21 FIVE with Cain’s wine. Wine professionals, as well as the greater purchasing public, have come to  
22 assume a proprietary relationship between the Cain Vineyard and Winery and wine offered under the  
23 marks FIVE and CAIN FIVE.

24 4. Cain believes that it will be damaged by registration of the 5 FÜNFF mark, which depicts  
25 both the Arabic number 5 and the word “Fünf,” which is the German word for “five.” Applicant’s mark  
26 thus conveys the identical connotation to Cain’s registered FIVE marks. Cain spends substantial  
27 amounts of money each year in marketing expenses to promote its FIVE wine through public events  
28 such as wine presentations, wine dinners, wine tastings, and other events. Cain’s FIVE wine was

1 awarded Food & Wine Magazine’s award for Best Bordeaux Blend in 2001, and has also won Decanter  
2 Magazine’s “Wine of the Month” award.

3 5. In 2006, Applicant sought to register the mark FÜNF GERMAN RIESLING in  
4 connection with wine. The USPTO refused this registration on the express ground that it was  
5 “sufficiently similar” to Cain’s FIVE Mark “to cause a likelihood of confusion under Section 2(d) of the  
6 Trademark Act.” A true and correct copy of the USPTO’s rejection is annexed hereto as Exhibit A.

7 6. Defendants sought reconsideration of the USPTO’s ruling. The USPTO denied that  
8 request, stating that “no new facts or reasons have been presented that are significant and compelling  
9 with regard to the point at issue.” A true and correct copy of the USPTO’s reconsideration refusal letter  
10 is annexed hereto as Exhibit B.

11 7. Despite these refusals, and the knowledge that consumers would be confused by the use  
12 of the substantively identical FÜNF mark on identical goods, Applicant proceeded to distribute, offer for  
13 sale and sell FÜNF wine in the United States. Cain is informed and believes, and on that basis alleges,  
14 that Applicant has done so with the intent to cause confusion among consumers as to source, sponsorship  
15 or affiliation.

16 WHEREFORE, Cain prays that said application Serial No. 79101857 be rejected, that no  
17 registration be issued thereon to Applicant, and that this opposition be sustained in favor of Cain.

18 Cain hereby appoints Harvey Siskind LLP, a law firm composed of members of the bar of the  
19 State of California, to act as attorneys for Cain herein, with full power to prosecute said opposition, to  
20 transact all relevant business with the U.S. Patent and Trademark Office and in the United States Courts  
21 and to receive all official communication in connection with this opposition.

22  
23 Dated: February 15, 2012

Respectfully submitted,

24 HARVEY SISKIND LLP  
25 D. PETER HARVEY  
26 NAOMI JANE GRAY

27 By           /Naomi Jane Gray/            
28 Naomi Jane Gray

**Exhibit A**  
**to Notice of Opposition**

**Offered by Cain Cellars, Inc.**  
**d/b/a Cain Vineyard And Winery**

*Cain Cellars, Inc.*  
*d/b/a Cain Vineyard And Winery v.*  
*Schmitt Söhne GmbH Weinkellerei*

**Serial No. 79101857**

**To:** Schmitt Soehne GmbH Weinkellerei ([lewertoff.katrin@arentfox.com](mailto:lewertoff.katrin@arentfox.com))  
**Subject:** TRADEMARK APPLICATION NO. 78835538 - 5 FÜNF GERMAN RIESLI - DT-7256 / 43  
**Sent:** 12/3/2007 10:46:15 AM  
**Sent As:** ECOM108@USPTO.GOV  
**Attachments:**

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**SERIAL NO:** 78/835538

**MARK:** 5 FÜNF GERMAN RIESLI

**\*78835538\***

**CORRESPONDENT ADDRESS:**

Katrin Lewertoff and Leslie K. Mitchell  
Arent Fox LLP  
1675 Broadway  
New York NY 10019

**RESPOND TO THIS ACTION:**

<http://www.uspto.gov/teas/eTEASpageD.htm>

**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/main/trademarks.htm>

**APPLICANT:** Schmitt Soehne GmbH  
Weinkellerei

**CORRESPONDENT'S REFERENCE/DOCKET  
NO:**

DT-7256 / 43

**CORRESPONDENT E-MAIL ADDRESS:**

[lewertoff.katrin@arentfox.com](mailto:lewertoff.katrin@arentfox.com)

**OFFICE ACTION**

TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE.

**ISSUE/MAILING DATE:** 12/3/2007

**THIS IS A FINAL ACTION.**

This letter responds to applicant's communication filed on November 6, 2007.

The applicant has argued against the refusal to register under Section 2(d) in view of one registered mark. The examining attorney has considered the applicant's argument carefully but has found them unpersuasive. For the reasons set forth below, the refusal under Trademark Act Section 2(d), 15 U.S.C.

§1052(d) is now made FINAL with respect to U.S. Registration No. 3141106, 37 C.F.R. §2.64(a).

## **Section 2(d) Likelihood of Confusion**

Registration was refused under Trademark Action Section 2(d), 15 U.S.C. §1052(d) because the mark for which registration is sought so resembles the mark shown in U.S. Registration No. 3141106 as to be likely, when used in connection with the identified services, to cause confusion, or to cause mistake, or to deceive.

The applicant's mark is "5 FUNF GERMAN RIESLING" in stylized font for "wines." The cited mark in Registration No. 3141106 is "FIVE" in stylized font for "wine."

Taking into account the relevant *du Pont* factors, a likelihood of confusion determination in this case involves a two-part analysis. First, the marks are compared for similarities in appearance, sound, connotation and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Second, the goods or services are compared to determine whether they are similar or related or whether the activities surrounding their marketing are such that confusion as to origin is likely. *In re National Novice Hockey League, Inc.*, 222 USPQ 638 (TTAB 1984); *In re August Storck KG*, 218 USPQ 823 (TTAB 1983); *In re Int'l Tel. and Tel. Corp.*, 197 USPQ 910 (TTAB 1978); *Guardian Prods. Co., v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); TMEP §§1207.01 *et seq.* Regarding the issue of likelihood of confusion, all circumstances surrounding the sale of the goods and/or services are considered. *Industrial Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386 (C.C.P.A. 1973). These circumstances include the marketing channels, the identity of the prospective purchasers, and the degree of similarity between the marks and between the goods and/or services. In comparing the marks, similarity in any one of the elements of sound, appearance or meaning may be sufficient to find a likelihood of confusion. In comparing the goods and/or services, it is necessary to show that they are related in some manner. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1536 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1043 (TTAB 1987); *In re Mack*, 197 USPQ 755, 757 (TTAB 1977); TMEP §§1207.01 *et seq.*

Finally, Trademark Act Section 2(d) bars registration where an applied-for mark so resembles a registered mark that it is likely, when applied to the goods and/or services, to cause confusion, mistake or to deceive the potential consumer as to the source of the goods and/or services. TMEP §1207.01. The overriding concern is to prevent buyer confusion as to the source of the goods and/or services. *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt as to the existence of a likelihood of confusion must be resolved in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); *Lone Star Mfg. Co. v. Bill Beasley, Inc.*, 498 F.2d 906, 182 USPQ 368 (C.C.P.A. 1974).

## **Arguments**

### ***Comparison of the Marks***

The applicant argues that the use of the same or similar term in different marks does not necessarily result in a finding of a likelihood of confusion. Similarly, applicant argues that the fact that the goods may be sold in the same channels of trade does not warrant a likelihood of confusion refusal. In addition, applicant provides other registrations that include the word "five" in various forms for wines. The examining attorney respectfully disagrees with these arguments for the following reason.

As noted in the Office Action dated May 16, 2007, applicant's mark, "5 FÜNFF GERMAN RIESLING" is highly similar in connotation and commercial impression to registrant's mark, "FIVE." The only

difference is the applicant's use of the number "5" (as opposed to the word "five" in English) and the German word representing "five" with the addition of the generic words "german riesling." Regarding the issue of likelihood of confusion, the question is not whether people will confuse the marks, but whether the marks will confuse people into believing that the goods they identify come from the same source. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558 (C.C.P.A. 1972). For that reason, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. *Recot, Inc. v. M.C. Becton*, 214 F.2d 1322, 54 USPQ2d 1894, 1890 (Fed. Cir. 2000); *Visual Information Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179 (TTAB 1980). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975); TMEP §1207.01(b).

Applicant's argument that the same or similar term in different marks does not necessarily result in a finding of a likelihood of confusion is contrary to the doctrine of foreign equivalents. An applicant may not register foreign words or terms if the English-language equivalent has been previously registered for related products or services and the consumer would be likely to translate the foreign word(s) into its English equivalent. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1377, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Perez*, 21 USPQ2d 1075 (TTAB 1991); *In re American Safety Razor Co.*, 2 USPQ2d 1459 (TTAB 1987); *In re Ithaca Industries, Inc.*, 230 USPQ 702 (TTAB 1986); *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983); TMEP §1207.01(b)(vi). Likewise, under the doctrine of legal equivalents, a pictorial representation and its literal equivalent may be found confusingly similar. This doctrine is based upon a recognition that a pictorial depiction and equivalent wording are likely to impress the same mental image on purchasers. See, e.g., *In re Rolf Nilsson AB*, 230 USPQ 141 (TTAB 1986) (design comprising the silhouette of the head of a lion and the letter "L" for shoes held likely to be confused with LION for shoes); *Puma- Sportschuhfabriken Rudolf Dassler KG v. Garan, Inc.*, 224 USPQ 1064 (TTAB 1984) (designs of mountain lion, for shirts and tops, held confusingly similar to PUMA, for items of clothing; the design of a puma, for items of sporting goods and clothing; and PUMA and design for T-shirts); *In re Duofold, Inc.*, 184 USPQ 638 (TTAB 1974) (design of eagle lined for the color gold, for various items of sports apparel, held likely to be confused with GOLDEN EAGLE and design of an eagle, for various items of clothing). Moreover, the number "5" and the word "five" are, in essence, phonetic equivalents and are thus similar sounding. Similarity in sound alone may be sufficient to support a finding of likelihood of confusion. *RE/MAX of America, Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964 (TTAB 1980); *Molenaar, Inc. v. Happy Toys Inc.*, 188 USPQ 469 (TTAB 1975); *In re Cresco Mfg. Co.*, 138 USPQ 401 (TTAB 1963); TMEP §1207.01(b)(iv). Accordingly, applicant's use of the numeral "5" and the German word "five" does not obviate the similarities between the marks.

Finally, applicant's addition of the words "german riesling" merely designates the type of wine with no source identifying significance, and as such is less significant for purposes of a Section 2(d) analysis. Disclaimed matter is typically less significant or less dominant when comparing marks. Although a disclaimed portion of a mark certainly cannot be ignored, and the marks must be compared in their entireties, one feature of a mark may be more significant in creating a commercial impression. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); and *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553 (TTAB 1987). See also *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ 2d 1001 (Fed. Cir. 2002); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (C.C.P.A. 1976); *In re El Torito Rests. Inc.*, 9 USPQ2d 2002 (TTAB 1988); *In re Equitable Bancorporation*, 229 USPQ 709 (TTAB 1986).

Finally, applicant's submission of other marks containing the word "five" in some form are not relevant to the case at hand., notably because all of the marks contain an additional non-generic word or words that clearly create a different connotation and commercial impression from just the word or number "5." In fact, the approval for Registration No. 3210946, FÜN BEGINS AT 5, (owned by this applicant) was granted by the same examining attorney because it was determined that the additional wording "FÜN BEGINS AT" created a different commercial impression against the mark "FIVE." This is not the case with respect to this application. Here, the marks are basically, "FIVE" versus "5" and "FÜNF" – all meaning simply "five."

The applicant's mark, 5 FÜNF contains the same dominant feature, namely FIVE, as the registered mark, FIVE. Although the marks are compared in their entireties under a Section 2(d) analysis, one feature of a mark may be recognized as more significant in creating a commercial impression. Greater weight is given to that dominant feature in determining whether there is a likelihood of confusion. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (C.C.P.A. 1976). *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987); TMEP §1207.01(b)(viii). Since the term FIVE is very significant in creating a commercial impression, the marks are highly similar in sound, appearance, meaning and connotation

Considering the above, the marks of both parties are sufficiently similar to cause a likelihood of confusion under section 2(d) of the Trademark Act.

### ***Comparing the Goods***

Notably, applicant does not refute that the goods are the same goods, namely, wine. Where the goods of the respective parties are the same, the degree of similarity between marks required to support a finding of likelihood of confusion is not as great as would apply with diverse goods or services. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 877, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), *cert. denied* 506 U.S. 1034 (1992); *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987); *ECI Division of E-Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ 443 (TTAB 1980); TMEP §1207.01(b). In this case, the goods are the same and would be encountered by, and purchased by the same class of purchasers most likely in the same purchasing trip and marketed through the same channels of trade.

Because the marks are highly similar and the good are the same, the similarities among the marks are so great as to create a likelihood of confusion among consumers as to the source of the goods. As such, the refusal for registration is made FINAL under Trademark Action Section 2(d).

### ***Response to Final Action***

If applicant fails to respond to this final action within six months of the mailing date, the application will be abandoned. 15 U.S.C. §1062(b); 37 C.F.R. §2.65(a). Applicant may respond to this final action by:

- (1) submitting a response that fully satisfies all outstanding requirements, if feasible (37 C.F.R. §2.64(a)); and/or
- (2) filing an appeal to the Trademark Trial and Appeal Board, with an appeal fee of \$100 per class (37 C.F.R. §§2.6(a)(18) and 2.64(a); TMEP §§715.01 and 1501 *et seq.*; TBMP Chapter 1200).

In certain circumstances, a petition to the Director may be filed to review a final action that is limited to

procedural issues, pursuant to 37 C.F.R. §2.63(b)(2). 37 C.F.R. §2.64(a). See 37 C.F.R. §2.146(b), TMEP §1704, and TBMP Chapter 1201.05 for an explanation of petitionable matters. The petition fee is \$100. 37 C.F.R. §2.6(a)(15).

/cglasser/  
Caryn Glasser  
Trademark Examining Attorney  
Law Office 108  
Phone: (571) 270-1517  
Fax: (571) 270-2517

**RESPOND TO THIS ACTION:** If there are any questions about the Office action, please contact the assigned examining attorney. A response to this Office action should be filed using the form available at <http://www.uspto.gov/teas/eTEASpageD.htm>. If notification of this Office action was received via e-mail, no response using this form may be filed for 72 hours after receipt of the notification. **Do not attempt to respond by e-mail as the USPTO does not accept e-mailed responses.**

If responding by paper mail, please include the following information: the application serial number, the mark, the filing date and the name, title/position, telephone number and e-mail address of the person signing the response. Please use the following address: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

**STATUS CHECK:** Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

**To:** Schmitt Soehne GmbH Weinkellerei ([lewertoff.katrin@arentfox.com](mailto:lewertoff.katrin@arentfox.com))  
**Subject:** TRADEMARK APPLICATION NO. 78835538 - 5 FÜNF GERMAN RIESLI - DT-7256 / 43  
**Sent:** 12/3/2007 10:46:17 AM  
**Sent As:** ECOM108@USPTO.GOV  
**Attachments:**

**IMPORTANT NOTICE**  
**USPTO OFFICE ACTION HAS ISSUED ON 12/3/2007 FOR**  
**APPLICATION SERIAL NO. 78835538**

Please follow the instructions below to continue the prosecution of your application:

**VIEW OFFICE ACTION:** Click on this link [http://tportal.uspto.gov/external/portal/tow?DDA=Y&serial\\_number=78835538&doc\\_type=OOA&](http://tportal.uspto.gov/external/portal/tow?DDA=Y&serial_number=78835538&doc_type=OOA&) (or copy and paste this URL into the address field of your browser), or visit <http://tportal.uspto.gov/external/portal/tow> and enter the application serial number to access the Office action.

**PLEASE NOTE:** The Office action may not be immediately available but will be viewable within 24 hours of this notification.

**RESPONSE MAY BE REQUIRED:** You should carefully review the Office action to determine (1) if a response is required; (2) how to respond; and (3) the applicable response time period. Your response deadline will be calculated from **12/3/2007**.

**Do NOT hit "Reply" to this e-mail notification, or otherwise attempt to e-mail your response, as the USPTO does NOT accept e-mailed responses. Instead, the USPTO recommends that you respond online using the Trademark Electronic Application System response form at <http://www.uspto.gov/teas/eTEASpageD.htm>.**

**HELP:** For *technical* assistance in accessing the Office action, please e-mail [TDR@uspto.gov](mailto:TDR@uspto.gov). Please contact the assigned examining attorney with questions about the Office action.

**WARNING**

- 1. The USPTO will NOT send a separate e-mail with the Office action attached.**
- 2. Failure to file any required response by the applicable deadline will result in the ABANDONMENT of your application.**

**Exhibit B**  
**to Notice of Opposition**

**Offered by Cain Cellars, Inc.**  
**d/b/a Cain Vineyard And Winery**

*Cain Cellars, Inc.*  
*d/b/a Cain Vineyard And Winery v.*  
*Schmitt Söhne GmbH Weinkellerei*

**Serial No. 79101857**

**To:** Schmitt Soehne GmbH Weinkellerei ([lewertoff.katrin@arentfox.com](mailto:lewertoff.katrin@arentfox.com))  
**Subject:** TRADEMARK APPLICATION NO. 78835538 - 5 FÜNF GERMAN RIESLI - DT-7256 / 43  
**Sent:** 6/25/2008 4:33:35 PM  
**Sent As:** ECOM108@USPTO.GOV  
**Attachments:**

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**SERIAL NO:** 78/835538

**MARK:** 5 FÜNF GERMAN RIESLI

**\*78835538\***

**CORRESPONDENT ADDRESS:**

Katrin Lewertoff and Leslie K. Mitchell  
Arent Fox LLP  
1675 Broadway  
New York NY 10019

**GENERAL TRADEMARK INFORMATION:**  
<http://www.uspto.gov/main/trademarks.htm>

**APPLICANT:** Schmitt Soehne GmbH  
Weinkellerei

**CORRESPONDENT'S REFERENCE/DOCKET  
NO:**

DT-7256 / 43

**CORRESPONDENT E-MAIL ADDRESS:**

lewertoff.katrin@arentfox.com

**REQUEST FOR RECONSIDERATION DENIED**

**ISSUE/MAILING DATE:** 6/25/2008

Applicant is requesting reconsideration of a final refusal issued/mailed December 3, 2007.

After careful consideration of the law and facts of the case, the examining attorney must deny the request for reconsideration and adhere to the final action as written since no new facts or reasons have been presented that are significant and compelling with regard to the point at issue.

Accordingly, applicant's request for reconsideration is *denied*. The time for appeal runs from the date the final action was issued/mailed. 37 C.F.R. Section 2.64(b); TMEP Section 715.03(c). If applicant has

already filed a timely notice of appeal, the application will be forwarded to the Trademark Trial and Appeal Board (TTAB).

cglasser  
/cglasser/  
Caryn Glasser  
Trademark Examining Attorney  
Law Office 108  
Phone: (571) 270-1517  
Fax: (571) 270-2517

**STATUS CHECK:** Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

**To:** Schmitt Soehne GmbH Weinkellerei ([lewertoff.katrin@arentfox.com](mailto:lewertoff.katrin@arentfox.com))  
**Subject:** TRADEMARK APPLICATION NO. 78835538 - 5 FÜNF GERMAN RIESLI - DT-7256 / 43  
**Sent:** 6/25/2008 4:33:37 PM  
**Sent As:** ECOM108@USPTO.GOV  
**Attachments:**

**IMPORTANT NOTICE**  
**USPTO OFFICE ACTION HAS ISSUED ON 6/25/2008 FOR**  
**APPLICATION SERIAL NO. 78835538**

Please follow the instructions below to continue the prosecution of your application:

**VIEW OFFICE ACTION:** Click on this link [http://tportal.uspto.gov/external/portal/tow?DDA=Y&serial\\_number=78835538&doc\\_type=REC&](http://tportal.uspto.gov/external/portal/tow?DDA=Y&serial_number=78835538&doc_type=REC&) (or copy and paste this URL into the address field of your browser), or visit <http://tportal.uspto.gov/external/portal/tow> and enter the application serial number to access the Office action.

**PLEASE NOTE:** The Office action may not be immediately available but will be viewable within 24 hours of this notification.

**RESPONSE MAY BE REQUIRED:** You should carefully review the Office action to determine (1) if a response is required; (2) how to respond; and (3) the applicable response time period. Your response deadline will be calculated from **6/25/2008**.

**Do NOT hit "Reply" to this e-mail notification, or otherwise attempt to e-mail your response, as the USPTO does NOT accept e-mailed responses. Instead, the USPTO recommends that you respond online using the Trademark Electronic Application System response form at <http://www.uspto.gov/teas/eTEASpageD.htm>.**

**HELP:** For *technical* assistance in accessing the Office action, please e-mail [TDR@uspto.gov](mailto:TDR@uspto.gov). Please contact the assigned examining attorney with questions about the Office action.

**WARNING**

- 1. The USPTO will NOT send a separate e-mail with the Office action attached.**
- 2. Failure to file any required response by the applicable deadline will result in the ABANDONMENT of your application.**



1 **CERTIFICATE OF TRANSMISSION**

2

3 I hereby certify that a true and correct copy of the attached **NOTICE OF OPPOSITION**,

4 dated February 15, 2012 (Serial No. 79101857), is being electronically transmitted to the Trademark

5 Trial and Appeal Board on February 15, 2012.

6

7

8 */Naomi Jane Gray/*

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9 Naomi Jane Gray