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Filing date: **08/20/2014**

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

Proceeding	91212112
Party	Plaintiff Quintessential Brands S.A.
Correspondence Address	RACHEL BLUE MCAFEE & TAFT 1717 S BOULDER SUITE 900 TULSA, OK 74119 UNITED STATES rachel.blue@mcafeetaft.com, diane.goswick@mcafeetaft.com
Submission	Opposition/Response to Motion
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Signature	/Rachel Blue/
Date	08/20/2014
Attachments	OPPOSERSRESPONSETOMSJ91212112.pdf(5542725 bytes) EXHIBITS-1.pdf(2234972 bytes) EXHIBITS-2.pdf(702638 bytes) EXHIBITS-3.pdf(3885215 bytes) EXHIBITS-4.pdf(5362871 bytes) EXHIBITS-5.pdf(1132264 bytes)

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

In re Application Serial No. 85/859,169
Filing Date: February 25, 2013

Mark:
Published in the *Official Gazette*: July 23, 2013

QUINTESSENTIAL BRANDS S.A.,	)	
	)	
Opposer,	)	
	)	Opposition No. 91212112
	)	
JORDAN GERBERG,	)	
	)	
Applicant.	)	

OPPOSER'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT

Opposer Quintessential Brands, S.A. ("Opposer") hereby submits its response to the Motion for Summary Judgment submitted by Applicant Jordan Gerberg ("Applicant"). Contrary to Applicant's assertions, Applicant has failed to satisfy his burden of demonstrating that no genuine issue of material fact exists as to Opposer's claim that the mark identified in Application Serial No. 85/859,169 ("Applicant's Mark") is likely to be confused with the mark identified in U.S. Registration No. 3,224,142 ("Opposer's Mark"). Indeed, the relevant evidence produced to date demonstrates that a likelihood of confusion exists in this case. Accordingly, Opposer's Motion for Summary Judgment should be denied.

STATEMENT OF THE CASE

This case concerns two marks that consist primarily of a stylized letter "Q": Applicant's Mark, Application Serial No. 85/859,169, and Opposer's Mark, U.S. Registration No. 3,224,142.

The competing marks, which are used and/or intended to be used in connection with alcoholic beverages (International Class 33), are set forth in their entireties below:

Applicant's Mark

Registrant's Mark

At the summary judgment stage, it is Applicant's burden to demonstrate that there is no genuine issue of material fact as to the question in dispute, namely, whether Applicant's Mark is likely to be confused with Opposer's Mark. *See* TBMP 504.02; *Kraft Grp., LLC v. Harpole*, 90 USPQ2d 1837, 1840 (TTAB 2009). Applicant has failed to satisfy that burden.

Applicant's arguments to the contrary ignore both the significant similarities between the two marks and other factors that weigh against the conclusion that the two marks are likely to be confused. Accordingly, Applicant has failed demonstrate that there is no evidence to support Opposer's contention that the two marks are confusingly similar, and Applicant's Motion for Summary Judgment must be denied.

STATEMENT OF FACTS

Opposer hereby adopts and incorporates the Statement of Facts set forth in Applicant's Motion for Summary Judgment, and agrees the facts set forth therein are undisputed, with the following exceptions:

1. With respect to Applicant's Statement of Fact No. 6, Opposer's records indicate that Applicant served its initial disclosures on or about November 18, 2014, and served its Supplemental Initial Disclosures on or about January 9, 2014.

2. With respect to Applicant's Statement of Fact No. 6, Opposer's records indicate that Opposer's Pretrial Disclosures were served on July 15, 2014.

Opposer presents the following supplemental facts as follows:

1. Opposer is still awaiting requested supplemental discovery responses from Applicant.
2. Opposer's Mark is registered for use in connection with alcoholic beverages, namely, gin. *See* Ex. 1.
3. The application for registration, attached as Exhibit 2, indicates that Applicant's Mark will be used in connection with alcoholic beverages, namely distilled spirits, spirits, and liqueurs. *See* Ex. 2. Documents recently located by Opposer suggest that Applicant's Mark is being used in connection with Tequila. *See* Ex. 3, Affidavit of Diane Goswick and attachments thereto.

ARGUMENT

Although many factors are relevant to the likelihood-of-confusion analysis, *See In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563 (CCPA 1973), Applicant rests his Motion for Summary Judgment on only one factor—the similarity or dissimilarity of the marks in question. But contrary to Applicant's arguments, all of the relevant *DuPont* factors, including the factor relied upon by Applicant, support the conclusion that the two marks at issue in this proceeding *are* likely to be confused. Applicant's arguments to the contrary misstate the law, and undervalue the many substantial similarities in the marks themselves, the goods associated with them, and the other factors that would lead a reasonable consumer to be confused by these two highly similar marks.

A. The Marks are similar in appearance, sound, connotation and commercial impression.

An examination of the marks themselves demonstrates that the two marks are so similar in appearance, sound, and overall commercial impression that they are likely to be confused with one another based solely on the similarities in any one of these three categories. *See Krim-Ko Corp. v. The Coca-Cola Bottling Co. of N.Y.*, 390 F.2d 728, 731-33, 156 USPQ 523, 526 (CCPA 1968) (recognizing that similarity in any one of these three categories may be sufficient to support a conclusion that confusion is likely). Applicant's arguments to the contrary improperly emphasize minor elements of the competing marks at the expense of the shared dominant elements, and neglect to consider the fact that Applicant's Mark and Opposer's Mark will not be viewed side-by-side, but will be recalled, often imperfectly, by the ordinary consumer who will normally retain only a general impression of competing trademarks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

1. The marks are visually similar.

First, Applicant's Mark is visually similar to Opposer's Mark, as both marks are dominated by a large letter "Q," which is printed in a calligraphy-style font. In both marks, the circular element of the "Q" is very thin at the top and bottom, and substantially thicker at the sides. In both marks, the tail of the Q is stylized to resemble a tilde ("~"). These similarities render the two marks highly similar in appearance. Applicant attempts to downplay these similarities, arguing that there "are no visual similarities" other than the presence of the letter Q. But in each of the marks, the Qs are the most prominent—and therefore dominant—elements. The Q in Opposer's Mark is the first and largest element of that mark. Because the Q is prominently placed and dwarfs the remaining elements of the mark, it is the element "Q" that will most likely be impressed upon the minds of potential purchasers. *See Presto Prods., Inc. v.*

Nice-Pak Prods, Inc., 9 USPQ2d 1895 (TTAB 1988) (noting that it "is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"); *See also Truescents LLC v. Ride Skin Care, LLC*, 81 USPQ2d 1334 (TTAB 2006).

Contrary to Applicant's arguments, the inclusion of the additional stylistic elements in Applicant's Mark—what Applicant refers to as the "pina" pattern and the "agave leaf"—are insufficient to distinguish Applicant's "Q" from Opposer's "Q." *See, e.g. Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1266, 62 USPQ2d 1001 (Fed. Cir. 2002) (holding that, because the dominant portion of the two marks were identical, a likelihood of confusion could exist notwithstanding other differences between the marks). Applicant has presented no evidence to suggest that the ordinary consumer would understand the "agave leaf" tail of the Q in Applicant's Mark to be anything more than a thicker, slightly higher version of the tail of the Q used in Opposer's Mark. Nor has Applicant presented any evidence suggesting that the ordinary consumer viewing Applicant's Mark would understand the pattern inside the Q to be a source-identifying "pina" pattern, rather than, for example, a generic textured surface or pattern placed behind Opposer's Mark.[1] But even if Applicant had attempted to introduce such evidence, these minimal, subordinate stylizations of the interior and tail of the dominant element "Q" are simply insufficient to render these two marks visually distinguishable in view of the other overriding similarities between the marks. *See Wella Corp. v. Cal. Concept Corp.*, 558 F.2d 1019, 1022-23, 194 USPQ 419 (CCPA 1977) (concluding that the introduction of the element "California" and a surfer design element were insufficient to prevent confusion between the design mark CALIFORNIA CONCEPT and the word mark CONCEPT).

[1] In fact, the United States Patent and Trademark Office has categorized this pattern as a "pine cone" pattern. *See* Ex. 2, Design Search Code.

Applicant's attempt to dissect Opposer's Mark and focus only on the literal element "QUINTESSENTIAL" must also be rejected. When considering whether a likelihood of confusion exists, a mark must be considered in its entirety. The likelihood-of-confusion analysis cannot be conducted by dissecting competing marks into distinct components. *In re Nat'l Data Corp.*, 753 F.2d 1056, 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985). Here, Opposer's Mark consists of two separate, literal elements: the letter "Q," which is large and centrally placed, and the word QUINTESSENTIAL, which is placed beneath the dominant Q in a font that is less than 10% of the size of the "Q" element. In this case, no consumer would view Opposer's Mark and conclude that the small, subordinate word "QUINTESSENTIAL," is the dominant portion of the mark. *Cf. Truescents LLC*, 81 USPQ2d 1334 (TTAB 2006) (concluding that the literal element "ride" dominated over the remaining literal elements because it was many times larger than other lettering and was prominently and centrally displayed, and therefore would be the primary source-indicating feature). Indeed, a consumer viewing Applicant's Mark may not notice that Applicant's Mark does not contain the literal element "QUINTESSENTIAL" and, even if he did, he may simply conclude that Applicant's Mark is nothing more than a shortened form of Opposer's design. *See In re United States Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985) (concluding that applicant's "CAREER IMAGE" mark would appear to prospective purchasers to be a shortened form of registrant's "CREST CAREER IMAGES" mark").

Applicant's comparison of the two marks at issue in this case treats Opposer's Mark as though it were nothing more than the literal mark QUINTESSENTIAL. This approach improperly disregards the other more prominent aspects of Opposer's Mark that will leave the greatest impression on the minds of consumers. *See In re Electrolyte Labs., Inc.*, 929 F.2d 645, 647, 16 USPQ2d 1239 (Fed. Cir. 1990). ("A design is viewed, not spoken, and a stylized letter

design cannot be treated simply as a word mark."). The evidence of the marks themselves demonstrates that an ordinary consumer, after viewing Opposer's Mark and Applicant's Mark and relying on his often imperfect, generalized impressions of the marks at issue, would recall that both marks consist predominantly of the similarly stylized letter "Q."

2. The marks are audibly similar.

In addition to being visually similar, the marks share a dominant audible element—the letter "Q," which is the first, and therefore dominant, spoken element of Opposer's Mark. The authority cited by Applicant, *Jet, Inc. v. Sewage Aeration Sys.*, 165 F.3d 419, 49 USPQ2d 1355 (6th Cir. 1999), is distinguishable. In fact, the rationale of the *Jet* opinion supports the conclusion that the marks are audibly similar. In *Jet*, the United States Court of Appeals for the Sixth Circuit held that the mark JET differed from the mark AEROB-A-JET because, among other things, (1) the dominant portion of the AEROB-A-JET mark was the *introductory phase* "AEROB-A" and (2) there was no evidence to suggest that the ordinary user would abbreviate the mark AEROB-A-JET to simply "JET." Id. at 423-24. The two categories of evidence that were absent in *Jet* are present in this case: In this dispute, unlike in *Jet*, the Applicant's Mark wholly appropriates and incorporates the introductory, dominant element of Opposer's Mark—the letter "Q." Thus, the Applicant's Mark and Opposer's Mark—unlike the marks in *Jet*—share a dominant element. Furthermore, in this case, unlike in *Jet*, Opposer has collected and produced evidence that consumers of Opposer's Goods often shorten the mark from "Q QUINTESSENTIAL" to just "Q." *See* Applicant's Requests for Production Nos. 7 and 8, Opposer's Supplemental Responses and Documents Produced in Response Thereto, Attached hereto as Ex. 4 (Doc. Nos. 2, 3, 4-5, 16, 20, 21, 23, 26, 27-30, 32-35, 38-39, 43-44, 50-57).

There is, therefore, ample evidence that the marks are audibly similar due to Applicant's Mark's wholesale incorporation of the dominant spoken element of Opposer's Mark.

In view of these overwhelming similarities of the pronunciation of the marks, Applicant's suggestion that the difference in the number of syllables in the two marks is sufficient to render them audibly distinct cannot stand: Words with varying numbers of syllables are routinely deemed audibly similar when they share a key, dominant element. *E.g., Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1495, 1 USPQ2d 1813 (Fed. Cir. 1987) (concluding that the two-syllable COMMCASH mark was confusingly similar to the four-syllable COMMUNICASH mark). The fact that Opposer's Mark contains more syllables than Applicant's Mark does nothing to minimize the strong similarities created by virtue of the fact that the marks share a dominant spoken element, particularly in view of the evidence that third parties routinely abbreviate Opposer's Mark in a manner that renders it audibly identical to Applicant's Mark.

3. The marks are similar in connotation and commercial impression.

Applicant's arguments concerning the commercial impressions generated by the two marks mirror the arguments raised in connection with the visual similarities between the marks, and fail for the same reasons. Applicant's argument that the "word elements" are dominant, and therefore the term "QUINTESSENTIAL" is dominant, completely ignores the fact that the stylized Q in Opposer's Mark is also a literal element. Thus, the two marks at issue in this case share a literal element—the letter Q—and are therefore generally similar. Moreover, as discussed previously, it is that shared element, and not the subordinate term "QUINTESSENTIAL," that is the primary and dominant element of Opposer's Mark. *Presto*

Prods., Inc., 9 USPQ2d at 1897 (noting that the first literal element is the element "most likely to be impressed upon the mind of a purchaser and remembered").

The literal elements of the two marks alone generate highly similar commercial impressions, because both marks prominently feature the standalone literal element "Q." The visual similarities between the design elements discussed previously, which are virtually ignored by Applicant, likewise support the conclusion that the two marks generate highly similar commercial impressions. Indeed, the "Q" in Applicant's Mark is virtually identical to the "Q" in Opposer's Mark. The minor alterations to the "Q" relied upon by Applicant, including the introduction of the "pina" design in the center of the Q and the thickening of the tail of the Q, do not change the overall commercial impression that the goods sold under both marks are alcohol and spirits affiliated with the letter "Q." *Cf. Jansen Enters., Inc. v. Israel Rind & Stuart Stone*, 85 USPQ2d 1104 (TTAB 2007) (holding that the introduction of additional wording and design elements created differences in the appearances of the marks, but could not overcome the shared impression that the marks were affiliated with restaurants owned by "Izzy").

In sum, the marks at issue in this case are visually similar, are audibly similar, and generate similar commercial impressions. The ordinary consumer, observing these marks in the marketplace and recalling them generally, would be left with the overall impression that both marks consist primarily of a similarly styled letter Q. The visual, audible, and commercial similarities resulting from Applicant's appropriation of that dominant feature of Opposer's Mark are certainly sufficient to create a genuine issue of fact as to whether a likelihood of confusion exists in this case, particularly in view of the lower degree of similarity required to support such a finding in cases where, as here, the corresponding goods are highly similar. *See Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877, 23 USPQ2d 1698, 1701 (Fed. Cir.

1992) ("When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines."). Applicant has failed to satisfy his burden of proving that no reasonable consumer could be confused as to the origin of the goods associated with the two Q marks based on the similarities of the marks alone. Accordingly, Applicant's Motion should be denied.

B. The remaining *DuPont* factors support the conclusion that a likelihood of confusion exists with respect to the two Marks.

Although, in some cases, the dissimilarities between two "sufficiently dissimilar" marks will support the conclusion that no likelihood of confusion exists, the marks in question in this matter are not "dissimilar" at all: To the contrary, they are highly similar, and a finding of likelihood of confusion could be predicated on the similarities of the marks alone. *See supra* at 4-10. Because Applicant has not presented any evidence with respect to these factors, and because the evidentiary record and all reasonable inferences must be drawn in favor of Opposer at the summary judgment stage,[3] Applicant has effectively conceded for purposes of this Motion that the remaining *DuPont* factors support the conclusion that a likelihood of confusion exists. *See Cytosport, Inc. v. Comercializadora de Lacteos y Derivados, S.A. de C.V.*, Opp. No. 91194995, Order Granting Motion for Summary Judgment, attached hereto as Ex. 5 (nonprecedential opinion) ("We note that applicant's motion for summary judgment only concerns whether the marks at issue are sufficiently similar and/or dissimilar for likelihood of confusion purposes and that for purposes of the motion, applicant has effectively conceded that all of the other likelihood of confusion factors favor finding that there is a likelihood of confusion."). Moreover, the evidence concerning three of the remaining *DuPont* factors corroborates the conclusion that Applicant's Motion must be denied.

---

[3] *See* TBMP 528.01; *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 767-68, 25 USPQ2d 2027, 2029-30 (Fed. Cir. 1993).

First, Opposer submits, and Applicant does not dispute, that the liqueurs and spirits offered under Applicant's Mark are highly similar to the alcoholic beverages offered under Opposer's Mark. *See In re Majestic Distilling Co.,*, 315 F.3d 1311, 1316, 65 USPQ2d 1201 (Fed. Cir. 2003) ("The PTO responds, and we agree, that malt liquor and tequila are similar by virtue of the fact that both are alcoholic beverages that are marketed in many of the same channels of trade to many of the same consumers."). Second, because the goods at issue in this case are both alcoholic beverages, and therefore identical, it may be presumed that they will travel through substantially identical trade channels, such as liquor stores, retail outlets, restaurants, bars and entertainment venues. *See Genesco, Inc. & Genesco Brands, Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade."); *See also Majestic Distilling Co.*, 315 F.3d at 1316 (agreeing with the Board's conclusion that "malt liquor and tequila are similar goods and are sold in many of the same established and likely-to-continue trade channels"). Third, the goods offered under the competing marks are alcoholic beverages, which are not sold at a high price point, and are often purchased on impulse. *See* Ex. 4, Docs. 38-39 (setting forth prices for various gin products). Applicant has produced no evidence to the contrary. "When the products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care." *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *see also Eveready Battery Co. v. Green Planet, Inc.*, 91 USPQ2d 1511 (TTAB 2009).

These three *DuPont* factors, which are ignored by Applicant, corroborate the conclusion that the simultaneous use of the two marks is likely to result in consumer confusion. Applicant's Mark and Opposer's Mark are strikingly similar, and these two similar Q marks will be used on identical goods that will travel through substantially identical trade channels before being sold to substantially identical consumers under substantially identical circumstances. These facts demonstrate that a genuine a risk of consumer confusion exists in this case. Applicant has failed to satisfy his burden of proving that there is no evidence to support Opposer's claims. Accordingly, Applicant's Motion for Summary Judgment should be denied.

CONCLUSION

The similarities of the marks alone are sufficient to create a genuine issue of material fact as to Opposer's claim of likelihood of confusion. The additional similarities in the corresponding goods, trade channels, and circumstances of sale only serve to increase the likelihood that such confusion will result from simultaneous use of the two Q marks. Applicant has failed to demonstrate that there is no evidence to support Opposer's claims and, accordingly, Opposer's Motion for Summary Judgment must be denied.

Dated: August 20, 2014

Respectfully submitted,

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Jessica L. John Bowman
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Attorneys for Opposer

CERTIFICATE OF MAILING

I hereby certify that a true and complete copy of the foregoing OPPOSER'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT has been served on Applicant by e-mail and by mailing said copy this 20th day of August, 2014, first class mail, postage prepaid, to:

Matthew H. Swyers
344 Maple Avenue West, Suite 151
Vienna, VA 22180-5612

I further hereby certify that a true and complete copy of the foregoing was transmitted electronically to the Commissioner for Trademarks at http://estta.uspto.gov/filing-type.jsp.

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Attorneys for Opposer

Int. Cl.: 33

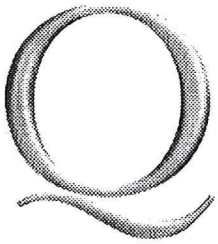
Prior U.S. Cls.: 47 and 49

Reg. No. 3,224,142

United States Patent and Trademark Office

Registered Apr. 3, 2007

TRADEMARK
PRINCIPAL REGISTER



QUINTESSENTIAL

WHITE ROCK DISTILLERIES, INC. (MAINE CORPORATION)
21 SARATOGA STREET
LEWISTON, ME 04240

FOR: ALCOHOLIC BEVERAGES, NAMELY GIN, IN CLASS 33 (U.S. CLS. 47 AND 49).

FIRST USE 7-10-2005; IN COMMERCE 7-10-2005.

OWNER OF U.S. REG. NO. 2,376,974.

SER. NO. 78-707,115, FILED 9-6-2005.

JULIE WATSON, EXAMINING ATTORNEY

EXHIBIT 1

United States Patent and Trademark Office

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Trademarks > Trademark Electronic Search System (TESS)

TESS was last updated on Wed Aug 13 02:21:45 EDT 2014

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Logout Please logout when you are done to release system resources allocated for you.

Record 1 out of 1

TSDR | Assign Status | TTAB Status ***(Use the "Back" button of the Internet Browser to return to TESS)***

Word Mark	Q
Goods and Services	IC 033. US 047 049. G & S: Distilled Spirits; Spirits; Spirits and liqueurs
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	05.03.25 - Leaf, single; Other leaves 05.13.05 - Pine cones 27.03.04 - Plants forming letters or numerals
Serial Number	**85859169**
Filing Date	February 25, 2013
Current Basis	1B
Original Filing Basis	1B
Published for Opposition	July 23, 2013
Owner	(APPLICANT) Gerberg, Jordan INDIVIDUAL UNITED STATES P.O. Box 331 Aspen COLORADO 81612
Attorney of Record	Matthew H. Swyers
Description of Mark	Color is not claimed as a feature of the mark. The mark consists of a stylized agave piña filling the inside area of the letter "Q" and showing a distinctive pattern depicting the cut shape on the piña where the agave leaves are cut from the piña. The bottom of the letter "Q" is depicted in a stylized shape of an agave leaf also displaying the distinctive pattern where the leaf is cut from the piña and is designed to form the bottom stem of the letter "Q".
Type of Mark	TRADEMARK
Register	PRINCIPAL
	LIVE

EXHIBIT 2

Live/Dead Indicator

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

In re Application Serial No. 85/859,169
Filing Date: February 25, 2013

Mark:
Published in the *Official Gazette*: July 23, 2013

QUINTESSENTIAL BRANDS S.A.,	)	
	)	
Opposer,	)	
	)	Opposition No. 91212112
	)	
JORDAN GERBERG,	)	
	)	
Applicant.	)	

AFFIDAVIT OF DIANE GOSWICK

COUNTY OF TULSA)
) ss.
STATE OF OKLAHOMA)

I, Diane Goswick, being of lawful age and being first being duly sworn upon oath, depose and state as follows:

1. My name is Diane Goswick. I am a Paralegal with the law firm of McAfee & Taft.

2. The matters stated herein are based on my personal knowledge gained from firsthand experience, observation and review of records kept in the ordinary course of business.

3. On or about August 1, 2014 and August 14, 2014, I conducted an internet search for "Jordan Gerberg" and "Tres Ochos Tequila." Attached hereto as Exhibit A are examples from my search.

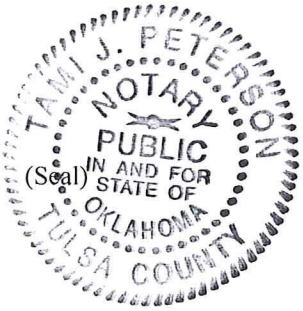
I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct to the best of my knowledge.

EXHIBIT 3

Further affiant sayeth not.

Diane Goswick

Subscribed and Sworn to before me, the undersigned authority, this 20th day of August 2014.



(Seal)

Tami J. Peterson
Notary Public
02018791
Expires 11-8-14

888

TRES OCHOS

TEQUILA

100% Agave

HECHO EN MÉXICO

YES NO

EXHIBIT A

888 Spirits Company
April 9

Email or Phon

Keep me l

888 Spirits Company

Food/Beverages

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ABOUT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
The Trademark Trial and Appeal Board

Serial No. 85/859,169
For the mark Q

Quintessential Brands S.A.,	:	
Opposer,	:	
vs.	:	Opposition No. 91212112
Gerberg, Jordan,	:	
Applicant.	:	

APPLICANT'S FIRST REQUESTS FOR
PRODUCTION OF DOCUMENTS TO OPPOSER

TO: Rachel Blue, Esq. McAfee & Taft
1717 S. Boulder Suite 900 Tulsa, OK 74119

FROM: Matthew H. Swyers, Esq., The Trademark Company, PLLC,
344 Maple Avenue West, Suite 151, Vienna, VA 22180.

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and TBMP §408, Applicant, Jordan Gerberg (hereinafter "Applicant"), requests that Opposer, Quintessential Brands S.A. (hereinafter "Opposer"), produce and permit Applicant to inspect and copy the Documents (as defined hereinafter) and things designated below at The Trademark Company, PLLC, 344 Maple Avenue West, Suite 151, Vienna, VA 22180 within the time permitted by the applicable rules.

DEFINITIONS

A. "Documents" includes "things" and is defined in the broadest sense permitted by the Federal Rules of Civil Procedure and the Trademark Rules of Practice, including without limitation, written documents, audio or video recordings, and computer data together with

EXHIBIT 4

5. All Documents evidencing, referring, or relating to alternative names, phrases, logos, designs or words considered by Opposer, whether or not adopted, in connection with the process that resulted in the adoption of Opposer's Claimed Mark for any products or services of Opposer.

RESPONSE:

6. All Documents evidencing, referring, or relating to Opposer's first use of Opposer's Claimed Mark as a trademark or a service mark or name in connection with any products, services, or business activities of Opposer.

RESPONSE:

7. All Documents evidencing, referring, or relating to Opposer's use of Opposer's Claimed Mark after the first use of Opposer's Claimed Mark as a trademark or a service mark or name in connection with any products, services or business activities of Opposer.

RESPONSE:

8. All Documents evidencing, referring, or relating to goods or services offered by Opposer under or pursuant to Opposer's Claimed Mark.

RESPONSE:

25. All specimens submitted to the USPTO in connection with the application for Opposer's Claimed Mark.

RESPONSE:

26. Each and every document which relates or refers to all bona fide uses of Opposer's Claimed Mark.

RESPONSE:

DATED this 9th day of January, 2014.

THE TRADEMARK COMPANY, PLLC

/Matthew H. Swyers/
Matthew H. Swyers, Esquire
344 Maple Avenue West, Suite 151
Vienna, VA 22180
Telephone (866) 455-8800 x704
Facsimile (270) 477-4574
mswyers@TheTrademarkCompany.com
Attorney for Applicant

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
The Trademark Trial and Appeal Board

Serial No. 85/859,169
For the mark Q

Quintessential Brands S.A.,	:	
Opposer,	:	
vs.	:	Opposition No. 91212112
Gerberg, Jordan,	:	
Applicant.	:	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of the foregoing this 9th day of January, 2014 to be served, via first class mail, postage prepaid, upon:

Rachel Blue, Esq.
McAfee & Taft
1717 S. Boulder Suite 900
Tulsa, OK 74119

Matthew H. Swyers/
Matthew H. Swyers

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

In re Application Serial No. 85/859,169
Filing Date: February 25, 2013

Mark:
Published in the *Official Gazette*: July 23, 2013

QUINTESSENTIAL BRANDS S.A.,	)	
Opposer,	)	Opposition No. 91212112
JORDAN GERBERG,	)	
Applicant.	)	

OPPOSER'S SUPPLEMENTAL RESPONSES TO
APPLICANT'S FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS

Opposer, Quintessential Brands, S.A. ("Opposer") submits its Supplemental Responses to Applicant's First Requests for Production of Documents as follows:

DEFINITIONS

1. The term "Quintessential Brands" means "Quintessential Brands, S.A."

2. For purposes of this response only, Quintessential Brands, S.A., adopts the definitions set forth in Applicant's First Requests for Production of Documents.

GENERAL OBJECTIONS

Pursuant to 37 CFR § 2.120(d)(2), the production of documents and things will ordinarily be made at the place where the documents and things are usually kept, or where the parties agree, or where and in the manner which the Trademark Trial and Appeal Board, upon motion, orders. Applicant has requested the production of physical documents in the State of Virginia.

Quintessential Brands believes that it has no documents depicting Opposer's first use of Opposer's Claimed Mark, other than those documents that are publicly available. Quintessential Brands is willing to permit a representative of Applicant to review, inspect any documents in Quintessential Brands's possession concerning Opposer's Claimed Mark at Quintessential Brands's headquarters, subject to an agreement concerning the time and date of such inspection. Quintessential Brands maintains and reserves any and all claims of privilege, work-product protection, confidentiality, or other protections afforded under the applicable laws, rules, regulations and/or protective order that may apply to any documents so reviewed.

REQUEST NO. 7: All Documents evidencing, referring, or relating to Opposer's use of Opposer's Claimed Mark after the first use of Opposer's Claimed Mark as a trademark or a service mark or name in connection with any products, services or business activities of Opposer.

RESPONSE: Quintessential Brands objects to this request on the grounds that the request is vague and ambiguous. The request for all documents "evidencing, referring or relating to" any use of Opposer's Claimed Mark fails to describe with reasonable particularity the items or category of documents to be produced.

Furthermore, Quintessential Brands objects to this request on the grounds that it is overbroad, unduly burdensome, and unlikely to lead to the discovery of relevant information. Depending on the construction of the request, Applicant's request for all documents "evidencing, referring or relating to" any use of Opposer's Claimed Mark at any time in connection with any products, services or activities may include numerous categories of documents, including, but not limited to invoices, shipping labels, product labels,

memoranda, emails, and internal correspondence merely referring to the fact that a use of the Opposer's Claimed Mark had been made. Some of these documents would be subject to privilege and/or work-product protection, while others would be neither relevant nor likely to lead to the discovery of relevant information. Furthermore, even if such documents were relevant, producing all such documents would require Quintessential Brands to collect and assemble hundreds of documents that have little to do with this litigation. The burden associated with the collection and assembly of all such documents would substantially outweigh the benefit of producing all such documents.

In view of the specific objections set forth above, Quintessential Brands limits its production as follows: Following the entry of an agreement between the parties regarding the time and place of production, Quintessential Brands agrees to produce a list of goods and services sold or marketed in connection with Opposer's Claimed Mark, with an example or illustration of the manner in which the Opposer's Claimed Mark is used with respect to each claimed good or service.

SUPPLEMENTAL RESPONSE: Quintessential Brands has produced a representative sample of the documents depicting the use of Opposer's Claimed Mark. *See* Documents 2-5, produced May 28, 2014; Response to Interrogatory No. 1.

REQUEST NO. 8: All Documents evidencing, referring, or relating to goods or services offered by Opposer under or pursuant to Opposer's Claimed Mark.

RESPONSE: Quintessential Brands objects to this request on the grounds that the request is vague and ambiguous. The request for all documents "evidencing, referring or relating to" goods and services offered under Opposer's Claimed Mark fails to describe with reasonable particularity the items or category of documents to be produced.

Furthermore, Quintessential Brands objects to this request on the grounds that it is overbroad, unduly burdensome, and unlikely to lead to the discovery of relevant information. Depending on the construction of the request, Applicant's request for all documents "evidencing, referring or relating to" any and all goods and services offered under Opposer's Claimed Mark may include numerous categories of documents, including, but not limited to invoices, shipping labels, product labels, memoranda, emails, and internal correspondence merely referring to the fact that a good was offered under Opposer's Claimed Mark. Some of these documents would be subject to privilege and/or work-product protection, while others would be neither relevant nor likely to lead to the discovery of relevant information. Furthermore, even if such documents were relevant, producing all such documents would require Quintessential Brands to collect and assemble hundreds of documents that have little to do with this litigation. The burden associated with the collection and assembly of all such documents would substantially outweigh the benefit of producing all such documents.

In view of the specific objections set forth above, Quintessential Brands limits its production as follows: Following the entry of an agreement between the parties regarding the time and place of production, Quintessential Brands agrees to produce a list of goods and services sold or marketed in connection with Opposer's Claimed Mark, with an example or illustration of the manner in which the Opposer's Claimed Mark is used with respect to each claimed good or service.

SUPPLEMENTAL RESPONSE: Quintessential Brands has produced a representative sample of the aforementioned documents. *See* Documents 1-105, produced May 28, 2014; Response to Interrogatory No. 1.

Quintessential Brands to collect and assemble hundreds of documents that have little to do with this litigation. The burden associated with the collection and assembly of all such documents would substantially outweigh the benefit of producing all such documents.

SUPPLEMENTAL RESPONSE: Quintessential Brands stands on its original objections.

Dated: July 24, 2014

Respectfully submitted,

Rachel Blue
McAFEE & TAFT
1717 S. Boulder, Suite 900
Tulsa, Oklahoma 74119
Telephone: (918) 574-3007
Facsimile: (918) 574-3107
E-Mail: Rachel.Blue@mcafeetaft.com

Attorneys for Opposer

CERTIFICATE OF SERVICE

I hereby certify that a true copy of OPPOSER'S SUPPLEMENTAL RESPONSES TO APPLICANT'S FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS was served upon Opposer by e-mail and by mailing the same, postage prepaid, on this 24th day of July, 2014, to:

Matthew H. Swyers
344 Maple Avenue West, Suite 151
Vienna, VA 22180

Rachel Blue
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Attorneys for Opposer

13550659_2

Born from a unique infusion process of fine distillation and rare gentle botanicals, Quintessential Gin combines the refined and balanced flavor of Hungarian juniper, lotus, lavender, and the leaves of the sacred lotus flower gives Q Gin a smooth taste profile matched by no other contemporary gin.

Produced by one of England's original and most distinguished distillers, Quintessential's aim is to the fine British tradition of gin distillation in brave new directions.

The silky flavor profile of lavender and lotus leaf combined with water from one of Wales' purest springs imparts a uniquely refreshing smooth taste. Taken straight up or in a favorite cocktail, Q Gin is brave enough to be different, graceful enough to be admirable and deliciously unforgettable. To taste Q Gin is to taste perfection.

Q is the Quintessential Gin.

"Q" and it's Qualities

"Q" Stands for Quintessential and also for Quality.

Quintessence by Definition is "Of purest Form"

Why?

- 5 Times distilled - most gins only distilled 3 times.
- The extra distillations and unique process gives the gin a smooth delicate and balanced flavour.
- Only the finest botanicals are selected.

Botanicals

5 Times distilled with 5 Botanicals

- Juniper from Italy - Fragrant, Spicy, Bitter Sweet Taste
- Coriander from Morocco or Belgium - imparting a mellow aroma of Lemon Sage and Ginger.
- Angelica from Germany of Belgium - imparting essential dryness to the Gin with musky sweet pine aroma.
- Cubebs from Java - giving a peppery aroma and taste.
- Lime - allowing a fresh citrus juicy flavour.

Taste

Distinctive, Smooth, Delicate, Refreshing, Long

The Packaging

- The only super premium gin in frosted bottle.
- Premium strength at 45% ABV
- Personal Reserve of Lord Daresbury
- Story to tell behind the Label
- Tall Statuesque, Stylish Sophisticated Bottle
- Defined Lines arousing curiosity and great visual impact
- Unique cork stopper
- commands premium price

QUINTESSENTIAL
London
DRY GIN
IMPORTED
40% ALC/VOL (80 PROOF)
750 ML

Q
MAKES
THE
QUINTESSENTIAL
GIN
COCKTAIL
IMPORTED
DARESBURY'S
Q
QUINTESSENTIAL
WASHINGTON
DRY GIN
5 TIMES
The Private Reserve of Lord Daresbury
DISTILLED FROM 100% GRAIN NEUTRAL SPIRITS
Q
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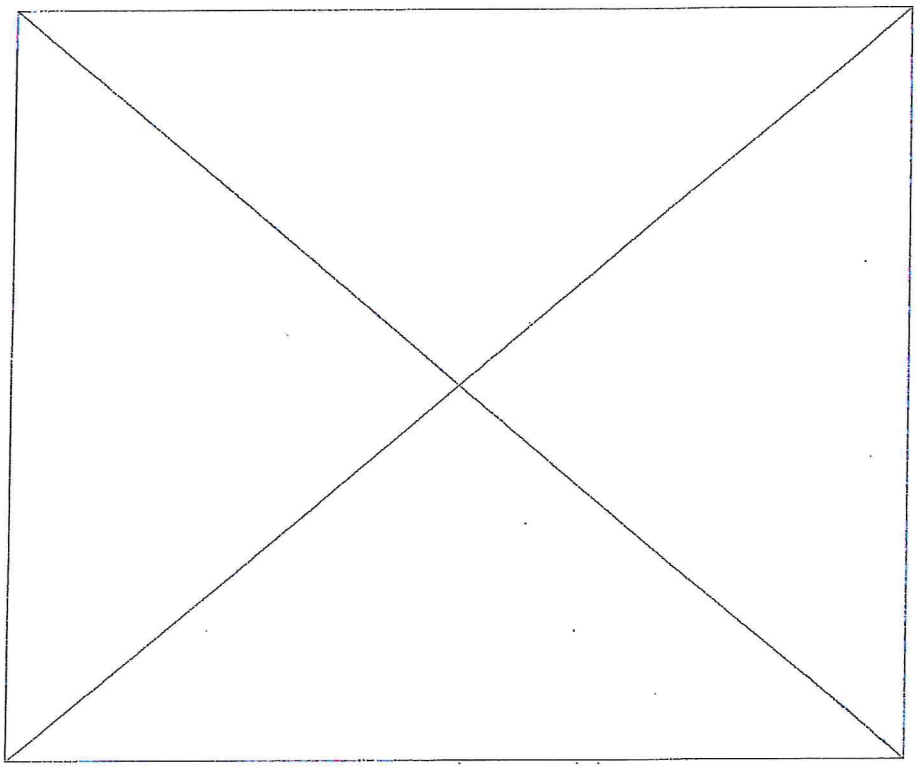
Quintessential Gin Review

March 6, 2011 By Justin 1 Comment



"Quintessentially Your's"

Massive overture of flowers, Song of Dance and Romance, with hints of lavender and love.

Q gin also known as Quintessential gin, combining sophistication and feminism in a glass.

Lotus Flower Leaves give Q it's uniqueness and wrap around your senses. A low alcohol content of 40%, with a light feel, vegetation through and through. Flowers smooth out the rough interpretation of gin, and let you know there's more where that came from. On the back end, lets you explore the world of gin for more diversity.

Reminds us more of a vodka, rather than a gin. A vodka like quality all it's own. May appeal to vodka drinkers due to it's characteristic of a smooth gin.

Summer Fruit Cup

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Cocktails with… Q (Quintessential) Gin

Posted on July 11, 2011 by DTS

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from one of Wales finest springs.

The aroma is a light but heady blend of juniper, complex floral elements and spice notes. While not intense or strong it's a nice scent that makes you want to try a sip. As the spirit sits it opens up and you can sense the floral elements developing strength.

The taste is a smooth and tasty mix of spices and flowers over a mid-level juniper base. This is a nice twist on a traditional London Dry Gin, bringing in more floral notes than the norm in a crisp and clean way.

Q won the Beverage Tasting Institute 2005 award for the Worlds Smoothest Gin and I most heartedly agree that it is very smooth and luscious. It's definitely an excellent gin, one that is best drunk straight on the rocks. It also makes a mighty fine dry martini and has just enough of a unique taste that it also works well with premium tonic water and in fine cocktails.

Filed Under: Lush Life, Raves & Reviews, Trends, Liquor Cabinet, Drink Recipes, Drinks
Tags: gin, lavender, liquor cabinet, lotus flower leaves, Quintessential London Dry Gin, QuintessentialLondonDryGin

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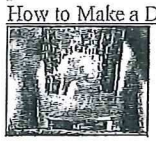

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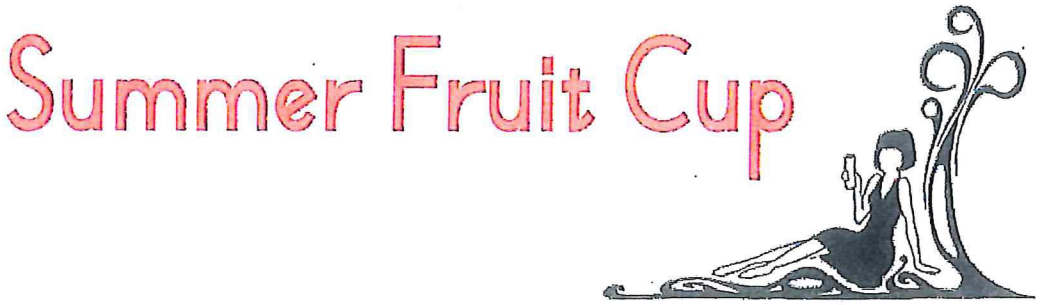

Cocktails with… Q (Quintessential) Gin

Posted on July 11, 2011 by DTS

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— Modern Quintessential Gin

Q Gin, previously known as Quintessential, is distilled in England (maybe Greenall's) and imported to the United States by White Rock Distilleries. It is distilled five times from grain. The bottle makes a good deal over the purity of the spirit.
Originally called Denbury's Quintessential Gin, named after the Lord Daresbury, a chairman of Greenalls Group. In the last few years the packaging has had a revamp and the gin relaunched.
Q is distilled five times, as an essence with each of the four botanicals (this includes lotus flower & lavender) and then a fifth time with extra juniper and lime.

Although only available in the US it certainly has it's fan amongst spirit experts.

Gin author Geraldine Coates has described this as:

"exceptionally clean and dry in flavour" and an "instant classic"

F. Paul Pacult describes it as:

"the right choice for drinkers"

Own: Juniper and a hint of coconut come through; it's sweet, soft and very smooth. Pleasant to drink and one of the nicest gins I have tried to drink neat.

Follow

— Original Quintessential Gin

Martini: Once more, juniper and a little spice are immediately evident. The coconut element is still present, but more subtle in this drink. Delightfully smooth; really, really nice.

Gin & Tonic: This is a very juniper-led G&T; quite light and soft, though. There is a bit of spice, but coconut, less so. It's a bit juicy and a good thirst-quencher.

Pink Gin: Quite sweet and floral, with hint of violet sugar and refreshers sweets the finish is the juicy flashiness of edible flowers.Not very bitter at all.

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About DTS

partial to a martini? to a smoke-hazed gin joint & a perfect tipple poured with the style, swank & skill of a true aficionado? …then pull up your stool to the bar, prepare to stock up your cocktail cabinet & get ready to drink it all in as we introduce you to a stitch in times' resident barman… David T. Smith is a drinks enthusiast currently residing in the U.K. a long-time fan of tasting & exploring various types of alcohol, he has a fascination for vintage spirits and cocktails, in particular their heritage & origins; this was strengthened last year when he presented a talk and accompanying monograph on the Martini. It was as a result of his research of this topic that he was introduced to drinks paraphernalia, & he is now the happy owner of a colourful collection of bottles, books, and gadgets from a wide range of eras… an avid believer in the validity and variety of personal opinion, particularly in the subjective area of tasting, he enjoys hosting tasting sessions for friends, constantly challenging them to find their own favourite tipple. In addition to all of this, he is also interested in economics, three-piece suits, board games & keeping

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alive the art of engaging in enjoyable conversation with a good glass of port whilst surrounded by pipe smoke… www.summerfruitcup.com Thanks to Analiebe for writing this rather flattering blurb for me.

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Holiday merchandising: here's a selection from this year's holiday-themed value-added packaging and other merchandising materials available to retailers. They can be used to help create a festive atmosphere in the store, as well as spur added sales.

Magazine

StateWays
November 1, 2006 | Copyright

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White Rock Distilleries is offering this holiday gift set featuring its superpremium "Q" Quintessential Gin along with a Martini glass.

[ILLUSTRATION OMITTED]

PAMA Pomegranate Liqueur, from Heaven Hill Distilleries, made with California pomegranates is clearing the way for a bright holiday season with its clear-packaged gift carton for gift-giving. The packaging includes the brand logo across the top and bottom.

[ILLUSTRATION OMITTED]

This luxurious holiday gift pack for Hennessy X.O includes two unique glasses designed by Thomas Bastide, formerly of Baccarat. The exterior of the box showcases metallic red X.O patterns on a matte finish, using Hennessy's trade colors and complementing the holiday season.

[ILLUSTRATION OMITTED]

Bacardi is featuring an upscale, high-grade holiday frosted box for its Bacardi Limon and Bacardi Grand Melon flavors. Each box has festive cocktail recipes for entertaining a crowd and contains two etched rocks glasses--great for gift-giving. Sizes available are 750 ml for Bacardi Limon and Bacardi Grand Melon and a 1.75 for Bacardi Limon only.

[ILLUSTRATION OMITTED]

Absolut's Level Vodka scores with Martini lovers and connoisseurs this holiday season with a gift pack that includes a 750 ml and two Martini glasses.

[ILLUSTRATION OMITTED]

Ultra-premium Remy XO Cognac is featuring this classy gift set for the holidays, including a 750 ml of the renowned cognac, as well as 2 logoed snifters.

[ILLUSTRATION OMITTED]

Value-added packs from Chivas Regal display the Chivas 12 Year Old 750 ml with two rocks glasses, the Chivas 12 Year Old 1.75 liter with four coasters; the Chivas 750 ml holiday tin and

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the Chivas Royal Salute 750 ml wood valet box and are designed to appeal to a wide range of holiday shoppers. A 3-D Chivas case card is available to enhance the holiday display.

[ILLUSTRATION OMITTED]

Agavero Tequila turns up the heat this holiday season with the introduction of its limited edition gift pack, featuring a 750 ml bottle and two hand-crafted agave "caballitos"--also known as tequila sipping glasses. Agavero is the 100 percent blue agave tequila blended with the Damiana flower, said to have aphrodisiacal properties. ...

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White Rock Distilleries re-launches its superpremium Quintessential Gin, with new packaging and flavor profile, in response to a changing, sophisticated marketplace. The new "Q" gin packaging is more stylish, with a tall, tapered bottle that has a blue fade and metal-applique "Q. ...

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White Rock Distilleries has re-launched its superpremium Quintessential Gin, with new packaging and a new flavor profile. The new "Q" Gin, imported from England, is distilled five times, while the essence of lotus leaves and lavender have been added to the traditional flavor profile of juniper and other botanicals, giving it a distinctive and smooth taste, the company says. ...

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Getting to Know London Dry Gins

By Perry Luntz from Whiskey and Spirits For Dummies

London dry gin, the world's most popular gin type, is rarely made in London (only one distiller remains in the city) and is dry only in the sense that it lacks sugar to make it sweet. London dry gins tend to be high in alcohol — 90 proof (45 percent alcohol by volume, or ABV) — with a characteristic citrus flavor and aroma due to the widespread addition of dried lemon and/or orange peels to the botanical recipe.

Bombay and Bombay Sapphire

Despite having Queen Victoria's picture and funky lettering, the label was designed to give Bombay a feeling of age and great respectability — necessary because it's a recent product that was created by an American in the 1960s. None of this should detract from the fact that Bombay is a very smooth gin that can only be described as *non-juniperish* — possibly because the botanical flavorings are steamed as they're redistilled with the grain neutral spirits.

To its credit, even though it isn't required to do so, Bombay has always listed its main ingredients on the label. But don't read the label until you taste the gin — that way, you get to test your palate as well as the spirit.

Bombay Sapphire, introduced in 1988 in its distinctive blue bottle, is a bit spicier than the original, but both Bombays have good body. Bombay Sapphire is the best-selling premium gin globally.

Beefeater

Beefeater is, as of this writing, the only distiller left in London. Founded in 1820 on the banks of the Thames by James Burrough, the distillery has since moved to larger quarters in Kensington. It was one of the earliest British gins to be imported to the United States (starting in 1918).

In making Beefeater, the botanicals are diffused in the spirit for a full 24 hours before redistilling the gin. The result is a highly perfumed product with a touch of citrus and a desirably long finish.

Although the label was recently modernized, the picture of the actual Beefeater guardsman from the Tower of London is still prominent; in fact, Beefeater uses it in its ads as well. He's still carrying that monstrous long lance, too.

Tanqueray Special Dry and Tanqueray No. TEN

Both Tanqueray types are made in pot stills that exactly replicate the original Tanqueray gin still. Botanicals are added to the spirit just before distillation, which means no steeping time; the result is a fresh but complex herbal flavor that has made Tanqueray a worldwide brand and the number-two leading imported gin in the United States.

The latest member of the Tanqueray family, Tanqueray No. TEN, has been breaking records for introductory sales. It's more expensive, presumably because its botanicals cost more, and the bottle is a modernized version of the original — but it's still green.

New arrivals

Quintessential Gin (or, just Q), is recently introduced and already generally available throughout the U.S. It's creating a stir, possibly because among its botanicals are lotus and lavender, which give it a distinctive flavor and aroma.

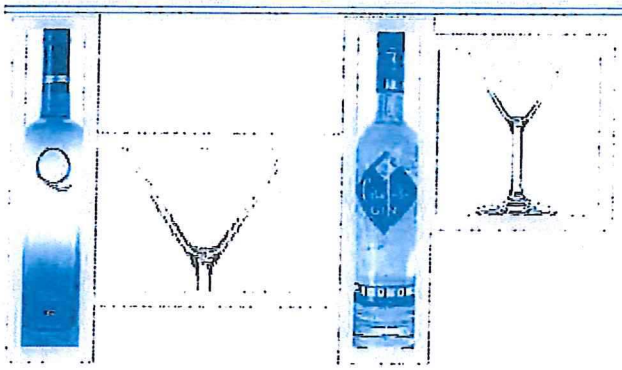
Hendricks, introduced to the world in 2004, is a super-premium brand of gin made in Scotland. It includes cucumbers and rose leaves among its list of more than ten botanicals.

Whitely and Neill is made by the heirs to a centuries-old British distilling family. What makes their gin different is an unusual bottle and the addition of botanicals from Africa, including baobab tree fruit and cape gooseberries. This gin is 42 proof (21 percent ABV).

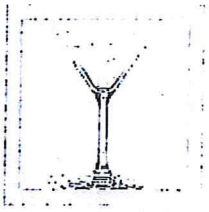
TasteReport.com

taste the world

drink



My martini of choice is a classic gin martini - made with a flavourful premium gin. Give up the vodka. Gin is in.



photos: handout

SPIRITS: TASTE REPORT - PREMIUM GIN

A PREMIUM GIN PRIMER

Hendrick's Gin ($33): From Scotland, this "small batch, handcrafted" gin comes in a stubby brown bottle with the warning: "It is not for everyone", but local retails say everyone is buying. Infused with the usual botanicals, plus the unusual addition of rose petals and cucumbers.

Q (Quintessential Gin) ($35): A Warrington Dry, Quintessential is distilled five times for crystal clarity and a silky smoothness. It's strong (45%) with only five botanicals and a distinctive peppery flavour behind the usual juniper.

Bombay Sapphire ($27): Bacardi-Martini owns this brand which started the premium gin craze with it's pretty blue bottle and intense style – lots of juniper flavor and nine other botanicals, including eucalyptus and citrus.

Citadelle Gin ($45): Among the most expensive new gins, this French product lays claim to infusing the most botanical flavours into its gin – 19 in all – and being "hand crafted, one cask at a time."

Plymouth Gin ($25): Well priced, fruity and smooth in martinis or G&Ts, this is the world's only geographically designated gin – you can make "London Dry" gins in Canada or Calcutta, but Plymouth must be made in Plymouth.

Tanquerey No. Ten ($55): The Tanquerey brand upped its gin ante with this super-premium product, made with only fresh (not dried) botanicals for an intense fruity flavour. Elegant green bottle with a red seal.

South Gin (n/a): From New Zealand, this new premium gin is popping up at all of the finest restaurants in Vancouver (West, Cin Cin, Araxi) but hasn't appeared in Alberta yet. It's flavored with the usual botanicals, plus local manuka berries and kawakawa, making it taste like "walking through the bush after it's rained." Imagine that.

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James Bond M NO P R S T UVW

Updated Menus - Vodka - Gin - AppleTinis - Cosmos -James Bond

CASINO ROYALE
Hendricks Gin & Grand Marnier topped off with Champagne.

GOLDFINGER TINI
Three Olives Orange Vodka, Orange Juice & Tuaca.

JAMES BOND TINI
Three Olives Naked Vodka & a splash of Hendricks Gin Shake well & pour into a frosted Martini glass & garnish with a Bleu Cheese Olive.

MONEYPENNY TINI
A mixture of Hendricks Gin & a splash of Cointreau.

OCTOPUSSY TINI
Three Olives Cherry Vodka, Pineapple Juice, & a splash of Lemon Juice

QUANTUM OF SOLACE
Woodford Reserve Bourbon & Grand Marnier.

SEAN CONNERY
Three Olives Naked Vodka, a splash of Q gin & a splash of Cointreau

THE M TINI
Hendricks Gin, a splash of Cointreau & a splash of Scotch

THE Q TINI
Hendricks Gin & a splash of Ketel One Vodka. Garnish with a Bleu Cheese stuffed olive.

VESPER
Hendricks Gin, Three Olives Naked Vodka, a splash of Lillet Wine & a lemon twist

FROM RUSSIA WITH LOVE
Stoli Vodka, a splash of Triple Sec, Cointreau & Grand Marnier.

Cool Links:

Why James Bond wanted his martinis shaken and not stirred.

All about James Bond

JAMES BOND TINI:	Three Olives Vodka, Splash of Bombay Gin. Shake well and pour into our Special Martini Glass. Garnish with a Blue Cheese Olive.
MONEYPENNY TINI :	A mixture of Quintessential Gin and a Splash of Contreau.
THE "Q" TINI:	a mixture of Quintessental gin and a splash of 3 olives vodka and garnish with a blue chesse olive.
THE "M" TINI:	A mixture of Quintessential Gin, splash of Cointreau and a splash of Scotch.
CASINO ROYALE:	A mixture of Quintessential Gin, Grand Mariner topped off with Champagne.
GOLDFINGER TINI:	A mixture of 3 Olives Orange Vodka, Orange Juice and Tuaca..

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James Bond M NO P R S T UVW

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Telephone:
406.549.7723

Operating Hours
Monday - Friday
9:00 a.m. - 6:30 p.m.
Saturday:
9:00 a.m. - 6:00 p.m.

Our Location
110 W. Spruce St.
Missoula, MT 59802

MAP

Gin 3

Gin 1 | Gin 2 | Gin 3

New Amsterdam Gin

The general trend in gin these days is to infuse it with ever more exotic botanicals and other unusual ingredients to make as distinctive a spirit as possible. However, New Amsterdam, a new gin from the E.&J. Gallo Winery in California (their first non-grape product), is more about subtlety.

The quintessential gin component juniper is suppressed in this "straight" concoction, which with its citrusy notes produces a lighter, cleaner, less "ginny" gin than you're no doubt used to. The name refers to the 17th-century Dutch settlement that became New York City and the modernistic bottle features a slice of the Manhattan skyline.

50ml
200ml
375ml
750ml
Trav
1L
1.75L

Proof 80
Type Gin
Origin USA
Website www.newamsterdamgin.com

Nikolai Gin

50ml
200ml
375ml
750ml
Trav
1L
1.75L

Proof 80
Type Gin
Origin USA
Website

No. 3 London Dry Gin

No.3 is the London Dry Gin distilled to a proprietary recipe of Berry Bros. & Rudd, London's oldest wine and spirit merchant. The name No.3 refers to the address in St James's Street, London: our home since 1698. No.3 was created to be the last word in gin for a Dry Martini.

'A Taste of Tradition': With juniper at its heart, it unashamedly celebrates the integrity and character of traditional London Dry Gin: three fruits and three spices distilled in traditional copper pot stills.

Three fruits: Juniper, from Italy, not only gives gin its name, but also the unmistakable gin taste of pine and lavender. Sweet Spanish orange peel provides freshness in the form of clean, crisp citrus. Grapefruit peel gives an extra zingy lift.

Three spices: Angelica root delivers an earthy quality and helps to make the gin dry. Moroccan coriander seed releases a lemon flavour and a spicy, slightly peppery finish. And finally, cardamom pods which add a spicy, aromatic, yet warm bite.

50ml
200ml
375ml
750ml
Trav
1L
1.75L

Proof 92
Type Gin

IN STORE
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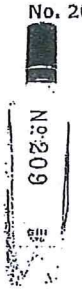
BAR NONE DRINKS
A Bazillion Drink Recipes from Bar None Drinks

New Amsterdam
Nikolai
No. 3 London Dry
No. 209 Gin 5XD
Plymouth
Potter's
Quintessential
Ridge Silvertip
Rogue Spruce
Seagram's
Seagram's Lime Twisted
Seagram's Orange Twisted
Skol
Tanqueray
Tanqueray 10
Tanqueray Rangpur
Van Gogh

Origin Holland
Website www.no3gin.com

No. 209 Gin 5XD



Start with a love of gin and a reverence for tradition. Add a vintner's passion for quality, the modern sensibility and drive of two extraordinary young women, and the skill of a brilliant master distiller. Mix in an affinity for the underdog, topped off with American ingenuity and hard work, and combine them all in the unique, cosmopolitan and slightly roguish city of San Francisco.

50ml
200ml
375ml
750ml
Trav
1L
1.75L

No. 209 Gin, a small batch hand-crafted spirit with a flavor for the 21st Century.

What's different about gin, than say, its more popular counterpart, vodka, is that each gin has its own personality with a distinct aroma, taste profile and finish. Vastly different from the juniper-heavy gins of the past, No. 209 opens with a beautifully aromatic nose of predominately citrus and floral notes with a hint of spiciness. First across the palette are the citrus high notes, with lemon predominate followed by a hint of orange. As the spirit warms in the mouth, delicate floral notes are liberated from the bergamot and coriander. Mid palette, there is a pepper-like warmth from the emerging cardamom and juniper with a wonderful counterpoint from the mint-like components of the cardamom. As the gin passes the palette, the cassia and other warm spice notes become prominent. The cassia in particular will linger in the aftertaste, encouraging another sip.

We take great pride in making a handcrafted, unique and intriguing spirit that is truly artisinal in quality. Whether you drink No. 209 neat in a martini or in a mixed cocktail, you will be able to tell that it is No. 209 and appreciate the difference that it makes.

Proof 92
Type Gin
Origin San Francisco, CA, USA
Website www.distillery209.com

Plymouth Gin

Well, if you want to avoid that unpleasantry, then make it a point to purchase Plymouth Gin. It is excellent. First made back in 1793, Plymouth Gin is a grand old institution in Britain. Churchill soaked it up, as does the Royal Navy. To this day Plymouth makes their gin on an ancient site, a 16th-century Dominican Friary where Miles Standish and the Pilgrim stayed the night before they set out for America.

50ml
200ml
375ml
750ml
Trav
1L
1.75L

Plymouth Gin, at 82.4 proof, is a very smooth gin. How the folks at Wine Enthusiast ever could have said that it was "sharp, astringent, and heavy" I do not know. Plymouth Gin is triple distilled and it has a bevy of botanicals in it- juniper, coriander seeds, angelica root, orris root and cardamom.

Now you may be scratching your head and wondering, "Botanicals, schmotanicals- so damn what?" Well, I tell you about the botanicals because Plymouth isn't just smooth and inoffensive, it also has outstandingly flavor. This is rare. Plymouth Gin doesn't whack you with the piney juniper taste. No, it gives you hints of citrus, lemon or perhaps orange, and coriander and then a mild juniper flush. As you let it slide down your throat you sense a softness and certain, well, earthiness. Such balance

www.alcoholreviews.com

Proof 84
Type Gin
Origin United Kingdom
Website www.plymouthgin.com

Potter's Gin

50ml
200ml
375ml
750ml
Trav
1L
1.75L

Proof 80
Type Gin
Origin United Kingdom
Website

Quintessential Gin

Originally launched in America and Canada, and due to its success, is now available in Britain! Quintessence by definition is 'of purest form' and while most gins are distilled 3 times Quintessential is distilled 5 times with 5 botanicals. The extra distillations and unique process gives Quintessential a smooth, delicate and balanced flavour.

Distilled at the renowned G & J Greenalls Distillery in Warrington, the last independent, family-operated distillery in the UK. Gilbert Greenall carefully selected 'Q's' recipe for his private reserve because of it's extra smooth taste.

Q is distilled by the traditional method in a pot still with grain neutral spirit and 5 selected botanicals. The gin is infused with the flavours and aromas of these five botanicals. The first distillation takes place with juniper, coriander and angelica and for final distillation cubebs and lime are added.

50ml
200ml
375ml
750ml
Trav
1L
1.75L

Proof 90
Type Gin
Origin United Kingdom
Website

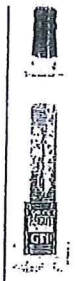
Ridge Silvertip Gin

Ridge Distillery LLC, providing small-batch artisanal beverages from the heart of Montana's Rocky Mountains. The alpine herbs are carefully grown and harvested to capture the traditional essence of a century ago.

50ml
200ml
375ml
750ml
Trav
1L
1.75L

Proof 88
Type Gin
Origin USA
Website www.ridgeherbs.com/

Rogue Spruce Gin



Tasting Notes:
Rogue Spirits released the first ever Spruce Gin, made with 14 ingredients in October of 2006

14 Ingredients:
Spruce, cucumber, angelica root, orange peel, coriander, lemon peel, ginger, orris root, grains of paradise, tangerine, juniper berries. Champagne Yeast, Grain Neutral Spirit & Free Range Coastal Water.

50ml
200ml
375ml
750ml
Trav
1L
1.75L

Proof 90
Type Gin
Origin USA
Website www.rogue.com

Seagram's Extra Dry Gin

A delicate, elegant style offering a rich flavor balanced with aromatics.

50ml
200ml
375ml
750ml
Trav
1L
1.75L

Proof 70
Type Gin
Origin USA
Website www.seagramsginlive.com

Seagram's Lime Twisted Gin

Seagram's Lime Twisted gin is perfect for gin and tonics. The extra hint of lime accents the great refreshing gin taste.

50ml
200ml
375ml
750ml
Trav
1L
1.75L

Proof 70
Type Gin
Origin USA
Website www.seagramsginlive.com

Seagram's Orange Twisted Gin

Seagram's Orange Twisted gin is perfect for gin and tonics. The extra hint of orange accents the great refreshing gin taste.

50ml
200ml
375ml
750ml
Trav
1L
1.75L

Proof 70
Type Gin
Origin USA

Website www.seagramsginlive.com

Skol Gin

Lighter aromas have a crisp, zesty character. On the palate this is dry and crisp with hints of sweet zest and licorice. Finishes quickly, through cleanly.

50ml
200ml
375ml
750ml
Trav
1L
1.75L

Proof 80
Type Gin
Origin USA
Website www.bartonbrands.com

Tanqueray Gin

Clear. Pungent, aggressive citrus and juniper aromas. Very flavorsome with tart cut snappy spice and alcohol heat on the finish. Very persistent.

50ml
200ml
375ml
750ml
Trav
1L
1.75L

Proof 94.6
Type Gin
Origin Scotland
Website www.tanqueray.com

Tanqueray 10 Gin

Described as "sublimely fresh with depth and complex flavor and a mouth-feel that can only be described as unctuous," Tanqueray No. Ten is highlighted by flavors of grapefruit, orange and lime and mellowed by juniper and chamomile.

50ml
200ml
375ml
750ml
Trav
1L
1.75L

Proof 94.6
Type Gin
Origin Scotland
Website www.tanqueray.com

Tanqueray Rangpur Gin

Tanqueray has come out with a new version of their classic gin. Tanqueray Rangpur is distilled with Rangpur limes for a more subtle gin taste with a hint of lime. The gin is very smooth and excellent in martinis.

50ml
200ml
375ml
750ml
Trav
1L
1.75L

Proof 82.6
Type Gin
Origin Scotland
Website www.tanqueray.com

Van Gogh Gin

The classics never go out of style. Handcrafted in Schiedam, Holland since 1891, Van Gogh Gin continues to satisfy the spirit lover's refined tastes - with an elegance critically acclaimed as the finest spirit in the world. Triple-distilled in small batches for a smooth, gentle finish, this delicate blended flavor of ten distinctive herbs and botanicals from Europe and Africa continues to enchant, year after year. This is the classic spirit, for the classic gin connoisseur.

Crafted to delight, distilled to perfection. Straight or mixed with other fine Van Gogh spirits, Van Gogh Gin always makes the Luxury Martini.

50ml
200ml
375ml
750ml
Trav
1L
1.75L

Proof 80
Type Gin
Origin Holland
Website vangoghvodka.com

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THIS DECISION 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

gcp

Mailed: September 26, 2011

Opposition No. 91194995

Cytosport, Inc.

v.

Comercializadora de Lácteos y Derivados, S.A. de C.V.

Before Bucher, Zervas, and Bergsman, Administrative Trademark Judges.

By the Board:

Comercializadora de Lácteos y Derivados, S.A. de C.V. ("applicant") seeks to register the mark NUTRI LECHE in standard character format for "milk-based beverages containing milk concentrates, vegetable oil and added nutrients" in International Class 29.[1] Applicant has provided the English translation of the Spanish term "LECHE" to mean "milk." Applicant has also disclaimed the term "LECHE."

[1] Application Serial No. 77502817, filed on June 19, 2008 pursuant to Trademark Act Section 44(e).

EXHIBIT 5

Cytosport Inc. ("opposer") has filed a notice of opposition to registration of applicant's NUTRI LECHE mark. As grounds for opposition, opposer alleges priority of use and that applicant's mark, when used on the identified goods, so resembles opposer's previously used and registered family of "MILK" marks, as identified below, as to be likely to cause confusion, mistake or to deceive under Section 2(d) of the Trademark Act.

Opposer's pleaded marks are as follows:

MUSCLE MILK for "powdered nutritional supplement containing milk derived ingredients for adding to food or drink" in International Class 5;[2]

MUSCLE MILK for "nutritional supplements" in International Class 5;[3]

MUSLCE MILK for "meal replacement drinks; meal replacement and dietary supplement drink mixes; protein based, nutrient-dense meal replacement bars; and pre-mixed nutritionally fortified beverages" in International Class 5 and "protein based, nutrient-dense snack bars" in International Class 29;[4]

MUSCLE MILK LIGHT for "dietary and nutritional supplements" in International Class 5;[5]

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[2] Registration No. 2714802, issued on May 13, 2003, claiming June 1, 1998 as both the date of first use anywhere and date of first use in commerce. Section 8 and 15 affidavits accepted and acknowledged on December 17, 2008.

[3] Registration No. 2809666, issued on February 4, 2003, claiming October 8, 1999 as both the date of first use anywhere and the date of first use in commerce. The term "MUSLCE" is disclaimed. Section 8 and 15 affidavits accepted and acknowledged on April 14, 2009.

[4] Registration No. 2973352, issued on July 19, 2007, claiming October 1, 2001, as both the date of first use anywhere and date of first use in commerce. Section 8 affidavit accepted on May 7, 2011.

[5] Registration No. 3333886, issued on November 13, 2007, claiming January 31, 2007 as both the date of first use anywhere and date of first use in commerce. The term "LIGHT" is disclaimed.

MUSCLE MILK N' OATS for "dietary and nutritional supplements" in International Class 5 and "fortified food, namely, protein based, nutrient-dense oatmeal" in International Class 30;[6]

MUSCLE MILK PUDDING for "dietary and nutritional supplements" in International Class 5 and "fortified food, namely, protein based, nutrient-dense oatmeal" in International Class 30;[7]

MIGHTY MILK for "dietary and nutritional supplements" in International Class 5;[8] and

MIGHTY MILK BAR for "dietary and nutritional supplement" in International Class 5 and "fortified food, namely, protein based, nutrient-dense oatmeal" in International Class 30.[9]

Opposer has also pleaded ownership of two applications; one for the mark MIGHTY MILK N' OATS[10] and the other for the mark MIGHTY MILK PUDDING.[11] Both applications recite "dietary and nutritional supplement" in International Class

---

[6] Registration No. 3311489, issued on October 16, 2007, claiming January 31, 2006 as both date of first use anywhere and date of first use in commerce for both classes. The term "OATS" is disclaimed.

[7] Registration No. 3311490 issued on October 16, 2007, claiming January 31, 2007 as both date of first use anywhere and date of first use in commerce for both classes. The term "PUDDING" is disclaimed.

[8] Registration No. 3132139, issued on August 22, 2006, claiming December 31, 2004 as the date of first use anywhere and July 31, 2005 as the date of first use in commerce.

[9] Registration No. 3886569, issued on December 7, 2010, claiming October 14, 2010 as both the date of first use anywhere and date of first use in commerce for both classes. The term "BAR" is disclaimed.

[10] Application Serial No. 77103659, filed on February 9, 2007, based upon an allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

[11] Application Serial No. 77103668, filed on February 9, 2007, based upon an allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act. The Board notes that this application has been abandoned for failure to file a timely Statement of Use.

5 and "fortified food, namely, protein based, nutrient-dense oatmeal" in International Class 30.

Applicant, in its answer, has denied the salient allegations of the notice of opposition.

Applicant's Motion for Summary Judgment

This case now comes before the Board for consideration of applicant's motion for summary judgment on opposer's asserted claim of likelihood of confusion. The motion is fully briefed.

In support of its motion, applicant, while conceding for the purpose of its motion that opposer owns valid trademarks and has priority, essentially argues that the differences in appearance, pronunciation and commercial impression between applicant's NUTRI LECHE mark and opposer's pleaded MILK marks are so great that confusion as to source is not likely. Specifically, applicant contends that the dominant element of its mark is the wording NUTRI which has no meaning, although it may suggest a product that is "nutritious" or contains "nutrients." As such, applicant maintains that the term NUTRI is more likely to be noticed and recalled by potential consumers.

Moreover, applicant argues that while the terms "LECHE" and "MILK" mean the same thing in the abstract, they have different connotations when used in the parties' respective marks. In support of this point, applicant states that it

has agreed to disclaim the term LECHE because it is descriptive of its milk-based beverage products. In contrast, applicant maintains that opposer successfully disputed the Office's requirement to disclaim MILK in opposer's applications for the marks MIGHTY MILK and MUSCLE MILK by arguing that the term MILK, as used in opposer's marks, suggests that opposer's goods replicate mother's milk in that the goods are natural, healthy and nutritious. Further, applicant maintains that confusion is unlikely between marks that share a descriptive or suggestive term, i.e., the term "milk" and the Spanish equivalent thereof, when the dominant elements of the marks are completely different.

As evidence in support of its motion, applicant has submitted the declaration of John M. Murphy, counsel for applicant, which introduces the following exhibits: (i) a printout from the USPTO's TARR database displaying the status of application Serial No. 77103668 for the mark MIGHTY MILK PUDDING; (ii) an excerpt from the *Larousse Gran Diccionario Ingles-Español*, with an English translation of the Spanish word "leche"; (iii) copies of an office action dated October 1, 2008, and the response thereto dated March 23, 2009 regarding application Serial No. 77502817 to register the mark NUTRI LECHE; (iv) a response to an office action dated June 21, 2004 in application Serial No. 7854425

to register the mark MUSCLE MILK; and (v) a response to an office action dated March 20, 2006 in application Serial No. 78574711 to register the mark MIGHTY MILK.

In response, opposer maintains that there are sufficient similarities between the marks such that a reasonable fact finder could find that similarities between the marks, taken together with the relatedness of the respective goods and channels of trade, are sufficient such that a likelihood of confusion does exist between the marks. Specifically, opposer contends that because the term LECHE means "milk," applicant's mark should be interpreted as NUTRI MILK.[12] As such, opposer argues that a fact finder could conclude that consumers are likely to believe that the mark NUTRI LECHE is part of opposer's family of MILK marks, and that the product used in connection with the NUTRI LECHE mark originates from the same source as opposer's products.

Opposer further argues that it is unclear from the record whether the term "LECHE" in applicant's mark is in fact generic, descriptive or suggestive of applicant's identified goods and, therefore, additional discovery is required to make such determination. To the extent such discovery would reveal that the term "LECHE" is suggestive of applicant's identified goods, opposer maintains that

[12] We note that this argument is not supported by any declaration or any other evidence of record.

there is even a greater probability that a likelihood of confusion exists between applicant's NUTRI LECHE mark and opposer's pleaded MIGHTY MILK and MUSCLE MILK marks. Opposer also argues that even if the word "leche" aka "milk" is determined to be descriptive, it does not mean that the respective marks are not confusingly similar. The fact that a word, which is part of a trademark, is deemed descriptive does not remove the word from the mark and remains visible, audible and meaningful to consumers. In other words, opposer contends that consumers will not discount the word "leche" aka "milk" from NUTRI LECHE mark based on whether the product does or does not contain dairy milk; rather, upon hearing or seeing applicant's NUTRI LECHE mark on beverage products, consumers familiar with opposer's family of MILK marks would likely believe that the respective marks and products are affiliated.

Finally, opposer argues that summary dismissal is improper where dissimilarity of the marks alone is the basis for concluding that there is no issue of fact as to likelihood of confusion. Opposer contends that, even if the Board were to agree with applicant, and concludes that the respective marks are dissimilar, this factor alone does not obviate the need to consider other important factors, such as the relatedness of the parties' respective goods and the channels of trade through which they travel, in making a

final determination as to whether a likelihood of confusion exists.

As evidence in support of its motion, opposer has submitted the declaration of Roberta White, Vice President of Legal and Regulatory Affairs for opposer, who declares that (1) opposer first used its MUSCLE MILK mark in 1998; (2) opposer's products are sold and marketed at health and nutrition retail outlets, convenience stores, club stores and fitness gyms; (3) opposer markets its goods to both English and Spanish speaking consumers and that opposer has several marketing campaigns directed specifically to Spanish speaking consumers in the United States; and (4) opposer currently uses a family of MILK marks in connection with some of its dietary and nutritional supplements. The declaration also introduces copies of various federal registrations for MILK marks owned by opposer. Opposer also introduces, *inter alia*, without a supporting declaration, (1) a printout of the prosecution history of applicant's involved application;[13] (2) copies of its pleaded registrations; and (3) a printout of C.F.R. Title 21, Chapter 1, Part 131, Sec. 131.110 which provides a

[13] The submission of the file history of applicant's involved application is unnecessary inasmuch as it is already of record. *See* Trademark Rule 2.122(b)(1).

description of milk and its properties as defined by the Food and Drug Administration.

Concurrently with its opposition to applicant's motion for summary judgment, opposer has also filed a motion for continued discovery under Fed. R. Civ. P. 56(d).

In reply, applicant disputes opposer's need for additional discovery inasmuch as opposer has been able to respond substantively to applicant's motion. Moreover, applicant argues that opposer has not demonstrated ownership of a family of "MILK" marks because opposer has failed to show that its pleaded marks have been used and advertised in such a manner as to create common exposure and recognition of common ownership. Applicant contends that opposer's only support for its contention that it owns a family of MILK marks is the declaration of opposer's in-house counsel which applicant argues is pure assertion, not evidence. Lastly, applicant argues that that dissimilarities of the marks alone is sufficient to find that a likelihood of confusion does not exist.

We first turn to opposer's motion for continued discovery under Fed. R. Civ. P. 56(d). In support of its motion, opposer contends that it needs discovery regarding the following subject matters in order to respond properly to applicant's motion for summary judgment:

1. Information regarding all possible English translations of applicant's NURTI LECHE mark;
2. Information regarding the products with which applicant has used or intends to use the NUTRI LECHE mark;
3. Information regarding applicant's date of first use of the NUTRI LECHE mark;
4. Information regarding the consumers to which applicant markets or intends to market its products;
5. Information regarding the channels of trade through which applicant distributes or intends to distribute its products;
6. Information regarding the circumstances under which applicant became aware of opposer's MILK marks;
7. Information regarding the primary ingredients and nutrients found in applicant's product;
8. Information regarding whether applicant's products are "nutritionally fortified;" and
9. Information regarding whether applicant's products identified for use in connection with the NUTRI LECHE mark are or contain "milk" as that term is defined by the U.S. Food and Drug Administration in 21 CFR § 131.110.

We note that applicant's motion for summary judgment only concerns whether the marks at issue are sufficiently

similar and/or dissimilar for likelihood of confusion purposes and that for purposes of the motion, applicant has effectively conceded that all of the other likelihood of confusion factors favor finding that there is a likelihood of confusion. We further note that opposer has been able to respond substantively to this limited issue without the need for the requested additional discovery. *See Ron Cauldwell Jewelry, Inc. v. Clothestime Clothes, Inc.*, 63 USPQ2d 2009, 2012 n. 8 (TTAB 2002) ("Inasmuch as opposer has submitted a substantive response to applicant's motion for summary judgment, opposer's request for discovery pursuant to Fed. R. Civ. P. 56(f0 is denied"). Moreover, we find that the discovery requested by opposer goes beyond the scope of the issues presented in applicant's motion and therefore such discovery is unnecessary for purposes of responding to applicant's motion for summary judgment. With regard to opposer's alleged need to obtain discovery from applicant regarding all English translations of applicant's NUTRI LECHE mark, we note that applicant has already made of record a dictionary definition of the term "LECHE" and, to the extent there are other definitions of said term, opposer can obtain such definitions by conducting its own research. Accordingly, opposer's motion for continued discovery under Fed. R. Civ. P. 56(d) is denied.

We now turn to the merits of applicant's motion for summary judgment. In a motion for summary judgment, the moving party has the burden of establishing the absence of any genuine dispute of material fact and that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. A genuine dispute with respect to a material fact exists if sufficient evidence is presented that a reasonable fact finder could decide the question in favor of the non-moving party. *See Opryland USA Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992). Thus, all doubts as to whether any particular factual issues are genuinely in dispute must be resolved in the light most favorable to the non-moving party. *See Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ 1542 (Fed. Cir. 1992).

In the present case, we find that applicant has adequately met its burden of proof of showing that no genuine dispute of material fact exists, and that there is no likelihood of confusion as a matter of law with regard to all of opposer's pleaded marks. We believe that the circumstances here are similar to those in *Kellogg Co. v. Pack'em Enterprises, Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991), in

that the single *DuPont*[14] factor of the dissimilarity of the marks in their entireties substantially outweighs any other relevant factors and is dispositive of the issue of likelihood of confusion.

As noted above, in bringing its motion for summary judgment based solely on the dissimilarities of the parties' respective marks, applicant has effectively conceded all other relevant *DuPont* factors in opposer's favor for the purposes of applicant's motion, and the Board has so considered those factors as favoring opposer. Thus, even viewing the other relevant *DuPont* factors in opposer's favor, the dissimilarities of the marks are so great as to avoid likelihood of confusion.

While we acknowledge that the term "LECHE" contained in applicant's involved mark means "milk" in English, we note that applicant seeks to register the mark NUTRI LECHE not NUTRI MILK. As such, we find that applicant's mark creates a markedly different visual appearance as compared to opposer's pleaded MILK marks. In addition to the visual differences, applicant's NUTRI LECHE mark and opposer's pleaded MILK marks, when considered as a whole, do not sound alike. Further, the marks do not share the same meaning; the first term in applicant's mark, i.e., NUTRI, is not a

[14] See *In re DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 463 (CCPA 1973).

recognized word but may suggest that applicant's goods are nutritious or contain nutrients. In comparison, the first terms in opposer's pleaded marks are MUSCLE[15] and MIGHTY[16] which do not convey anything about nutrients or nutrition. In view thereof, we find that when wording with completely different connotations is added before LECHE and MILK, i.e., NUTRI on the one hand and MUSCLE and MIGHTY on the other,

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[15] **mus·cle** *'noun, verb,* -cled, -cling, *adjective*

noun

1. a tissue composed of cells or fibers, the contraction of which produces movement in the body.
2. an organ, composed of muscle tissue, that contracts to produce a particular movement.
3. muscular strength; brawn: *It will take a great deal of muscle to move this box.*
4. power or force, especially of a coercive nature: *They put muscle into their policy and sent the marines.*
5. lean meat.

The American Heritage® Dictionary of the English Language (4th Ed. 2006).

[16] **might·y** *adjective,* might·i·er, might·i·est, *adverb, noun*

adjective
1. having, characterized by, or showing superior power or strength: *mighty rulers.*
2. of great size; huge: *a mighty oak.*
3. great in amount, extent, degree, or importance; exceptional: *a mighty accomplishment.*

The American Heritage® Dictionary of the English Language (4th Ed. 2006).

The Board may take judicial notice of dictionary definitions, including online reference works which exist in print format or have regular fixed editions. See *Boston Red Sox Baseball Club LP v. Sherman,* 88 USPQ2d 1581, 1590 (TTAB 2008) (judicial notice taken of definition from the Merriam-Webster Online Dictionary).

the ensuing combination of the terms create marks with completely different connotations. The commercial impressions of applicant's mark is different from opposer's marks too because of the differences in connotation, appearance and sound.

We would arrive at the same conclusion even if opposer established that it owns a family of "____ MILK" marks and purchasers understand that the English translation of "leche" is "milk." The differences in sound, meaning and appearance noted above sufficiently distinguish opposer's pleaded MILK marks from applicant's mark which would not lead a prospective purchaser to conclude that NUTRI LECHE is part of opposer's alleged family of marks.

In view of the foregoing, we find that applicant's involved NUTRI LECHE mark and opposer's pleaded MILK marks, considered in their entirety, are dissimilar in appearance, sound, and connotation, and create utterly dissimilar commercial impressions. *See Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459 (Fed. Cir. 1998) (court affirms Board dismissal of opposition based on dissimilarity of the marks CRISTAL and CRYSTAL CREEK); *Kellogg Co. v. Pack'em Enterprises, Inc.*, 21 USPQ2d at 1145 (court affirms Board dismissal of opposition based on dissimilarity of the marks FROOTEE ICE and elephant design and FRUIT LOOPS); *Keebler Co. v. Murray Bakery*

Products, 866 F.2d 1386, 9 USPQ2d 1736 (Fed. Cir. 1989)(court affirms Board dismissal of opposition based on dissimilarity of the marks PECAN SANDIES and PECAN SHORTEES). *See also Sears Mortgage Corp. v. Northeast Savings F.A.*, 24 USPQ2d 1227 (TTAB 1992)(dissimilarity between the marks APPROVAL PLUS and APPROVALFIRST dispositive).

Accordingly, applicant's motion for summary judgment is granted, and the opposition is dismissed with prejudice.