

<p>This Opinion is Not a Precedent of the TTAB</p>

Mailed: September 22, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Allagash Brewing Company

v.

Cathie A. Pelletier

Opposition No. 91214028
to Application Serial No. 85779517

James G. Goggin of Verrill Dana, LLP
for Allagash Brewing Company

Anthony D. Pellegrini of Rudman Winchell
for Cathie A. Pelletier

Before Kuhlke, Mermelstein and Goodman,
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, Cathie A. Pelletier, seeks registration of the mark ALLAGASH WILD (in standard characters, ALLAGASH disclaimed) for goods identified as “Jellies and jams; Marmalades; Preserved fruits and vegetables,” in International Class 29.¹

¹ Application Serial No. 85779517, filed on November 14, 2012, based on an allegation of a *bona fide* intention to use the mark in commerce under Section 1051(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Opposer, Allagash Brewing Company, has opposed registration of Applicant's mark on the ground that as used in connection with Applicant's goods, the mark so resembles Opposer's previously used and registered mark ALLAGASH for beer, and previously used common law marks ALLAGASH WHITE, ALLAGASH BLACK, ALLAGASH TRIPEL and ALLAGASH CURIEUX for beer, as to be likely to cause confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). By its answer, Applicant denied the salient allegations.²

In addition, Opposer presented argument on the issue of Applicant's lack of a bona fide intent to use the mark. Implied consent to the trial of an unpleaded issue can be found only where the nonoffering party (1) raised no objection to the introduction of the evidence on the issue, and (2) was fairly apprised that the evidence was being offered in support of the issue. *Morgan Creek Productions Inc. v. Foria International Inc.*, 91 USPQ2d 1134, 1138 (TTAB 2009). The question of whether an issue was tried by consent is basically one of fairness. The non-moving party must be aware that the issue is being tried, and therefore there should be no doubt on this matter. *Id.* at 1139.

Applicant did not object to Opposer's submission of her responses to interrogatories under notice of reliance for the issue of her "lack of bona fide intent to use the mark in interstate commerce."³ We further note that Applicant, in her

² The complaint also includes the allegation that Applicant's use of its mark "will infringe and/or dilute" Opposer's "prior rights in the ALLAGASH marks." Notice of Opp. ¶ 10. The Board does not have jurisdiction over infringement claims and the claim of dilution was not sufficiently pled.

³ 7 TTABVUE 2.

brief, responded on the merits and without objection to Opposer's arguments of lack of a bona fide intent to use the mark. In view thereof, we consider the claim of no bona fide intent to use as having been tried by implied consent pursuant to Fed. R. Civ. P. 15(b) and we, therefore, deem Opposer's Notice of Opposition to be amended to include this claim.

RECORD

By operation of the Trademark Rules, the pleadings and the file of the subject application are of record. Trademark Rule 2.122, 37 C.F.R. § 2.122. Opposer attached to its notice of opposition a printout from the USPTO Trademark Electronic Search System database (TESS) consisting of a copy of its pleaded registration showing its current status and title. The registration is summarized as follows:

Registration No. 2011090 on the Principal Register for the mark ALLAGASH in typed form⁴ for "beer," in International Class 32, filed on March 17, 1995, issued on October 22, 1996, section 8 and 15 combined declaration accepted and acknowledged, renewed.

In addition, Opposer submitted under notice of reliance copies of Applicant's responses to Opposer's interrogatories; Applicant's response to Opposer's requests for the production of documents indicating she has no responsive documents; a printout of an online article/recipe titled "Stout Beer Jelly"; third-party applications and registrations for marks that include both beer and jams and/or jellies in their

⁴ Prior to November 2, 2003, "standard character" drawings were known as "typed" drawings. A typed mark is the legal equivalent of a standard character mark. TMEP § 807.03(i) (July 2015).

identification of goods; printouts from third-party websites themainemag.com, jellybelly.com, foxnews.com;⁵ and excerpts from a cookbook. Finally, Opposer submitted the testimony, with accompanying exhibits, of Robert Tod, Jr., Opposer's president.⁶

Applicant submitted several notices of reliance which are the subject of a fully briefed motion to strike, filed on April 14, 2015, which we now consider. Applicant's trial period closed on Tuesday January 20, 2015. On that day Applicant submitted her declaration with accompanying exhibits. On January 21-22, 2015, Applicant submitted notices of reliance on several third-party registrations. Opposer seeks to strike this evidence on the basis that the declaration is improper because the Trademark Rules require trial testimony to be presented by deposition and the remaining notices of reliance are untimely as they were filed after the close of testimony. Applicant argues that Opposer waived its right to object to this evidence

⁵ The media kits for various magazines do not appear to be proper matter for submission under notice of reliance. In order to qualify for submission under notice of reliance, a printed publication must be in general circulation. While the magazines would fall under that category, the media kits for the magazines, presumably used to get advertisers, do not. In addition, if these documents were retrieved from the Internet, they do not identify a date of publication or access, or their source (URL). *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031 (TTAB 2010).

⁶ The hyperlinks and discussion of their contents presented in Opposer's reply brief have not been considered. This evidence is untimely as it was not submitted during the trial period and is in improper form. Trademark Rules 2.116(d), 2.121(a) and 2.123(l); *In re Powermat Inc.*, 105 USPQ2d 1789, 1791 (TTAB 2013) (providing hyperlinks to Internet materials is insufficient to make linked materials of record). *See also In re HSB Solomon Associates LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012) (evanescent nature of web content makes it particularly important that a copy of the relevant material be submitted in the record).

because a procedural objection must be made promptly, the delay of one day is not material, and Opposer has made no showing it will be prejudiced.⁷

When an objection to evidence is based on a defect that may be cured such objection must be raised promptly. Applicant's untimely submission of her notices of reliance is a defect that cannot be cured. Thus, the failure to raise the objection promptly did not serve to waive the objection. *Miss Nude Florida, Inc. v. Drost*, 193 USPQ 729, 731 (TTAB 1977). In addition, the declaration was filed on the last day of Applicant's testimony period. Absent a reopening of Applicant's testimony period based on excusable neglect this defect also could not be cured, and failure to make the objection promptly did not waive the objection. In addition, at trial, testimony must be taken by oral deposition and may only be submitted in declaration form based on written agreement by the parties. Trademark Rule 2.123(a) and (b). Inasmuch as there was no such stipulation, the declaration was improper and may not be considered as trial evidence. *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1427 (a declaration cannot be submitted in lieu of a testimony deposition absent a stipulation of the parties). The Board does not consider evidence not filed in compliance with the rules. Trademark Rule 2.123(l). In view thereof, Opposer's motion to strike is granted and Applicant's notices of reliance filed on January 20-23 have not been considered.

⁷ Applicant's argument that all of the materials may be submitted without need for a notice of reliance is misplaced. Applicant references Section 528 of the Trademark Trial and Appeal Board Manual of Procedure (TBMP) to support her position. However, that section concerns motions for summary judgment not trial evidence which is governed by the Trademark Rules and addressed in Chapter 700 of the TBMP (June 2015). Trial evidence must be submitted through testimony or under a notice of reliance.

Even though Applicant's notices of reliance have been stricken, Opposer, as plaintiff in this proceeding, must nonetheless prove its standing and its claim by a preponderance of the evidence. *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); and *Cerveceria Centroamericana, S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989).

STANDING/PRIORITY

Because Opposer's pleaded registration is of record, is valid and subsisting, and owned by Opposer, Opposer's standing to oppose registration of Applicant's mark is established and its priority is not in issue as to the goods listed in the registration. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); and *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

In addition, Opposer has proven common law rights to the pleaded marks ALLAGASH WHITE, ALLAGASH BLACK, ALLAGASH TRIPEL and ALLAGASH CURIEUX prior to Applicant's filing date of November 14, 2012.⁸ Opposer has been brewing Belgian-style beer in Portland, Maine for 20 years.⁹ Opposer sells about 20

⁸ We note Opposer also submitted registrations for these marks under Mr. Tod's testimony. However, Opposer did not plead these registrations or their underlying applications and did not seek to amend its pleading to add these registrations. Thus, although they are of record (and might have been relied on for some other purpose), we cannot grant an opposition based on a likelihood of confusion with these unpleaded registered marks. In addition, Opposer submitted evidence regarding other ALLAGASH-formative marks but these were not pleaded nor the subject of a motion to amend to add them to the pleading. In view thereof, Opposer may not rely on them for any presumptions under Section 7(b) of the Trademark Act, and we only consider them for any other relevant purpose.

⁹ Tod Test., 12 TTABVue 8.

different beers under various ALLAGASH marks, including ALLAGASH WHITE,¹⁰ ALLAGASH TRIPEL,¹¹ ALLAGASH CURIEUX,¹² and ALLAGASH BLACK.¹³ Opposer sells its beer in several states in the eastern United States, California and the Chicago area.¹⁴

We turn to the issue of likelihood of confusion under Section 2(d).

LIKELIHOOD OF CONFUSION

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also*, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003) (listing thirteen factors). Two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). Further, “[a]lthough confusion, mistake or deception about source or origin is the usual issue posed under Section 2(d), any confusion made likely by a junior user’s mark is cause for refusal; likelihood of confusion encompasses confusion of sponsorship, affiliation or connection.” *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423, 1429 (TTAB 1993); *see also Majestic*, 65 USPQ2d at 1205 (“...mistaken belief that [a good] is manufactured or

¹⁰ 12 TTABVUE 8, Exh. 2A, 13 TTABVUE 15.

¹¹ 12 TTABVUE 9, Exh. 2C, 13 TTABVUE 17.

¹² Exh. 9C, 13 TTABVUE 30.

¹³ 12 TTABVUE 18, Exhs. 1D and 18B, 13 TTABVUE 7, 71.

¹⁴ 12 TTABVUE 11, Exh. 3, 13 TTABVUE 19.

sponsored by the same entity ... is precisely the mistake that Section 2(d) of the Lanham Act seeks to prevent”). We focus on Opposer’s registration for the typed mark ALLAGASH for beer because if we do not find a likelihood of confusion with that mark and its associated goods, then there would be no likelihood of confusion with the marks in the other pleaded registrations. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

Similarity/Dissimilarity of the Marks

We turn to the *du Pont* factor of the similarities and dissimilarities between Applicant’s mark ALLAGASH WILD and Opposer’s mark ALLAGASH. We analyze “the marks in their entirety as to appearance, sound, connotation and commercial impression.” *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) *quoting du Pont*, 177 USPQ at 567. *See also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005).

While we must make our determination on the marks in their entirety, “there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark ... [i]ndeed, this type of analysis appears to be unavoidable.” *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). The first word in Applicant’s mark is ALLAGASH, the entirety of Opposer’s mark, and it is often the first part of a mark that is more likely to be remembered by potential consumers. *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). *See also Palm Bay Imports*, 73 USPQ2d at

1692. In Applicant's mark, it may be that the term WILD overcomes its secondary position, in that Applicant has disclaimed the term ALLAGASH, as it is geographically descriptive of the origin of her intended goods.¹⁵ However, the word WILD in connection with Applicant's jams and jellies is at least suggestive of the ingredients for them as she intends to make them from wildflowers and berries.¹⁶ Thus, to the extent the term WILD commands more source-identifying significance, this is not sufficient to distinguish the marks.

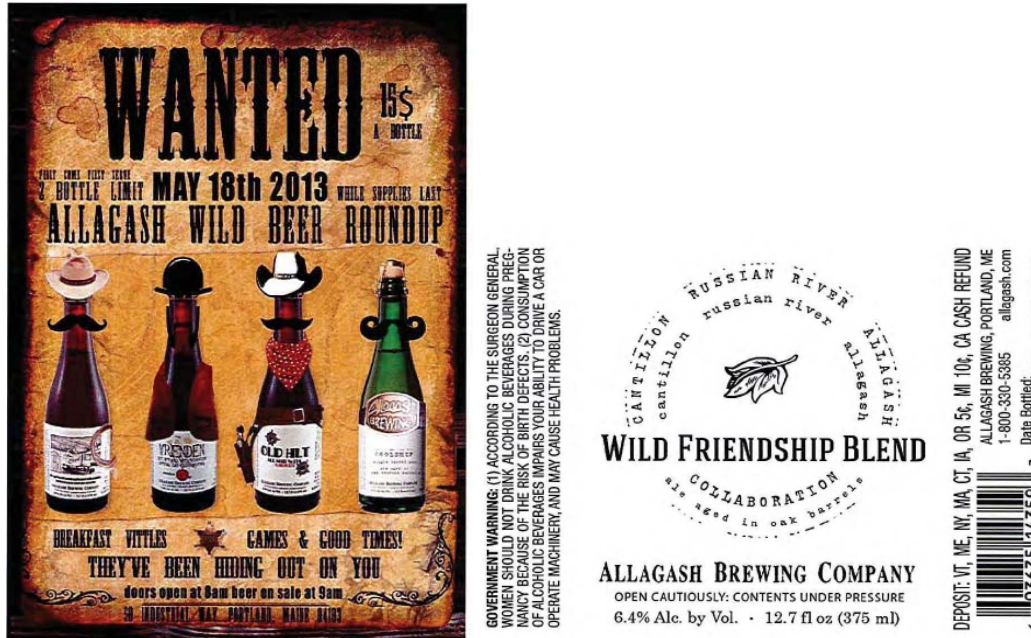
We further note that Opposer has used the word WILD in connection with some of its beers "because 'wild' is a name that's commonly referred to with beers that are not fermented with standard ale yeasts. It's a style of beer that we're well known for as brewers of Belgian-style beer. The Belgians commonly make these wild beers."¹⁷ Opposer brews such beers and refers to them as its "Wild Beer Roundup," shown below.¹⁸

¹⁵ "Allagash, township (1990 population 359), Aroostook county, N. Maine, at junction of Saint John and Allagash rivers." THE COLUMBIA GAZETTER OF THE WORLD (2013), March 13, 2013 Office Action, TSDR p. 4. Applicant's address in the application is 163 Allagash Road, Allagash, Maine 04774.

¹⁶ "The flowers and plants I would be using to make jellies and jams grow wild here on my land in Allagash." Ans. Interrogatory No. 1., Opp. NOR, 7 TTABVUE 5.

¹⁷ 12 TTABVUE 38.

¹⁸ 12 TTABVUE 38, Exh. 13B, 14 TTABVUE 3.



We find the marks to be very similar in appearance, sound, meaning and overall commercial impression, and this similarity in the marks outweighs the dissimilarities. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (confusing similarity found where the mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION, and LION was dominant part of both parties' marks). This factor weighs heavily in Opposer's favor.

Strength of Opposer's Mark

There is no evidence of third-party use¹⁹ of the word ALLAGASH by any other food or beverage companies and Opposer's president testified that he only knew of "a beef jerky company that used it for a while [b]ut other than that, no ... I don't

¹⁹ We note that Applicant's stricken evidence included third-party registrations for clothing and paper, but no examples of third-party use.

think anyone currently is using it – that I know of.”²⁰ Opposer’s sales have grown from 120 barrels in 1995 to 70,000 barrels in 2015. In the last two years it has increased its sales by over 20% annually.²¹ Opposer markets its beer through signage and glassware, retail displays, tap handles, sell sheets given to distributors and retailers, promotional events, booths at beer festivals, and sampling tables in stores.²² In addition, Opposer has a social media presence on Facebook, Twitter and Instagram.²³ During a 28-day period Opposer averaged 1.46 million impressions on Facebook, defined as “[t]he number of people who were served any activity from your Page including posts, posts by other people, Page like ads, mentions and checkins.”²⁴ They have 13,000 followers on Twitter, over 16,000 people on their Instagram site, and over 53,000 “likes” on Facebook.”²⁵ Opposer also places advertisements in “traditional magazines,” including Craft Beer and Brewing, All About Beer, Maine Magazine, Down East and Fall Beer Guide. Opposer spent \$75,000 on advertising in 2014.²⁶ Approximately 20,000 people visit the brewery every year and purchase beer and merchandise with the ALLAGASH marks (*e.g.*, T-shirts, jackets, signs, glassware, bottle openers).²⁷ Opposer also sells the

²⁰ Tod Test., 12 TTABVUE 19.

²¹ 12 TTABVUE 25-26, Exhs 7, 7A, 13 TTABVUE 25-26.

²² 12 TTABVUE 21-23, 31-32.

²³ *Id.* at 33, 34.

²⁴ *Id.* at 34, Exh. 12A, 13 TTABVUE 39.

²⁵ 12 TTABVUE 34, Exh. 12B, 13 TTABVUE 40.

²⁶ 12 TTABVUE 34-37, Exhs 16A-16E, 13 TTABVUE 52-61.

²⁷ 12 TTABVUE 37-38, Exhs 13A-13VV, 14 TTABVUE 2-50.

merchandise on its website.²⁸ The Brewers Association ranks Opposer at 47 in the top 50 craft brewing companies by beer sales volume²⁹ out of approximately 2000 craft brewers in the United States.³⁰ Opposer's mark has received unsolicited press coverage in *Saveur* magazine, as well as, *Bon Appetit*, *Esquire*, and *Men's Journal*.³¹ Finally, Opposer's ALLAGASH beer has received several United States and International awards.³²

We find that Opposer's mark has attained commercial strength in the craft beer market.

Relatedness of the Goods, Channels of Trade, Classes of Consumers

We turn then to the goods, channels of trade and classes of purchasers. We must make our determinations under these factors based on the goods as they are recited in the application and registration, respectively. *See Octocom Systems Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to

²⁸ 12 TTABVUE 40.

²⁹ *Id.* at 24, Exh. 5, 13 TTABVUE 21.

³⁰ 12 TTABVUE 23.

³¹ 12 TTABVUE 40-41, Exhs 14, 17A, 17B, 13 TTABVUE 41, 62-63 .

³² 12 TTABVUE 42-43, Exhs 17C, 17D, 17E, 13 TTABVUE 64-69 (European Beer Star 2014, Brussels Beer Challenge, Great American Beer Fest). *See also* Exh. 17B, 13 TTABVUE 63 (Men's Journal Magazine ranks ALLAGASH beer 39 out of 100 Best Beers in the World).

which sales of the goods are directed.”); and *In re Elbaum*, 211 USPQ 636 (TTAB 1981). As to Opposer’s common law marks, Opposer must establish through evidence the type of good, channels of trade and classes of consumers.

Opposer argues that the goods are related based on the doctrine of natural expansion. Under this doctrine the first user of a mark in connection with particular goods or services possesses superior rights in the mark as against subsequent users of the same or similar mark for any goods or services which purchasers might reasonably expect to emanate from it in the normal expansion of its business under the mark. *Mason Engineering and Design Corporation v. Mateson Chemical Corp.*, 225 USPQ 956 (TTAB 1985). Generally, this doctrine is used in the context of parties’ dueling claims of priority. *Id.* (applicant argued it had priority because opposer’s goods were within applicant’s zone of expansion of the goods in its prior registration). *But see Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650 (TTAB 2002) (evidence of licensing ROADRUNNER mark on wide variety of goods and use of another mark BUGS BUNNY on maps supported finding that road maps were within the natural area of expansion of products for plaintiff); *May Department Stores Co. v. Prince*, 200 USPQ 803 (TTAB 1978) (shampoo is natural expansion from plaintiff’s health and beauty aids inasmuch as shampoo falls within the category of health and beauty aids). Moreover, this doctrine requires a specific analysis that does not appreciably add to our understanding of the relatedness of the goods in this case.³³ Finally, “[l]ack of present intent to expand use of one’s

³³ The factors to be considered are 1) whether the second area of business (that is, the subsequent user’s area of business, into which the first user has or potentially may expand)

mark is not an overriding consideration.” *Tuxedo Monopoly, Inc. v. General Mills Fund Group*, 209 USPQ 986 (CCPA 1981) (MONOPOLY for clothing likely to cause confusion with famous MONOPOLY mark for board game). Opposer’s arguments and evidence are better analyzed by simply adding to our understanding of consumer perceptions regarding these goods and whether they are related in the minds of consumers in a way that is likely to cause confusion.

In support of its argument that their respective goods are related, Opposer made of record several third-party use-based registrations that cover beer and jam or jellies.³⁴ See, e.g., Reg. No. 3980623 for the mark U-MAY for, *inter alia*, beer and

is a distinct departure from the first area of business (of the prior user), thereby requiring a new technology or know-how, or whether it is merely an extension of the technology involved in the first area of business, 2) the nature and purpose of the goods or services in each area, 3) whether the channels of trade and classes of customers for the two areas of business are the same, so that the goodwill established by the prior user in its first area of business would carry over into the second area, 4) whether other companies have expanded from one area to the other, and 5) the determination must be made on the basis of the circumstances prevailing at the time when the subsequent user first began to do business under its mark, i.e., what was “natural” in the relevant trade at that time. *Mason*, 225 USPQ at 962.

As noted in the McCarthy treatise, this doctrine

appears to be no more than a specific application of the familiar “related goods” test. The “natural expansion” thesis seems to be nothing more than an unnecessarily complicated application of the likelihood of confusion of source or sponsorship test to a particular factual situation. If the “intervening” use was likely to cause confusion, it was an infringement, and the senior user has the right to enjoin such use, whether it had in fact already expanded itself or not.

J.T. McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §24:20 (4th ed. updated 2015).

³⁴ Opposer also submitted several third-party applications which are of little probative value and only serve to show that an application was filed. *Weider Publications, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1360 (TTAB 2014). In addition, the third-party registrations based on international treaty obligations that do not require use for registration (*i.e.*, based on Sections 44 or 66 of the Trademark Act) are of little probative

jellies; Reg. No. 1395765 for the mark CONDAL for, *inter alia*, beer and jellies, jams; Reg. No. 1818909 for the Big Boy design mark for, *inter alia*, beer and jellies, jams; Reg. No. 4522691 for the mark FLAVORFIT for, *inter alia*, beers and jellies, jams; Reg. No. 2766286 for the mark HALDIRAM'S for, *inter alia*, beer and jams, jellies;³⁵ Reg. No. 3893101 for the mark WOW for, *inter alia*, beer and jellies, jams; and Reg. No. 2010939 for the mark HANNAFORD for, *inter alia*, beer and jams, jellies.³⁶ Third-party registrations may serve to suggest that the goods are of a type that may emanate from a single source. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB), *aff'd per curiam*, 864 F.2d 149 (Fed. Cir. 1988). However, third-party registrations for a large variety of goods, are less probative on this point. Some of the registrations appear to be more in the nature of house marks used on a wide variety of food and beverages.

Mr. Tod testified that it is common for brewing companies to make and sell food products. For example, Belgian breweries have “traditionally made cheese, for decades if not centuries.”³⁷ Other examples include brewers making mustard with their beer as an ingredient or selling food items (e.g., mustard, pickles, sausage) under the same mark as their beer.³⁸ In addition, Mr. Tod testified that craft beer is commonly associated with food, in general, and Opposer conducts cooking contests,

value. *Calypso Tech., Inc. v. Calypso Capital Mgmt., LP*, 100 USPQ2d 1213, 1221 n.15 (TTAB 2011).

³⁵ 9 TTABVUE 25, 30, 33, 38, 42.

³⁶ 10 TTABVUE 4, 8.

³⁷ 12 TTABVUE 44, Exh. 15B, 13 TTABVUE 42.

³⁸ 12 TTABVUE 44.

beer and food pairings, and beer and cheese pairings. “So you very commonly see beer – craft beer and food together and very commonly with the same brand name.”³⁹

Examples in the record include beer and cheese, beer and clam chowder, beer and hot sauce, beer and barbecue sauce, beer and ice cream, and beer and peanut brittle, shown below.⁴⁰



Victory

At Victory Brewing Company, we love distinctive, full-flavored beer and delicious, chef-inspired food. We are proud to feature products created by our own chefs and to support and collaborate with local artisan food brands.

Ice Creams

Our beer-inspired, wort-infused ice creams combine all natural ingredients and rich, creamy, locally sourced milk to create unique flavors that will tickle your sweet tooth.



Cheddar Spreads

These beer-infused, hand-crafted cheddar spreads merge locally Wisconsin cheddar with Victory beer and fresh ingredients, creating both simple and complex flavors to please any palate.



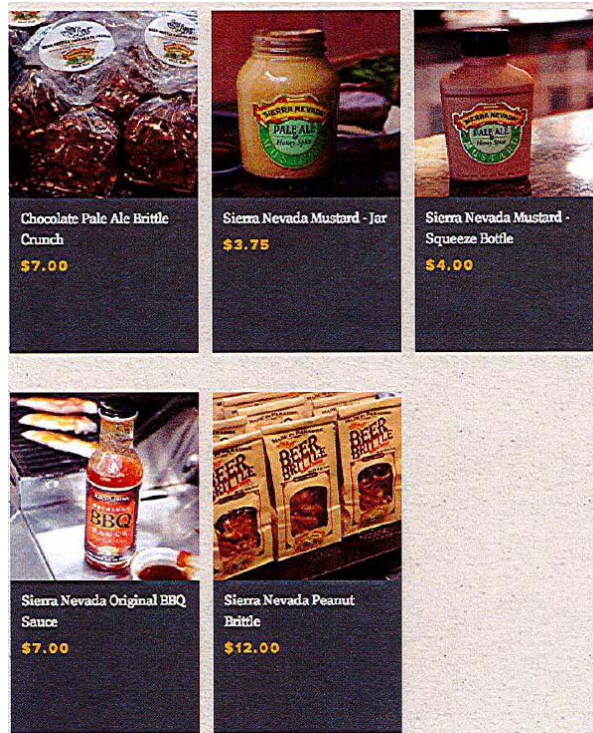
More Beer Infused Treats

We are proud to collaborate with and support local artisan food brands. These unique products feature Victory beer and/or wort and are created in small batches by our knowledgeable partners.



³⁹ *Id.*

⁴⁰ 13 TTABVUE 42-47.



Mr. Tod testified that Opposer produces a vinegar called “Allagash Vinegash” but does not sell it in retail stores yet.⁴¹ Opposer also has a cookbook that contains recipes for dishes that pair well with its beers or include its beer as an ingredient.⁴² In addition, the record includes examples of online recipes using beer as an ingredient.⁴³

Mr. Tod opined that consumers of Opposer’s beer would believe, upon encountering ALLAGASH WILD for jams and jellies, etc., that they emanate from Opposer because it is “very common ... for breweries to extend their brand into lots of different kinds of foods; and you’ll commonly find these foods, you know, not only in their stores, but in retail stores like grocery stores. In restaurants they’re

⁴¹ 12 TTABVUE 47.

⁴² 12 TTABVUE 49; NOR, 11 TTABVUE 4-13.

⁴³ See, e.g., <http://growitcookitcanit.com>, 7 TTABVUE 27.

commonly found. I think if people see ‘Allagash’ with anything that’s consumable, any kind of food – jams, spreads, mustards, pickles; as in the case of Dogfish beer, clam chowder – people are going to assume we’re making it.”⁴⁴

Based on this record, we find that at least a subset of the goods encompassed by Opposer’s identification, craft beers, are sufficiently commercially related to jams and jellies such that consumers could be confused as to source.

Considering the channels of trade and classes of purchasers, because there are no limitations as to channels of trade or classes of purchasers in either the application or Opposer’s registration, we must presume that Applicant’s and Opposer’s goods travel through all usual trade channels for such goods and to all classes of prospective purchasers for those goods. *See Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77-78 (CCPA 1973); and *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Beer, jam, jellies, marmalade, and preserved fruits and vegetables are all sold in retail food and beverage stores, including grocery stores in some states (the extent of overlap of course depends on

⁴⁴ 12 TTABVUE 48. Applicant asserts that this testimony is “the mere opinion of the president of Opposer” and there is no expert testimony or survey to support it. App. Br., 27 TTABVUE 18. Opposer has not presented Mr. Tod as an expert, and we view his testimony as that of a fact witness and account for the possible bias of his testimony, being Opposer’s president. However, Mr. Tod is very knowledgeable in the field of craft brewing and his testimony is not contradicted by the record and is, in fact, supported by the evidence of record. The fact that Mr. Tod was presented as a lay witness does not categorically disqualify his opinions. Fed. R. Evid. 701 (conditions for allowing the opinion testimony of lay witnesses).

the state or county). Applicant acknowledges as much in her responses to Opposer's interrogatories.⁴⁵

In view of the above, the *du Pont* factors of the similarity of the goods, the channels of trade, and classes of purchasers favor a finding of likelihood of confusion.

With regard to the conditions of sale, neither party addressed this factor directly. Opposer simply notes that in another case the Court observed that beer and deli meats, *etc.* were "low cost food and beverage items not conducive to the exercise of careful selectivity by purchasers." *Frank Brunkhorst Co. v. G. Heileman Brewing Co.*, 875 F.Supp. 966 (E.D.N.Y. 1994) (WEINHARD'S BOAR'S HEAD RED for beer likely to be confused with BOAR'S HEAD for deli meats, *etc.*). Opp. Br. p 9, 26 TTABVUE 13. While purchasers of craft beer may be more discriminating in their purchase, the level of care exercised in such purchase would not obviate confusion. In addition, the registration is for "beer" which includes all types of beer. Even where there may be some care taken in the purchasing process, consumers sophisticated or knowledgeable in a particular field are not necessarily immune to source confusion. *See In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993); *Top Tobacco, LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011). Absent any evidence on this factor, we find this factor to be neutral.

⁴⁵ "I assume I first saw Allagash Beer in a Fort Kent, Maine grocery store since the name would most likely catch my attention." Response to Interrog. No. 11, Opp. NOR, 7 TTABVUE 8.

Balancing the Factors

Because Applicant's mark ALLAGASH WILD is very similar to Opposer's mark ALLAGASH, the goods are related, and the channels of trade and classes of consumers overlap, confusion is likely between Applicant's mark ALLAGASH WILD and Opposer's mark ALLAGASH.

In view of our determination on the Section 2(d) claim, we do not reach the claim of no bona fide intent to use.

Decision: The opposition is sustained.