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

Proceeding	91214312
Party	Plaintiff Diageo Brands B.V.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Diageo Brands B.V.,)
)
 Opposer,)
) Opposition No. 91214312
 v.)
)
 Midway Trading Corp.,)
)
 Applicant.)

**MOTION TO DISMISS COUNTERCLAIM FOR PARTIAL CANCELLATION FOR
FAILURE TO STATE A CLAIM**

I. INTRODUCTION

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Opposer Diageo Brands B.V. respectfully moves the Board to dismiss the counterclaim of Applicant Midway Trading Corp. for the partial cancellation of Opposer’s Reg. No. 3369110 under 15 U.S.C. § 1068. As the basis of this motion, Opposer submits that Applicant has failed to support its counterclaim with the required factual averments establishing that the relief sought would preclude the likelihood of confusion alleged by Opposer’s Notice of Opposition.

**II. THE BOARD SHOULD DISMISS APPLICANT’S CAUSE OF ACTION FOR
FAILURE TO STATE A CLAIM**

As set forth in paragraphs 1-6 of the Notice of Opposition, Opposer and its predecessors-in-interest have owned and used in United States commerce various marks consisting of or including the element TANQUERAY (collectively “Opposer’s Marks”) since well prior to any claim of priority that Applicant can advance. In addition to its common-law rights to those marks, Opposer owns: (1) incontestable U.S. Reg. No. 0120024 of TANQUERAY for “dry gin”; (2) incontestable U.S. Reg. No. 1438675 of TANQUERAY for “gin”; (3) incontestable U.S.

Reg. No. 2874913 of TANQUERAY for “alcoholic beverages, namely vodka”; and
(4) incontestable U.S. Reg. No. 3369110 of TANQUERAY for “distilled spirits.”

Applicant does not dispute that Opposer has stated a prima facie cause of action for likely confusion based on the first three of the four registered marks set forth above, which, to reiterate, cover only “gin,” “dry gin,” and “alcoholic beverages, namely vodka.” Applicant also does not claim that any restriction of the identification of goods set forth in Reg. No. 3369110 would eliminate the likelihood of dilution averred by paragraph 16 of the Notice of Opposition, an omission that will require the Board to consider Opposer’s unrestricted goods in the context of that averment even if Applicant’s counterclaim otherwise is allowed.¹ Rather, Applicant’s counterclaim for partial cancellation is based on the theory that restricting the identification of goods in Reg. No. 3369110 to gin and vodka will preclude a likelihood of confusion between Opposer’s Marks and Applicant’s TANDUAY mark for rum.

The Supreme Court has made it clear that allegations such as those advanced here by Applicant must provide “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 570 (2007)). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, “a plaintiff’s obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (citations omitted).

¹ If, as the Board held in *Eurostar Inc. v. “Euro-Star” Reitmoden GmbH & Co. KG*, 34 U.S.P.Q.2d 1266 (T.T.A.B. 1994), an applicant facing a Section 2(d)-based challenge must allege that the partial cancellation of its opponent’s registration will render confusion unlikely, *id.* at 1272, there is no readily apparent reason why an applicant facing a Section 43(c)-based challenge should be excused from satisfying the same requirement in that context.

Thus, a plaintiff is required to do more than make bald assertions in support of a particular claim. *Iqbal*, 556 U.S. at 678.

Here, the Board should dismiss Applicant's counterclaim because the relief sought by the counterclaim will not preclude a finding of likely confusion between the parties' marks. On this issue, the Board has held that:

[T]he modification or restriction provisions of Section 18 are in the nature of an equitable remedy; [and] that for a plaintiff to prevail on a request for modification of an application or restriction of a registration, in a case involving likelihood of confusion, the party must plead and prove that (i) entry of the proposed restriction to the identification would avoid a finding of likelihood of confusion, and (ii) its opponent is not using the mark on goods/services sought to be excluded by the restriction

Seculus da Amazonia S/A v. Toyota Jidosha Kabushiki Kaisha, 66 U.S.P.Q.2d 1154, 1157

(T.T.A.B. 2003). In particular, and as to the first of these requirements, the Board has held that "we will permit the restriction [a] petitioner seeks only if the petitioner alleges (and later proves) that a likelihood of confusion will be avoided if the registration is restricted in the manner sought by the petitioner." *Eurostar Inc. v. "Euro-Star" Reitmoden GmbH & Co. KG*, 34 U.S.P.Q.2d 1266, 1272 (T.T.A.B. 1994).

Applicant has advanced no factual recitations, threadbare or otherwise, supporting its claim that a likelihood of confusion can be avoided by a restriction on the identification of goods in Opposer's Reg. No. 3369110 to gin and vodka, especially in light of the otherwise unrestricted nature of the parties' filings. Here, as in any other context, direct competition is unnecessary for a senior user to prevail. *See, e.g., John Walker & Sons, Ltd. v. Bethea*, 305 F. Supp. 1302 (D.S.C. 1969) (confusion likely between JOHNNIE WALKER mark for Scotch whisky and JOHNNY WALKER mark for hotel services); *Churchill Downs Distilling Co. v. Churchill Downs*, 90 S.W.2d 1041 (Ky. 1936) (confusion likely between CHURCHILL DOWNS for horse racing

services and CHURCHILL DOWNS for whiskey). Instead, a likelihood of confusion may exist if the goods have some relationship with one another and could be encountered under circumstances suggesting a common source. *See, e.g., Univ. of Ga. Athletic Ass'n v. Laite*, 756 F.2d 1535 (11th Cir. 1985) (confusion likely between stylized bulldog designs used in connection with services related to sports activities and with beer); *Schieffelin & Co. v. Jack Co. of Boca Inc.*, 850 F. Supp. 232 (S.D.N.Y. 1989) (confusion likely between DOM PERIGNON for sparkling wine and DOM POPIGNON for popcorn). The key inquiry is whether the parties' goods are "related in some manner" such that they would give rise to the "mistaken belief that they originate from or are in some way associated with the same producer or provider." *In re Azteca Rest. Enters.*, 50 U.S.P.Q.2d 1209, 1210-11 (T.T.A.B. 1999); *see also E. Remy Martin & Co. v. Shaw-Ross Int'l Imps.*, 756 F.2d 1525, 1530 (11th Cir. 1985) ("The question . . . is not whether the purchasing public can readily distinguish wine from cognac but whether the products are the kind the public attributes to a single source.").

Applying this principle, the Board and courts alike have found that numerous alcoholic beverages are sufficiently related to other beverages, alcoholic or not, to support a finding of likely confusion.² Those beverages include tequila and malt liquor, *see In re Majestic Distilling*

² This is in part because of "the often chaotic conditions under which alcoholic beverages are purchased in bars[] and the impulse nature of these purchases." *Guinness United Distillers & Vintners B.V. v. Anheuser-Busch Inc.*, 64 U.S.P.Q.2d 1039, 1044 (S.D.N.Y.), *aff'd*, 50 F. App'x 52 (2d Cir. 2002). As the Board properly has recognized, "[i]t is well known that liquor is ordered by the spoken word. Under the circumstances, there is a distinct likelihood of confusion or mistake or deception of purchasers." *Heublein, Inc. v. Destileria Serralles, Inc.*, 124 U.S.P.Q. 111, 112 (T.T.A.B. 1960); *see also A. Smith Bowman Distillery, Inc. v. Schenley Distillers, Inc.*, 198 F. Supp. 822, 827-28 (D. Del. 1961) ("[I]n the case of alcoholic beverages, the degree of similarity need not be as high as usual since the likelihood of confusion is greater because drinks are frequently purchased at bars and clubs without the purchaser seeing any bottles or labels."); *Joseph S. Finch & Co. v. W. Wine & Liquor Co.*, 99 U.S.P.Q. 145, 145 (Comm'r Pats. 1953) ("It is . . . a matter of common knowledge that bars and taverns are frequently noisy places, with the

Co., 315 F.3d 1311 (Fed. Cir. 2003), tequila and beer, *see In re Chatham Int'l Inc.*, 380 F.3d 1340 (Fed Cir. 2004), fruit juice and wine, *see Pink Lady Corp. v. L. N. Renault & Sons, Inc.*, 265 F.2d 951 (C.C.P.A. 1959), Scotch whisky and malt whiskey, *see Maclean Duff (Distillers), Ltd. v. Frankfort Distilleries, Inc.*, 129 F.2d 695 (C.C.P.A. 1942), beer and ginger ale, *see Am. Brewing Co. v. Delatour Beverage Corp.*, 100 F.2d 253 (C.C.P.A. 1938), wines and liqueurs, *see Dubonnet Wine Corp. v. Ben-Burk, Inc.*, 121 F.2d 508 (C.C.P.A. 1941), wine and water beverages, *see Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 U.S.P.Q.2d 1424 (T.T.A.B. 2013), beer and wine, *see In re Sailerbrau Franz Sailer*, 23 U.S.P.Q.2d 1719 (T.T.A.B. 1992), liqueurs and cognac, *see Bureau Nat'l Interprofessionnel du Cognac v. Int'l Better Drinks Corp.*, 6 U.S.P.Q.2d 1610, 1616 (T.T.A.B. 1988), wine and apple cider, *see In re Jakob Demmer KG*, 219 U.S.P.Q. 1199 (T.T.A.B. 1983), whiskey and wine, *see In re AGE Bodegas Unidas, S.A.*, 192 U.S.P.Q. 326 (T.T.A.B. 1976), malt liquor and soft drinks, *see Am. "76" Co. v. Nat'l Brewing Co.*, 158 U.S.P.Q. 417 (T.T.A.B. 1968), Bourbon whiskey and "a non-alcoholic, maltless, lemon juice drink," *see In re Jack Daniel Distillery*, 171 U.S.P.Q. 312 (T.T.A.B. 1971), brandy and coffee, *see In re Sazerac Co.*, 156 U.S.P.Q. 466 (T.T.A.B. 1967), wine and lithiated lemon soda, *see Ex parte Grapette Co.*, 91 U.S.P.Q. 63 (Comm'r Pats. 1951), Scotch whisky and "a dry liqueur," *see McKesson & Robbins, Inc. v. Village Winery*, 72 U.S.P.Q. 379 (Comm'r Pats. 1947), whiskey and ale, *see Wardall v. Camden County Beverage Co.*, 45 U.S.P.Q. 530 (Comm'r Pats. 1940), and Scotch whisky and mineral water, *see White Rock Mineral Springs Co. v. Neurad*, 33 U.S.P.Q. 163 (Comm'r Pats. 1937).³

sound of voices, glasses and ice, and usually a television set in operation, the combination of which dulls, at least to some extent, the auditory sense.”)

³ *See also E. Remy Martin & Co. v. Shaw-Ross Int'l Imps.*, 756 F.2d 1525 (11th Cir. 1985) (confusion likely between REMY MARTIN for cognac and F. REMY for wines); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149 (9th Cir. 1963) (confusion likely between

Indeed, the Board and courts alike also have recognized that a finding of likely confusion can lie even if one party's mark is used in connection with alcoholic beverages and the other party's mark is not used with beverages at all. This recognition has come in cases involving such disparate goods and services as whiskey and preserved fruit, *see Schenley Indus. v. Fournier, Inc.*, 357 F.2d 395 (C.C.P.A. 1966), liqueurs and macadamia nuts, *see Castle & Cooke, Inc. v. Joseph E. Seagram & Sons, Inc.*, 346 F.2d 621 (C.C.P.A. 1965), wine and restaurant services, *see In re Opus One Inc.*, 60 U.S.P.Q.2d 1812 (T.T.A.B. 2001), wine and wine certification services, *see Stabilisierungsfonds fur Wein v. Peter Meyer Winery GmbH*, 9 U.S.P.Q.2d 1073 (T.T.A.B. 1988), wine and cheese, *see Bongrain Int'l (Am.) Corp. v. Moquet Ltd.*, 230 U.S.P.Q. 626 (T.T.A.B. 1986), cognac and wine selection services, *see In re Hennessy*, 226 U.S.P.Q. 274 (T.T.A.B. 1985), air transportation services and cocktails, *see In re Carl Mampe AG*, 167 U.S.P.Q. 248 (T.T.A.B. 1970), tequila and cigars, *see Compania Insular Tabacalera, S.A. v. Maidstone Imps. Inc.*, 199 U.S.P.Q. 238 (T.T.A.B. 1978), Scotch whisky and cigars, *see Alfred Dunhill of London, Inc. v. E. Martinoni Co.*, 161 U.S.P.Q. 368 (T.T.A.B. 1969), wine and the retail sale of women's clothing, *see Three Sisters, Inc. v. S. Liquor Distribs., Inc.*, 57 U.S.P.Q. 333 (Comm'r Pats. 1943), and wine and margarine, *see Glidden Co. v. E. & J. Gallo Winery*, 55 U.S.P.Q. 485 (Comm'r Pats. 1942).⁴

BLACK & WHITE for Scotch whisky and BLACK & WHITE for beer); *Maker's Mark Distillery, Inc. v. Diageo N. Am., Inc.*, 703 F. Supp. 2d 671 (W.D. Ky. 2010) (confusion likely between wax seals used in connection with Bourbon whisky and tequila), *aff'd*, 679 F.3d 410 (6th Cir. 2012); *Guinness United Distillers & Vintners B.V. v. Anheuser-Busch Inc.*, 64 U.S.P.Q.2d 1039 (S.D.N.Y.) (confusion likely between RED LABEL for Scotch whisky and RED LABEL BY ANHEUSER-BUSCH for beer), *aff'd*, 50 F. App'x 52 (2d Cir. 2002); *Del-Jac Corp. v. Ernest & Julio Gallo Winery*, 230 U.S.P.Q. 143 (E.D. Pa. 1983) (confusion likely between SAVORY & JAMES for sherry, port, and brandy and BARTLES & JAYMES for wine coolers).

⁴ *See also E. & J. Gallo Winery v. Gallo Cattle Co.*, 955 F.2d 1327 (9th Cir. 1992) (confusion likely between GALLO for wine for JOSEPH GALLO for cheese); *Chem. Corp. of Am. v.*

Not surprisingly, therefore, the case law is replete with examples of findings of likely confusion involving marks used in connection with the goods that would be at issue even if the Board ordered the requested restriction. Those findings include determinations of confusing similarity between marks used for gin and nonalcoholic club soda, quinine water, and ginger ale, *see Coca-Cola Bottling Co. of Memphis, Tenn., Inc. v. Joseph E. Seagram & Sons, Inc.*, 526 F.2d 556 (C.C.P.A. 1975), gin and vodka, *see Am. Distilling Co. v. Supreme Wine Co.*, 203 F. Supp. 736 (S.D.N.Y.), *rev'd in part on other grounds*, 310 F.2d 888 (2d Cir. 1962), gin and restaurant services, *James Burrough, Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266 (7th Cir. 1976), gin and tobacco-related products, *see Alfred Dunhill of London, Inc. v. E. Martinoni Co.*, 161 U.S.P.Q. 368 (T.T.A.B. 1969), and gin and cola, *see Cont'l Distilling Corp. v. Buston*, 40 U.S.P.Q. 566 (Comm'r Pats. 1939). They also include findings of likely confusion involving marks used in

Anheuser-Busch, Inc., 306 F.2d 433 (5th Cir. 1963) (confusion likely between WHERE THERE'S LIFE . . . THERE'S BUD for beer and WHERE THERE'S LIFE . . . THERE'S BUGS for insecticide); *Tampa Cigar Co. v. John Walker & Sons*, 222 F.2d 460 (5th Cir. 1955) (confusion likely between JOHNNIE WALKER for Scotch whisky and JOHNNIE WALKER for cigars); *Anheuser-Busch, Inc. v. VIP Prods., LLC*, 666 F. Supp. 2d 974 (E.D. Mo. 2008) (confusion likely between BUDWEISER for beer and BUTTWIPER for dog toys); *E. & J. Gallo Winery v. Pasatiempos Gallo, S.A.*, 905 F. Supp. 1403 (E.D. Cal. 1994) (confusion likely between GALLO for wine and GALLO for playing cards); *Gioia Macaroni Co. v. Joseph Victori Wines*, 205 U.S.P.Q. 986 (E.D.N.Y. 1979) (confusion likely between GIOIA for wine and GIOIA for "Italian food products"); *Amana Soc'y v. Gemeinde Brau, Inc.*, 417 F. Supp. 310 (D. Iowa 1976) (confusion likely between AMANA for beer and AMANA for buns, cakes, rolls, hams, bacon, sausage, woolen blankets, woolen robes, woolen flannels, woolen suitings, woolen shirtings, walnut and cherry furniture for residential and business use, dehumidifiers and central air conditioning apparatus and parts thereof, refrigerators, freezers, and parts thereof), *aff'd*, 557 F.2d 638 (8th Cir. 1977); *Alfred Dunhill of London, Inc. v. Kasser Distillers Prods. Corp.*, 350 F. Supp. 1341 (E.D. Pa. 1972) (confusion likely between DUNHILL for Scotch whisky and DUNHILL for pipes, tobacco, cigars, and bar accessories), *aff'd without op.*, 480 F.2d 917 (3d Cir. 1973) *Carling Brewing Co. v. Philip Morris Inc.*, 297 F. Supp. 1330 (N.D. Ga. 1968) (confusion likely between BLACK LABEL for beer and BLACK LABEL for cigarettes); *Cal. Fruit Growers Exch. v. Gonska*, 61 U.S.P.Q. 208 (N.D. Ill. 1943) (confusion likely between SUNKIST WINE COMPANY for wine and SUNKIST and SUN-KIST for citrus fruits, raisins, canned grapes, canned blackberries, pineapple juice, tomato juice, canned and dried fruits and vegetables, milk, butter, walnuts, catsup, pickles, olive oil, jams, jellies, olives, coffee, tea, beans, and grape juice).

connection with vodka and brandy, *see Hood River Distillers, Inc. v. Meyers*, 331 F.2d 606 (C.C.P.A. 1964), vodka and wine, *see Blanchard Imp. & Distrib. Co. v. Charles Gilman & Son, Inc.*, 353 F.2d 400 (1st Cir. 1965), vodka and beachwear, *see V&S Vin & Sprit Aktiebolag v. Hanson*, 61 U.S.P.Q.2d 1277 (E.D. Va. 2001), vodka and beer, *see In re Cook*, Serial No. 75008728, 1999 WL 44207 (T.T.A.B. Jan. 29, 1999), vodka and whiskey, *see Somerset Distilling Inc. v. Speymalt Whisky Distribs., Ltd.*, 14 U.S.P.Q.2d 1539 (T.T.A.B. 1989), and vodka and cigarettes, *see Death Tobacco, Inc. v. Black Death USA*, 31 U.S.P.Q.2d 1899 (C.D. Cal. 1993). Finally, with respect to Applicant's goods, they include findings of confusing similarity between marks used in connection with rum and tequila, *see Fernandes Distillers Int'l Ltd. v. Tequilas Rancho Veijo SA de CV*, No. 92049848, 2012 WL 6654129 (T.T.A.B. Dec. 10, 2012), rum and cigars, *see In re Licores Veracruz, S.A. de C.V.*, Serial No. 77753913, 2012 WL 423807 (T.T.A.B. Jan. 26, 2012), rum and malt liquor, *see In re Worldwide Links, Inc.*, Serial No. 75099296, 1999 WL 180787 (T.T.A.B. March 31, 1999), rum and Scotch whisky, *see William Sanderson & Son Ltd. v. Fernandes & Co.*, 137 U.S.P.Q. 165 (T.T.A.B. 1963), rum and wines, *see Monarch Wine Co. v. Hood River Distillers, Inc.*, 196 U.S.P.Q. 855 (T.T.A.B. 1977), and rum and jewelry, *see Bacardi & Co. v. Bacardi Mfg. Jewelers Co.*, 174 U.S.P.Q. 284 (N.D. Ill. 1972), *aff'd without op.*, 475 F.2d 1406 (7th Cir. 1973).

Of equal importance, the related nature of Opposer's gin and vodka, on the one hand, and Applicant's rum, on the other, is reflected in numerous opinions finding confusion to be likely based on factual findings that one of the parties sold both gin and rum under its mark. *See, e.g., D.J. Bielzoff Prods. Co. v. White Horse Distillers, Ltd.*, 107 F.2d 583 (C.C.P.A. 1939) (junior user's mark used in connection with, *inter alia*, rums and gins); *Englander v. Cont'l Distilling Corp.*, 95 F.2d 320 (C.C.P.A. 1938) (both parties' marks used in connection with, *inter alia*, gin

and rum); *Gooderham & Worts Ltd. v. Sherbrook Distrib. Co.*, 57 U.S.P.Q. 197 (Comm’r Pats. 1943) (junior user’s mark used in connection with, *inter alia*, gin and rum); *McKesson & Robbins, Inc. v. Sherbrook Distrib. Co.*, 57 U.S.P.Q. 195 (Comm’r Pats. 1943) (same); *Cont’l Distilling Corp. v. Three G Distillery Corp.*, 33 U.S.P.Q. 392 (Comm’r Pat. 1937) (senior user’s mark used in connection with, *inter alia*, gin and rum); *MacDonald, Greenlees Ltd. v. Englander*, 33 U.S.P.Q. 348 (Comm’r Pats. 1937) (junior user’s mark used in connection with, *inter alia*, gin and rum). A similar pattern holds with respect to the use of marks in connection with vodka and rum, *see Monarch Wine Co. v. Hood River Distillers, Inc.*, 196 U.S.P.Q. 855 (T.T.A.B. 1977) (junior user’s mark used in connection with, *inter alia*, vodka and rum), and, indeed, at least one determination of likely confusion has turned on a finding that the defendant used its mark in connection with all three goods at issue, namely, gin, vodka, *and* rum. *See Gordon’s Dry Gin Co. v. Gordon*, 208 U.S.P.Q. 759 (D. Ariz. 1979).

That gin, vodka, and rum are related goods for purposes of the likelihood-of-confusion inquiry is even more apparent in light of “the . . . trend in the alcohol industry for distributors of spirits to leverage the equity of their brands.” *Guinness United Distillers & Vintners B.V. v. Anheuser-Busch Inc.*, 64 U.S.P.Q.2d 1039, 1042 (S.D.N.Y.), *aff’d*, 50 F. App’x 52 (2d Cir. 2002). As one court has explained in finding a likelihood of confusion between uses of similar marks in connection with beer and with various high-end deli items, “consumers are as aware as businessmen that companies frequently cross product lines and manufacture products in different facilities which complement each other in the market place.” *Frank Brunckhorst Co. v. G. Heileman Brewing Co.*, 35 U.S.P.Q.2d 1102, 1111 (E.D.N.Y. 1994). Consistent with that observation, the Board has found in the past that “consumers of alcoholic beverages are accustomed to seeing brands on new products,” *Austin, Nichols & Co. v. Stichting Lodestar*,

Opposition No. 91155165, 2006 WL 236409, at *7 (T.T.A.B. Jan. 17, 2006),⁵ and the Court of Customs and Patent Appeals long ago recognized that “no . . . distinction can be drawn between different distilled alcoholic beverages” *Meyers*, 331 F.2d at 607. Because Applicant has failed to aver any factual basis for the proposition that gin, vodka, and rum are insufficiently related to support a finding of likely confusion, much less a factual basis that satisfies the requirements of *Twombly* and *Iqbal*, its counterclaim fails to state a claim and should be dismissed.

III. CONCLUSION

For the reasons set forth above, Opposer requests the Board to dismiss Applicant’s challenge to Opposer’s Reg. No. 3369110 for failure to state a claim.

Respectfully submitted,

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⁵ In *Austin, Nichols & Co.*, the Board sustained an opposition to an application to register a mark for, *inter alia*, “rum, gin, [and] vodka.” *Quoted in id.* at *1. And, even before the emergence of the brand leveraging phenomenon recognized in *Austin, Nichols & Co.*, the Board sustained an opposition with the following observation:

While it may be true that scotch whisky and rum are not usually produced by the same manufacturers of alcoholic beverages or that they would normally emanate from the same geographic areas, it is nevertheless apparent that these distilled alcoholic beverages would be handled by the same distributors and would be sold through the identical retail outlets to the same class of ultimate purchasers. These alcoholic beverages must, therefore, be considered as closely related in kind.

Rosenblum v. George Willsher & Co., 161 U.S.P.Q. 492, 492 (T.T.A.B. 1969) (citation omitted); *see also United Rum Merchants Ltd. v. Fregal, Inc.*, 216 U.S.P.Q. 217, 220 (T.T.A.B. 1982) (finding confusion likely between marks used in connection with liqueurs and wine in part on ground that [w]ith both [parties’] products commonly employed for cocktail use, the relatedness of these alcoholic beverages is made quite evident.”).

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 v.)
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 Midway Trading Corp.,)
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 Applicant.)

CERTIFICATE OF SERVICE

I certify that a copy of the attached pleading has been served on counsel of record via
first-class mail addressed to

Julia C. Archer, Esq.
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939 Burke Street
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on September 8, 2014.

/s/ Theodore H. Davis Jr.
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Diageo Brands B.V.