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Bar-Adon & Vogel, PLLC

April 10, 2007

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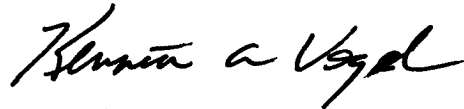
RE: YOSEMITE BEER – Serial No. 78710805

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To Whom It May Concern:

Enclosed is the brief on appeal regarding the above-referenced trademark application for the Spirits of New Merced, LLC.


Respectfully Submitted,



Kenneth A. Vogel

Enclosures:

Brief on Appeal



04-10-2007

U.S. Patent & TMO/c/TM Mail Rcpt Dt #72

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

In re the Application of: :
Spirits of New Merced, LLC : Law Office 108
Application No.: 78710805 : Examining Attorney: Alain Lapter
Filed: 09/12/05 :
For: YOSEMITE BEER :

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BRIEF ON EX PARTE APPEAL

PROCEDURAL BACKGROUND

This is an Appeal from a section 2(e)(2) Final Refusal dated December 8, 2006 to register the mark YOSEMITE BEER for a brand name of alcoholic beer in International Class 032.

In the Examining Attorney's Final Refusal, the Attorney cited grounds in support of the refusal to which Applicant responded with a Request for Reconsideration and a Notice of Appeal. (The Appeal was suspended pending action on the Request for Reconsideration.) In the Office Action Response to Applicant's Request for Reconsideration on December 15, 2006, the

Examining Attorney maintained his earlier Final Refusal while acknowledging Applicant had added information pertaining to the application. The Examining Attorney stated that no new issue had been raised, and that no new compelling evidence had been presented with regard to the point at issue in the final action. This Appeal brief follows.

COMPANY PROFILE, PRODUCT BACKGROUND

Applicant's establishment is categorized as a "brewpub." A brewpub is a restaurant that brews and serves its own beer. The Applicant, which is based in Los Angeles, California (270 miles from Yosemite National Park), owns a brewpub which is located in the City of Merced, California. Merced City, the county seat of Merced County, is situated in the San Joaquin Valley. It is located approximately 80 miles away from Yosemite National Park. The brewpub restaurant was formerly operated as Backdraft Brewpub®,¹ which was a firehouse-themed establishment. It has since been re-named Big Bubba's Bad to the Bone BBQ®,² and has a cowboy-western theme and menu items. Some menu items include "Texas Toast," "Texas Tators," "Bad to the Bone Nachos," "Bubba's Caesar Salad," "Bubba's Bad Sauce," and "Bubba's Brownie Bonanza." The entire menu has a similar naming scheme, and all food items are named using either Southwestern themes, Texas themes, incorporation of the name "Bubba," or a combination of the three. The brewpub's beer menu consists of a variety of beers with names of all types, including "Inferno®,"³ "El Bombero®,"⁴ "Black Rascal®,"⁵ and

¹ BACKDRAFT BREWPUB, for restaurant services in Class 43.
Registered on August 30, 2005. Reg. No.: 2,990,500

² BIG BUBBA'S BAD TO THE BONE BBQ, for restaurant services in Class 43.
Registered on October 24, 2006. Reg. No.: 3,164,149

³ INFERNO, for beer in class 032.
Registered (non-2(f)) on: February 6, 2007. Reg. No.: 3,206,972.

“FireDrill®.”⁶ The brewpub’s menu is hereby attached to this document, labeled as “Exhibit A,” as is a photograph of the brewpub establishment, labeled as “Exhibit B.” Exhibit A illustrates the lack of any other item using the term “Yosemite” aside from “Yosemite Beer.” Exhibit B demonstrates that the décor of the establishment does not purport any relationship to Yosemite National Park.

ISSUE ON APPEAL

The issue on appeal is whether or not the Examining Attorney properly applied available evidence and consistently applied precedent in the form of previously registered marks, and whether the Examining Attorney gave sufficient weight to Applicant’s assertions, which are offered to prove the absence of any likelihood for customer confusion between the Applicant’s mark and the geographic area which the Examining Attorney has associated it with.

SUMMARY OF ARGUMENTS

There are numerous registered marks on the Principal Register which contain the names of geographical locations, and which are not 2(f)-registrations. It is readily accepted, by statute and in practice, that utilizing a term in common with the name of a geographic location does not in and of itself, invalidate a trademark application.

⁴ EL BOMBERO, for beer in class 032.
Registered (non-2(f)) on: October 3, 2006. Reg. No.: 3,150,905.

⁵ BLACK RASCAL, for beer in class 032.
Registered (non-2(f)) on: September 12, 2006. Reg. No.: 3,142,155.

⁶ FIREDRILL, for beer in class 032.
Registered (non-2(f)) on: December 5, 2006. Reg. No.: 3,180,346.

The name YOSEMITE BEER was previously registered twice on the Principal Register in International Class 32. The registrations were cancelled due to non-renewal. Neither registration was a 2(f)-registration. Additionally, there is no such place as Yosemite, California. "Yosemite" by itself is a word derived from a Native American tribal language, and the word "Yosemite" standing alone does not hold any independent significance, geographic or otherwise. The Yosemite National Park (hereinafter also referred to as the "Park"), is located approximately 80 miles away from applicant's brewpub, but there is no connection between the applicant's beverages or establishment and the Yosemite National Park. Yosemite National Park does not produce any commercial goods or services of any kind, and there can be no reasonable or likely goods/place association on the part of consumers.

ARGUMENT

In the Examining Attorney's decision on reconsideration, he adhered to his earlier Final Refusal in which he stated that the "evidence shows that the primary significance of the term "YOSEMITE" is geographic because both it is [an] extremely well known geographic location, as the evidence in the office action clearly demonstrated, and it [is] where the good[s] originate." He also noted Applicant's entering of a translation statement for the word "YOSEMITE," and accepted the translation but stated that "the fact that the word has a translation in the Miwok Indian tribe language will not obviate from the 2(e)(2) refusal."

In the Final Refusal, the Examining Attorney summarized the three-part test that must be applied to determine whether a mark is primarily geographically descriptive of its goods. The actual test is found in TMEP §1210.01(a), which states in a prima facie case for refusal to register:

- (1) the primary significance of the mark is a generally known geographic location (*see* TMEP §§1210.02 *et seq.*);
- (2) the goods or services originate in the place identified in the mark (*see* TMEP §1210.03) ; **and** (*emphasis added*)
- (3) purchasers would be likely to believe that the goods or services originate in the geographic place identified in the mark (*see* TMEP §§1210.04 *et seq.*). *Note:* If the mark is remote or obscure, the public is unlikely to make a goods/place or services/place association (*see* TMEP §1210.04(c)).

Thus, all three prongs of the test must generally be met before a prima facie case for refusal is made. The Examining Attorney stated (but did not offer evidence to support) that the primary significance of the word “YOSEMITE” is geographic. He therefore merely assumed that the primary significance of the mark was a generally known geographic location. In fact, there is no place on earth named Yosemite or Yosemite, California. It is, at best, used as a shorthand term for the Yosemite National Park. Next, although the Examining Attorney noted the brewpub’s proximity (80 miles) to the Park, this was clearly not an issue for the previous registration of “YOSEMITE BEER” to a former brewery located even closer to the Park in the City of Mariposa, California (located 40 miles from the Park). Furthermore, the Examining Attorney stated (but did not offer evidence to support) that purchasers would be likely to believe that the goods or services originated in the geographic place identified in the mark, despite the fact that no goods or services are produced in the Park. Finally, nothing in the beer’s ingredients: wheat, barley, or hops, could potentially be confused as originating from the Park, as no such ingredients are grown in the Park, nor could they be extracted for commercial use if they were, since the Park does not grow any agricultural products or produce any goods or services. Even if, assuming arguendo, that the Examining Attorney had offered evidence to support the two of the three prongs of the test, the language of the test indicates that all three must be met for a refusal based on geographic descriptiveness.

I. REGISTRATIONS HAVE BEEN GRANTED FOR “YOSEMITE BEER,” AS WELL AS OTHER MARKS USING THE WORD “YOSEMITE”

A. **“YOSEMITE BEER” has already been trademarked and abandoned by a company located even closer to Yosemite National Park than Applicant’s brewpub.**

By way of rebuttal to the Examining Attorney’s declaration that the term is geographically descriptive, Applicant responded by submitting evidence and arguments in support of registerability, including two abandoned registrations for YOSEMITE BEER and one for YOSEMITE BREWING COMPANY; and the accepted translation of the word “YOSEMITE” used to illustrate the variety of meanings for the term.

Two abandoned marks on the Principal Register are for YOSEMITE BEER.⁷ Both marks were filed in 1995 by Yosemite Beverage Company in Mariposa, California, located approximately 40 miles from Yosemite National Park. Both marks were registered in 1997 and 1998 respectively, and were cancelled at the end of 2004. Both marks were non-service marks, and neither mark was registered pursuant to Section 2(f)’s provision on subsequently acquired distinctiveness. Applicant’s mark is also not a service mark, and had been used continuously in commerce starting in late 2005. More importantly, Applicant’s beer is produced in Merced, California, located approximately 80 miles from the Park, more than twice the distance from the previously-registered brewery location. Nothing has changed with respect to the Park or Park activities which should change or alter the registerability of the mark Yosemite Beer. Applicant concludes that “YOSEMITE BEER” was previously granted to a company based far closer in

⁷ YOSEMITE BEER for Beer. First use in commerce: 09.16.1995.
First mark registered on: 01.27.1998. Reg. No.: 2,131,642.
Second mark registered on: 10.07.1997. Reg. No.: 2,102,601.

proximity to the Park than Applicant's establishment, yet no presumption of confusion was made for that earlier mark, and there is no evidence of actual consumer confusion.

B. Several other marks incorporating the word

"YOSEMITE" have been registered.

Applicant submitted evidence regarding several other registered trademarks that also use the term "YOSEMITE" in their mark.⁸ Marks such as "YOSEMITE TECHNOLOGIES," "YOSEMITE EQUITY STRATEGIES," and "YOSEMITE" have been granted without regard to the existence of Yosemite National Park. Applicant agrees that an important consideration is whether or not there is a likely goods-place association, and the fact that no such association is likely makes the marks registerable. For example, one registered mark for "YOSEMITE" on the principal register is for metrology systems using a scanning electron microscope to measure features of semiconductor devices in connection with the fabrication of semiconductor wafers. The registration is not the result of 2(f) consideration, and is registered by a company in San Jose, California with similarly no presumed or implied association with Yosemite National Park, located 180 miles away.

Applicant points out that no such association would be possible with "YOSEMITE BEER" considering the usage of Applicant's product bearing that name. Applicant's "YOSEMITE BEER" is brewed on-site at the Applicant's brewpub, and is consumed exclusively

⁸ YOSEMITE TECHNOLOGIES for computer software used in archiving and restoring computer files. Registered (non-2(f)) on: June 3, 2003. Reg. No.: 2,721,476.

YOSEMITE EQUITY STRATEGIES for investment management advisory services. Registered (non-2(f)) on: August 28, 2001. Reg. No.: 2,483,860.

YOSEMITE for computer software used to forecast and display weather data. Registered (non-2(f)) on: October 2, 2004. Reg. No.: 2,890,800.

YOSEMITE for metrology systems using a scanning electron microscope to measure features of semiconductor devices in connection with fabrication of semiconductor wafers. Registered (non-2(f)) on: August 19, 2003. Reg. No.: 2,754,194.

at the brewpub. No bottling, canning, kegging, or wholesale distribution of the beer is done at the establishment. Applicant asserts that no relation to the Yosemite National Park is presumed, as proven by the name of the establishment (“Big Bubba’s Bad Barbeque” brewpub), the décor, other menu items served there, or even in the context of other named beers that are brewed or consumed at the brewpub. Some of these other beers (all with either currently registered or pending trademarks) include “Inferno®,” “El Bombero®,” “Black Rascal®,” and “FireDrill®.”

Furthermore, even if the word “Yosemite” is the predominant word in the name of a geographic location, its use in the mark “Yosemite Beer” is an arbitrary use of the word because no commercial activity is performed there. See TMEP §1210.04(d). The Park does not conduct or permit any commercial manufacturing or industrial activities of any kind. No goods are produced at all within the Park, and Applicant’s product does not use any components or ingredients or anything Park-related in the production or consumption of its beer. National parks in general do not produce beer, nor are national parks known for beer or brewpubs. The rest of Applicant’s menu items do not use or imply any relation to the Park’s components or wildlife, nor does the rest of Applicant’s establishment presume any relation to the Park. Applicant asserts that his company should not be penalized for its relative proximity to the Yosemite National Park, as there are several other registered marks that use the term “YOSEMITE,” including past registrations for “YOSEMITE BEER” that were located even closer to the Park than Applicant’s brewpub. Further, the City of Merced, where Applicant’s brewpub is located, does not even bring in or use water that comes from the Park, but instead uses water from its own underground wells. Thus, there is no connection between the brewpub and its products or services, and the Park.

C. The word “YOSEMITE” has been used in numerous registered marks, some of which are associated with outdoor activities or environments. Even if “YOSEMITE” came to be primarily associated with the Park, it has been registered for such a massive variety of products and marks from a variety of locations that it has diluted in meaning.

Applicant points to a number of corporations in California and elsewhere that use the word “Yosemite” in their marks. Marks such as “YOSEMITE ANIMAL COOKIES,” registered by Wildlife Cookie Company in Illinois,⁹ do not purport any relation to Yosemite National Park, nor would such an association be presumed since the Park does not produce cookies, particularly not in Illinois.

Yosemite has become far more expansive than the original Indian word, or even than the Park itself. It now connotes all manner of nature, sports and outdoor activities. Companies such as Harris-Tarkett, Inc. in Tennessee have registered “YOSEMITE NATURAL” for hardwood flooring.¹⁰ With this latter example, while a low potential for customer confusion could exist because there is certain to be wood growing in a national park, almost no one would believe that the Park’s wood is harvested for the production of flooring. Other companies have also trademarked products associated with outdoor activities, such as Yokota Cycle USA, Inc., which registered the mark “YOSEMITE” for bicycles.¹¹ Hi-Tech Sports, Limited, based in the United

⁹ YOSEMITE ANIMAL COOKIES, for cookies in class 030. Registered (non-2(f)) on November 12, 2002. Reg. No. 2,649,887.

¹⁰ YOSEMITE NATURAL, for hardwood flooring in class 019. Registered (non-2(f)) on July 28, 1992. Reg. No.: 1,703,305.

¹¹ YOSEMITE, for bicycles in class 012. Registered (non-2(f)) on January 29, 1991. Reg. No.: 1,633,117.

Kingdom, has trademarked “YOSEMITE” for sports shoes which would certainly be associated with the outdoors.¹² Santa Clara-based Geocities has registered “YOSEMITE” for chat services pertaining to outdoor recreation.¹³ A Modesto, CA company (located 110 miles from the Park) registered “YOSEMITE” for athletic bags and sports/leisure clothing. Another California-based company registered “YOSEMITE” for folding camping trailers.

II. THERE HAS BEEN NO EVIDENCE SUBMITTED CONCLUDING THE TERM “YOSEMITE,” BY ITSELF, IS GEOGRAPHICALLY DESCRIPTIVE.

A. The Term “YOSEMITE” by itself has no primarily significant meaning, geographic or otherwise, and further its only known translation does not relate to Yosemite National Park.

In the Examining Attorney’s Final Refusal, he stated that the “evidence shows that the primary significance of the term ‘YOSEMITE’ is geographic because both it is [an] extremely well known geographic location, and it [is] where the good[s] originate. The fact that a term may have other meanings in other contexts does not necessarily negate the basis for refusal as long as the most prominent meaning or significance is geographic for the identified goods and/or services.” However, the Examining Attorney did not explain what basis he had for stating that the term “YOSEMITE,” by itself, is a well known geographic location, or that it has any independent significance aside from being included in the term “YOSEMITE NATIONAL

¹² YOSEMITE, for shoes in class 025. Registered (non-2(f)) on May 17, 1988. Reg. No.: 1,488,557.

¹³ YOSEMITE, for chat services, namely ... of general interest to those in outdoor recreation in class 038. Registered (non-2(f)) on May 8, 2001. Reg. No.: 2,448,642.

PARK.” The Examining Attorney failed to explain what the term “YOSEMITE” means, if another definition exists. The Examining Attorney also did not offer any evidence to show that there is any geographic location called “YOSEMITE,” and Applicant asserts that there is none.

Applicant rebutted this presumption by submitting evidence of other registrations having been granted which also use the term “YOSEMITE,” including recently abandoned registrations for the exact same mark as Applicant’s. Applicant asserts that the term “YOSEMITE,” by itself, cannot be associated solely with “YOSEMITE NATIONAL PARK,” as there are several other marks that use the term “YOSEMITE” but are not even remotely near the “YOSEMITE” geographic region. If analyzed under the same framework, these marks would have to be deemed deceptively misdescriptive or geographically misdescriptive depending on the subject matter. In fact, Applicant also submitted evidence, acknowledged by Examining Attorney, stating that the term “YOSEMITE” translates to a word that does not even describe the region itself, but actually means “those who kill,” or “the killers” in the Native American Miwok tribal language. Applicant asserts that the Examining Attorney has submitted no evidence as to how the “primary” significance of the term “YOSEMITE” relates to the Park in light of other marks using that term, and the only known definition of the term “YOSEMITE.”

B. There is no evidence that concludes consumers would be likely to presume YOSEMITE BEER was produced in the Park or using products from it.

Applicant also asserts that although the brewpub is located 80 miles away from the Park, the Park is not the origin of the goods which the Examining Attorney had stated and could not be construed as such in light of that distance.

There are no commercially available products produced in the Park. The park is devoid of any industry or manufacturing. The sole commercial enterprises are licensed vendors who provide services to Park visitors (such as lodging and souvenirs). Thus, Applicant asserts that there is nothing that a consumer would presume comes from the Park which could be used in the production of "YOSEMITE BEER." Past registrations for "YOSEMITE BEER" have been granted for a company even closer to the Park than Applicant's brewpub, in which case even if such a presumption existed, that notion would be even stronger due to the closer proximity to the Park than Applicant's brewpub. Nonetheless, the prior registrations for "YOSEMITE BEER" were granted notwithstanding that possibility, and thus, Applicant respectfully requests registration for the same mark now that it has been abandoned.

C. There have been numerous other registered marks on record that use common terms with geographic regions, but have not been denied on the grounds of either geographic descriptiveness or misdescriptiveness.

Throughout the examination process, Applicant submitted a number of exhibits, many of which contained registered marks that used words in common with geographic regions. These include Sierra Nevada, El Capitan, Denali, Adirondack, Saranac, Snake River, Mt. Shasta, etc. Some of these, such as Sierra Nevada and Adirondack, have registered marks (which were also non-2(f) registrations) for beer or alcoholic beverages.

On December 13, 2006, Applicant further submitted additional exhibits which were more specifically relevant, and which contained registered marks using terms in common with the names of twelve more geographic locations. Of these twelve locations, nine were used in the names of beers or brewing companies. While some locations may be considered to be obscure or

remote to an Examining Attorney, others are widely recognizable geographic regions if it is deemed that the primary significance of their terms is geographic. These regions included Chesapeake Bay near Maryland;¹⁴ Roslyn in Washington State;¹⁵ Rio Chama in New Mexico;¹⁶ Mobjack Bay near Virginia;¹⁷ Fox River in Wisconsin;¹⁸ Key Bridge in the District of Columbia;¹⁹ Salado Creek in Texas;²⁰ Woodstock in Georgia;²¹ Cold Spring in Minnesota;²² Mauna Loa in Hawaii;²³ Rocky Mountain in Colorado;²⁴ and Bear Mountain in New York.²⁵

¹⁴ CHESAPEAKE BAY BREWING COMPANY for beer and/or ale, in class 032. Registered (non-2(f)) on: June 18, 2002. Reg. No.: 2,582,971.

¹⁵ ROSLYN BEER, for beer in class 032. Registered (non-2(f)) on August 12, 2003. Reg. No.: 2,750,110.

ROSLYN BREWING COMPANY for beer in class 032. Registered (non-2(f)) on August 12, 2003. Reg. No.: 2,750,111.

¹⁶ CHAMA RIVER BREWING CO., for providing food and drink to guests, in class 043. Registered (non-2(f)) on: September 26, 2006. Reg. No.: 3,149,250.

RIO CHAMA STEAKHOUSE for restaurant services, in class 042. Registered (non-2(f)) on: May 29, 2001. Reg. No.: 2,455,063.

¹⁷ MOBJACK BAY BREWING COMPANY, for beer and soft drinks in class 032. Registered (non-2(f)) on: November 9, 1999. Reg. No.: 2,291,433.

¹⁸ FOX RIVER BREWING COMPANY, for restaurant services, namely providing food and beverages in class 042. Registered (non-2(f)) on: February 24, 1998. Reg. No.: 2,139,104.

¹⁹ KEY BRIDGE ALE, for beer in class 032. Registered (non-2(f)) on: December 28, 2004. Reg. No.: 2,915,129.

²⁰ SALADO CREEK BREWING COMPANY, for malt beverages, namely beer, in class 032. Registered (non-2(f)) on: August 26, 1997. Reg. No.: 2,091,998.

²¹ WOODSTOCK BREWING COMPANY, for beer in class 032. Registered (non-2(f)) on: June 13, 2006. Reg. No.: 3,104,947.

²² COLD SPRING, for beer and soft drinks, in class 032. Registered (non-2(f)) on July 4, 2006. Reg. No.: 3,111,175.

²³ MAUNA LOA, for macadamia nut oil for food, in class 029. Registered (non-2(f)) on May 10, 2005. Reg. No.: 2,948,119.

²⁴ ROCKY MOUNTAIN CHOCOLATE FACTORY, for food and beverages in class 030. Registered (non-2(f)) on November 12, 1996. Reg. No.: 2,015,284.

ROCKY MOUNTAIN BATH WORKS, for personal care products in class 003.

Marks such as “KEY BRIDGE ALE,” “ROSLYN BEER,” and “CHESAPEAKE BAY BREWING COMPANY” clearly demonstrate a willingness for trademarks to be registered even though they share terms in common with geographic regions. Applicant asserts that its trademark should also be registered on the Principal Register as these other trademarks clearly cannot be factually or legally distinguished from its own trademark on any viable grounds for geographic descriptiveness.

Applicant recognizes that there is a tension in the rules between the concepts of a trademark being primarily Geographically Descriptive versus a trademark being Geographically Deceptively Misdescriptive. The problem here is that the procedures seem to create a “sweet spot” where companies can neither be too close nor too far away from locations. But, selectively allowing certain trademark registrations by companies located an arbitrary distance to a similarly-named geographic region is unequal protection and treatment under the law, and Applicant respectfully asserts that this practice should not be upheld in the interest of fairness to trademark applicants. If, hypothetically, a Georgia individual would be permitted to register the mark “Yosemite” for cigarettes²⁶ or an Illinois company can register “Yosemite Animal Cookies”²⁷ for cookies but a California company would not use the word Yosemite for its product, then this is an arbitrary distinction and discriminates against a California company. The Illinois-based Wildlife Cookie Company, which makes “Yosemite Animal Cookies,” should not be treated any better or worse than the Applicant, Spirits of New Merced, LLC. If “Yosemite”

Registered (non-2(f)) on October 10, 2006. Reg. No.: 3,153,592.

²⁵ BEAR MOUNTAIN, for clothing in class 025.
Registered (non-2(f)) on September 12, 2000. Reg. No.: 2,384,568.

²⁶ YOSEMITE, for cigarettes in class 040.
Registered (non-2(f)) on July 26, 2005. Reg. No.: 2,979,459.

²⁷ YOSEMITE ANIMAL COOKIES, for cookies in class 030.
Registered (non-2(f)) on November 12, 2002. Reg. No. 2,649,887.

in Yosemite Animal Cookies refers to the Park, then does that indicate that the cookies have some connection to the animals in the Park? Cookies contain water, wheat, yeast and sugar. Beer contains water, wheat, yeast and hops. Cookies are made in a bakery; beer is made in a brewery. Are consumers less likely to believe that cookies originate in the Park, as opposed to beer?

Of course, Applicant does concede that some geographic regions may be obscure and remote enough (in the eyes of the Examining Attorney) to justify granting a mark using similar or shared terms, since there would be no likely customer confusion. However, much of Applicant's submitted evidence shows that many of these marks are in fact being registered in geographic areas close to the areas that they are arguably named after, or have similar/common terms.

For example, both "ROSLYN BEER" and "ROSLYN BREWING COMPANY" are trademarked by a corporation located in Roslyn, Washington. "CHESAPEAKE BAY BREWING COMPANY" is trademarked by a corporation located 30 miles from the Chesapeake Bay, Maryland. "CHAMA RIVER BREWING COMPANY" and "RIO CHAMA STEAKHOUSE" are trademarked by a corporation located 90 miles from Rio (River) Chama, New Mexico. "MOBJACK BAY BREWING COMPANY" is trademarked by a corporation located 60 miles from Mobjack Bay, Virginia. "FOX RIVER BREWING COMPANY" is trademarked by a corporation alongside the Fox River, Wisconsin. "KEY BRIDGE ALE" is trademarked by a corporation with an office located 10 miles from the Key Bridge between Washington, D.C. and Roslyn, Virginia. "WOODSTOCK BREWING COMPANY" is trademarked by a corporation in Woodstock, Georgia. "COLD SPRING" beer is trademarked by a corporation located in Cold Spring, Minnesota. "MAUNA LOA MOUNTAIN" is trademarked

by a corporation located 30 miles from Mauna Loa Mountain in Hawaii. "BEAR MOUNTAIN" is trademarked by a corporation located 40 miles from Bear Mountain in Palisades National Park, New York. Applicant respectfully asserts that there can be no possible legal distinction between many of these marks and Applicant's mark, being used 80 miles away from Yosemite National Park but without any connection whatsoever to the Park.

CONCLUSION

In summary, the Examining Attorney erred in maintaining his Final Refusal on the above basis, particularly in light of past registrations for "YOSEMITE BEER," other registrations for similarly-named products, translations for the word "YOSEMITE", a wide usage and broad connotation associated with the word "Yosemite", inconsistent treatment of the Applicant in light of host of other registrations for arguably geographically descriptive or misdescriptive marks, an explanation of the Applicant's brewpub services and products, and a lack of any evidence whatsoever supporting Examining Attorney's two main assertions, which, even if supported by evidence, would still fall short of the three-prong test provided for by the Trademark Manual of Examining Procedure. As such, Applicant respectfully requests that Examining Attorney's Final Refusal be reversed and Applicant's mark "YOSEMITE BEER" be registered on the Principal Register.

In the alternative, Applicant respectfully requests that "YOSEMITE BEER" be registered on the Supplemental Register.

For Spirits of New Merced, LLC

BY: *Kenneth A. Vogel*

Kenneth A. Vogel

Attorney-of-Record

BY: *Koorosh K. Orandi*

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ATTACHED EXHIBITS IN RE: YOSEMITE BEER – Serial No. 78710805

EXHIBIT A:

Menu from Big Bubba's Bad to the Bone BBQ, displaying various menu items including "Yosemite Pale Ale."

EXHIBIT B:

Internet web page showing a photo of the Big Bubba's Bad BBQ establishment in Merced, CA.

THIRST QUENCHERS

COFFEE \$1.99 ICED TEA \$1.99 MILK \$1.50

SOFT DRINKS Pepsi, Diet Pepsi, Mug Root-Bear, Sierra Mist, Dr. Pepper, Lemonade, Pepsi-Wild Cherry & Mountain Dew: \$1.99

WINE

Wine by the Glass & by the Bottle!

HOUSE WINE(S)	Glass	Bottle
Cabernet Sauvignon.....	\$6.00	\$22.00
Merlot.....	\$6.00	\$22.00
Chardonnay.....	\$5.75	\$18.00
White Zinfandel.....	\$4.50	\$13.00

DRAFT

Domestic & imported beer in bottles are also available.

	16 oz.	34 oz.
Budweiser.....	\$3.50	\$6.75
Bud Light.....	\$3.50	\$6.75
Michelob Amber Bock.....	\$3.50	\$6.75
Widmer Hefeweizen.....	\$4.75	\$8.00
Firestone Double Barrel Ale.....	\$4.75	\$8.00
New Castle Brown Ale.....	\$5.00	\$8.00
El Bombero (Merced location only).....	\$3.50	\$6.75
Golden Bobcat Wheat (Merced location only).....	\$3.50	\$6.75
Yosemite Pale Ale (Merced location only).....	\$3.50	\$6.75
Rascal Creek Red (Merced location only).....	\$3.50	\$6.75
Rascal Creek Black (Merced location only).....	\$3.50	\$6.75

SPECIALTY DRINKS

Full Stocked Bar..... Bubba's Bad!!!



BIG BUBBA'S BAD TO THE BONE

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(805) 238-6250 Fax

ATASCADERO, CA
8050 El Camino Real
(805) 466-9866
(805) 466-9844 Fax

VISALIA, CA
6100 South Mooney Blvd.
(559) 686-1510
(559) 686-5275 Fax

MERCED, CA
560 West 18th Street
(209) 384-3797
(209) 384-2897 Fax



(Please Call Ahead For Orders To Go)
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Corporate Office

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PO Box 3767

Paso Robles, CA. 93447

Email:

info@bigbubbasbadbbq.com

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Paso Robles

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Restaurant Hours:

Sun. - Thurs.

11am - 10pm

Fri. - Sat.

11am - 11pm

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6100 South Mooney

Blvd.

Visalia

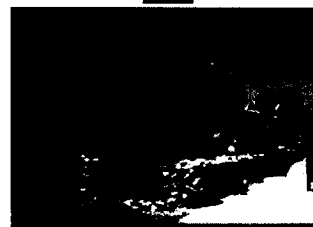
559 686 1510

Restaurant Hours:

Mon. - Sun.

11am - 12am

Atascadero



8050 El Camino

Real

Atascadero

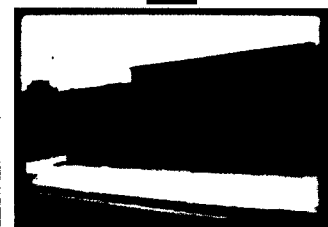
805 466 9866

Restaurant Hours:

Mon. - Sun.

11am - 9pm

Merced



560 West 18th St.

Merced

209 384 3797

Kitchen Hours:

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11am - 9pm

Fri. & Sat.

11am - 10pm

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