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

Proceeding	87140389
Applicant	Dead Bird Brewing, LLC
Applied for Mark	X
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Serial No. 87140389

Mark:



Serial No. 87140417

Mark:

Dead Bird Brewing Company

Applicant: Dead Bird Brewing, LLC

Examining Atty: Amy Thomas
Law Office 110

APPLICANT'S EX PARTE APPEAL BRIEF

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Applicant, Dead Bird Brewing, LLC, respectfully appeals the Examining Attorney's refusal to register Applicant's marks, namely the standard character DEAD BIRD BREWING COMPANY mark in Application Serial No. 86/091,299 and the  logo mark in Application Serial No. 87/140,389 (collectively, "Applicant's Marks"). The Examining Attorney's refusal on the grounds that Applicant's Marks are likely to be confused Trademark Act § 2(d), 15 U.S.C. § 1052(d), is inappropriate because Applicant's Marks, for use in connection with beer, are not likely to be confused with the registered DEADBIRD mark for wines. Therefore, Applicant's mark is suggestive, and it should not be denied registration on the Principal Register.

PROSECUTION HISTORY

Applicant's word and logo Applications were filed August 19, 2016, seeking registration on the Principal Register for the mark DEAD BIRD BREWING COMPANY and logo for use in connection with "beer" in Class 32.

Logo application (SN 78140389)

On November 30, 2016, the Examining Attorney refused registration of the logo mark under Trademark Act §2(d) on the grounds that Applicant's mark is likely to be confused with the mark in Reg. No. 5054429. On March 21, 2017, Applicant submitted an office action response. On April 26, 2017, the Examining Attorney issued a Final Office Action. On July 12, 2017, Applicant filed a Request for Reconsideration along with a Notice of Appeal with the Board and a request to consolidate the appeal with that for SN 87140417. TTABVUE 1, 2 and 4.

Standard Character application (SN 87140417)

On November 29, 2016, the Examining Attorney refused registration of the

word under Trademark Act §2(d) on the grounds that Applicant's mark is likely to be confused with the mark in Reg. No. 5054429. On January 12, 2017, Applicant submitted an office action response. On February 6, 2017, the Examining Attorney issued a Final Office Action. On March 2, 2017, Applicant filed a Request for Reconsideration along with a Notice of Appeal with the Board and a request to consolidate the appeal with that for SN 78140389. TTABVUE 1. On March 22, 2017, the Examining Attorney denied the Request for Reconsideration. On July 12, Applicant filed a request for remand with an additional request for reconsideration, along with a motion for consolidation. On July 19, the Board consolidated the appeal and granted the remand. TTABVUE 8. On August 10, 2017, the Board resumed the appeal and gave Applicant 60 days to file its appeal brief. TTABVUE 9.

SUMMARY OF EVIDENCE

SN 87140417 – DEAD BIRD BREWING COMPANY Word mark

Examining Attorney's Evidence

11/29/2016 Office Action

- Registration No. 86921775
- Reg. Nos. 1736692, 39817131, 3456841, 3522339, 4332166, 3861451, 4380436, 3962914, 3819774, 3099373, 3934483, 4133934, 4367607, 4387348, 4951746, 4694631, 4832756, 4832965, 4833373, 4984116, 4887801, 4838384, 4896450, 5037342, 4327599
- Screenshots: Norm's Beer and Wine Store, Yelp (Total Wine & More) Shram vineyards, Planet Wine, Fenwick Beer and Wine, Downtown Crown, Colesville Beer & Wine, Portland Spring Beer and Wine Fest, Wagner Valley Brewing Co, Von Jakob Vineyard & Brewery, Arcadian Moon Winery & Brewery, Wikipedia entry for "Brewery"

2/6/2017 Final Office Action

- Screenshots: Lighthouse Beer Wine, WINE + BEER, Holiday Valley, New Seasons Market, 2017 Portland Beer and Wine Fest,

3/22/2017 Reconsideration Letter

- Screenshots: Fenton Winery & Brewery, Grafton Winery, Grand River Brewery, Motor City Brewing Works, Round Barn

Applicant's Evidence

1/12/2017 Office Action Response

- Exhibit A, list of registration pairs

3/2/2017 Request for Reconsideration

- Exhibit A: Registration Certificates for Reg. Nos. 4077587, 4031173, 3986881, 2639398, 4704867, 3902646, 4323706, 4115454, 5056054, 3389850, 2196136, 2783556, 3671520, 3463202, 2011128, 2859391, 3119888, 2224435, 4531523, 4161958, 2667078, 3363470, 1883835, 3650313, 1681366, 1359598, 4701812, 4521357, 4891134, 4124752, 4007886, 3846147, 4353951, 2188323, 4305476, 4712766, 5061924, 4235379, 4071615, 3119923, 3499602, 3126862, 4729299, 1977315, 3974628, 3858011, 4925405, 4257481, 3954090, 4722579, 5130262, 3690301, 3661738, 2764766, 4530116, 4301941, 1992300, 3761218, 5001734, 3076685, 4861191, 2731942, 4530412, 3187156, 4423171, 3038275, 3931704, 4531957, 4580218, 2570780, 4871617, 4094108, 4805287, 4726659, 905955, 3751026, 4102319, 3740806, 4856920, 4270684, 4636210, 3808854, 5138334, 5059442, 4563537, 3436793, 4831411, 3389585, 3421671, 2427705, 4995653, 4800089, 4877654, 4838176, 4763092, 4305759, 4651137, 4430717, 3416157, 4708249, 5070910, 4643725, 3076169, 3798152, 3168170, 3667286, 4875817, 3389493, 4462616, 2991248, 5088064, 4586081, 2829005, 2592852, 4480391, 4056808, 4104226, 1613177, 4620700, 3793894, 4505392, 4505392, 4844228, 4756496, 3839371, 4369957, 4360171, 3838615, 5047427, 5000312, 5046813, 3731816, 4800923, 3631916, 4964685, 3966188, 2950860, 1400616, 2633968, 3303892, 3090930, 2722467, 1486399, 3399401, 906899, 3446914, 1597742, 2000803, 2515629, 3076685, 1441389, 3272244, 4431993, 4676336, 2450962, 1798867, 3625529, 3343976, 2684632, 3195187, 5102431, 4937262
- Exhibit B: “Alcohol Beverage Labeling and Advertising,” ALCOHOL & TOBACCO TAX & TRADE BUREAU, https://www.ttb.gov/consumer/labeling_advertising.shtml (last visited Mar. 2, 2017).

7/12/2017 Request for Reconsideration (filed with TTAB with request for remand)

- Exhibit A: Registration Certificate Nos. 4691381, 4687723, 4004379, 2686404, 4756946, 4530911, 4739992, 2636667, 4949580, 3851324, 2692785, 406613
- Exhibit B - KKK: Webpages showing third party marks used for beer and wine (See details below)
- Exhibit LLL: “Number of Breweries,” BREWER’S ASS’N, <https://www.brewersassociation.org/statistics/number-of-breweries/> (last visited June 7, 2017).
- Exhibit MMM: “Number of United States Wineries Reaches 8,702,” WINE BUS. MONTHLY, <https://www.winebusiness.com/wbm/?go=getArticle&dataId=163894/> (last visited June 7, 2017).

SN 87140389 – Logo mark

Examining Attorney's Evidence

11/30/2016 Office Action

- Registration No. 86921775
- Reg. Nos. 1736692, 39817131, 3456841, 3522339, 4332166, 3861451, 4380436, 3962914, 3819774, 3099373, 3934483, 4133934, 4367607, 4387348, 4951746, 4694631, 4832756, 4832965, 4833373, 4984116, 4887801, 4838384, 4896450, 5037342, 4327599
- Screenshots: Norm's Beer and Wine Store, Yelp (Total Wine & More) Shram vineyards, Planet Wine, Fenwick Beer and Wine, Downtown Crown, Colesville Beer & Wine, Portland Spring Beer and Wine Fest, Wagner Valley Brewing Co, Von Jakob Vineyard & Brewery, Arcadian Moon Winery & Brewery

4/26/2017 Final Office Action

- 87140389 specimen
- Screenshots: The Straight Dope; Yahoo! Answers; Apple communities, Adweek, Lighthouse Beer Wine, Wine + Beer, Bulldog Beer and Wine, Holiday Valley, New Seasons Market, 2017 Portland Beer and Wine Fest, IndyStar article, Merry Family Winery, Edg Clif Farms & Vineyard, White Rock, Northport, St. Louis Wine & Beermaking, Belleville, Passport Series, Maine Beer & Wine Distributors Association, IncredibREW, Harvest Ridge Winery, Chiltern Valley Winer & Brewery, Frenton Winery & Brewery, Grafton Winery, Grand River Brewery, Motor City Brewing Works, Round Barn

8/5/2017 Reconsideration letter

- Google search results for dead bird cartoons
- Bing search results for "dead bird drawing"

Applicant's Evidence

7/12/2017 Request for Reconsideration

Exhibit A: Registration Certificate Nos. Registration Certificate Nos. 4691381, 4687723, 4004379, 2686404, 4756946, 4530911, 4739992, 2636667, 4949580, 3851324, 2692785, 3406613

Exhibit B: Badger Hill Brewery, <http://www.badgerhillbrewing.com/homepage/> (last visited June 6, 2017).

Exhibit C: Badger Mountain Vineyard, <http://www.badgermtnvineyard.com/> (last visited June 20, 2017).

Exhibit D: "Barista – Kasteel Barista Chocolate Quad Beer," BINNY'S, http://www.binnys.com/beer/Kasteel_Barista_Chocolate_Quad_937812.html (last visited June 6, 2017).

Exhibit E: Barista Winery, "SO. WINE & SPIRIT," <http://www.southernwines.com/barista/wineestate.cfm> (last visited June 20, 2017).

Exhibit F: Barrelhouse Brewing Co., <https://www.barrelhousebrewing.com/#intro> (last visited June 6, 2017).

Exhibit G: "Barrelhouse Bourbon Cabernet Sauvignon," TOTAL WINE, <http://www.totalwine.com/wine/red-wine/cabernet-sauvignon/barrelhouse-bourbon-cabernet-sauv/p/174049750?s=205&igrules=true> (last visited June 6, 2017).

Exhibit H: Bell's Brewery, <https://www.bellsbeer.com/> (last visited June 7, 2017).

Exhibit I: Bell Wine Cellars, <http://www.bellwine.com/> (last visited June 7, 2017).
Exhibit J: Blank Canvas Brewery, <https://blankcanvasbrewery.wordpress.com/> (last visited May 24, 2017).
Exhibit K: Blank Canvas Wine, <https://blankcanvasbrewery.wordpress.com/> (last visited May 24, 2017).
Exhibit L: Cedar Creek Brewery, <http://cedarcreekbrewery.com/home/3563292> (last visited June 6, 2017).
Exhibit M: Cedar Creek Winery, <http://www.cedarcreekvineyard.com/> (last visited June 6, 2017).
Exhibit N: “Our Beers,” OUTER LIGHT BREWING CO., <http://www.outerlightbrewing.com/our-beers/> (last visited May 24, 2017).
Exhibit O: Cloudbreak Winery, <http://www.cloudbreakwines.com/wine.html> (last visited June 6, 2017).
Exhibit P: “Cooper’s Original Pale Ale,” TOTAL BEVERAGE SOLUTIONS, <http://www.totalbeveragesolution.com/brands/label.php?IID=197&bid=70&type=Beer> (last visited June 6, 2017).
Exhibit Q: Cooper Wine Co., <http://www.cooperwinecompany.com/> (last visited June 6, 2017).
Exhibit R: “Cottonwood Pumpkin Ale,” FOOTHILLS BREWING, <http://www.foothillsbrewing.com/brews/cottonwood-pumpkin-spiced-ale/> (last visited June 6, 2017).
Exhibit S: Cottonwood Winery, <http://www.cottonwoodwinery.com/> (last visited June 6, 2017).
Exhibit T: Dark Horse Brewing Co., <http://www.darkhorsebrewery.com/> (last visited June 6, 2017).
Exhibit U: Dark Horse Wine, <http://www.darkhorsewine.com/> (last visited June 6, 2017).
Exhibit V: Door County Brewing Co., <http://www.doorcountybrewingco.com/> (last visited June 6, 2017).
Exhibit W: “Door County Four Seasons Wine,” ORCHARD COUNTRY, <http://www.orchardcountry.com/door-county-four-seasons-wine/> (last visited June 6, 2017).
Exhibit X: Elevation Beer Co., <http://elevationbeerco.com/> (last visited June 6, 2017).
Exhibit Y: Elevation Cellars Wine, <http://www.elevationcellars.com/> (last visited June 6, 2017).
Exhibit Z: Firestone Walker Brewing Co., <http://www.firestonebeer.com/> (last visited June 7, 2017).
Exhibit AA: Firestone Vineyards, <https://www.firestonewine.com/> (last visited June 7, 2017).
Exhibit BB: Icicle Brewing Co., <https://iciclebrewing.com/> (last visited June 7, 2017).
Exhibit CC: Icicle Ridge Winery, <http://icicleridgewinery.com/> (last visited June 7, 2017).
Exhibit DD: “Kumbaya,” EARTH EAGLE BREWINGS, <http://eartheaglebrewings.com/beer-gruits/kumbaya/> (last visited June 6, 2017).
Exhibit EE: Kumbaya Wine, <http://www.kumbayawine.com/> (last visited June 6, 2017).

Exhibit FF: Mantra Brewing, <http://www.mantrabrewing.com/> (last visited June 6, 2017).

Exhibit GG: “Mantra Alexander Valley Cabernet Sauvignon,” VIVINO, <https://www.vivino.com/wineries/mantra/wines/alexander-valley-cabernet-sauvignon-2014> (last visited June 6, 2017).

Exhibit HH: Martin House Brewing Co., <http://martinhousebrewing.com/> (last visited June 6, 2017).

Exhibit II: Martin Estate, <http://www.martinestate.com/> (last visited June 6, 2017)

Exhibit JJ: Mendocino Brewing Co., <http://www.mendobrew.com/home.html> (last visited June 6, 2017).

Exhibit KK: Mendocino Wine Co., <http://www.mendocinowineco.com/> (last visited June 6, 2017).

Exhibit LL: Momentum Brewhouse, <http://www.momentumbrewhouse.com/beer/> (last visited June 7, 2017).

Exhibit MM: “Momentum,” ROBERT MONDAVI, <https://www.robertmondaviwinery.com/2013-Robert-Mondavi-Winery-Momentum-Red-Wine-Napa-Valley> (last visited June 6, 2017).

Exhibit NN: Napa Valley Brewing Co., <http://napabeer.com/brewery.html> / (last visited June 7, 2017).

Exhibit OO: Napa Valley College Estate Winery, www.nvcwinery.com/ (last visited June 7, 2017).

Exhibit PP: Radius Brewing Co., <http://radiusbrewing.com/> (last visited June 6, 2017).

Exhibit QQ: “Radius,” PRECEPT WINE, <http://www.preceptwine.com/our-wines/radius/> (last visited June 6, 2017).

Exhibit RR: Red Brick Brewing Co., <https://www.redbrickbrewing.com/> (last visited June 7, 2017).

Exhibit SS: Red Brick Winery, http://www.catchwine.com/wineries/iowa/red_brick_winery/ (last visited June 20, 2017).

Exhibit TT: Red Car Brewery, <http://redcarbrewery.com/> (last visited June 6, 2017).

Exhibit UU: Red Car Wine, <https://redcarwine.com/> (last visited June 6, 2017).

Exhibit VV: Revolution Brewing Co., <https://revbrew.com/about/our-story/> (last visited May 24, 2017).

Exhibit SS: Red Brick Winery, http://www.catchwine.com/wineries/iowa/red_brick_winery/ (last visited June 20, 2017).

Exhibit TT: Red Car Brewery, <http://redcarbrewery.com/> (last visited June 6, 2017).

Exhibit UU: Red Car Wine, <https://redcarwine.com/> (last visited June 6, 2017).

Exhibit VV: Revolution Brewing Co., <https://revbrew.com/about/our-story/> (last visited May 24, 2017).

Exhibit WW: Revolution Wine Co., http://www.revolutionwinecompany.com/wine_revolution_company.html (last visited May 24, 2017).

Exhibit XX: Santa Fe Brewing Co., <https://santafebrewing.com/?age-verified=a306b96d4e> (last visited June 6, 2017).

Exhibit YY: Santa Fe Vineyards, <http://www.estrelladelnortevineyard.com/scripts/cpg.cfm/2> (last visited June 6, 2017).

Exhibit ZZ: Schaefer Beer, <http://schaefer-beer.com/Home.aspx> (last visited June 20, 2017).

Exhibit AAA: Shafer Vineyards, <http://www.shafervineyards.com/> (last visited June 7, 2017).

Exhibit BBB: Sockeye Brewing, <http://sockeyebrew.com/> (last visited June 6, 2017).

Exhibit CCC: "Sockeye Pinot Grigio," PRECEPT, <http://www.preceptwine.com/our-wines/sockeye/pinot-grigio/> (last visited June 6, 2017).

Exhibit DDD: Stone Brewing, <https://www.stonebrewing.com/#ageGatePassed> (last visited June 7, 2017).

Exhibit EEE: Stone Cellars, <http://broncowine.com/product-category/national/national-all/stonecellars-national-all/> (last visited June 7, 2017).

Exhibit FFF: Saint James Brewery, <http://www.saintjamesbrewery.com/welcome> (last visited June 6, 2017).

Exhibit GGG: St. James Winery, <https://www.stjameswinery.com/> (last visited June 6, 2017).

Exhibit HHH: Summit Brewing Co., <http://www.summitbrewing.com/> (last visited June 6, 2017).

Exhibit III: "Summit Estates" TOTAL WINE, <http://www.totalwine.com/wine/brand/summit-estates> (last visited June 6, 2017).

Exhibit JJJ: Valiant Brewing Co., <http://www.valiantbrewing.com/> (last visited May 24, 2017).

Exhibit KKK: Valiant Vineyards, <http://www.valiantvineyards.us/Home.html> (last visited May 24, 2017).

Exhibit LLL: "Number of Breweries," BREWER'S ASS'N, <https://www.brewersassociation.org/statistics/number-of-breweries/> (last visited June 7, 2017).

Exhibit MMM: "Number of United States Wineries Reaches 8,702," WINE BUS. MONTHLY, <https://www.winebusiness.com/wbm/?go=getArticle&dataId=163894> (last visited June 7, 2017).

3/21/2017 Office Action Response

- Exhibit A: Reg. Nos. 4077587, 4031173, 3986881, 2639398, 4704867, 3902646, 4323706, 4115454, 5056054, 3389850, 2196136, 2783556, 3671520, 3463202, 2011128, 2859391, 3119888, 2224435, 4531523, 4161958, 2667078, 3363470, 1883835, 3650313, 1681366, 1359598, 4701812, 4521357, 4891134, 4124752, 4007886, 3846147, 4353951, 2188323, 4305476, 4712766, 5061924, 4235379, 4071615, 3119923, 3499602, 3126862, 4729299, 1977315, 3974628, 3858011, 4925405, 4257481, 3954090, 4722579, 5130262, 3690301, 3661738, 2764766, 4530116, 4301941, 1992300, 3761218, 5001734, 3076685, 4861191, 2731942, 4530412, 3187156, 4423171, 3038275, 3931704, 4531957, 4580218, 2570780, 4871617, 4094108, 4805287, 4726659, 905955, 3751026, 4102319, 3740806, 4856920, 4270684, 4636210, 3808854, 5138334,

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- Exhibit B: “Alcohol Beverage Labeling and Advertising,” ALCOHOL & TOBACCO TAX & TRADE BUREAU, https://www.ttb.gov/consumer/labeling_advertising.shtml (last visited Mar. 2, 2017).

ARGUMENT

The Examining Attorney has refused registration pursuant to Trademark Act § 2(d), 15 U.S.C. § 1052(d), on grounds that Applicant’s word and logo marks, for beer, are likely to be confused with the DEADBIRD registered mark for wine. For the following reasons, Applicant respectfully disagrees with the Examining Attorney’s finding and requests that the Board reverse the statutory refusal and allow publication of the Application.

I. Beer and Wine Marks in General

If goods or services at issue in the likelihood of confusion analysis are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely. TMEP § 1207.01(a)(i) (citing *Shen Manufacturing Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004)). The Examining Attorney has the burden to “provide evidence showing that the goods and services are related to support a finding of likelihood of confusion.” TMEP § 1207.01(a)(vi).

Applicant readily acknowledges that the Board has frequently in the past found beer and wine to be related goods for purposes of the *DuPont* analysis regarding a likelihood of confusion. However, to our knowledge, no Applicant has ever presented the body of evidence provided here, namely more than 150 third party registration certificates for marks registered in connection with beer and wine from different owners along with significant evidence of use of pairs of similar marks for beer and wine. These registration certificates show pairs of registrations for marks that are identical, functionally identical, or highly similar registered by different owners for beer and wine goods. More than 60 pairs show marks that are identical, or that have only minor differentiations (such as disclaimed or descriptive wording, differences in language, tense, singular/plural status, or punctuation). This evidence shows that similar marks are routinely registered by the USPTO for both beer and wine, that such marks can exist on the register without confusion, and that it is not likely consumers will be confused as to source when encountering Applicant's mark.

Finding the relevant evidence of co-existing pairs is not easy under the current TESS database structure, certainly not as easy as finding "relatedness" evidence routinely used by examining attorneys. Such third-party evidence is permitted and encouraged by the TMEP. "Third-party registrations that cover a number of different goods or services may have some probative value to the extent that they may serve to suggest that goods or services are of a type that may emanate from a single source, if the registrations are based on use in commerce. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). If third-party evidence can be used to show the

relatedness of goods or services, surely it can be used to show the lack of relatedness as well.

Furthermore, Applicant believes the evidence provided of more than 60 pairs to be only a small sample of marks that coexist for beer and wine. For example, Applicant's primary search efforts were limited to standard character marks. An Applicant is naturally at a disadvantage to collect evidence of this type because of the difficult nature of comprehensively searching the trademark register using TESS.

The Federal Circuit has recognized that in the context of food and wine, the USPTO must establish "something more" than that similar or even identical marks are used for food products." *In re Coors Brewing Co.*, 343 F.3d 1340, 1345 (Fed. Cir. 2003). In *Coors Brewing*, the Federal Circuit explained that "While the evidence produced by the examining attorney shows that some restaurants brew or serve their own private label beer, that evidence does not support the Board's conclusion that consumers are likely to conclude that beer and restaurant services with similar marks emanate from the same source." *Id.* at 1346. In light of the "something more" requirement, the Examining Attorney has not established that beer and wine are related for the purposes of the likelihood of confusion analysis. The two dozen registrations provided by the Examining Attorney purporting to show the relatedness of the goods pales in comparison to Applicant's evidence.

The evidence of pairs of third-party registrations provided by Applicant demonstrates:

- (A) a history of inconsistent treatment of such marks for beer versus wine marks by the USPTO over many years,

- (B) a pattern of permitting registration of dozens of marks for beer or wine when nearly identical marks are already registered for the other good;
- (C) the marketplace realities that consumers are used to seeing such marks used to indicated different sources for beer and for wine; and
- (D) the business realities that beer and wine makers repeatedly have applied for very similar marks and thus clearly do not view their products as presenting potential trademark conflicts.

Elements (C) and (D) are of heightened relevance when paired with the additional marketplace evidence provided by Applicant of co-existing beer and wine brands with identical names.

If there were merely five or ten such registration pairs in the USPTO register, it could be argued that they don't reflect a trend, or don't reflect the marketplace realities in the industry. But here there are dozens of such pairs. Even if there are consent agreements in some instances, they would be additional evidence of the marketplace realities that beer and wine brands don't conflict.

Sufficient evidence of third-party use and registrations of similar marks is "powerful on its face." *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671 (Fed. Cir. 2015). Such evidence can "show that customers . . . have been educated to distinguish between different . . . marks on the basis of minute distinctions." *Id.* (quoting 2 McCarthy on Trademarks and Unfair Competition § 11:88 (4th ed. 2015) (internal quotations omitted)). The evidence shows "the sense in which the mark is used in ordinary parlance"—that is, showing that the marks have a "normally understood and well-recognized descriptive or suggestive meaning." *Id.* See also *Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New*

Millennium Sports, S.L.U., 797 F.3d 1363, 116 USPQ2d 1129 (Fed. Cir. 2015).

Here, the third-party registration and third-party usage evidence indicates that beer and wine brand co-exist frequently with identical names or with only descriptive or generic terms differentiating them.

II. EVIDENCE OF COEXISTING BEER AND WINE THIRD-PARTY REGISTRATIONS

Applicant has provided evidence of dozens of pairs of registered and co-existing marks for beer and wine indicating different sources with nearly identical or identical marks. The comparison of these pairs with the marks at issue here (DEAD BIRD BREWING COMPANY and DEADBIRD wine) is striking. For example:



- DEAD HORSE is registered for beer to Moab Brewers, LLC
- DEAD HORSE is registered for wine to Mark Ryan Winery, LLC
- DARK HORSE BREWING COMPANY is registered for beer to Mor-Dall Enterprises, Inc.
- DARK HORSE is registered for wine to E & J. Gallo Winery

The marks in the pairs above, and in most of the pairs in the table below, feature arbitrary terms. They are no different than the comparison of DEAD BIRD BREWING COMPANY for beer and DEADBIRD for wine. Yet the current applicant is being treated different from these dozens of other registrants.

There is no rule barring the TTAB from considering such third-party registrations. In fact, in the wake of the 2015 Federal Circuit cases *Jack Wolfskin* and *Juice Generation*, such evidence is clearly relevant.


Applicant provided evidence of the following third party registration pairs:

Registered Beer Marks	Registered Wine Marks
ALCHEMY Reg. No. 4077587	ALCHEMY Reg. No. 4031173

Registered Beer Marks	Registered Wine Marks
AMBROSI A Reg. No. 3986881	AMBROSI A Reg. No. 2639398
ASCENSION Reg. No. 4704867	ASCENCION Reg. No. 3902646
AVATAR JASMINE IPA Reg. No. 4323706	AVATAR Reg. No. 4115454
AXIS IPA Reg. No. 5056054	AXIS Reg. No. 3389850
ALAMO Registration No. 2196136	ALAMOS Registration No. 2783556
BIG KAHUNA Registration No. 3671520	THE BIG KAHUNA Registration No. 3463202
BLIND FAITH Registration No. 2011128	BLIND FAITH Registration No. 2859391
BLUE MOON Registration No. 3119888	BLUE MOON Registration No. 2224435
BONESHAKER Reg. No. 4531523	BONESHAKER Reg. No. 4161958
BLACK EYE ALE Registration No. 2667078	BLACKEYE ZIN Registration No. 3363470
CLASSIC DARK Registration No. 1883835	CLASSIC CAB Registration No. 3650313
 Registration No. 1681366	 Registration No. 1359598
DALI LA Reg. No. 4701812	DALI LA Reg. No. 4521357
DEVOTION Reg. No. 4891134	DEVOTION Reg. No. 4124752
DISCOVERY Reg. No. 4007886	DISCOVERIES Reg. No. 3846147
DUET Reg. No. 4353951	DUETTO Reg. No. 2188323
FALSTAFF Reg. No. 4305476	FALSTAFF Reg. No. 4712766
FARMSTEAD Reg. No. 5061924	FARMSTEAD Reg. No. 4235379
FATHOM Reg. No. 4071615	FATHOM Reg. No. 3119923
FREAK OUT! Reg. No. 3499602	FREAKOUT Reg. No. 3126862
FREESTONE Reg. No. 4729299	FREESTONE Reg. No. 1977315

Registered Beer Marks	Registered Wine Marks
FURIOUS Reg. No. 3974628	FURIOSO Reg. No. 3858011
GRATITUDE Reg. No. 4925405	GRATITUD Reg. No. 4257481
HOGWASH Reg. No. 3954090	HOGWASH Reg. No. 4722579
HELIOTROPIC Reg. No. 5130262	HELIOTROPE Reg. No. 3690301
HOURGLASS ALE Registration No. 3661738	HOURGLASS Registration No. 2764766
KINETIC Reg. No. 4530116	KINETIC Reg. No. 4301941
LUCKY Reg. No. 1992300	LUCKY Reg. No. 3761218
MAGIC PILS Reg. No. 5001734	MAGIC Reg. No. 3076685
MAPLEWOOD Reg. No. 4861191	MAPLEWOOD Reg. No. 2731942
MINER BREWING Reg. No. 4530412	MINER Reg. No. 3187156
MONTAGE Reg. No. 4423171	MONTAGE Reg. No. 3038275
NEMESIS Reg. No. 3931704	NEMESIS Reg. No. 4531957
OASIS Reg. No. 4580218	OASIS Reg. No. 2570780
PERIODIC BREWING Reg. No. 4871617	PERIODIC Reg. No. 4094108
PLUNDER! Reg. No. 4805287	PLUNDER Reg. No. 4726659
PRIMO Reg. No. 905955	PRIMA Reg. No. 3751026
PUCK Reg. No. 4800427	PUCK Reg. No. 5071586
RACHEL'S GINGER BEER Reg. No. 4102319	RACHEL Reg. No. 3740806
REDICULOUS Reg. No. 4856920	REDICULOUS Reg. No. 4270684
REGGAE RED Reg. No. 4636210	REGGAE Reg. No. 3808854
REVENANT RED Reg. No. 5138334	REVENANT Reg. No. 5059442
RIVERBANK RED Reg. No. 4563537	RIVERBANK Reg. No. 3436793
RUDIE Reg. No. 4831411	RUDY Reg. No. 3389585

Registered Beer Marks	Registered Wine Marks
SCHNEIDER WEISSE Registration No. 3421671	SCHNEIDER Registration No. 2427705
SHORELINE Reg. No. 4995653	SHORELINE Reg. No. 4800089
SINGULARITY Reg. No. 4877654	SINGULARITY Reg. No. 4838176
SOLIDARITY Reg. No. 4763092	SOLIDARITY Reg. No. 4305759
SPI TFIRE Reg. No. 4651137	SPI TFIRE Reg. No. 4430717
SPRINGBOARD Reg. No. 3416157	SPRINGBOARD Reg. No. 4708249
STACK Reg. No. 5070910	STACK Reg. No. 4643725
SUNDANCE Reg. No. 3076169	SUNDANCE Reg. No. 3798152
SUNFLOWER Reg. No. 3168170	SUNFLOWER Reg. No. 3667286
TEMBLOR Reg. No. 4875817	TEMBLOR Reg. No. 3389493
TRI FECTA Reg. No. 4462616	TRI FECTA Reg. No. 2991248
UPSIDE Reg. No. 5088064	UPSIDE Reg. No. 4586081
VENOM PALE ALE Reg. No. 2829005	VENOM Reg. No. 2592852
VIGILANTE IPA Reg. No. 4480391	VIGILANTE Reg. No. 4056808
WARRIOR IPA Reg. No. 4104226	WARRIOR Reg. No. 1613177
WAYFARER Reg. No. 4620700	WAYFARER Reg. No. 3793894
WILDFLOWER Reg. No. 4505392	WILDFLOWER Reg. No. 2076866
ZEPHYR INDIA PALE ALE Reg. No. 4844228	ZEPHYR Reg. No. 4756496
SALUD Reg. No. 3839371	SALUTÈ Reg. No. 4369957
PRESQUE ISLE PILSNER Reg. No. 4360171	PRESQU'ILE Reg. No. 3838615
GIUSTO Reg. No. 5047427	GIUSTI Reg. No. 5000312
ANTI CIPATE Reg. No. 5046813	ANTI CIPATION Reg. No. 3731816
CENTURY ALE Reg. No. 4800923	CENT'ANNI Reg. No. 3631916

Registered Beer Marks	Registered Wine Marks
W4 Reg. No. 4964685	W2 Reg. No. 3966188
STEELHEAD Registration No. 2950860	STEELHEAD RUN Registration No. 1400616
MURPHY'S Registration No. 2633968	MURPHY'S LAW Registration No. 3303892
TRIPLE BLACK Registration No. 3090930	TRIPLE BLACK SLOPES Registration No. 2722467
INDIA GOLD LABEL Registration No. 1486399	GOLD LABEL Registration No. 3399401
ELEPHANT Registration No. 0906899	ELEPHANT HILL Registration No. 3446914
GEORGE WASHINGTON PORTER Registration No. 1597742	GEORGE WASHINGTON VANDERBILT Registration No. 2000803
MAGIC HAT Registration No. 2515629	MAGIC C Registration No. 3076685
MUSTANG Registration No. 1441389	 Registration No. 3272244
DISCRETION BREWING Reg. No. 4431993	DISCRETO Reg. No. 4676336
WINTER SOLSTICE Registration No. 2450962	SOLSTICE Registration No. 1798867
NAKED ED'S Registration No. 3625529	NAKED Registration No. 3343976
 Registration No. 2684632	SWEETIE Registration No. 3195187
A ÇAI CO Reg. No. 5102431	ACAI BO Reg. No. 4937262
DEAD HORSE Reg. No. 2692785	DEAD HORSE Reg. No. 3406613
DAMN GOOD BEER Reg. No. 4004379	DAM FINE WINE Reg. No. 2686404
LOVE BEER. LOVE LIFE Reg. No. 4756946	LOV WINES Reg. No. 4530911
TEXAS BEER REFINERY Reg. No. 4739992	TEXAS STYLE WINES Reg. No. 2636667
WILD BEER Reg. No. 4949580	WILD CELLARS Reg. No. 3851324

Taken as a whole, these registrations are powerful evidence of the past treatment of beer and wine marks by the USPTO.

III. MARKETPLACE EVIDENCE

Additionally, Applicant has submitted evidence from the marketplace showing beers and wines from different producers that share the same brand names.

Screenshots from more than 30 pairs have been provided.

<u>Beers</u>	<u>Wines</u>
BADGER HILL BREWERY	BADGER MOUNTAIN VINEYARD
BARI STA – KASTEEL BARI STA CHOCOLATE QUAD BEER	BARI STA WINERY
BARRELHOUSE BREWING CO.	BARRELHOUSE
BELL’S BREWERY, INC.	BELL WINE CELLARS
BLANK CANVAS BREWERY	BLANK CANVAS WINE
CEDAR CREEK BREWERY	CEDAR CREEK WINERY
CLOUDBREAK BEER	CLOUDBREAK WINERY
COOPERS PALE ALE	COOPERS WINE CO.
COTTONWOOD PUMPKIN ALE	COTTONWOOD WINERY OF OREGON
DARK HORSE BREWING CO.	DARK HORSE WINE
DOOR COUNTY BREWING CO.	DOOR COUNTY FOUR SEASONS WINE
ELEVATION BEER CO.	ELEVATION CELLARS HOME
FIRESTONE WALKER BREWING CO.	FI RESTONE VINEYARDS
I CICLE BREWING CO.	I CICLE RIDGE WINERY
KUMBAYA – EARTH EAGLE BREWINGS	KUMBAYA WINE
MANTRA BREWING	MANTRA WINES
MARTIN HOUSE BREWING CO.	MARTIN ESTATE
MENDOCINO BREWING CO.	MENDOCINO WINE CO.
MOMENTUM BREWHOUSE	MOMENTUM RED BLEND
NAPA VALLEY BREWING CO.	NAPA VALLEY COLLEGE ESTATE WINERY
RADIUS BREWING CO.	RADIUS WINE
RED BRICK BREWING CO.	RED BRICK WINERY
RED CAR BREWERY	RED CAR WINE
REVOLUTION BREWING CO.	REVOLUTION WINE CO.

SANTA FE BREWING CO.	SANTA FE VINEYARS
SCHAEFER BEER.	SHAFFER VINEYARDS
SOCKEYE BREWING	SOCKEYE WINE
STONE BREWING	STONE CELLARS
SAINT JAMES BREWERY	ST. JAMES WINERY
SUMMIT BREWING CO.	SUMMIT ESTATES
VALIANT BREWING CO.	VALIANT VINEYARDS

The existence of these businesses using similar or identical brands in the marketplace in connection with beer and wine demonstrates that consumers are accustomed to seeing identical names on both beer and wine goods from different producers, and that actual confusion between such products is therefore unlikely. The Board has repeatedly found that marketplace evidence is highly probative regarding relatedness. *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424 (TTAB 2013).

The beer and wine industries are so saturated that in 2016 there were over 5,300 breweries and 8,700 wineries in the United States alone. Those numbers increase exponentially when considering that each winery or brewery produces multiple types or brands of wines, each with a different branded name. Given the vast number of businesses in the market place and because it is very cumbersome to structure a search to produce such evidence, Applicant believes that the evidence presented is only a fraction of the evidence of beer and wine names that coexist. Perhaps tellingly, none of the marketplace examples used are duplicative of any of the marks produced in Applicant's search of TESS records.

Further, the saturation of the market and the circumstances surrounding the production of wine and beer are commonly understood to be vastly different, so the consumer would understand that distribution of beer and wine under a similar name

is not likely to come from the same source. The wine and beer industries have exploded in the United States, and consumers are offered so many different options, that educational blogs, websites, and social media platforms have been developed to help train the average beer consumer to become the craft beer enthusiast. The average consumer of a beer or wine generally understands the differences in these products and productions and would assume that branding in both industries would cost a lot of time, money, and resources that are not available to most businesses.


Applicant also submitted information from the Alcohol and Tobacco Tax and Trade Bureau (TTB), an agency of the Department of the Treasury, describing the nature and purpose of alcohol labeling laws and regulations. According to the TTB, the purpose of these laws is “to prevent the deception of the consumer and provide them with “adequate information” as to the identity and quality of the product.” *Id.* See also 7 C.F.R. § 7.23.

Taken as a whole, the marketplace evidence featuring pairs of virtually identical marks weighs in favor of finding no likelihood of confusion.

IV. ADDITIONAL ARGUMENTS REGARDING LOGO MARK

The Examining Attorney argues that Applicant’s design mark conveys a substantially similar commercial impression to that conveyed by the cited standard character mark. Applicant’s Mark, however, is a design mark without wording, while the cited mark is a standard character mark without any design. Marks are compared in their entireties in terms of sound, appearance, meaning and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). Under *duPont*, even when marks

share a common portion, confusion is unlikely when the marks create different commercial impressions. *Long John Distilleries, Ltd. v. Sazerac*, 426 F.2d 1406, 166 USPQ 30 (CCPA 1970).

The cited DEADBIRD mark is just the words DEAD BIRD, presented with no space between them. Applicant's Mark, on the other hand, is a design: .

Applicant's mark does not contain any literal elements, and therefore looks entirely different. There is also no means of "pronouncing" Applicant's Mark, because it is an image. Consumers would have to find their own words to describe the image. Moreover, Applicant's Mark is not a literal or highly accurate image. Instead, the design in Applicant's Mark has exaggerated lines and sparse details. The image of the bird is presented upside down. Therefore, the words that consumers may choose to describe Applicant's mark may not be "DEAD BIRD." Consumers may describe the image as "upside-down bird," "drunk bird," or "dizzy bird." Even if consumers take a more morbid interpretation of the mark, they may settle on variations such as "deceased bird" or "dying bird."

Because of these various connotations and meanings, Applicant's Mark is not merely equivalent to the words in the cited mark. Instead, the marks are different in sound, appearance, meaning, and connotation. When combined with the evidence presented herein regarding the relatedness or lack thereof, of the respective goods, there is no likelihood that the registered word mark for wine and Applicant's logo mark for beer will be confused by consumers.

CONCLUSION

Evidence of third-party registrations and third-party use is relevant to the likelihood of confusion analysis regarding the similarity and/or strength of the

marks. Such evidence has often been used to show the purported relatedness of beer and wine. However, if third-party evidence can be used to show the relatedness of goods or services, surely it can be used to show the opposite. The co-existing pairs of marks for beer and wine shown by Applicant do just that; namely, this wealth of evidence demonstrates that beer and wine are not treated as related goods by the USPTO, by Applicants, or by business operators in the field.

There is no reason that evidence of pairs of marks in scenarios identical to the one at hand shouldn't be relevant to the analysis of the similarity of the goods and services. Examining Attorneys are routinely permitted to use evidence from the register to show goods and services are related; failing to permit evidence such as that provided by Applicant to show patterns regarding the relationship of goods and services would be unfair and unjust. Furthermore, nothing in the CAFC precedent or Board precedent indicates that such evidence cannot or should not be considered. When a myriad of Applicants and Registrants and businesses in the field of wine repeatedly opt for names featuring the same terms, surely it is indicative of the marketplace conditions and relatedness of the products.

Upon consideration of the evidence of third party use and registration of analogous pairs of marks, Applicant believes the evidence demonstrates that consumers are not likely to be confused. Furthermore, if Applicant's marks are approved and if the cited Registrant believes there is a conflict, Registrant would have the right to oppose the marks.

WHEREFORE, Applicant respectfully requests that the Board REVERSE the statutory refusals pursuant to Trademark Act §2(d) and allow the Applications to proceed to publication.

Dated this 10th day of October, 2017.

Respectfully submitted,



Erik M. Pelton