

This Opinion is not a  
Precedent of the TTAB

Mailed: April 24, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re 1729 Investments LLC*  
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Serial No. 90694523  
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Randy Michels, Kevin Hartley, and Bill Ferrel of Trust Tree Legal PC,  
for 1729 Investments LLC.

Dannean Hetzel, Trademark Examining Attorney, Law Office 106,  
Mary Sparrow, Managing Attorney.

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Before Bergsman, Goodman and Lebow,  
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

1729 Investments LLC (“Applicant”) seeks registration on the Principal Register  
of the mark RAO’S (in standard characters) for

Wine produced from grapes grown in a single designated  
vineyard in the Atlas Peak American Viticultural Area,  
labeled and advertised in compliance with U.S. laws for the  
Atlas Peak American Viticultural Area appellation of  
origin; all of the foregoing sold at the vineyard, wine  
specialty stores, and direct to consumers; none of the  
foregoing sold in restaurants in International Class 33.<sup>1</sup>

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<sup>1</sup> Application Serial No. 90694523 was filed on May 6, 2021, based upon Applicant’s  
assertion of a bona fide intention to use the mark in commerce under Section 1(b) of the

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the following Principal Register marks: **RAO'S**<sup>2</sup> (section 2(f) for "restaurant services" in International Class 42 and RAO'S<sup>3</sup> (in standard characters) (section 2(f) for "bar services; restaurant services" in International Class 43, both owned by the same entity, as to cause confusion, to cause mistake, or to deceive.<sup>4</sup>

When the refusal was made final, Applicant requested reconsideration, accompanied by evidence, which request the Examining Attorney denied.<sup>5</sup> Applicant then filed a second request for reconsideration, accompanied by a declaration from

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Trademark Act, 15 U.S.C. § 1051(b). The application includes a statement that the name shown in the mark "identifies Muktheswara Rao Meka, whose consent(s) to register is made of record."

Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system. Applicant's brief is at 6 TTABVUE; the Examining Attorney's brief is at 8 TTABVUE.

<sup>2</sup> Registration No. 2670863, issued June 7, 2003; renewed. The restaurant services in this registration are classified in International Class 42, rather than International Class 43, because the registration issued prior to the reclassification of restaurant services under the Nice Agreement to Class 43.

<sup>3</sup> Registration No. 4349617, issued June 11, 2013; renewed.

<sup>4</sup> During the pendency of this application, a letter of protest was filed by the owner of various RAO's and RAO's FOOD registrations. The Deputy Commissioner found the information relevant and made the accompanying material part of the application file. Trademark Manual of Examining Procedure (TMPEP) Section 1715.04(a) (July 2022). However, the Examining Attorney did not issue any Section 2(d) refusals citing the registrations listed in the Letter of Protest.

<sup>5</sup> July 13, 2022 Request for Reconsideration (first request); July 18, 2022 Denial of Reconsideration.

Applicant's owner, along with a notice of appeal.<sup>6</sup> After the Examining Attorney denied the second request for reconsideration, the appeal was resumed.

We reverse the refusal to register.

### I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). We must consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See In re Charger Ventures LLC*, \_\_F.4th \_\_, 2023 USPQ2d 451, at \*4 (Fed. Cir. 2023) (“In any given case, different *DuPont* factors may play a dominant role and some factors may not be relevant to the analysis.”); *In re Shell Oil Co.*, 992 F.2d 1204, 1209, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); *Federated Foods, Inc. v.*

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<sup>6</sup> August 5, 2022 Request for Reconsideration (second request); August 8, 2022 Denial of Reconsideration.

*Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and or services] and differences in the marks.”). These factors, and others, are discussed below.

#### A. Strength of the Mark

We first consider the strength of the cited marks. *DuPont*, 177 USPQ at 567. “A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning.” *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010). *See also In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at \*3 (TTAB 2020) (“[A]n analysis of the similarity between marks may include an analysis of the conceptual strength or weakness of the component terms and of the cited mark as a whole.”); *New Era Cap. Co. v. Pro Era LLC*, 2020 USPQ2d 10596, at \*10 (TTAB 2020) (“In determining the strength of the cited mark, we consider [ ] inherent strength, based on the nature of the mark itself ...”).

“[T]o determine the conceptual strength of the cited mark, we evaluate its intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary (or fanciful) continuum of words.” *In re Davia*, 110 USPQ2d 1810, 1814 (TTAB 2014). *See generally, Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000) (word marks registered without a claim of acquired distinctiveness that are arbitrary, fanciful or suggestive are “held to be inherently distinctive.”); *In re MBNA Am. Bank, N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003)

(citing *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 23 USPQ2d 1081, 1083 (1992)).

Applicant argues that in view of the cited registrations' issuance under Section 2(f), RAO'S is conceptually weak and entitled to a narrow scope of protection.<sup>7</sup>

We note first that Registrant effectively conceded that its asserted RAO'S marks are not inherently distinctive by seeking registration under Section 2(f) of the Trademark Act. *Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988) (Where an "applicant seeks a registration based on acquired distinctiveness under Section 2(f), the statute accepts a lack of inherent distinctiveness as an established fact."). Second, we find that the evidence submitted by Applicant indicates that RAO is the surname of Registrant's founder.<sup>8</sup> Surnames are considered to have some inherent weakness as marks. See *Harry Winston, Inc. and Harry Winston S.A. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1447 (TTAB 2014) ("We may, of course, consider the strength or weakness of the mark WINSTON. A surname such as WINSTON would ordinarily suffer some inherent weakness as a source identifier."). Therefore, we find that the cited marks are conceptually weak.

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<sup>7</sup> 6 TTABVUE 9. Applicant has not argued that RAO or RAO's is commercially weak or submitted any evidence on this point. Furthermore, the owner of the cited registrations is not a party to this proceeding and thus cannot introduce evidence regarding its use of the marks protected thereby. See *In re Thomas*, 79 USPQ2d 1021, 1027, n. 11 (TTAB 2006) ("Because this is an *ex parte* proceeding, we would not expect the examining attorney to submit evidence of fame of the cited mark"). As a result, the commercial strength of Registrant's marks simply is not at issue in this appeal.

<sup>8</sup> February 11, 2022 Response to Office Action at TSDR 12-14.

Nonetheless, while a non-inherently distinctive weak designation may be entitled to a narrower scope of protection than an entirely arbitrary or coined term, we must keep in mind that “likelihood of confusion, mistake or deception is to be avoided as much between weak marks as between strong marks. ... and that even weak marks are entitled to protection against registration of similar marks, especially identical ones, for related goods and services.” *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982). In this regard, because the cited marks are registered on the Principal Register, they are entitled to the benefits accorded registered marks under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b) (a registration is prima facie evidence of the validity of the registration and registrant’s exclusive right to use the mark in commerce). *See In re Charger Ventures LLC*, 2023 USPQ2d 451, at \*7 (citing 15 U.S.C. § 1057(b)); *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006) (a “mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions”).

#### B. Similarity of the Marks

We turn next to the first *DuPont* factor, the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (citing *DuPont*, 177 USPQ at 567).

One of the cited RAO’S marks and Applicant’s RAO’s mark are in standard characters which means that these marks can be depicted in any font style, size, or color. Trademark Rule 2.52(a), 37 CFR § 2.52(a). For that reason, we must assume

the marks could be displayed in a stylization identical or similar to each other. *See Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (“[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display. By presenting its mark merely in a typed drawing, a difference cannot legally be asserted by that party.”); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) (“[T]he rights associated with a standard character mark reside in the wording per se and not in any particular font style, size, or color.”) (citation omitted). Additionally, as to the cited stylized mark, **RAO’S**, in view of the foregoing, we must assume that Applicant’s mark could be displayed in the same stylization.

Applicant argues that the marks have different commercial impressions because RAO’s connotes the middle name of Applicant’s owner,<sup>9</sup> while RAO’s in the cited mark connotes the surname of Registrant’s founder.<sup>10</sup> However, consumers not aware of this information may attribute the same connotation to the term, either as a personal name or a surname, while consumers aware of the connotation for Applicant’s and Registrant’s separate RAO’S marks would still treat RAO’s as a name, which results in the same general commercial impression as that of a person’s name.

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<sup>9</sup> The declaration submitted by Applicant’s owner Muktheswara Rao Meka states that he is known by RAO and that RAO’s in the mark is his name. Declaration of Muktheswara Rao Meka, paragraphs 4-5, August 5, 2022 second Request for Reconsideration at TSDR 5.

<sup>10</sup> 6 TTABVUE 9-10. Applicant submitted information during prosecution to show that Rao’s is a reference to the surname of the restaurant founder, Joshua Anthony Rao. Wikipedia February 11, 2022 Response to Office Action at TSDR 12-14.

While we find that the term RAO's has some conceptual weakness because it may be a given name or surname, the marks are identical in their appearance, sound, meaning and commercial impression.

The first *DuPont* factor favors a finding of likelihood of confusion.

### C. Similarity or Dissimilarity of the Goods and Services

We turn next to the second *DuPont* factor, where we assess the similarity or dissimilarity of Applicant's and Registrant's goods and services. *Dupont*, 177 USPQ 567. In determining relatedness of Applicant's goods and Registrant's services, we must focus on the goods and services as they are identified in the involved application and cited registrations including any limitations or restrictions included therein. *See Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

It is common knowledge that restaurants often serve alcoholic beverages such as wine and beer. However, it does not necessarily follow that consumers commonly expect wine to emanate from the same source as restaurants. "[T]he test is not that goods and services must be related if used together, but merely that that finding is part of the underlying factual inquiry as to whether the goods and services at issue . . . can be related in the mind of the consuming public as to the origin of the goods." *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1355 (Fed. Cir. 2000). *See also Shen Mfg. Co. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1356 (Fed. Cir. 2004) ("[A]lthough a student of RHL's cooking classes would

undoubtedly use kitchen textiles, it does not necessarily follow that the consuming public would understand those products to have originated from the same source.”). Therefore, the Examining Attorney’s argument that “it can be presumed that registrant’s restaurant and bar services could feature applicant’s type of wine”<sup>11</sup> is misplaced; the issue is whether consumers consider the wine and the restaurant services to emanate from the same source.

There is no per se rule that food and beverage products and restaurant services are related. *Lloyd’s Food Prods., Inc. v. Eli’s, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2030 (Fed. Cir. 1993) (no per se rule about confusion, where similar marks are used in connection with restaurant services and food products).

When presented with food services and food and beverage products, the Office must show, in order to establish likelihood of confusion, “something more than that similar or even identical marks are used for food products and for restaurant services.” *Jacobs v. Int’l Multifoods Corp.*, 668 F.2d 1234, 212 USPQ2d 641, 642 (CCPA 1982); *In re Giovanni Food Co., Inc.*, 97 USPQ2d 1990, 1992 (TTAB 2011) (“relatedness of food services and food items is not to be assumed and that evidence sufficient to meet the “something more” standard is necessary”) (citing *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)).

For example, the Board has found the “something more” requirement to be met where an applicant’s mark made clear that its restaurant specialized in registrant’s type of goods. See *In re Golden Griddle Pancake House Ltd.*, 17 USPQ2d 1074-1075

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<sup>11</sup> 8 TTABVUE 9.

(TTAB 1990) (GOLDEN GRIDDLE PANCAKE HOUSE for restaurant services confusingly similar to GOLDEN GRIDDLE for table syrup; “pancakes” in the mark denotes the fare to be served at the restaurant, and “no doubt pancake (or table) syrup, as well”); *In re Azteca Restaurant Enters., Inc.*, 50 USPQ2d 1209, 1211 (TTAB 1999) (AZTECA MEXICAN RESTAURANT for restaurant services confusingly similar to AZTECA for Mexican food items).

The Board also found the “something more” requirement met where the registrant’s mark was “a very unique, strong mark” and there was a commercial relationship between the goods (mustard) and restaurants. *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1469 (TTAB 1988) (the food item served in the restaurant is of the type which may typically be packaged for retail sale by the restaurant under the same name, such as house specialty products). *See also In re Opus One Inc.*, 60 USPQ2d 1812, 1813-5 (TTAB 2001) (finding “something more” based on “strong and arbitrary character of registrant’s OPUS ONE mark” and the fact that the record showed that registrant’s wines were actually sold in applicant’s restaurant).

As the Court noted in *In re Coors Brewing Co.*:

It is not unusual for restaurants to be identified with particular food or beverage items that are produced by the same entity that provides the restaurant services or are sold by the same entity under a private label. Thus, for example, some restaurants sell their own private label ice cream, while others sell their own private label coffee. But that does not mean that any time a brand of ice cream or coffee has a trademark that is similar to the registered trademark of some restaurant, consumers are likely to assume that the coffee or ice cream is associated with that

restaurant. The *Jacobs* case stands for the contrary proposition, and in light of the very large number of restaurants in this country and the great variety in the names associated with those restaurants, the potential consequences of adopting such a principle would be to limit dramatically the number of marks that could be used by producers of foods and beverages.

68 USPQ2d at 1064.

The Examining Attorney's burden in this case is to show that restaurants operating under a particular mark also sell wines, branded with the same mark as the restaurant, and that the sale of wine is not merely an aspect of the service of providing food and drink to patrons in a restaurant. The Examining Attorney must show that there is "a substantial overlap" between restaurants and wine as to source such that "consumers are likely to conclude that [wine] and restaurant services with similar marks emanate from the same source." *Id.* at 1063.

To support relatedness, the Examining Attorney submitted 31 active third-party registrations covering "restaurant and bar services" and "wines" under the same mark.<sup>12</sup> Third-party registrations based on use in commerce that individually cover a number of different goods or services may serve to suggest that the listed goods and services are of a type which may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).<sup>13</sup>

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<sup>12</sup> September 27, 2021 Office Action at TSDR 7-47; March 8, 2022 Office Action at TSDR 2-73. Some of these registrations identify the bar services as "wine bar."

<sup>13</sup> Although none of the "wines" are specifically identified as being labeled with an American Viticultural Area (AVA) appellation of origin, the identification is broad enough to include that type of wine. In addition, the "wines" in these registrations are identified without trade channel restriction.

Although third-party registrations submitted by the Examining Attorney support a finding of relatedness, they are not sufficient alone to establish “something more.” See *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050 (TTAB 2012) (“something more” shown for coffee goods certification mark and services of providing food and drink by evidence in the record that applicant’s own website indicated it is in the business of rendering coffee house services, that five third-party registrations covered café and restaurant services and coffee beverages, and that the mark contained the term “coffee house,” identifying a place where coffee is served); *In re Azteca Rest. Enters. Inc.*, 50 USPQ2d at 1211 (“something more” shown for Mexican food and restaurant services by evidence in the record that three food items listed in registrant’s registrations were defined by dictionary definitions as “Mexican cookery,” that ten use-based third-party registrations covered restaurant services and food items, that applicant’s menu showed applicant served a variety of Mexican fare, that the last page of applicant’s menu offered a “Jar of Azteca Hot Sauce,” showing applicant already marketed for retail sale a food product under the mark AZTECA, and that the mark included the terms “Mexican Restaurant” making clear that Applicant will serve Mexican fare). Compare *In re Coors Brewing Co.*, 68 USPQ2d at 1061 (“something more” not established where record included evidence that brewpubs, which brew and serve their own beer, often provide restaurant services and that some restaurants serve their own private label beer, that third-party registrations of marks covering beer and restaurant services were in the record, but no evidence or suggestion registrant’s restaurant was a brewpub or offered its own private label

beer, and that there were 1,450 brewpubs, microbreweries, and regional specialty breweries in the United States in contrast to approximately 815,000 restaurants) *with In re Giovanni Food Co.*, 97 USPQ2d at 1991 (“something more” not found for catering services and barbeque sauce where the record consisted of third-party registrations showing that a single mark has been registered for “restaurant and catering services” and “barbeque sauce” and third-party websites showed that barbeque restaurants and catering services and barbeque sauce are offered under the same mark from a single source). *See also In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086-1087 (Fed. Cir. 2014) (“[T]o rely on the similarity of the goods and services as a basis for refusing registration, the PTO must come forth with a persuasive evidentiary showing of relatedness between the goods and services at issue”; “in circumstances in which the types of goods and services in question are well-known or otherwise generally recognized as having a common source of origin, the PTO’s burden to establish relatedness will be easier to satisfy”); *In re Albert Trostel & Sons Co.*, 29 USPQ2d at 1785-86 (“third-party registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them”).

The Examining Attorney also submitted internet website evidence of 13 wineries that have on-site restaurants with purportedly the same name as the winery, and by implication, the same name as the wine produced by the winery.<sup>14</sup> The Examining

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<sup>14</sup> March 8, 2022 Office Action at TSDR 73, 74, 78, and 79 (vinepair.com, 10best.com, foodandwine.com, girlsdrinkwinetoo.com). The two wineries listed in the Vinepair excerpt are provided as separate winery website webpages by the Examining Attorney.

Attorney also provided excerpts of four articles that discuss “the best” on-site restaurants at wineries.<sup>15</sup> We note that in this case, the registered marks are simply for restaurant/restaurant and bar services in general and not a winery and a restaurant. Applicant’s submitted Wikipedia article about Registrant’s restaurant indicates that RAO’S is a southern Italian restaurant in New York city with sister restaurants in Los Angeles and Las Vegas; it is not identified as being connected to a winery.<sup>16</sup>

The Examining Attorney submits that “the [internet] evidence shows third parties providing restaurant services *and* selling wine under a single mark, not merely serving wine at the dinner table. For example, Ferrante Winery & Ristorante provides restaurant services and sells a house wine separately under the same mark as does Cooper’s Hawk. Also Barboursville Vineyards provides a restaurant and sells wine under the same mark as does J. Bookwalter. ...These few examples highlight the evidence of record which demonstrates that it is common for a single mark to be used for both the sale of wine and restaurant services.”<sup>17</sup> (emphasis in original).

We find that the internet evidence overall does not support the Examining Attorney’s position that it is *common* for regular restaurants to offer house-branded wine under the same name as its restaurant, or, for that matter, even wineries to

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<sup>15</sup> September 27, 2021 Office Action at TSDR 48-53; March 8, 2022 Office Action at TSDR 74-86. Aside from third-party registrations, the Examining Attorney did not provide any other evidence showing that bars offer wine under the same name or trademark. We also have no specific evidence in the record relating to the offering by restaurants of wines with American Viticultural Area (AVA) appellations.

<sup>16</sup> February 11, 2022 Response to Office Action at TSDR 12.

<sup>17</sup> 8 TTABVUE 5-6.

offer on-site restaurants with the same name as the winery-branded wine. Some of the website evidence (four wineries and the Food & Wine website article excerpt) have little or no probative value as to whether the same names are used for the wines produced by the winery and the restaurant, or even as to whether an on-site restaurant is offered. The J. Bookwalter webpage does not specify that it has a restaurant, but instead lists a “Woodinville Tasting Room.”<sup>18</sup> The webpage for King Estate indicates that it produces wine, but there is no reference to any restaurant.<sup>19</sup> The webpage for Long Meadow Ranch does not identify a restaurant but indicates it offers reservations for “excellence through responsible farming.”<sup>20</sup> The webpage for Cooper’s Hawk Winery and Restaurants does not show the name of the wines offered in the restaurant.<sup>21</sup> The Food & Wine article excerpt submitted by the Examining Attorney simply states that a number of wineries from across the country operate their own restaurants but does not specifically identify by name any wineries, and by implication their wine, and their restaurants’ name.<sup>22</sup>

Of the remaining nine winery webpages, three appear to show that the restaurants use the same name as the wines produced by the winery: Cascade Mountain Winery & Restaurant, Country Squire, Restaurant, Inn & Winery, and

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<sup>18</sup> March 8, 2022 Office Action at TSDR at 82.

<sup>19</sup> March 8, 2022 Office Action at TSDR 84.

<sup>20</sup> March 8, 2022 Office Action at TSDR 85.

<sup>21</sup> March 8, 2022 Office Action at TSDR 77; September 27, 2021 Office Action at TSDR 49.

<sup>22</sup> March 8, 2022 Office Action at TSDR 78.

Ferrante Restaurant & Winery.<sup>23</sup> Four webpages show wineries that do not use the same name for the wines produced by the winery and the winery restaurant:

Barboursville Vineyard's restaurant is named Palladio<sup>24</sup>

Wente Vineyard's restaurant is named The Grill<sup>25</sup>

Knapp Winery's restaurant is named Vineyard Restaurant<sup>26</sup>

Gervasi Vineyard's restaurants are named The Bistro, The Crush House, The Piazza and The Still House.<sup>27</sup>

Two winery websites show they offer food service, but the restaurants are unnamed. The Whispering Oaks Winery webpage indicates it serves dinner,<sup>28</sup> and the Flat Creek Estate webpage indicates it has "food offerings," providing a booking option for the "Bistro Dining Room."<sup>29</sup> The Vinepair article excerpt submitted by the Examining Attorney lists the Flat Creek Estate, but the text about the winery and its offerings are not part of the excerpt.<sup>30</sup> In view of the preceding evidence, we hesitate to assume that the Whispering Oaks Winery and the Flat Creek Estate restaurants are named after the winery, and by implication, the name of the wine produced by the winery.

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<sup>23</sup> September 27, 2021 Office Action at TSDR 50-52.

<sup>24</sup> This restaurant is the subject of Vinepair article excerpt submitted by the Examining Attorney. March 8, 2022 Office Action at TSDR 74, 80.

<sup>25</sup> March 8, 2022 Office Action at TSDR at 82.

<sup>26</sup> March 8, 2022 Office Action at TSDR at 86.

<sup>27</sup> September 27, 2021 Office Action at TSDR 53.

<sup>28</sup> March 8, 2022 Office Action at TSDR 76.

<sup>29</sup> March 8, 2022 Office Action at TSDR 83.

<sup>30</sup> March 8, 2022 Office Action at TSDR 74.

The article excerpt from the Girls Drink Wine Too website indicates that there are 23 Niagara wineries with restaurants.<sup>31</sup> Two of the three wineries listed do not use the same name for their winery and their restaurant: Peller's Estate identifies its restaurants as the Winery Restaurant and Coach House Café, the Henry of Pelham Family Estate Winery identifies its restaurant as the Coachhouse Café, and the Ravine Vineyard identifies its restaurant as the Ravine Vineyard Restaurant.<sup>32</sup> The USA Today's 10 Best list of "best wineries" shows that eight of the ten "best" winery restaurants do not use the same name as the winery, and by implication, the name of the wine:<sup>33</sup>

The J Bubble Room at J Vineyards & Winery

The Vineyard Rose Restaurant at South Coast Winery

Gabriel Archer Tavern at Williamsburg Winery

Restaurant at Upper Shirley Vineyards

Farm & Forage at Sokol Blosser Winery,

The Restaurant at JUSTIN

The Farmhouse at Veritas Restaurant,

Cabernet Grill

Cass Café at Cass Winery.

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<sup>31</sup> March 8, 2022 Office Action at TSDR 79.

<sup>32</sup> March 8, 2022 Office Action at TSDR 79.

<sup>33</sup> March 8, 2022 Office Action at TSDR 75.

Cooper's Hawk Winery.<sup>34</sup>

Overall, the internet evidence shows that most of the winery restaurants are not the same name as the wine produced by the winery which does not lend support to the Examining Attorney's position that restaurant services and wine goods are commonly offered under the same name or mark or even that it is common for wineries to name their on-site restaurants the same name as their wine. In addition, these winery restaurants as shown by the record are located in specific wine growing regions (Finger Lakes Region, Texas Hill region, and Niagara)<sup>35</sup> around the United States, and the website evidence submitted by the Examining Attorney does not show that wineries with restaurants are numerous in the context of the 1 million-plus restaurants in the United States that existed in 2022.<sup>36</sup> Further, there is no evidence in the record that regular restaurants not associated with wineries offer house-branded wines under the name of the restaurant.<sup>37</sup> Applicant criticizes the Examining Attorney's evidence arguing that "something more" has not been shown because the

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<sup>34</sup> March 8, 2022 Office Action at TSDR 75. As noted in n.21, the Cooper's Hawk Winery webpages were provided with the September 27, 2021 Office Action at TSDR 49 and the March 8, 2022 Office Action at TSDR 77.

<sup>35</sup> March 8, 2022 Office Action at TSDR at TSDR 74, 79.

<sup>36</sup> February 11, 2022 Response to Office Action at TSDR 16.

<sup>37</sup> In contrast, in *In re Opus One Inc.*, the Examining Attorney submitted evidence sufficient to show that "it is an increasingly common practice in the industry for restaurants to offer and serve their patrons 'private label' wines which are named after the restaurant, i.e., wine which is specially-made for the restaurant and served in bottles labeled with the restaurant's service mark." 60 USPQ2d at 1815.

record does not show it is common for a restaurant to sell house-branded wine as it shows “only a tiny percentage of restaurants sell house brands of wine.”<sup>38</sup>

We find the requirement to show “something more” has not been met by the Examining Attorney. In light of the large number of restaurants in the United States (1 million), the facts that a single mark is sometimes used to identify wine and restaurant services as shown by the third-party registrations, that some wineries have on-site restaurants and a small number of them show on-site restaurants having the same name as the wine produced at the winery, and that restaurants serve wine, is not sufficient to establish that it is generally recognized by consumers that wine and restaurant services have a common source of origin for purposes of likelihood of confusion. *See In re Coors Brewing Co*, 68 USPQ2d at 1064 (noting that the Board’s conclusion that restaurant services in general and beer are related “is based on the fact that a tiny percentage of all restaurants also serve as a source of beer, which is a very weak evidentiary basis for a finding of relatedness.”).

The second *DuPont* factor favors a finding of no likelihood of confusion.

#### D. Similarities or Dissimilarities of the Trade Channels and Conditions of Sale

The third *DuPont* factor considers the “established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567. In connection with this factor, we focus on the identifications in the application and cited registrations and limitations or

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<sup>38</sup> 6 TTABVUE 14.

restrictions included therein. *See Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 16 USPQ2d at 1787.

Without elaboration, the Examining Attorney argues that as shown by the evidence of record, and in view of the cited registrations' unrestricted trade channels, Registrant's restaurant services share the same channels of trade with Applicant's wine goods even though Applicant's wine goods include a restriction that they are not sold in restaurants.<sup>39</sup>

The Examining Attorney's argument disregards the restrictions in Applicant's identification of goods: 1) as to trade channel: "sold at the vineyard, wine specialty stores, and direct to consumers; none of the foregoing sold in restaurants"; 2) as to marketing and labeling: "labeled and advertised in compliance with U.S. laws for the Atlas Peak American Viticultural Area [AVA] appellation of origin" and 3) source and production: "from a single designated vineyard."

A meaningful limitation is one that (1) limits the goods with respect to either trade channels or class of purchasers; (2) alters the nature of the goods identified; or (3) represents that the goods will be marketed in any particular, limited way, through any particular, limited trade channels, or to any particular class of customers. *See In re i.am. symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1750 (Fed. Cir. 2017). On this record, we find the restrictions in the identification are meaningful because they serve to identify the goods as a more select type of limited production wine from a single designed winery in a limited growing area that, by marketing and labeling, is

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<sup>39</sup> 8 TTABVUE 4.

directed to particular consumers looking for wine to purchase with the Atlas Peak American Viticultural Area appellation, and not sold in restaurants.<sup>40</sup> *See In re The Shoe Works Inc.*, 6 USPQ2d 1890, 1891 (TTAB 1988) (restriction of trade channels of Applicant's goods to its own retail shoe store outlets meaningful and avoided confusion). *Cf. In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 765 (TTAB 1986) (finding trade channel overlap between applicant's wine and registrant's wine because although there was testimony relating to applicant's wine being an expensive high-quality wine sold through high-quality wine and spirits stores to a small group of extremely sophisticated wine consumers who were well-informed and cognizant of vineyard naming conventions in France, no such restriction was provided in the identification).

Therefore, the question is whether Applicant's trade channel restriction of its single vineyard, speciality wine shops, and direct to consumer sales, overlaps in any meaningful way with the usual restaurant trade channels since Applicant's identification of goods indicates that its wine is not sold in restaurants. There is no evidence in the record of the trade channels for the sale of house-branded wine in regular restaurants not associated with a winery. We have some evidence showing wineries that have on-site restaurants (which as shown by the evidence are not always named after the winery) offering their house-branded (winery-named) wine

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<sup>40</sup> As discussed *infra*, the wine with this geographic appellation from a single designated vineyard must contain a specific percentage of grapes grown from this region.

with food service. Additionally, as shown on some of the webpages, some of the wineries with on-site restaurants also offer separate wine shops or direct to consumer sales.<sup>41</sup>

In view of the trade channel restriction in Applicant's identification excluding the sale of its wine in restaurants, we find the evidence of record does not show any meaningful trade channel overlap for restaurants in general with Applicant's wine that is not served in restaurants.<sup>42</sup> *Cf. In re Accelerate s.a.l.*, 101 USPQ2d at 2051 (because neither the services of "providing of food and drink" nor registrant's certification mark for coffee goods are limited to any particular trade channels or classes of purchasers, "we must deem that applicant's services and the coffee will be offered in all appropriate channels and to all the usual purchasers for such goods and services. ...Because of the nature of the identified goods and services, this would mean that both are offered to the general public, and that the coffee certified by registrant could be served and sold directly by applicant's coffee house").

The dissimilarities of the trade channels favor a finding of no likelihood of confusion.

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<sup>41</sup> March 8, 2022 Office Action at TSDR 81-86; September 27, 2021 Office Action at TSDR 49, 52, 53.

<sup>42</sup> We recognize that this limitation in the identification applies to Applicant, and not third parties (e.g., restaurants, or third-parties associated with restaurants). The identification also indicates that wine is sold in "wine specialty stores," which may or may not be owned by Applicant. Hence, there is nothing to prevent third parties from purchasing Applicant's wines on their own, and providing them in a restaurant setting. On the other hand, the record is devoid of evidence showing anything about the wine purchasing process by restaurants. Clearly, Applicant intends to limit the sale of its wine in restaurants to the extent possible. To the extent there could be any overlap in the channels of trade, we find it *de minimis*.

We turn next to the fourth *DuPont* factor which considers the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Purchaser sophistication or degree of care may tend to minimize likelihood of confusion. *Palm Bay Imps.*, 73 USPQ2d at 1695. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Id.*

Applicant argues that it offers a “rare and exclusive” wine from a single vineyard, its consumers are sophisticated, discerning, diligent, careful shoppers when buying wine, and that before making a purchase, its consumers “ensure that Applicant is the source.”<sup>43</sup> The Examining Attorney argues that “Applicant has not submitted any evidence to support this proposition” of sophisticated purchasing decisions.<sup>44</sup> However, this statement is incorrect, because the Examining Attorney overlooks the submitted declaration from the owner of Applicant,<sup>45</sup> the information Applicant submitted related to the Atlas Peak AVA which further supplements the declarant statements regarding the AVA appellation, and the restriction in the identification of goods.

According to the materials submitted by Applicant, an AVA is a “legally designated grape growing area that possesses distinguishable characteristics such as

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<sup>43</sup> 6 TTABVUE 15.

<sup>44</sup> 8 TTABVUE 6.

<sup>45</sup> “[W]e accord the[ ] declaration[ ] such probative value as [it] may have, and weigh [it] with the totality of the evidence.” See *In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1597 (TTAB 2018).

climate, terrain, soils and cultural and historical significance.”<sup>46</sup> “In order for the wine to be labeled with a specific AVA, at least 85% of the grapes must be sourced from that AVA.”<sup>47</sup> Atlas Peak is located in Napa Valley, California, and “[t]he Atlas Peak appellation was given official status in 1992.”<sup>48</sup> The total growing area of the Atlas Peak region is two square acres (1500 acres).<sup>49</sup> The Atlas Peak region grapes are sold to wineries in Napa and Sonoma California and help create some of the “finest wines in the world,” and “local vinters and winemakers produce, bottle, and market their own brands” from the Atlas Peak region grapes.<sup>50</sup>

Applicant also submitted the declaration of Muktheswara Rao Meka, owner of Applicant, who states that Applicant’s wine will be “rare and exclusive,” “consumers of applicant’s wine will be highly discriminating” and “diligently ensure that applicant is the source before purchase” as well as “mindful and conscious of the geographic origin of the wine” and that the wine will be sold at Applicant’s vineyard, directly to consumers, and through wine specialty stores.<sup>51</sup> Mr. Meka’s statements are consistent with the restrictions in the identification.

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<sup>46</sup> July 13, 2022 first Request for Reconsideration at TSDR 7.

<sup>47</sup> Napavinters.com, July 13, 2022 first Request for Reconsideration at TSDR 7. Although this website is lacking the date accessed, the Examining Attorney did not object, so any objection is waived. *In re Mueller Sports Medicine, Inc.*, 126 USPQ2d 1584, 1587 (TTAB 2018).

<sup>48</sup> July 13, 2022 first Request for Reconsideration at TSDR 13.

<sup>49</sup> Wikipedia, July 13, 2022 first Request for Reconsideration at TSDR 9 and February 11, 2022 Response to Office Action at TSDR 9; Atlaspeakappellation.com, July 13, 2022 first Request for Reconsideration at TSDR 13.

<sup>50</sup> July 13, 2022 first Request for Reconsideration at TSDR 13.

<sup>51</sup> Declaration of Muktheswara Rao Meka, paragraphs 11-15, August 5, 2022 second Request for Reconsideration at TSDR 5-6.

As indicated by the identification of goods, the wine will be advertised and labeled with the specific “Atlas Peak AVA appellation of origin,” which, according to Mr. Meka, is utilized by the consumers of Applicant’s wine to select the goods. We find that purchasers of Applicant’s goods are wine consumers interested in wines with AVA appellations.

The evidence shows that grapes from the limited growing area of the Atlas Peak AVA create fine wines, and Mr. Meka’s statements show that Applicant’s goods are a single vineyard limited production wine, that is rare and exclusive, and by implication, a premium product. The purchaser of Applicant’s goods is one that is looking for a fine and rare single vineyard small production AVA appellation wine. Applicant’s purchaser can be presumed to be in the market for this limited and upscale item for consumption and to have a reasonably focused need. Therefore, Mr. Meka’s statements as well as the information relating to the Atlas Peak AVA establishes that Applicant’s wine goods are not an impulse purchase but a planned one and that purchasers of Applicant’s wine are highly discriminating and aware of the geographic viticultural appellation, as reflected by, and consistent with, the restrictions in the identification of goods.<sup>52</sup> See *G.H. Mumm & Cie v. Desnoes & Geddes, Ltd.*, 917 F.2d 1292, 16 USPQ2d 1635, 1638 (Fed. Cir. 1990) (“Mumm

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<sup>52</sup> In contrast, in *In re Bercut-Vandervoort & Co.*, involving wines, the Board found that “evidence and/or argument relating to the fact that the particular wines sold under the marks are expensive, high quality wines sold in high-quality wine and spirits stores to discriminating, sophisticated purchasers who would likely be familiar with the vineyard naming customs in France must be disregarded since there is no restriction in the application or registration limiting the goods to particular channels of trade or classes of customers.” 229 USPQ at 765.

markets its product as a premium good: the purchaser of Mumm champagne can be presumed to be in the market for an upscale item for consumption and to have a reasonably focused need which weighs against confusion” under the fourth *DuPont* factor).

Although the class of purchasers of Registrant’s services are ordinary consumers who are patrons of restaurants and bars, we find Applicant’s purchasers are sophisticated and that the overlapping consumers will exercise a high degree of care because of the specificity in Applicant’s description of goods, which weighs against a finding of likelihood of confusion.

We find the fourth *DuPont* factor favors a finding of no likelihood of confusion.

## II. Conclusion

Balancing all of the *DuPont* factors, we conclude that confusion is not likely. Although Registrant’s marks have some conceptual weakness, the first *DuPont* factor weighs in favor of likelihood of confusion. The second, third and fourth *DuPont* factors weigh against likelihood of confusion. Notwithstanding the similarity of the marks, we find that relatedness of the goods and services, the trade channels and sophistication of the purchasers weighs against a finding of likelihood of confusion making confusion unlikely.

**Decision:** The Section 2(d) refusal to register Applicant’s mark RAO’S is reversed.