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

Proceeding no.	91268532
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

RASA VINEYARDS, LLC,

Opposer,

v.

RASASVADA, LLC,

Applicant.

Opposition No. 91268532

Application No. 88/496,247

APPLICANT'S REBUTTAL ACR BRIEF AND RESPONSE RE EVIDENTIARY ISSUES

Dated: June 24, 2022

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As shown in Applicant's ACR Brief and Evidentiary Objections [45 TTABVUE], Opposer has utterly failed to meet its burden of establishing a likelihood of confusion between Applicant's Mark and Opposer's mark when the relevant *DuPont* factors are properly weighed and considered.

I. Opposer Has Failed to Show Similarity of the Marks

Opposer's case is essentially that it should win because RASA is identical to RASA. Applicant's mark, however, is not RASA – Applicant applied to register RASASVADA, which is different in sight, sound, meaning and commercial impression. Opposer's attempt to overcome these substantial differences is based on the faulty legal premise that Opposer's Mark should be compared with only a portion of Applicant's Mark, with the remainder essentially disregarded. Opposer's argument flatly contradicts the requirement that marks must be considered "*in their entirety*" when determining similarity. *Application of E.I. DuPont DeNeMours & Co.*, 476 F.2d 1357, 1361, 177 U.S.P.Q. (BNA) 563, 567 (C.C.P.A. 1973). Despite this requirement, Opposer maintains the untenable position that the Board should disregard the significant differences in (1) how the marks sound; (2) how the marks appear; (3) the connotations of the marks; and (4) the commercial impression of the marks. [50 TTABVUE 3 – 6].

Opposer's attempt to persuade the Board to dissect Applicant's Mark, focus solely on its first four letters, and disregard the distinctive third and fourth syllables, is improper. None of the cases cited by Opposer stands for this proposition, and the argument has no basis in law. To the contrary, the Federal Circuit has specifically held that, in assessing the *DuPont* factor regarding similarities, "the law forbids" a dissected analysis of the sound, meaning, connotation and commercial impression of the marks. *Shen Mfg. Co., Inc. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 1242 (Fed. Cir. 2004). No part of a mark may be disregarded; while "more or less weight" may be given to a particular feature, in every case "the ultimate conclusion rests on consideration of the marks in their entirety. *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1357 (Fed. Cir. 2000) ("[a]ll relevant facts pertaining to appearance, sound, and connotation must be considered"); *In re National Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir.

1985) (likelihood of confusion cannot be predicated “on only part of a mark”); *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005 (C.C.P.A. 1981) (“[i]t is axiomatic that a mark should not be dissected and considered piecemeal”); *Kellogg Co. v. Toucan Golf*, 2001 WL 34082276 (W.D. Mich. Sept. 6 2001), *aff’d* 337 F.3d 616 (6th Cir. 2003) (while a particular component of a mark may carry more weight than others, “that does not excuse consideration of the other components of the mark as a whole”); *Food Specialty Co. v. Kal Kan Foods, Inc.*, 487 F.2d 1389, 1391 (C.C.P.A. 1973) (affirming the Board’s refusal to focus exclusively on a mark’s dominant component, rejecting opposer’s suggestion that the facts allowed the Board to ignore the “basic rule” that marks be viewed “as a whole”).

In its rebuttal, Opposer proffers three arguments in support of its position that the Board should effectively consider only consider the first four letters of Applicant’s mark, namely, “rasa.” First, Opposer speculates that consumers will order Applicant’s product verbally in shortened form, and argues that as a result the Board should consider a shortened form of the mark for similarity. [50 TTABVUE 3 – 6]. Second, Opposer argues that Applicant’s occasional use of RASA lends support to the conclusion that only “rasa” needs to be considered in the similarity analysis. [50 TTABVUE 5 – 7]. Third, Opposer argues that “rasa” is the dominant portion of RASASVADA, and the remaining portions of Applicant’s Mark should be afforded no weight in the analysis. *Id.* None of these arguments has any merit, for the following reasons.

A. Opposer’s Case Is Premised on Speculation as to How Consumers Might Make Verbal Orders for the Product

Opposer speculates that consumers will refer to Applicant’s products in the shortened version “rasa.” Whether consumers will actually do so is unknown, and speculation by Opposer and Applicant’s creative branding firm is not evidence of how consumers will behave. Nevertheless, Opposer argues that the law allows analysis of a shortened version of a mark for alcoholic beverages “especially in the context of goods that are requested orally.” [50 TTABVUE 3]. Opposer misconstrues the authorities on which it relies. Neither *In Re Sensi Vigne & Vini Srl*, No. 79201501, 2020 WL 1166461 (Feb. 21, 2020) nor *In re Clipper City Brewing Co.*, 2017 WL 412405 (Jan. 10, 2017) stands for the proposition, advanced by

Opposer, that marks of alcohol products which may be ordered verbally in shortened form are analyzed for overall commercial impression in that shortened form alone.

Instead, *Clipper City* merely demonstrates that a dominant portion of a mark can be given greater weight than other generic or highly descriptive elements of a mark. In concluding that BLACKBEARD'S BREAKFAST and BLACKBEARD ALE and Design were confusingly similar, the Board expressly noted that "[t]he remaining, non-dominant portions of the registered mark do not serve to distinguish them from Applicant's mark." The Board also found that the addition of the letter "s" to form a possessive form of BLACKBEARD did not yield a unitary mark. The Board's similarity analysis did not rest on the point that the marks may be shortened when ordered verbally. Instead, the Board reviewed the sound, appearance, connotation and commercial impression of the marks in their entireties and ruled that the word "Blackbeard" so dominated both marks as to define the overall commercial impression of each of them. Here, Applicant's mark RASASVADA is a unitary mark with two additional distinctive syllables that are neither generic nor descriptive. Opposer has not shown any basis for finding that RASA is dominant, violating the anti-dissection rule, or ignoring distinctive syllables of Applicant's Mark.

The same analysis is found in *In Re Sensi Vigne & Vini Srl*, No. 79201501, 2020 WL 1166461 (Feb. 21, 2020). There the Board concluded that the terms DOLCEVITA and DOLCE VITA were dominant, noting that the additional "merely descriptive or informational" elements were disclaimed and are "entitled to less weight in the likelihood of confusion analysis." *Sensi* does not stand for the proposition that the Board can abandon the requirement to review the marks in their entirety. Nor does the case provide a basis for ignoring the fact that Applicant's Mark is a unitary mark with distinguishing additional syllables.

Contrary to Opposer's arguments, the fact that a mark may be shortened by the public in verbal orders does not, in itself, allow for a similarities analysis of only the shortened version of the mark. *Cf. In re 1776, Inc.*, 1984 WL 62821, *2, 223 USPQ (BNA) 186 (TTAB June 1, 1984) (rejecting Examining Attorney's position that there was likelihood of confusion where the conflicting marks might be verbally

shortened to the same word, stating, “our decision as to likelihood of confusion must be based on the marks as registered and as presented for registration, rather than upon speculation as to how the public may alter them in making reference to them”); *see also House of Worsted-Tex, Inc. v. the Theodore Kotzin Co., Ltd.*, 1960 WL 7169, *1, 124 U.S.P.Q. (BNA) 341 (TTAB Feb. 11, 1960) (refusing to assess the similarity of marks based on projected oral short-form use of the marks).

Opposer’s reliance on its conclusory argument that RASASVADA may be shortened by customers to “rasa” effectively presents an improper attempt to sidestep the rule that marks must be analyzed in their entirety. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1341 (Fed. Cir. 2015) (finding it “impermissible” in a similarity analysis to give no significance to portions of a mark); *see also Franklin Mint v. Master Mfg. Co.*, 667 F.2d 1005 (C.C.P.A. 1981) (rejecting opposer’s view on the commercial impression of a mark because Opposer “apparently would have [the Board] ignore” certain of the mark’s distinguishing features.). Contrary to Opposer’s contention, there is no special rule for alcoholic beverages; marks for alcohol beverages, like all marks, must be evaluated in their entirety for sound, appearance, meaning, and commercial impressions. *Champagne Louis Roderer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375 (Fed. Cir. 1998). Opposer has failed to demonstrate that the Board can ignore distinguishing elements of Applicant’s unitary mark RASASVADA.

B. The Meaning and Commercial Impression of RASASVADA is Not Defined By Applicant’s Promotional Materials

Opposer argues that Applicant’s occasional use of the shortened form “rasa” in certain of its promotional materials – always in conjunction with the entire mark, RASASVADA – is “evidence that the consuming public ... considers RASASVADA to be similar to RASA.” [50 TTABVUE 5]. As noted above, there is no evidence in the record as to whether consumers consider the marks similar, and Opposer’s conclusions are without merit. Neither Applicant’s use nor the speculation of its creative agency is evidence that consumers consider RASASVADA to be similar to RASA and the Board should disregard Opposer’s unsupported arguments.

Additionally, none of the authorities cited by Opposer stands for the proposition that promotional materials are dispositive of a marks' meaning or commercial impression. Further, none of the three cases relied upon by Opposer involved a party's abbreviation of its own mark. In *Northwestern Golf Company v. Acushnet Company*, 1985 WL 72071, 226 U.S.P.Q. (BNA) 240 (TTAB May 22, 1995), the Board rejected opposer's argument that certain advertising claims made in promotional materials supported a finding of likelihood of confusion, finding the marks POWER-STEP and POWER KICK conveyed different, albeit perhaps somewhat related, meanings. 1985 WL 72071 at *4-5. In *In re Ari Brands*, 2021 WL 2660523 (TTAB June 8, 2021), the Board rejected applicant's argument regarding the commercial impression of the *registrant's mark* as shown in the registrant's promotional materials. 2021 WL 2660523 at *13. And in *American Rice, Inc. v. H.I.T. Corp.*, 231 U.S.P.Q. 793, 796 (TTAB Sept. 17, 1986), the Board refused registration based on independent factors, stating, "[e]ven were we to concede . . . that the lettering, layout and colors of opposer's packaging for this brand imparts. . . a separate commercial impression, confusion is not obviated." 1986 WL at * 4. Accordingly, Opposer failed to provide any authority for the proposition that certain of Applicant's promotional materials should determine the commercial impression of the mark RASASVADA.

As set forth in Applicant's Brief and Evidentiary Objections, the Board should not consider the evidence of Applicant's use of RASA. Applicant has applied to register RASASVADA (not RASA) and the materials are misleading and taken out of context. To the extent the Board does consider them, the materials provide no support whatsoever for Opposer's conclusory arguments that RASA and RASASVADA have the same meaning or commercial impression.

C. Opposer Has Failed to Show that the Dominant Portion of RASASVADA is RASA or that the Commercial Impression of the Marks is the Same

In pressing the conclusion that that the marks here are confusingly similar, Opposer effectively asks the Board to focus solely on what Opposer considers to be the dominant portion of Applicant's mark. [50 TTABVUE 5 – 6]. As stated above, such an analysis is forbidden. *Cf., Juice Generation*, 794 F3d at 1341

(finding it “impermissible” in a similarity analysis to give no significance to a mark’s non-dominant portions).

Here, Opposer has failed to establish that the first four letters of Applicant’s one-word, unitary mark are dominant. Opposer’s attempt to ignore the distinguishing third and fourth syllables of Applicant’s unitary mark by dissecting it and focusing exclusively on what it considers the dominant portion is improper. In *Mr. Hero Sandwich Sys. v. Roman Meal Co.*, 781 F.2d 884, 888 (Fed. Cir. 1986), the opposer failed in a similar attempt to have the court dissect Applicant’s one-word, unitary mark, ROMANBURGER into ROMAN with another word. The Federal Circuit explained that one-word unitary marks cannot be dissected:

The word “Roman” in the mark ROMANBURGER is part of a unitary phrase that does not create [a] separable impression . . . “Romanburger” is one word, not “Roman” plus another word. The mark is pronounced as one word, with sound and cadence distinctly different from the Roman Meal marks . . .

781 F.2d at 888. *See also, In re 1776, Inc.*, 1984 WL 62821, 223 U.S.P.Q. (BNA) 186 (TTAB June 1, 1984) (a party does not establish that a component of a mark is “dominant “just because it, or a variation of it, is part of the other mark with which a mark as a whole is being compared”). The same is true here, where RASAVADA is a unitary mark “with sound and cadence distinctly different” from Opposer’s mark RASA.

Opposer’s argument that the “additional letters” in RASASVADA are irrelevant and should be ignored runs counter to applicable law. Trademark law is replete with cases finding no likelihood of confusion when an applicant’s word mark has additional distinguishing letters, syllables or words.¹ The

¹ *Cf., Ritz Hotel*, 393 F.3d at 1242 (application for PUTTING ON THE RITZ allowed despite opposition by owner of the mark “THE RITZ” where applicant’s mark had a commercial impression, considered in its entirety, distinct from opposer’s); *Consolidated Artists BV v. Camille Beckman Corporation*, 2012 WL 680270 (TTAB Feb 16, 2012) (opposition to the mark MANGO BEACH by holder of the mark MANGO denied where MANGO BEACH was found to have a different connotation and commercial impression); *Sand CPH A/S v. Xiuling Guo*, 2020 WL 3107829 (TTAB June 11, 2020) (opposition to the mark SANDRIVER by holder of the mark SAND denied where SANDRIVER was found to have different connotations); *Land-O-Nod Company v. Peter Paulison, d.b.a. Paulison and Co.*, 1983 WL 51867, U.S.P.Q. (BNA) 61 (TTAB Aug. 11, 1983) (opposition to the mark CHIRO-MATIC by holder of the mark -CHIRO- denied where CHIROMATIC was found to have a “distinguishably different” connotation); *Deckers*

issue is not whether the incorporated element of an opposer's mark is dominant, but rather, whether the applicant's mark, taken as a whole, has a different connotation or commercial impression. *Cf.*, *MediaMath, Inc. v. MATH Venture Partners Management, LLC*, 2020 WL 7074698, (TTAB Nov. 18, 2020) (while recognizing that "Math" is the dominant part of both applicant's and opposer's marks, the Board allowed registration, finding that the applicant's mark "engenders a different commercial impression from Opposer's marks when view in its entirety").²

Here, an analysis of the mark as a whole reveals the dissimilarity, not the similarity, between the marks. The full mark, RASASVADA, has an entirely different sound, appearance, meaning and commercial impression. [46 TTABVUE 9 – 13]. RASA is short and familiar sounding. RASASVADA is a much longer word, stretching four syllables. RASA means sap, or juice. *Id.* RASAVADA connotes a sensation, "the perception of pleasure." *Id.* at *8. Most significantly, "rasa" is found in the English dictionary, while "rasasvada" is not. The Board has repeatedly found marks to be dissimilar where applicant's mark incorporates an English word into its foreign-word mark. *Cf. Primo Emporio s.n.c. di Giovanni Provitera & C.*, 2009 WL 1068772, *3 (TTAB Apr. 8, 2009) (finding PRIMO EMPORIO would be viewed as an Italian phrase that was not confusingly similar to PRIMO!); *see also, Tarek K. Alattar v. Attar Mist LLC*, 2022 WL 486654 (Jan 28, 2022) (where registered marks were in English and applicant's mark was foreign, the marks were considered dissimilar).

Opposer seeks to pivot from this important distinction by claiming that "since consumers do not speak or read Sanskrit, the English translations of either mark have little bearing on their respective commercial impressions." [50 TTABVUE 3]. The issue, however, is not whether "rasasvada" has an

Outdoor Corporation subs. as party plaintiff for Simple Shoes, Inc. v. Shoe Show, Inc., 2004 WL (TTAB Sept. 14, 2004) (Opposition to the mark SIMPLE IMAGES by holder of the mark SIMPLE denied where applicant's mark created a different commercial impression).

² Opposer's argument that because Applicant's Mark incorporates the letters "rasa" it necessarily takes on the meaning of RASA is a *non sequitur*. *See Food Specialty Co. v. Kal Kan Foods*, 487 F.2d 1389, 1392 (C.C.P.A. 1973).

English equivalent that is known to American buyers. Instead, the issue is whether Opposer has shown that Applicant's Mark RASASVADA is confusingly similar to RASA, despite the fact that the marks are different in sight, sound, meaning and have an entirely different connotations. Where a foreign word mark incorporates an English language word, the complete foreign-word mark should be translated in assessing similarity, not just the English language portion. "If a term that appears in the English dictionary appears in a mark as part of . . . [a] unitary expression, a translation of the . . . unitary expression is required." *Primo Emporio*, 2009 WL 1068772 at *3 ("[i]t would be illogical to break the phrase into its individual word elements . . . [s]uch a translation would serve no useful purpose because it would not convey the [marks'] true commercial impression") (citing TMEP § 808.3).³

Because Applicant's Mark RASASVADA, when viewed in its entirety, is dissimilar in sight, sound, commercial impression, and connotation, there is no likelihood of confusion. [46 TTABVUE 8 – 11]. Applicable caselaw, employing the fundamentals of trademark law, overwhelmingly supports the conclusion that Opposer has not met its burden of establishing a likelihood of confusion.

II. Opposer's Mark is Weak

As set forth in Applicant's ACR Brief, [46 TTABVUE 13 – 17], Opposer's mark is weak because (1) RASA is simple, descriptive English word; (2) RASA is the subject of numerous third party registrations in use for related goods and services; (3) RASA is generally unknown to the public at large. Opposer counters in rebuttal that RASA is not descriptive because it has many meanings in English; none of the many registrations using RASA or a variant thereof start with "rasa"; and RASA's low sales volume is not indicative of the weakness of its mark. The fact that "rasa" has more than one meaning does not, in itself, lend strength to the mark. Further, Opposer does not dispute that there are a number of marks registered using "rasa" in variation, admits that its RASA mark is not famous, and nowhere suggest that its wine is

³ Opposer's assertion that Applicant conceded the doctrine of foreign equivalents does not apply to its mark is incorrect. [50 TTABVUE 7]. Applicant expressly argued that the English meaning of Opposer's Mark should be considered. [46 TTABVUE 14].

well-known or widely distributed throughout the United States. [50 TTABVUE 7 – 9]. RASA is a simple sounding English-language word that is descriptive of Opposer’s wine products. Finally, Opposer’s attempt to have the Board ignore evidence of record that RASA appears in English dictionaries and is in use for beer, restaurants and related goods is improper.⁴ [46 TTABVUE 14 – 16]. Accordingly, the weakness of the RASA mark weighs against the likelihood of confusion.

III. There Has Been No Actual Confusion

Opposer did not object to Applicant’s use or registration of the identical mark RASASVADA for Applicant’s Spirit Restorative Products, which are sold in bars and restaurants. Nor has Opposer introduced any evidence that Applicant’s expansion of its current use to Applicant’s Goods and Services is likely to lead to confusion. Far from irrelevant, this use suggests confusion is unlikely.

IV. The Parties’ Trade Channels are Different, and their Consumers are Sophisticated

In its ACR Brief, Applicant showed that Opposer mostly sells and markets its wine locally in its Washington State tasting room and makes relatively few sales online, whereas Applicant sells its products online throughout the United States. [46 TTABVUE 17 – 18]. The very limited overlap in the channels of trade weighs against the likelihood of confusion. *Leelanau Wine Cellars, Ltd. V. Blac & Red, Inc.*, 502 F.3d 504, 516 (6th Cir. 2007).

Moreover, Opposer failed to rebut Applicant’s showing that purchasers of the parties’ products are sophisticated. Purchaser sophistication is important and often dispositive because “[s]ophisticated consumers may be expected to exercise greater care.” *Electronic Design & Sales*, 954 F.2d 713, 718 (Fed.

⁴ Opposer argues that the Board should disregard Applicant’s evidence that HOP RASA is in use for beer and that RASA and variations are in use for restaurants and related goods. (Rebuttal Brief at p. 6). However, this evidence is not precluded by the cited request for admission because HOP RASA does not begin with RASA and the other uses are for restaurants and related goods, not alcoholic beverages. To the extent Opposer relies on Stipulated Fact 38 to block evidence of use of HOP RASA, the stipulation is contradicted by a document whose authenticity was stipulated to: RASASVADA0001492. [23 TTABVUE 10]. The Board should not allow Opposer to rely on an incorrect stipulation of fact when contrary evidence was stipulated into the record.

Cir. 1992) (“[t]here is always less likelihood of confusion where goods are expensive and purchased after careful consideration,” rather than on impulse) (citations omitted). Opposer does not deny that its wine sells for \$75 per bottle, and Applicant markets its current products to customers seeking rarified beverages. [46 TTABVUE 20 – 22]. Accordingly, the *DuPont* factor of channels of trade and purchaser sophistication weighs against a likelihood of confusion.

V. The Parties’ Respective Goods and Services are Not Related

Opposer’s registration is for wine. Despite Opposer’s attempts to portray an expanded scope of the subject application, Applicant’s application does not cover wine, nor does it cover wine-making. [46 TTABVUE 20 – 22]. Moreover, Opposer failed to rebut Applicant’s evidence that wine and spirits are made differently, and consequently there is little if any overlap between producers of spirits and producers of wines. *Id.* Taking these facts into consideration, the *DuPont* factor of relatedness of the parties’ goods and services weighs against a finding of likelihood of confusion.

CONCLUSION

Opposer has failed to meet its burden of demonstrating that Applicant’s Mark creates a likelihood of confusion with Opposer’s Mark. As such, Applicant respectfully requests that the Opposition be dismissed and Applicant’s Mark proceed to registration.

Dated June 24, 2022

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APPENDIX REGARDING EVIDENTIARY OBJECTIONS

I. Opposer Has Not Responded to Applicant's Showing that Opposer Is Relying on Misleading Evidence

Opposer's Appendix for Evidentiary Objections did not address the misleading cropped images in Opposer's Brief or the misleading PDFs that Opposer prepared from Applicant's website. Instead, Opposer argues that Applicant stipulated to the authenticity of the underlying documents. However, the parties' stipulation as to authenticity of documents [23 TTABVUE] does not prohibit evidentiary challenges to that evidence to the extent it is misleading.

II. Opposer's Evidentiary Objections Are Without Merit

Opposer's complaint that Applicant introduced additional evidence that RASA is found in English dictionaries is without merit. The parties' stipulation was merely that a dictionary entitled "A Practical Sanskrit Dictionary" contained the quoted definition of RASA. [24 TTABVUE 29] (Stip. Fact. ¶ 46). Contrary to Opposer's argument, there is no "fact stipulation that there are many possible meanings for 'rasa' in English." [50 TTABVUE 14]. In fact, the parties did not agree to stipulate on the meaning of RASA. A stipulation that one Sanskrit dictionary contains a particular definition does not preclude evidence that RASA appears in an English dictionary or has been defined differently.

Further, Opposer's assertion that Opposer relied on the English dictionary definition of RASA to support its argument that "RASA essentially mean[s] juice" is incorrect, if not misleading. Opposer's statement that "RASA essentially mean[s] juice" is directly supported by the stipulated definition set forth in a Practical Sanskrit Dictionary, which begins with "sap, juice (of plants)." *Id.*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Applicant's Rebuttal Brief and Response re Evidentiary Issues was served by electronic mail upon the following this 24th day of June, 2022:

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