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

Ex Parte Appeal - Serial No.	97039484
Appellant	MetaBev LLC
Applied for mark	META VODKA
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Submission	Appeal brief
Attachments	TTAB Brief META VODKA.pdf(222478 bytes )
Appealed class	Class 033. First Use: None First Use In Commerce: None All goods and services in the class are appealed, namely: Vodka; Distilled spirits
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Serial No.: 97039484  
Mark: META VODKA  
Applicant: Metabev LLC  
Examining Attorney: Caryn Glasser  
Law Office 105

## TABLE OF CONTENTS

APPLICANT'S STATEMENT OF THE CASE.....	1
A. Prosecution History.....	1
B. Examining Attorney's Evidence.....	1
C. Applicant's Evidence.....	2
QUESTION PRESENTED.....	2
ARGUMENT.....	2
Differences Between the Marks.....	3
Differences Between the Respective Goods and Trade Channels.....	6
Purchase Conditions.....	12
CONCLUSION.....	13

## TABLE OF AUTHORITIES

### CASES

<i>Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC</i> , 17 F.4th 129 (Fed. Cir. 2021).....	4, 6
<i>Buitoni Foods Corp. v. Gio. Burton &amp; C.S.</i> , 680 F.2d 290 (2d Cir. 1982).....	8
<i>Columbian Steel Tank Co. v. Union Tank &amp; Supply Co</i> , 125 U.S.P.Q. 406 (CCPA 1960).....	3
<i>Estate of P.D. Beckwith, Inc. v. Commissioner of Patents</i> , 252 U.S. 538 (1920) .....	4
<i>H. Mumm &amp; Cie v. Desnoes &amp; Geddes Ltd</i> , 917 F.2d 1292; 16 U.S.P.Q.2d 1635 (Fed. Cir. 1990).....	8
<i>Harlem Wizards Entertainment Basketball, Inc. v. NBA Properties</i> , 952 F. Supp. 1084 (D. N.J. 1997) .....	7
<i>In re Coors Brewing Co</i> , 343 F.3d 1340; 68 USPQ2d 1059 (Fed. Cir. 2003).....	5, 8, 10
<i>In re E.I. du Point de Nemours &amp; Co.</i> , 476 F.2d 1357; 177 USPQ 563 (C.C.P.A. 1973).....	3
<i>In re Golden Griddle Pancake House Ltd</i> , 17 USPQ2d 1074 .....	10
<i>In re Viterra Inc</i> , 671 F.3d 1358; 101 USPQ2d 1905 (Fed. Cir. 2012).....	3
<i>Jacobs v International Multifoods Corp</i> , 668 F.2d 1234; 212 USPQ2d 641 (CCPA 1982) .....	9
<i>National Distillers and Chemical Corp. v. William Grant &amp; Sons, Inc</i> , 505 F.2d 719; 184 U.S.P.Q. 34 (CCPA 1974).....	8
<i>Reno Air Racing Ass’n v. McCord</i> , 452 F.3d 1126 (9th Cir. 2006).....	4
<i>Sazerac Co. v. Fetzer Vineyards, Inc</i> , 265 F. Supp. 3d 1013 (N.D. Cal. 2017) .....	8, 11, 12

<i>Schwarzkopf v. John H. Breck, Inc,</i> 340 F.2d 978; 144 USPQ 433 (Cust. Ct. 1965).....	4
<i>Shen Mfg. Co., Inc. v. The Ritz Hotel, Ltd.,</i> 393 F.3d 1238 (Fed. Cir. 2004).....	4, 6
<i>Star Indus., Inc. v. Bacardi &amp; Co,</i> 412 F.3d 373 (2d Cir. 2005).....	12
<i>Stark v. Diageo Chateau &amp; Estate Wines Co,</i> 907 F. Supp. 2d 1042 (E.D. Cal. 2012).....	4
<i>Stonefire Grill, Inc. v. FGF Brands, Inc,</i> 987 F. Supp. 2d 1023 (C.D. Cal. 2013).....	4
<i>Stonefire Grill,</i> 987 F. Supp. 2.....	6
<i>Sunenblick v. Harrell,</i> 895 F.Supp. 616 (S.D.N.Y. 1995).....	7
<i>Visual Information Institute, Inc. v. Vicon Industries, Inc,</i> 209 U.S.P.Q. 179 (TTAB 1980).....	3
<i>Vitarroz Corp. v. Borden, Inc,</i> 209 U.S.P.Q. 969 (2nd Cir. 1981).....	3

## APPLICANT'S STATEMENT OF THE CASE

### A. Prosecution History

On September 22, 2021, Applicant filed an application with the United States Patent and Trade Office for the standard character word mark META VODKA (VODKA disclaimed) in Class 33 for “Vodka; distilled spirits.”

On May 31, 2022 the Examining Attorney for the USPTO issued an Office Action refusing the applied-for mark on the basis that it would create a likelihood of confusion with META WINE mark which is the subject of U.S. Trademark Reg. No. 5617930.

Applicant timely filed a Response to the Office Action on November 29, 2022, arguing that there was no likelihood of confusion given the significant differences in commercial impressions between the marks, noting the significant differences between the types of goods and identifying differences in purchasing conditions. Applicant addressed all issues raised in the Office Action.

On January 9, 2023, the Examining Attorney issued the final Office Action making the refusal final.

On April 8, 2023, Applicant timely filed this Appeal to the Trademark Trial and Appeal Board.

### B. Examining Attorney's Evidence

*May 31, 2022 Office Action*

The Examining Attorney attached screen captures from three websites as evidence that some alcoholic beverage manufacturers produce more than a single type of alcoholic, *e.g.*, beer and wine, wine and seltzer, etc.

*January 9, 2023 Final Office Action*

The Examining Attorney attached 12 registrations owned by third parties who produce more than one type of alcoholic beverage, and attached two additional screen captures from websites as evidence that some alcoholic beverage manufacturers produce more than a single type of alcoholic beverage.

### **C. Applicant's Evidence**

*November 29, 2022 Response to Office Action*

Applicant attached 10 registrations showing that the USPTO has allowed for co-existent registrations for beer, wine, hard seltzer and/or distilled spirits which are either identical or virtually indistinguishable. Applicant also supplied evidence that registrant of the META WINE mark (i) does not, in fact, produce or sell wine under the META WINE mark, pointing out that it identifies itself as a winery in order to market a custom white label program where its customers get to select their own packaging for wines that Registrant imports from third parties and (ii) is no longer in business, as evidenced by the expiration of its alcoholic beverage licenses absence of any activity on its social media channels since the Fall of 2020.

### **QUESTION PRESENTED**

Whether the standard character mark META VODKA for vodka and distilled spirits is sufficiently distinct from the registered mark META WINE for wine such that consumers are not likely to be confused, mistaken, or deceived as to the source of the goods or services.

### **ARGUMENT**

The Applicant's mark META VODKA (VODKA disclaimed) for vodka and distilled spirits is sufficiently distinct from the META WINE (WINE disclaimed) such that consumers are not likely to be confused, mistaken, or deceived as to the source

of the goods or services. Determination of likelihood of confusion under Section 2(d) is made on a case-by-case basis and the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) aid in this determination.

Although, depending on the evidence of record, not all of the *du Pont* factors are necessarily relevant or of equal weight in a given case, here the following factors are the most relevant: similarity of the marks, similarity and nature of the goods and/or services, and similarity of the trade channels of the goods and/or services. *See In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). Although the Examining Attorney considered the similarities between the applied-for mark for vodka and distilled spirits and the META WINE mark, with respect to these *du Pont* factors, the distinguishing points between the marks warrant registration of the Applicant's mark.

#### ***Differences Between the Marks***

There is no likelihood of confusion between META VODKA and META WINE. It is well-settled that when determining likelihood of confusion, the examiner should look not at a single aspect of a mark but should view the mark as a whole. *See, e.g., Columbian Steel Tank Co. v. Union Tank & Supply Co.*, 125 U.S.P.Q. 406 (CCPA 1960); *see also Vitarroz Corp. v. Borden, Inc.*, 209 U.S.P.Q. 969, 976-77 (2nd Cir. 1981) (no likelihood of BRAVO and BRAVO'S due to the different contexts in which the marks are presented). The central issue is whether the marks create the same overall impression. *Visual Information Institute, Inc. v. Vicon Industries, Inc.*, 209 U.S.P.Q. 179, 189 (TTAB 1980). Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *du Pont* at 1358, 1362. While both META

VODKA and META WINE contain the word META the marks are vastly different in sight, sound, meaning, and commercial impression.

Importantly, the “commercial impression of a trade-mark is derived from it as a whole, not from its elements separated and considered in detail.” *Estate of P.D. Beckwith, Inc. v. Commissioner of Patents*, 252 U.S. 538, 545-46 (1920). In other words, “disclaimed material forming part of a trademark cannot be ignored in determining whether the marks are confusingly similar.” *Schwarzkopf v. John H. Breck, Inc.*, 340 F.2d 978, 144 USPQ 433 (Cust. Ct. 1965). *See also Stark v. Diageo Chateau & Estate Wines Co.*, 907 F. Supp. 2d 1042 (E.D. Cal. 2012) (“Even if the dominant portion of the wines’ names is “stark,” this does not mean that the other words in the name have no significance.”).

Rather, as the Federal Circuit explained, “the disclaimed elements of a mark are relevant to the assessment of similarity. This is so because confusion is evaluated from the perspective of the purchasing public, which is not aware that certain words or phrases have been disclaimed.” *Shen Mfg. Co., Inc. v. The Ritz Hotel, Ltd.*, 393 F.3d 1238, 1243 (Fed. Cir. 2004). *See also Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129 (Fed. Cir. 2021) (the technicality of a disclaimer has no legal effect on the issue of likelihood of confusion. . . .”) (internal citations omitted); *Reno Air Racing Ass’n v. McCord*, 452 F.3d 1126 (9th Cir. 2006) (“[s]imilarity is not to be considered in the abstract, but from the ordinary consumer’s perspective.”). Lastly, at least one court has held that descriptive words in a mark can help to distinguish the subject mark from others. *Stonefire Grill, Inc. v. FGF Brands, Inc.*, 987 F. Supp. 2d 1023, 1052 (C.D. Cal. 2013) (“The additional words in the marks are crucial here because they describe or at least suggest the products or services offered by the party.”). As one prolific trademark law

commentator put it, buyers “neither know nor care about disclaimers” so, “a disclaimer is irrelevant in determining likelihood of confusion.” 3 J. McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:72 (2020).

Similarity “is not a binary factor but is a matter of degree.” *In re Coors Brewing Co.*, 343 F.3d 1340 (Fed. Cir. 2003). Applicant contends that the degree to which META VODKA is similar to META WINE is slight. This is not a “typical” case and when evaluated from the perspective of the purchasing public, as “META VODKA” could not reasonably be confused with “META WINE.” The marks consist of two words and the disclaimed/descriptive portions of the marks, WINE and VODKA, neither sound nor look anything alike and their connotations are different. No prudent ordinary consumer could conclude the marks originate from the same source; when a member of the purchasing public sees Applicant’s product on the shelf at a store it will see a label that has META VODKA on it. It is unreasonable to conclude that a person who sees META VODKA on a label will go through the technical legal analysis applied by the Examiner or otherwise engage in mental gymnastics, even subconsciously, and conclude that a META VODKA product emanates from the same source as META WINE.

In this matter, it seems that although the Examining Attorney acknowledged marks are to be compared in their entireties, *see* January 9, 2023 Office Action at p. 3, the distinguishing and descriptive feature of the registration, *e.g.*, WINE, was ignored and the Examining Attorney effectively compared only the dominant words in the marks.

In sum, META VODKA creates a different commercial impression than the META WINE mark embodied in the registration, most notably because of the fact— not in spite of the fact— that WINE is descriptive and specifically informs the consumer that the product sold under the mark is, indeed, vodka and not wine. *See Stonefire Grill*, 987 F. Supp. 2d at 1052 (“The additional words in the marks are crucial here because they describe or at least suggest the products or services offered by the party.”). When considered as a whole META VODKA does not create a likelihood of confusion with META WINE. *See Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129 (Fed. Cir. 2021) (the technicality of a disclaimer has no legal effect on the issue of likelihood of confusion. . . .“); *Shen Mfg. Co., Inc.*, 393 F.3d at 1243 (the disclaimed elements of a mark are relevant to the assessment of similarity)

#### *Differences Between the Respective Goods and Trade Channels*

The Examiner notes that “[v]arious alcoholic beverages have been shown to be related goods for purposes of a Trademark Act Section 2(d) analysis January 9, 2023 Office Action at p. 4. But, “[t]here is no *per se* rule that holds that all alcoholic beverages are related.” *In re White Rock Distilleries, Inc.* (T.T.A.B. 2009). *See also*, TMEP §1207.01(a)(iv) (“there can be no rule that certain goods or services are *per se* related, such that there must be a likelihood of confusion from the use of similar marks in relation thereto.”).

In fact, goods or services “may fall under the same general product category but operate in distinct niches. When two products are part of distinct sectors of a broad product category, they can be sufficiently unrelated that customers are not likely to assume the products originate from the same mark.” *Checkpoint Systems, Inc. v.*

*Check Point Software Technologies, Inc.*, No. 00-2373 (3rd Cir. Oct. 19, 2001). And, courts have held that the mere fact that “two products or services fall within the same general field. . . does not mean that the two products or services are sufficiently similar to create a likelihood of confusion.” *Harlem Wizards Entertainment Basketball, Inc. v. NBA Properties*, 952 F. Supp. 1084, 1095 (D. N.J. 1997) (“Meaningful differences between the products and services are often cited as a factor tending to negate reverse confusion, even when the products are superficially within the same category”). In *Sunenblick v. Harrell*, 895 F.Supp. 616 (S.D.N.Y. 1995), *aff’d.*, 101 F.3d 684, (2d Cir. 1996), for example, the court found that plaintiffs and defendant’s use of the UPTOWN RECORDS mark for music recordings did not create a likelihood of confusion because “[plaintiff]’s products [were] addressed to a somewhat esoteric market, *e.g.*, purchasers interested in lost or forgotten jazz artists, in the “straight ahead jazz” category, whereas defendants sell rap recordings,” and because the distinct recordings were “featured in different sections of the stores...according to genre and not by label name.” *Id.* at 629. Here, as in *Sunenblick* and *Bell*, the respective products are marketed to different consumers (beer drinkers vs. hard seltzer consumers) as well as found in different areas of the stores they are sold in.

Other examples where TTAB and the courts have determined that different categories of alcoholic beverages are sufficiently unrelated to one another include:

- In *In re White Rock Distilleries, Inc.* S.N. 77/093,221, (TTAB, October 5, 2009), the Board found the mark VOLTA, for “energy vodka infused with caffeine” in International Class 33, is not likely to cause confusion with the previously registered mark TERZA VOLTA & design for sparkling fruit wine; sparkling grape wine; sparkling wine; wines.

- In *Bell's Brewery, Inc. v. Bell Hill Vineyards, LLC*, Opp. No. 91/177,980, unpubl'd, the TTAB found that there was no likelihood of confusion between the mark BELL HILL for packaged wine and BELLS for beer including porter and ale stout and malt liquor.
- In *In re Coors Brewing Co.*, 343 F.3d 1340 (Fed. Cir. 2003) the court noted that the TTAB correctly "concluded that even though beer and wine are sometimes sold by the same party under the same mark, the two beverages are not sufficiently related that the contemporaneous use of similar marks on the two products is likely to cause confusion as to source.";
- In *Sazerac v. Fetzer Vineyards, Inc.*, 265 F.Supp.3d 1013 (N.D. Cal. 2017) the court wrote: "Both Sazerac's Buffalo Trace bourbon and Fetzer's 1000 Stories wine participate in the same general alcoholic beverage industry. And Sazerac presented evidence that the products are advertised and marketed in overlapping channels. *But they are nonetheless very distinct products. They have different alcohol contents and social uses, and they occupy different sections of the stores where they are offered for sale*" (emphasis added);
- *G. H. Mumm & Cie v. Desnoes & Geddes Ltd.*, 917 F.2d 1292, 16 U.S.P.Q.2d 1635 (Fed. Cir. 1990) (RED STRIPE and design for beer was not confusingly similar to a design of a red stripe for wines and sparkling wines); and
- *National Distillers and Chemical Corp. v. William Grant & Sons, Inc.*, 505 F.2d 719, 184 U.S.P.Q. 34 (CCPA 1974) (DUET for prepared alcoholic cocktails, some of which contained brandy, and DUVET for French brandy and liqueurs not confusingly similar); and
- *Buitoni Foods Corp. v. Gio. Burton & C.S. p.a.*, 680 F.2d 290, 292 (2d Cir. 1982) (table wine on one hand and brandies, liqueurs, aperitifs on the other have slight proximity).

In addition, the USPTO has allowed for co-existent registration in many cases for different categories of alcoholic beverages which are identical or virtually indistinguishable from another, such as those set forth below:

- LYTT used with hard seltzer (Reg. No. 6350191) and LIT used with vodka (Reg. Nos. 5754797 and 5854452);
- CHILL used with wine (Reg. No. 4818933) and CHILL VODKA used with vodka (Reg. No. 5728047);

- LOVE used with wine (Reg. No. 5434524) and LOVE used with alcoholic beverages and spirits (Reg. No. 5420967);
- FUEGO used with wines (Reg. No. 3299288) and FUEGO used with tequila (Reg. Nos. 4822311 and 4958686); and
- FIRE WATER used with liqueur (Reg. No. 1819150) and FIREWATER used with tequila (Reg. No. 5776879).<sup>1</sup>

Although Applicant's vodka and registrant's wine "may both be described generally as alcoholic beverages, this is insufficient to establish that applicant's and registrant's goods are related." See *In re White Rock Distilleries, Inc.* (T.T.A.B. 2009).

When presented with a potential overlap between a product and food services, in order to "establish the likelihood of confusion [the Office] must show something more than that similar or even identical marks are used for food products and for restaurant services." *Jacobs v International Multifoods Corp.*, 668 F.2d 1234, 212 USPQ2d 641, 642 (CCPA 1982). Prior court decisions have held that a few isolated incidents of overlap do not constitute substantial evidence. The court in *In re Coors Brewing Co.*, found that:

In light of the requirement that "something more" be shown to establish the relatedness of food and restaurant products for purposes of demonstrating a likelihood of confusion, the Board's finding that beer and restaurant services are related is not supported by substantial evidence .... While there was evidence that some restaurants sell private label beer, that evidence did not suggest that such restaurants are numerous.... Thus, the evidence before the Board indicates not that there is a substantial overlap between restaurant services and beer with respect to source, but rather that the degree of overlap between the sources of restaurant services and the sources of beer is de minimis ..... The evidence of overlap between beer and restaurant services is so limited that to uphold the Board's finding of relatedness would effectively overturn the

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<sup>1</sup> These registrations were attached as exhibits to Applicant's Response to the Non-Final Office Action.

requirement of *Jacobs* that a finding of relatedness between food and restaurant services requires “something more” than the fact that restaurants serve food....

343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003). While the “something more” requirement may be met by showing a shared specialization, no shared specialization is present here. Compare *In re Golden Griddle Pancake House Ltd.*, 17 USPQ2d 1074 (TTAB) (GOLDEN GRIDDLE PANCAKE HOUSE for restaurant services confusingly similar to GOLDEN GRIDDLE for table syrup).

No “something more” is present in this case. Although some wineries may offer hard seltzer, and the reverse may occur, those aberrations should not form the focus of the inquiry. In essence, the position taken by the Examining Attorney seeks to establish a *per se* rule that all alcoholic beverages are necessarily sufficiently related “such that there must be a likelihood of confusion from the use of similar marks in relation thereto,” a concept that is expressly prohibited by Trademark Manual of Examining Procedure. See TMEP §1207.01(a)(iv) (“there can be no rule that certain goods or services are *per se* related, such that there must be a likelihood of confusion from the use of similar marks in relation thereto.”). See also *In re White Rock Distilleries, Inc.* (T.T.A.B. 2009) (“There is no *per se* rule that holds that all alcoholic beverages are related.”).

Moreover, the registrant of META WINE does not actually sell wine under the META WINE mark; there are no bottles of META WINE for purchase at a liquor store, grocery store, restaurant or bar. In sum, there is not a META WINE brand of wine.

Rather, as registrant says on its website: “We produce the wine itself, as in the delicious, beloved beverage, but stop short of putting it into a package or promoting it

as a label or brand concept. Our customers buy the wine itself and we help them with their own packaging, branding and labeling." November 29, 2022 Resp. to Office Action at p. 7 and Ex. 2. As further demonstrated on the "Our Wines" page of the registrant's website, there is no META WINE packaging on any of its wines, just blank labels. *Id.* at Ex. 3. Not only is there not META WINE brand, the registrant uses the mark for a different purpose, namely, to identify itself as a winery and to market a custom white label program where its customers get to select their own packaging for wines that Registrant manufactures. *See id.* In fact, Registrant doesn't even claim to make wine. In its own words, "Meta Wine is a winery but we don't make the juice! Our customers trust us to source the BEST wine in the world from the most talented winemakers." *Id.*

In stark contrast, Applicant intends to sell nine unique flavors of hard seltzer in aluminum cans which will be sold by Applicant in highly stylized packaging through highly regulated liquor stores, restaurants and bars. Everyone who has sought to purchase and tasted hard seltzer and wine knows that they are very distinct products with distinct tastes, color and texture, with seltzer being carbonated and wine non-carbonated. Indeed, as one court wrote, different types of alcohol, *e.g.*, wine, distilled spirits, beer and hard seltzer, are "very distinct products," noting that "they have different alcohol contents and social uses, and they occupy different sections of the stores where they are offered for sale." *Sazerac v. Fetzer Vineyards, Inc.*, 265 F.Supp.3d 1013 (N.D. Cal. 2017).

Moreover, the registrant of the META WINE mark is out of business and no longer legally permitted to sell wine, as its alcohol licenses issued by the state of Illinois

have expired. November 29, 2022 Resp. to Office Action at p. 8 and Ex. 4. Finally, the registrant's social media channels on Instagram and Twitter have been silent and the company has not posted on them since the fall of 2020. *Id.* at Ex. 5. Whatever overlap in trade channels may have existed in the past, they are not likely to continue in the future given that Registrant's licenses have expired and is out of business.

Finally, whereas Registrant targets consumers who are in the market for customized white label bottles of wine sold in larger quantities—a service that would most likely require someone to search online for, then communicate via telephone or email to place the order—Applicant's customers are patrons who walk into or order from grocery stores, liquor stores, bars or restaurants. November 29, 2022 Resp. to Office Action at p. 8.

#### ***Purchase Conditions***

Courts have noted that “[p]urchasers of premium alcoholic beverages tend to exercise a high degree of sophistication and care when making their purchasing decisions.” *Star Indus., Inc. v. Bacardi & Co.*, 412 F.3d 373, 390 (2d Cir. 2005); *Sazerac Co. v. Fetzer Vineyards, Inc.*, 265 F. Supp. 3d 1013 (N.D. Cal. 2017). In *Bacardi & Co.*, the Second Circuit reasoned that “[u]nhurried consumers in the relaxed environment of the liquor store, making decisions about \$12 to \$24 purchases, may be expected to exhibit sufficient sophistication to distinguish between” products “which are differently labeled.” The rationale of the *Bacardi & Co.* Court is sound and Applicant submits the TTAB should apply that rationale in the evaluation process.

Alcoholic beverages are generally stocked in store by type of beverage, not alphabetically by name. In a liquor store, grocery store or convenience store, bottles of

Applicant's vodka would be stocked with other distilled spirits, whereas the META WINE wine products would be stocked in the wine section. In other words, these products would not be on the shelves in close proximity to one another.

### CONCLUSION

The central question is whether the ordinary prudent consumer is likely to see Applicant's mark META VODKA for vodka and distilled spirits and confuse it with META WINE for wine as. For reasons set forth herein, the marks can clearly coexist without a likelihood of consumer confusion. Applicant respectfully requests that its mark META VODKA be registered for use with vodka and distilled spirits.

Dated June 6, 2023.

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### CERTIFICATE OF SERVICE

I hereby certify that the above document was served on all parties and counsel of records through the ESTTA system on June 6, 2023.

/s/ Hank Fasthoff  
Hank Fasthoff