

This Opinion is Not a
Precedent of the TTAB

Mailed: February 22, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Caymus Vineyards
—

Serial No. 97040804
—

Stephen J. Jeffries and John C. Nix of Holland & Knight LLP,
for Caymus Vineyards.

Scott Bibb, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

—
Before Shaw, Pologeorgis and Cohen,
Administrative Trademark Judges.

Opinion by Cohen, Administrative Trademark Judge:

Caymus Vineyards (“Applicant”) seeks to register on the Principal Register the standard character mark TABLEAU¹ for “wine” in International Class 33.

Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s applied-for mark so resembles the standard

¹ Application Serial No. 97040804, filed September 22, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), and claiming a date of first use anywhere and in commerce of November 15, 2017.

character mark TABLEAU² registered on the Principal Register for “restaurant and bar services; cocktail lounges” in International Class 35, that it is likely to cause confusion or mistake or to deceive.

When the refusal was made final, Applicant appealed. Applicant and the Trademark Examining Attorney have filed briefs. For the reasons explained below, we affirm the Section 2(d) refusal.³

I. Likelihood of Confusion

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. duPont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is

² Registration No. 3381539 registered February 12, 2008.

In addition to Registrant’s mark, the Examining Attorney originally cited a standard character and a design registration for DICKIE BRENNAN’S TABLEAU for restaurant services both owned by the same entity. June 22, 2022 Office Action at TSDR 4-9. The refusal to register based on likelihood of confusion with the DICKIE BRENNAN’S TABLEAU registrations was withdrawn. November 16, 2022 Office Action at TSDR 1.

³ As part of an internal Board pilot citation program on possibly broadening acceptable forms of legal citation in Board cases, this decision varies from the citation form recommended in the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (June 2023). This decision cites decisions of the Court of Appeals for the Federal Circuit and the Court of Customs and Patent Appeals by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board and the Director, this decision may employ citations to the WESTLAW (WL) or LEXIS databases and/or the USPQ. Until further notice, however, parties and practitioners should continue to adhere to the practice set forth in TBMP § 101.03.

evidence or argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023) (“The Board is required to consider each factor for which it has evidence, but it can focus its analysis on dispositive factors.”); *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 1355 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 1206 (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 or services. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65 (Fed. Cir. 2002)); *see also In re Chatam Int’l Inc.*, 380 F.3d 1340, 1341-42 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

A. Similarity or Dissimilarity of the Marks

There is no dispute that Registrant’s mark and Applicant’s mark are identical. Indeed, Applicant concedes that “its TABLEAU mark is identical to the cited registered mark.”⁴ Further, there is no demonstrated meaning or significance of the term “tableau,” in connection with restaurant and bar services, cocktail lounges or

⁴ 6 TTABVUE 7.

wine. Applicant appears to agree arguing, although without evidence,⁵ that TABLEAU is “a basic English language dictionary term.”⁶ We find that the two marks are identical in appearance, sound and commercial impression.

The first *DuPont* factor strongly supports a finding that confusion is likely.

B. Strength of the Cited Mark

Applicant asserts that TABLEAU is not “very unique” because it is “a basic English language dictionary term”⁷ which is “subject to a certain degree of unregistered third party use in connection with restaurant services”⁸ pointing to the Examining Attorney’s original citation of two registrations for DICKIE BRENNAN’S TABLEAU and Internet printouts of three “third party use[s] in connection with restaurant services.”⁹ Applicant’s assertions, while raised in connection with whether there is a relationship between Applicant’s goods and Registrant’s services, address the strength of the cited registration.

First, the cited registration is registered on the Principal Register without a Section 2(f) claim. As such, the cited registration is entitled to all the Section 7(b) presumptions, including that the mark is inherently distinctive. *See Tea Bd. of India v. Republic of Tea Inc.*, 2006 WL 2460188, at *21 (TTAB 2006).

⁵ Applicant does not submit any definition for TABLEAU. Attorney argument is “no substitute for evidence,” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018).

⁶ *Id.* at 17.

⁷ *Id.*

⁸ *Id.*

⁹ February 13, 2023 Request for Reconsideration at TSDR 7, 34-43.

Second, generally, the existence of third-party registrations cannot justify the registration of another mark that is so similar to a previously registered mark as to create a likelihood of confusion, or to cause mistake, or to deceive. *See, e.g., i.am.symbolic*, 866 F.3d at 1329; *In re Max Cap. Grp. Ltd.*, 2010 WL 22348, at *7 (TTAB 2010); *In re Toshiba Med. Sys. Corp.*, 2009 WL 1896059, at *6 (TTAB 2009). Further, each case must be decided on its own merits. *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 1174 (Fed. Cir. 2009) (“[E]ach application must be considered on its own merits.”); *In re Nett Designs*, 236 F.3d 1339, 1342 (Fed. Cir. 2001) (same).

Last, as to its argument that TABLEAU is not “very unique,” as noted, Applicant relies on the Examining Attorney’s evidence regarding the cited registration, two registrations owned by one entity and three websites.¹⁰ This limited evidence falls short of the “ubiquitous” or “considerable” use of the mark necessary to support a finding that multiple third parties use the mark TABLEAU for restaurant services. *See i.am.symbolic*, 866 F.3d at 1329; *Jack Wolfskin Aurustung Fur Draussen GmbH & Co. KGAA v. New Millenium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed. Cir. 2015) (listing 25 third-party marks).

We therefore construe the cited registration as arbitrary and accord it the ordinary scope of protection to which an inherently distinctive mark is entitled.

C. Relatedness of the Goods and Services

As to the goods and services, we must determine whether their degree of relatedness rises to such a level that consumers would mistakenly believe the

¹⁰ 6 TTABVUE 17.

respective goods and services emanate from the same source. In considering the second *DuPont* factor, where identical marks are involved, as is the case here, the degree of similarity between the goods and services that is required to support a finding of likelihood of confusion declines. *Shell Oil Co.*, 992 F.2d at 1207 (Fed. Cir. 1993) (“even when the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source”). There is no per se rule that certain goods and services are related. *Lloyd’s Food Prods., Inc. v. Eli’s, Inc.*, 987 F.2d 766, 768 (Fed. Cir. 1993).

In analyzing the second *DuPont* factor, we look to the identifications in the application and cited registration. See *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computs. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990). It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any good encompassed by the identification in a particular class in the application. *In re i.am.symbolic, llc*, 2015 WL 6746543, at *3 (TTAB 2015).

Applicant sweeps all of Registrant’s services together arguing that we should apply the precedent requiring “something more” to establish relatedness between these goods and services. Applicant asserts that *Coors Brewing* which held that “to establish likelihood of confusion a party must show something more than that similar or even identical marks are used for food products and for restaurant services” is “especially pertinent and most authoritative here.”¹¹ *In re Coors Brewing*, 343 F.3d

¹¹ 6 TTABVUE 8.

1340, 1345 (Fed. Cir. 2003) (citation omitted); *see also In re St. Helena Hosp.*, 774 F.3d 747, 753 (Fed. Cir. 2014) (explaining the need to show “something more” than the mere fact that the goods and services are ‘used together’” in situations where the relatedness of the goods and services is obscure or not evident, well-known, or generally recognized). Applicant specifically argues that “something more” has only been found in three discrete circumstances: 1) when applicant and registrant specialize in the same cuisine; 2) when the registered mark is very unique; and 3) when “a registrant’s wines were actually sold in an applicant’s restaurant”;¹² and none of these circumstances is present in this proceeding.¹³

Applicant’s arguments are unavailing.

1. Applicant’s Wine and Registrant’s Bar Services and Cocktail Lounges

Applicant’s arguments fail to account for Registrant’s entire recitation of services. The cited registration identifies restaurant services but also bar services and cocktail lounges. We take judicial notice of the definition for “bar,” which is defined as “an establishment where alcoholic drinks and sometimes food are served”;¹⁴ and the

¹² 6 TTABVUE 16.

¹³ *Id.* at 16-18. Applicant suggests that these are the only scenarios under which “something more” may be proven. We are unaware of, and Applicant has not cited, any caselaw which limits a finding of “something more” to these scenarios only.

¹⁴ MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/bar>, Feb. 5, 2024.

The Board may take judicial notice of dictionary definitions retrieved from online sources when the definitions themselves are derived from dictionaries that exist in printed form. *See B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988); *In re Cordua Rests. LP*, 2014 WL 1390504, at *2 n.4 (TTAB 2014).

definition for “cocktail,” which is defined as “a usually iced drink of wine or distilled liquor mixed with flavoring ingredients.”¹⁵

Given these defined meanings, it is clear that bar services and cocktail lounges, such as Registrant’s, focus on serving alcoholic beverages such as Applicant’s wine. We find an inherent relationship between Registrant’s bar services and cocktail lounges and Applicant’s wine, so there is no need to support the relatedness of such goods and services with a showing of “something more.” *Cf. Coors Brewing*, 343 F.3d at 1347 (stating that a mark for a brewpub “would clearly be related” to a mark for beer).

Indeed, inherent relatedness often exists when the services in question include or center on the sale of the particular goods in question. *See In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464 (Fed. Cir. 1988) (“applicant’s ‘general merchandise store services’ would include the sale of furniture and the evidence introduced by the applicant in voluminous quantity makes it clear – though its arguments attempt to play down the fact – that it does in fact sell furniture. What else it sells is irrelevant; there is overlap.”); *In re Country Oven, Inc.*, 2019 WL 6170483, at *2 (TTAB 2019) (Applicant’s COUNTRY OVEN for bread buns was likely to cause confusion with the cited registration for COUNTRY OVEN for retail bakery shops. “[T]he relevant line of case law holds that confusion may be likely to occur from the use of the same or similar marks for goods, on the one hand, and for services involving those goods, on

¹⁵ MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/cocktail>, Feb. 6, 2024.

the other”); *In re Accelerate s.a.l.*, 2012 WL 684459, at *4 (TTAB 2012) (“applicant’s broadly worded ‘providing food and drink’ could encompass a coffee house ... [so that] applicant’s services, as recited, are sufficiently related to [Registrant’s] coffee”).

2. Wine and Restaurant Services

Even if “something more” were necessary, the standard would be met in this case as to restaurant services and wine. As discussed, the mark in the cited registration is arbitrary and inherently distinctive. *Opus One, Inc.*, 2001 WL 1182924, at *2. In addition, as explained below, the evidence establishes that restaurant services and wine may be advertised by the same source under the same mark and offered at the same location, and that there is an overlapping customer base for the wine and restaurant services. *Shell Oil*, 992 F.2d at 1207; *Coors Brewing*, 343 F.3d at 1345-46.

To show that these goods and services are often offered by the same entity under the same mark, and thus related, the Examining Attorney made of record copies of eleven third-party registrations for both wine and restaurant services;¹⁶ internet pages from more than ten third-party entities that offer both wine and restaurant services;¹⁷ and at least eight third-party internet articles discussing entities that offer both wine and restaurant services.¹⁸ A sampling of the Examining Attorney’s evidence is displayed below (arrow emphasis added):

- FOXBUSINESS.COM internet article which reads “Erin Ward, beverage director at the Alicart Restaurant Group, which owns Carmine’s Legendary Family Style Italian Restaurant, Virgil’s Real Barbecue, Artie’s NY Delicatessen, and

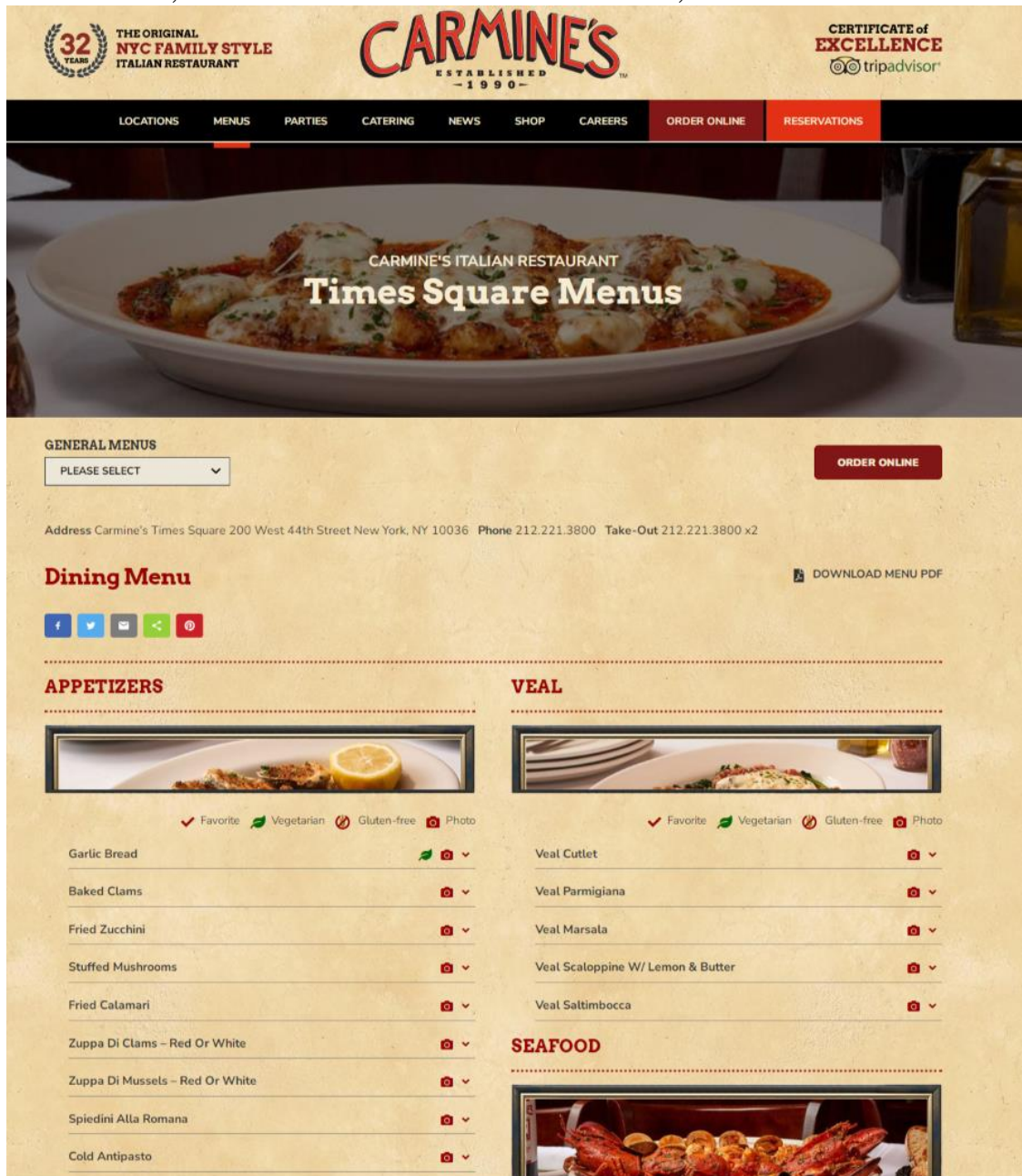
¹⁶ June 22, 2022 Office Action at TSDR 10-40.

¹⁷ November 16, 2022 Office Action at TSDR 2-16; May 11, 2023 Denial of Request for Reconsideration at TSDR 2-3, 6-7, 10, 16-18.

¹⁸ May 11, 2023 Denial of Request for Reconsideration at TSDR 1-18.

Gabriela's Mexican Restaurant and Tequila Bar, says that the private label wines are some of the best sellers ... Carmine's Chianti Classico DOCG is made by Rocca Delle Macie, in Tuscany and Carmine's Pinot Grigio is made by Ascevi Luwa, outside Venice near the border with Slovenia";¹⁹

- The online menu from Carmine's Italian Restaurant which offers Carmine's labelled wine, in addition to its restaurant services, as shown below:



¹⁹ *Id.* at 3.

CARMINE'S ITALIAN RESTAURANT
Times Square Menus

GENERAL MENUS
PLEASE SELECT

ORDER ONLINE

Address Carmine's Times Square 200 West 44th Street New York, NY 10036 Phone 212.221.3800 Take-Out 212.221.3800 x2

Beverage Menu DOWNLOAD MENU PDF

CARMINE'S MARTINIS

- Sardinian Lemon Drop
- Very Italian Manhattan
- Espresso Martini
- Carmine's Negroni
- Junior's Mango Martini
- Ginger Peartini

WINE BY THE GLASS

We Serve Our Wine In A Traditional "Old World" Style Italian Wine Glass, Like You Would Get At Nonna's House

- Prosecco, Carmine's Zardetto, Brut Cuvee, Italy
- Rose Prosecco, Val D'oca, Brut Cuvee, Italy
- Fratelli Moscato, Italy (Slightly Sweet)
- Trebbiano, Carmine's, Italy (Lighter)
- Pinot Grigio Carmine's-Ascevi Luwa, Friuli, Italy
- Pinot Grigio, Tiefenbrunner, Alto Adige, Italy
- Sauvignon Blanc, Carmine's-Ronchi Di Manzano, Friuli, Italy
- Sauvignon Blanc, Locations (By Orin Swift), New Zealand
- Riesling, Clean Slate, Mosel, Germany
- Chardonnay (Unoaked), Carmine's-Lechthaler, Trentino, Italy
- Chardonnay, Calera, Santa Barbara, California

BUBBLY & BOOZY

- CHEERSONLINE.COM internet article which reads “Brazilian-American steakhouse chain Texas de Brazil Churrascaria began working with Santa Rita Vineyards in Chile on a series of private-label wines ... The private-label wines are now some of Texas de Brazil best-selling wines” and includes a photo of the wines as reproduced below:

²⁰ *Id.* at 4-5.



;21

- The online menu for the restaurant, PlumpJack Cafe which offers PlumpJack labelled wine in addition to its restaurant services, as shown below:

The screenshot shows the PlumpJack Cafe website. At the top, there is a navigation menu with links for 'Menu', 'About', 'Visit PlumpJack Inn', 'Contact', and 'Careers'. The PlumpJack logo is centered, with 'PLUMPJACK CAFE' below it. To the right of the logo are social media icons for Facebook and Instagram. Below the navigation, there is a notice: 'We will be serving drinks at the bar starting at 4pm and dinner will be served from 5pm - 9pm Thursday - Monday.' This is followed by a paragraph: 'Our full menu is available for indoor dining and outdoor dining, in addition to wines by-the-bottle and by-the-glass from our award-winning wine list. Our bartenders are batching classic cocktails and our signature cocktails are available made to order at the bar.' Another paragraph states: 'Our menus are updated daily with items & prices subject to change based on seasonality and availability.'

Dinner Menu

available from 5-9pm in the PlumpJack Bar & Cafe

Appetizers

market salad 15 golden beets, cherry tomato, cucumber, manchego, golden balsamic vinaigrette	roasted butternut squash soup 15 candied pecans, chili oil	artisan cheese plate 25 3 cheeses, mixed nuts, fig jam, clover honey
caesar salad 16 garlic croutons, grana padano parmesan	pickelback chicken wings 21 pickels, housemade dipping sauce	poke wonton crisp 18 ponzu vinaigrette, cucumber, green onion, wakame

²¹ May 11, 2023 Denial of Request for Reconsideration at TSDR 16.

The PlumpJack Family of Wines

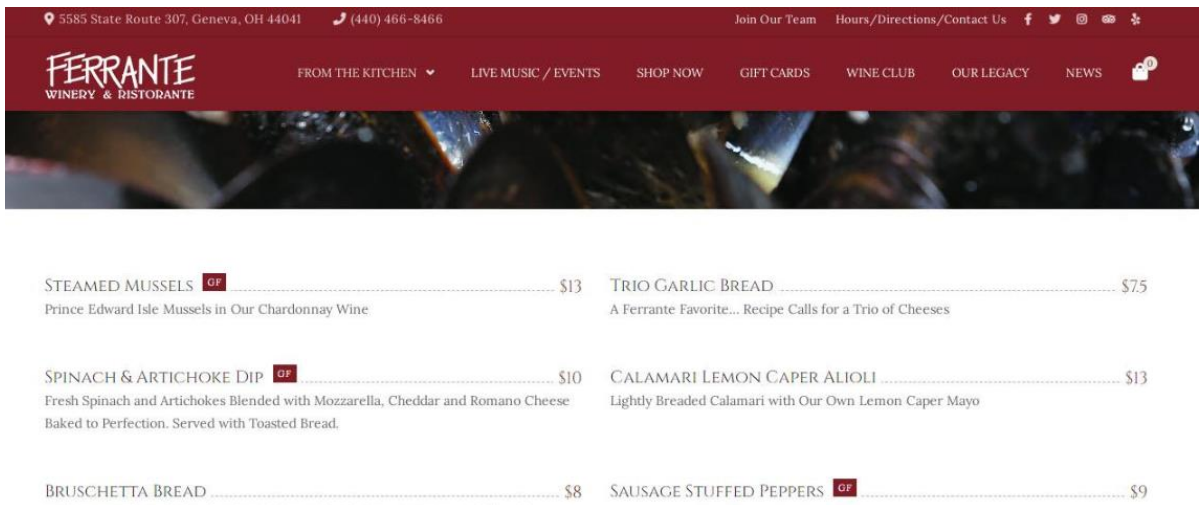
PlumpJack

Gavin Newsom and Gordon Getty established PlumpJack Winery in 1995, inspired by one of Shakespeare's most memorable characters, Sir John "PlumpJack" Falstaff. PlumpJack's down-to-earth, fun-loving, irreverent nature is rivaled only by his fierce loyalty to Prince Hal (Henry V), with whom he shares more than a few goblets of sack (wine) at the local tavern. "If sack and sugar be a fault," intones PlumpJack, "God help the wicked." At PlumpJack we appreciate this hearty fellow's priorities. We pay allegiance to our world-class vineyard by crafting wines of the highest quality and we celebrate the convivial spirit of our namesake with their inviting, approachable style.

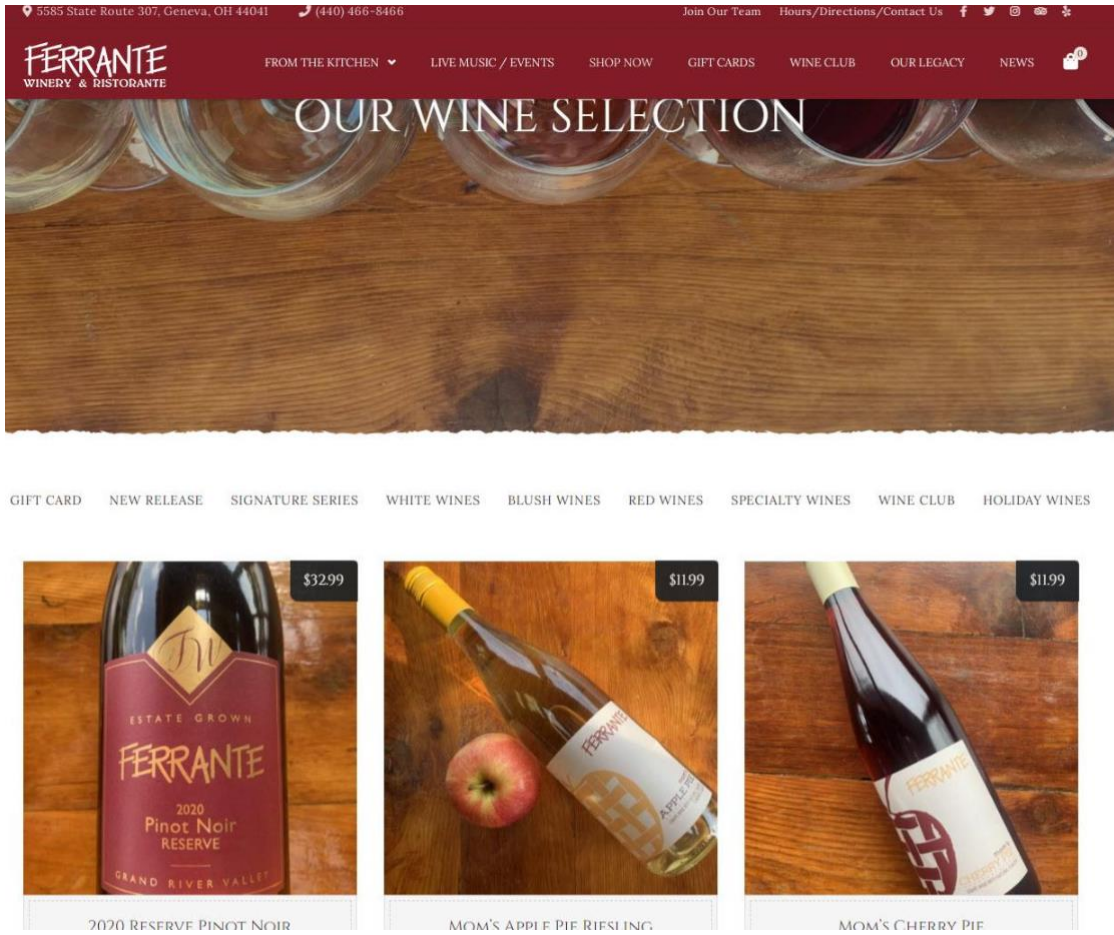
PlumpJack Chardonnay 'Reserve' (Napa Valley) 2019 - 375 ml half bottle	48
PlumpJack Chardonnay 'Reserve' (Napa Valley) 2019	76
PlumpJack Syrah (Napa Valley) 2018	100
PlumpJack Merlot (Napa Valley) 2018	100
PlumpJack 'Estate' Cabernet Sauvignon (Oakville) 2018 - 375 ml half bottle	130
PlumpJack 'Estate' Cabernet Sauvignon (Oakville) 2018	260
PlumpJack 'Reserve' Cabernet Sauvignon (Oakville) 2018	500

,22

- The online menu for Ferrante Winery & Ristorante which offers Ferrante labelled wine in addition to its restaurant services as shown below:



22 November 16, 2022 Office Action at TSDR 6-7.



- An online article from THECORKSCREWCONCIERGE.COM which reads “Perry’s Steakhouse & Grille is celebrating the 10th anniversary offering of its Private Reserves wines. In what seems like a growing trend for restaurants with private labels, Perry’s has been doing it, and quite successfully, for 10 years” along with a photo of the wine as shown below:

²³ *Id.* at 10-11.

I was invited to a special “First Pour Party” to commemorate the anniversary and where Perry’s premiered their new vintage: the 2015 Private Reserve Cabernet Sauvignon and 2016 Private Reserve Chardonnay. They also debuted their Magnum and larger formats (hello 6 liters!) of these wines, as well as the beautiful new etched bottle design.



Perry's

Corporate Sommelier Susi Zivanovic personally unveiled the new design and gave the “first pour” as well as shared her experience about making the wines and how they were chosen. Until then, no one outside of a few Perry's insiders had seen the new design.

;²⁴ and

- An online article from DMAGAZINE.COM about Nick & Sam’s restaurant which reads “No they haven’t shut the steakhouse and morphed into a winery. Rather, they have created a private-label wine for sale solely to their restaurant patrons” and includes a photo of the wine as shown below:

²⁴ May 11, 2023 Office Action at TSDR 15.

Nick & Sam's in Dallas Adds a Private Label Wine to Their List

By Andrew Chalk | December 1, 2010 | 12:43 pm



.25

Applicant takes issue with this evidence, arguing that “something more” has not been met because the Examining Attorney’s evidence “underscores (1) just how few restaurants private label their own wine and (2) just how few restaurants and wine products share the same trademark.”²⁶

As to the Internet articles submitted by the Examining Attorney, Applicant specifically addresses three suggesting that “this small collection of Internet articles”,²⁷ because they also discuss other entities which do not have private-labeled

²⁵ *Id.* at 17-18.

²⁶ 6 TTABVUE 14.

²⁷ 9 TTABVUE 3 (Applicant discuss the articles entitled, “Private-Label Wines: A Peek Behind the Label,” “The GJ Reserve Cabernet Sauvignon,” and “Sip Magazine: Private Label Wines”); *see also* 6 TTABVUE 13 (Applicant discusses article entitled “Private Label Wines:

wines under the same mark as their restaurants, do not support the contention that restaurants commonly offer wines under the same mark.²⁸ Applicant admits, however, that these articles do support the contention that “a retailer, hotel chain, or restaurant may *sometimes* have a hand in forming the flavor profile and style of a private-label wine”.²⁹

Even if we discount the three Internet articles addressed by Applicant, the Examining Attorney has submitted more than twenty-five combined registrations, websites and Internet articles involving third parties who offer both wine and restaurant services under the same mark.³⁰ The fact that the Examining Attorney did not submit more does not detract from the fact that this evidence reveals that wine and restaurant services are offered by the same party under the same mark. The Court of Appeals for the Federal Circuit and Trademark Trial and Appeal Board have long recognized that “the PTO is an agency of limited resources” for obtaining evidence when examining applications for registration; the practicalities of these limited resources are routinely taken into account when reviewing a trademark examining attorney’s action. *In re Pacer Tech.*, 338 F.3d 1348, 1352 (Fed. Cir. 2003) (citations omitted); *see also In re Loew’s Theatres, Inc.*, 769 F.2d 764, 768 (Fed. Cir. 1985).

A Peek Behind the Label” again arguing the article indicates some restaurants use different marks for private-labelled wine.)

²⁸ 6 TTABVUE 13; 9 TTABVUE 3-7.

²⁹ 9 TTABVUE 4.

³⁰ June 22, 2022 Office Action at TSDR 10-40; November 16, 2022 Office Action at TSDR 2-16; May 11, 2023 Denial of Request for Reconsideration at TSDR 1-18.

Applicant continues that as to some of the third-party registrations for wine and restaurant services submitted by the Examining Attorney, “the Internet materials subsequently submitted by Applicant demonstrates that the registered third-party marks, with at most two exceptions, are owned and used by wineries that offer on-premises restaurant services to winery visitors, not by restaurants that private label wine.”³¹ Applicant’s attempt to restrict the scope of use of the third-party registrations is unavailing. We may not limit, by resort to extrinsic evidence, the scope of goods and services as identified in the third-party registrations. *See, e.g., In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407-08 (Fed. Cir. 1997); *In re FCA US LLC*, 2018 WL 1756431, at *4 n.18 (TTAB 2018) (“[W]e may consider any such [trade channel] restrictions only if they are included in the identification of goods or services”). We therefore may not restrict the identified wine and restaurant services to wineries only. *See Citigroup Inc.*, 637 F.3d at 1353; *In re Integrated Embedded*, 2016 WL 7368696, at *13 (TTAB 2016).

Applicant further argues that there is evidence that there were over 600,000 restaurants in the U.S. as of 2021³² but that the Examining Attorney’s evidence constitutes only “25 *ten-thousands* of one percent, or fewer than *one in 10,000*. Thus, in this case, the Examining Attorney has proffered only a *de minimis* overlap of the compared goods and services – an overlap that is substantially smaller than the one rejected by the Federal Circuit in *Coors Brewing* (one in 500 breweries in

³¹ 6 TTABVUE 11-12.

³² February 13, 2023 Request for Reconsideration at TSDR 4, 10.

Coors Brewing compared to one in 10,000 wineries in this case)".³³ In support, Applicant submits an Internet printout from bls.gov which purportedly provides the "number of establishments in food services and drinking places."³⁴ While this Internet printout is admissible for what it shows on its face, *see* Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2), it constitutes hearsay when relied upon for the truth of the matters asserted therein. *See WeaponX Performance Prods Ltd. v. Weapon X Motorsports, Inc.*, 2018 WL 1326374, at *4 (TTAB 2018) (citing Fed. R. Evid. 801(c); *Safer, Inc. v. OMS Invs., Inc.*, 2010 WL 985355, at *10 (TTAB 2010); TBMP § 704.08(b) ("The probative value of Internet documents is limited. They can be used to demonstrate what the documents show on their face. However, documents obtained through the Internet may not be used to demonstrate the truth of what has been printed.")). As such, the probative value of this Internet printout is limited. The Internet printout, notably, is not evidence of the number of restaurants that do or do not offer wine or whether the wine offered is labeled with the same trademark.

Applicant asserts that there is no evidence that its wine is sold at Registrant's restaurant or that Applicant offers restaurant services at its winery.³⁵ For there to be a relationship between Applicant's goods and Registrant's services, it is not necessary that Applicant and Registrant be direct competitors; rather, they need only be producing goods and services that are related from the point of view of consumers of

³³ 6 TTABVUE 11.

³⁴ February 13, 2023 Request for Reconsideration at TSDR 10.

³⁵ 6 TTABVUE 17.

the respective goods. *Dan Robbins & Assocs. v. Questor Corp.*, 599 F.2d 1009, 1013 (CCPA 1979) (“The marks need not be used on directly competing goods, any relation likely to lead purchasers into assuming a common source being sufficient.”). That is, separately marketed goods and services could be encountered by the same consumer under situations that would lead to the mistaken belief that they originate from the same source. *Coach Servs., Inc. v. Triumph Learning LLC*, 688 F.3d 1356, 1369 (Fed. Cir. 2012).

In short, the Examining Attorney’s evidence demonstrates that consumers encounter wine under the same mark as restaurant services. *See In re Detroit Ath. Co.*, 903 F.3d 1297, 1306 (Fed. Cir. 2018) (crediting relatedness evidence that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”). On this record, we find that the Examining Attorney has demonstrated “something more,” and the record shows that Applicant’s “wine” and Registrant’s “restaurant and bar services; cocktail lounges” are related goods and services.

The second *DuPont* factor weighs in favor of likelihood of confusion.

D. Trade Channels and Classes of Consumers

As to the third *DuPont* factor, involving the channels of trade and classes of consumers, we again base our determination on the goods and services as they are

identified in the application and registration at issue, and must assume that they move through all normal and usual channels of trade and methods of distribution for such goods and services. *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1042-43 (Fed. Cir. 1983). Based on Applicant's unrestricted wine and Registrant's unrestricted restaurant and bar services, cocktail lounges, the channels of trade overlap and the goods and services reach the same classes of consumers.

The third *DuPont* factor weighs in favor of likelihood of confusion.

II. Conclusion

Applicant concedes that its mark is identical to Registrant's mark and, as such, the marks are the same in appearance, sound, connotation and commercial impression. There is an inherent relationship between Registrant's bar services and cocktail lounges and Applicant's wine. Additionally, the evidence establishes a relationship between Applicant's wine and Registrant's restaurant services that satisfies the "something more" requirement. The parties' respective goods and services also would move in the same or overlapping trade channels and are offered to the same classes of purchasers. We conclude that confusion between Applicant's mark and Registrant's mark is likely.

Decision: The refusal to register Applicant's mark under Section 2(d) is affirmed.